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Tackling *Lacunae* in International Courts and Tribunals' Procedure: The Role of External Precedent

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Abstract

International courts and tribunals are frequently faced with the need to fill *lacunae* in their own rules of procedure. Among the many tools at the disposal of adjudicative bodies, external precedent emerges as one of the most flexible and intuitive, allowing to “borrow” from the procedure of other bodies. This paper offers an overview of how international courts and tribunals use external precedent on procedural matters in the context of a number of typical gap-filling techniques. To this end, it delves into the possibility of employing external precedent as a subsidiary means for the determination of rules of law, as an instrument for carrying out systemic interpretation, and as a way of invoking and delimiting inherent powers. Through this analysis, the paper questions the view according to which recourse to external precedent necessarily contributes to the legitimacy of international courts and tribunals. It shows that, at least in procedural matters, this nexus is not straightforward and varies according to the context in which reference to external precedent is made.

Keywords

international procedural law – lacunae – external precedent – systemic interpretation – inherent powers – general international procedural law – legitimacy of international courts and tribunals

1 Introduction

International procedural law is constantly faced with the need to fill its *lacunae*. These are unavoidable as constitutive instruments and rules of procedure are often incomplete, either due to intentional omissions made in the negotiations phase,¹ or to the impossibility of taking all possible scenarios of arbitral procedure into consideration.² This issue is of growing concern as the proliferation of international courts and tribunals³ has steadily followed an increase in demand for international adjudication. The variety of fora as well as the involvement of subjects other than States has led not only to a higher number of cases but, inevitably, to a renewed variety of scenarios which international adjudication deals with. Against this backdrop, it is generally acknowledged that tribunals have acquired a “creative role” – i.e. a degree of discretion – in performing their day-to-day functions.⁴ This is different from the international courts and tribunals’ power to decide their own rules of procedure, which usually concerns structural powers of the body as a whole.

Scholarship has offered different theories on the ways the *lacunae* of international procedural law⁵ can be filled. A source-based approach refers to general international law, proposing the existence of a body of shared unwritten procedural rules.⁶ A more practice-based approach is concerned with the

1 SHAW, *Rosenne’s Law and Practice of the International Court, 1920–2015*, 5th ed., Leiden, 2016, p. 1057.

2 BROWN, “Inherent Powers in International Adjudication”, in ROMANO, ALTER, SHANY (eds.), *The Oxford Handbook of International Adjudication*, Oxford, 2013, p. 828 ff., p. 832.

3 For the sake of brevity, this paper will use the term “tribunal(s)”, meant as both permanent courts, arbitral tribunals and generally all branches of judicial (and even quasi-judicial) bodies. Although these categories present significant differences, a comprehensive analysis of the use of external precedent on procedural matters requires the opening of the scope of research to all judicial phenomena and relevant actors.

4 RUIZ FABRI, PAINE, “The Procedural Cross-Fertilization Pull”, in GIORGETTI, POLLACK (eds.), *Beyond Fragmentation*, Cambridge, 2022, p. 39 ff., pp. 47–57.

5 As a clear notion of “international procedural law” has not emerged, for the purposes of this paper “procedure” will refer to all rules concerning proceedings before an international court or tribunal, in the broadest sense, including “all rules relating to international judicial action. These include the rules governing the composition of the court, questions of competence and admissibility, the objective and subjective conditions for bringing a claim, as well as the modalities according to which the case will be dealt with” (KOLB, “General Principles of Procedural Law”, in ZIMMERMANN et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed., Oxford, 2019, p. 963 ff., p. 965).

6 BROWN, *A Common Law of International Adjudication*, Oxford, 2007.

concept of cross-fertilization.⁷ In this case, the *lacunae* would be filled by “borrowing” from the practice of other tribunals. This can be done with a variety of methods,⁸ including interpretive techniques such as systemic interpretation. Finally, reference must be made to inherent powers, i.e. the powers believed to be intrinsically connected to the notion of tribunal.⁹ This is just an attempt at categorizing the many ways in which tribunals articulate their reasoning: the mentioned approaches may easily overlap and may all involve the use of similar instruments.

One recurring tool of these gap-filling techniques is external precedent, i.e. the recourse to decisions issued by an adjudicative body different than the one invoking them. Such precedent is not binding since a rule of *stare decisis* does not exist in international adjudication.¹⁰ Moreover, the obligation to take precedents into consideration (so-called “taking into account approach”) is arguably concerned only with internal precedent.¹¹ Nevertheless, international courts and tribunals often refer to decisions of other bodies in order to

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- 7 See BROWN, “The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals”, *Loyola of Los Angeles International and Comparative Law Review*, 2008, p. 219 ff.; ID., *A Common Law of International Adjudication*, *cit. supra* note 6; MAROTTI, “The International Court of Justice Role in Influencing the Approach of other Courts on Fundamental Procedural Matters”, in ARCARI, BALMOND (eds.), *Judicial Dialogue in the International Legal Order*, Napoli, 2014, p. 7 ff., pp. 14–20; GIORGETTI, “Cross-fertilization of Procedural Law among International Courts and Tribunals: Methods and Meanings”, in SARVARIAN et al. (eds.), *Procedural Fairness in International Courts and Tribunals*, London, 2015, p. 223 ff.; RUIZ FABRI, PAINE, *cit. supra* note 4; CHARLOTIN, “The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis”, *Journal of International Economic Law*, 2017, p. 279 ff., p. 284 and p. 285, where the author talks of a “common practice among world courts/tribunals”; GIORGETTI, POLLACK, “Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition among International Courts and Tribunals”, in GIORGETTI, POLLACK (eds.), *Beyond Fragmentation*, Cambridge, 2022, p. 1 ff.
- 8 For an analysis of the main means of *cross-fertilization* see BROWN, “The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals”, *cit. supra* note 7.
- 9 BROWN, “Inherent Powers in International Adjudication”, *cit. supra* note 2, p. 832; MAROTTI, “I poteri inerenti”, in MANTUCCI (ed.), *Trattato di diritto dell'arbitrato vol XIII – L'arbitrato sugli investimenti*, Napoli, 2021, p. 525 ff., p. 525; BROWN, “The Inherent Powers of International Courts and Tribunals”, *British Yearbook of International Law*, 2005, p. 195 ff., p. 244.
- 10 GUILLAUME, “The Use of Precedent by International Judges and Arbitrators”, *Journal of International Dispute Settlement*, 2011, p. 5 ff.
- 11 PALOMBINO, MINERVINI, “Il ruolo del precedente”, in MANTUCCI (ed.), *Trattato di diritto dell'arbitrato vol XIII – L'arbitrato sugli investimenti*, Napoli, 2021, p. 935 ff., p. 970.

deal with their own procedural matters.¹² This has repeatedly happened, for example, for the development of the idea of bindingness of provisional measures, usually introduced with reference to the International Court of Justice's ("ICJ") decision in the *LaGrand* case.¹³ Similar references can also be found with regard to many other typical issues of procedural law, such as evidence and tribunals' powers.¹⁴

The use of external precedent is thus often defined as an instrument which may increase the legitimacy of a judicial decision¹⁵ and is connected to the idea of coherence in the application of substantive law.¹⁶ However, it is not necessarily so with regard to procedural law, where the issue is not one of application

12 See BROWN, "The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals", *cit. supra* note 7, p. 228, who highlights "a readiness by international courts to look to the practice of other international courts on issues of procedure and remedies and draw on that practice". See also, on the general recourse to external precedent, GUILLAUME, *cit. supra* note 10. For the practice of external precedent in the specific framework of the WTO see RIDI, "Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement", in GÁSPÁR-SZILÁGYI, BEHN, LANGFORD (eds.), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?*, Cambridge, 2020, p. 121 ff. Interestingly, a similar use has been made of documents expressing the position of monitoring bodies: see BONAFÉ, "Parallel Human Rights Proceedings Before International Courts and Monitoring Bodies", *Diritti Umani e Diritto Internazionale*, 2021, p. 369 ff., pp. 382–387.

13 *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March, ICJ Reports, 1999, p. 9 ff.; GUILLAUME, *cit. supra* note 10, p. 22. In general, on the use of ICJ decisions as external precedent see MAROTTI, "The International Court of Justice Role in Influencing the Approach of other Courts on Fundamental Procedural Matters", *cit. supra* note 7, pp. 14–20. On the interaction between the ICJ and the International Tribunal for the Law of the Sea ("ITLOS") on the matter of provisional measures see MAROTTI, "A 'Game of Give and Take': The ITLOS, the ICJ and Provisional Measures", in PALOMBINO, VIRZO, ZARRA (eds.), *Provisional Measures Issued by International Courts and Tribunals*, Den Haag, 2020, p. 131 ff.

14 For a review of these trends and case law see BROWN, "The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals", *cit. supra* note 7, pp. 219–245; GIORGETTI, *cit. supra* note 7; MAROTTI, "The International Court of Justice Role in Influencing the Approach of other Courts on Fundamental Procedural Matters", *cit. supra* note 7. On the matter of evidence see AMERASINGHE, *Evidence in International Litigation*, Leiden, 2005.

15 See, RUIZ FABRI, PAINE, *cit. supra* note 4, pp. 55–56; GUILLAUME, *cit. supra* note 10; COHEN, "Theorizing Precedent in International Law", in BIANCHI, PEAT, WINDSOR (eds.), *Interpretation in International Law*, Oxford, 2015, p. 268 ff.

16 PALOMBINO, MINERVINI, "Apropos of the External Precedent: Judicial Cross-Pollination Between Investment Tribunals and International Courts", in GOURGOURINIS (ed.), *Transnational Actors in International Investment Law*, Cham, 2021, p. 133 ff.

of the same substantive rules by different tribunals. Against this backdrop, this paper will offer an overview of how tribunals use external precedent in the context of a number of typical gap-filling techniques, highlighting their advantages and limits and focusing exclusively on the use of external precedent on procedural matters. Of course, as external precedent is commonly employed, it would not be possible for this paper to take all relevant case law into consideration. The analysis will therefore only mention select cases as a way to exemplify the different approaches to external precedent.

The following analysis is structured in five Sections. Section 2 considers the role of external precedent as a subsidiary means for the determination of rules of law, with specific regard to the peculiarities of general international procedural law. Section 3 analyzes another use of external precedent for apparently gap-filling purposes, i.e. its use in the context of systemic interpretation. Section 4 then proceeds to analyze external precedent's role in defining a shared notion of tribunal for the purpose of invoking inherent powers. Section 5 tries to offer new perspectives on the interactions between the use of external precedent and the issue of international courts and tribunals' legitimacy. Finally, a concluding Section evaluates the role of external precedent on procedural matters as it interacts with the typical tensions of international procedural law.

2 The Use of External Precedent to Determine Rules of General International Procedural Law

A typical method to fill the *lacunae* left by the constitutive instrument or the rules of procedure of a tribunal is the recourse to subsidiary means – including external precedents – for the determination of rules of law. For example, in *US-Measures Affecting Imports of Woven Wool Shirts and Blouses from India*,¹⁷ the World Trade Organization (“WTO”) Appellate Body, in order to state that burden of proof lays with the party who asserts a fact, referred to the practice of “various international tribunals” and, specifically, of the ICJ. In this case the Appellate Body also traced the rule back to a “generally-accepted canon of evidence”, common to the majority of domestic systems.¹⁸ The reference to ICJ

17 Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 25 April 1997, WT/DS33/AB/R.

18 *Ibid.*, p. 14.

practice is therefore used to determine the applicable rule i.e. general principles on evidentiary matters.¹⁹

This decision is often mentioned as an example of *cross-fertilization*²⁰ and, interestingly, it does not actually refer to any case of the ICJ. In the footnotes in the Appellate Body's report, there is only one reference to scholarship on the matter.²¹ Nevertheless, many other tribunals have further referred to this decision in order to apply the general rule on burden of proof.²² The International Centre for Settlement of Investment Disputes ("ICSID") award in *Marvin Roy Feldman Karpa*, for example, argued in favor of the existence of this principle by stating that "the majority finds the following statement of the international law standard helpful, as stated by the Appellate Body of the WTO: [...] various international tribunals, including the ICJ, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof".²³

Cases such as the ones above are common, and external precedent thus proves to be a useful tool to fill *lacunae* in treaty provisions which concern the procedure of the tribunal by helping determine the applicable rules of general international law. Its use, however, finds some limits, which are not implied by the recourse to external precedent *per se* but relate to the hurdles connected with the reference to "subsidiary means for the determination of rules of law" as provided in Article 38(1)(d) of the ICJ Statute.

A first issue concerns the application of all the categories of Article 38 to the area of procedural law. While it is now widely accepted that Article 38 can

19 MAROTTI, "The International Court of Justice Role in Influencing the Approach of other Courts on Fundamental Procedural Matters", *cit. supra* note 7, p. 12.

20 BROWN, "The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals", *cit. supra* note 7, p. 223; GIORGETTI, *cit. supra* note 7, p. 228.

21 *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, *cit. supra* note 17, p. 14, footnote 15, quoting "M. Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Kluwer Law International, 1996), p. 117".

22 ICSID tribunals have often referred to this decision. See, *ex multis*, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Stay of Enforcement of the Award of 23 March 2018, para. 52: "The Committee understands that, since there is no specific rule on burden of proof, general rules would be applicable, i.e. the burden of proof lies on the party asserting an affirmative claim or defense. Such general rules have guided the interpretation of other International Tribunals" (the decision continues quoting page 14 of *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, para. 177.

23 *Marvin Roy Feldman Karpa v. United Mexican States*, *cit. supra* note 22, para. 177.

be used as a rough guide for sources of international procedural law as well,²⁴ there have been doubts as to the possibility of applying general international law to the procedure of international courts and tribunals. In the past, its application was limited by the idea that international courts and tribunals were self-contained systems²⁵ and thus not concerned with general international law. This position has long been overcome and it is accepted that international procedural law is composed of more than just treaty law.²⁶ The focus thus moves to whether both sources under the umbrella of general international law – customary international law and general principles – can be sources of procedural law.

Customary international law is notably built on the two elements of state practice and *opinio juris*. However, neither of these elements can be immediately seen in the formation of custom pertaining only to international procedural law. The only relevant activity for the formation of custom would be the practice of international courts and tribunals, which cannot amount to “state practice”.²⁷ At most, the elements of custom could be seen in the decision to ratify tribunals’ constitutive instruments – often imbued with similar rules – and in the acceptance, or lack of protest, by States of the decisions of international courts and tribunals.²⁸ In any case, the possibility to refer to customary

24 LAUTERPACHT, “Principles of Procedure in International Litigation”, RCADI, 2009, Vol. 345, p. 405: “these sources [those mentioned in Art. 38] serve not only for the substantive rules of international law, but also for international procedural law”. See also AMERASINGHE, *cit. supra* note 14, pp. 21–30 and RUIZ FABRI, PAINE, *cit. supra* note 4, p. 55 ff.

25 Appeals Chamber, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 11: “In international law, every tribunal is a self-contained system (unless otherwise provided)”.

26 BROWN, *A Common Law of International Adjudication*, *cit. supra* note 6. See, of the opinion that procedural law can only be inferred from treaty law, rules of procedure, agreements between the parties and the practice of the tribunal, SIMPSON, FOX, *International Arbitration. Law and Practice*, London, 1959, p. 147.

27 BROWN, *A Common Law of International Adjudication*, *cit. supra* note 6, p. 53; PUNZHIN, “Procedural Normative System of the International Court of Justice”, *Leiden Journal of International Law*, 2017, p. 661 ff., p. 682.

28 BROWN, *A Common Law of International Adjudication*, *cit. supra* note 6, p. 53. The recourse to lack of protest as an element relevant for the formation of a rule of customary international law has been at the center of doctrinal debate. Thirlway (*The Sources of International Law*, 2nd ed., 2019, Oxford, p. 72), includes inaction within state practice, but notes that “it may not always be easy to distinguish masterful restraint leading to significant inaction from unconcern (or even bureaucratic ineptitude)” (p. 73). This debate was also part of the work of the International Law Commission on the topic. The Third Report of Special Rapporteur Wood (WOOD, Third Report on Identification of Customary International Law, UN Doc. A/CN.4/682) delves on the topic of “Inaction as practice and/or evidence of acceptance as law” (pp. 104–106) and lays the basis for Conclusion 6(1)

international law on matters of international procedural law is not straightforward. This has not, however, stopped scholarship and case law from at times referring to customary international law on procedural matters.²⁹

It is, on the other hand, certain that it is possible to refer to general principles on procedural matters.³⁰ Here, however, the debate is still heated with regard to the legal nature of general principles on matters of international procedural law.³¹ Indeed, whether they are general principles derived from national legal systems or principles formed within the international legal system³² is relevant as this implies different steps in order to ascertain their existence.³³ Tribunals, however, rarely specify to which source they are referring and use formulations

– “Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction” – and Conclusion 10(3) – “Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction” – (International Law Commission, Draft conclusions on identification of customary international law, with commentaries, 2018). The *caveat* in both cases is that silence should be a conscious choice of the State, usually where a reaction is called for.

29 THIRLWAY, “Dilemma or Chimera? – Admissibility of Illegally Obtained Evidence in International Adjudication”, *American Journal of International Law*, 1984, p. 622 ff.; LAUTERPACHT, *cit. supra* note 24, pp. 405–406; *Factory at Chorzów*, Judgment of 13 September 1928, PCIJ Reports, Series A, No 17, p. 51 ff.; BENZING, “Procedure, Evidentiary Issues”, in ZIMMERMANN et al. (eds.), *cit. supra* note 5, p. 1371 ff., p. 1379. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment of 1 July, ICJ Reports, 1994, p. 112 ff., para. 40.

30 KOLB, “General Principles of Procedural Law”, *cit. supra* note 5, p. 963.

31 FONTANELLI, BUSCO, “What We Talk About When We Talk About Procedural Fairness”, in SARVARIAN et al. (eds.), *Procedural Fairness in International Courts and Tribunals*, London, 2015, p. 17 ff., p. 33. On the topic of general principles see also FORTEAU, “General Principles of International Procedural Law”, *Max Planck Encyclopedia of International Procedural Law*, 2018; KOTUBY, SOBOTA, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, Oxford, 2017, p. 1.

32 This distinction has been recently outlined in the work of Special Rapporteur Marcelo Vázquez-Bermúdez in his First Report (VÁZQUEZ-BERMÚDEZ, First Report on General Principles of Law, UN Doc. A/CN.4/732) and it has long been accepted by both scholarship and international jurisprudence. See *ex multis* GAJA, “General Principles of Law”, *Max Planck Encyclopedia of Public International Law*, 2020; BONAFÉ, PALCHETTI, “Relying on General Principles in International Law”, in BRÖLMANN, RADI (eds.), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham, 2016, p. 160 ff.

33 See on the necessary steps to ascertain the existence of a general principle and, generally, on the topic: VÁZQUEZ-BERMÚDEZ, First Report, *cit. supra* note 32, VÁZQUEZ-BERMÚDEZ, Second Report on General Principles of Law, UN Doc. A/CN.4/741 and ID., Third Report on General Principles of Law, UN Doc. A/CN.4/753.

such as “universal and necessary, but yet almost elementary principles of procedural law”.³⁴

While definitive conclusions as to the *status* of these two sources of general international law have yet to be drawn, it is clear that their use must be made with caution, especially on procedural matters. This is reflected in the fact that reference to general international law through subsidiary means and especially external precedent is usually made for widely accepted rules, such as that in the above-mentioned example of *US-Measures Affecting Imports of Woven Wool Shirts and Blouses from India*.

A second issue surrounding the use of external precedent as a subsidiary means concerns the tribunals’ tendency to use it as a way of avoiding an analysis into the actual existence of a rule. While this issue may be considered particularly pressing with regard to categories such as customary international law on procedural matters, it is far bigger than that, embracing also issues of substantive law. As scholarship has underlined, international courts and tribunals sometimes take the existence of a rule for granted, rather than showing its existence.³⁵ It should be clear that the recourse to external precedent will be a means for determining the applicable rule of law only if, at any point, a tribunal actually proved the existence of such rule. Otherwise, it will be an instrument in the hands of the tribunal to disguise the referral to a norm whose existence is not actually certain.

These issues, both specific to the area of procedural law and generally concerning external precedent, could thus lead tribunals to take the “easy way out”, using external precedent instead of showing the existence of a rule. Moreover, judicial decisions rarely clarify, on matters of procedure, which kind of source of international law they are referring to.³⁶ If they refer to general principles derived from national legal systems, then, tribunals will rarely carry out a comparative analysis³⁷ or take into consideration – in applying the principles – the “*conditions et [...] besoins particuliers de la justice internationale*”.³⁸

34 *South West Africa (Second Phase)*, Judgment of 18 July, ICJ Reports, 1966, p. 6 ff., para. 64.

35 On the ICJ’s tendency to “assert” rules of customary international law see TALMON, “Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion”, *EJIL*, 2015, Vol. 26 (2), p. 417 ff.

36 BONAFÉ, PALCHETTI, *cit. supra* note 32, p. 170.

37 VON MANGOLDT, “La comparaison des systèmes de droit comme moyen d’élaboration de la procédure des tribunaux internationaux”, *Heidelberg Journal of International Law*, 1980, p. 554 ff., p. 561.

38 LALIVE, “Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice”, *Annuaire suisse de droit international*, 1950, p. 92 ff.

When reference is made to established rules such as *audiatur et altera pars*,³⁹ external precedent is thus an optimal tool to determine the rule to be applied. However, one of the possible risks arising out of this trend is that the reference to general international law through a subsidiary means will serve the purpose of hiding – rather than filling – a *lacuna* in the procedure.

3 The Use of External Precedent on Procedural Matters for Purposes of Systemic Interpretation

Another context in which external precedent can be employed is in the interpretation of constitutive instruments and rules of procedure. Specifically, such precedent can be invoked by a tribunal – when interpreting its own procedural rules⁴⁰ – as a bridge to other rules of procedural law, as interpreted by other courts and tribunals.⁴¹

An example of this method may be found in the European Court of Human Rights (“ECtHR”) case law, namely in *Mamatkulov and Abdurasulovic v. Turkey*. Here, the Court expressly invoked Article 31(3)(c) and referred to the ICJ’s external precedent of *LaGrand* in order to establish the binding nature of provisional measures imposed by the Court.⁴²

39 MANI, *International Adjudication: Procedural Aspects*, New Delhi, 1980, p. 12.

40 Indeed, constitutive instruments and rules of procedure can be interpreted just like any other treaty as the criteria outlined in Art. 31 of the Vienna Convention on the Law of Treaties (“VCLT”) are generally applicable to all kinds of treaties, provided the interpreter takes into consideration the peculiarities of the specific instruments. See DÖRR, SCHMALENBACH, “Article 31. General rule of interpretation” in DÖRR, SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties*, Berlin-Heidelberg, 2012, p. 521 ff., pp. 536–538.

41 Systemic interpretation is taken into consideration as one of the many ways to interpret statutes and rules of procedure. All of these methods can imply reference to external precedent. For example, external precedent could also be used to figure out the “ordinary meaning” of a term, under Art. 31(1) VCLT or in the context of an analogy. See also BROWN, *A Common Law of International Adjudication*, cit. supra note 6, pp. 41–53, who mentions as other interpretive options a “principle of effectiveness” and an “evolutive approach”. External precedent could also be used with respect to relatively new interpretive and gap-filling techniques, such as the “vacuum doctrine” employed by the European Court of Human Rights (“ECtHR”) to “coordinate” the European Convention on Human Rights (“ECHR”)’s provision with other sources of international law. See, on this technique, GAVRYSH, “Lo stato di emergenza e la dottrina del *vacuum* nella prassi della Corte europea dei diritti dell’uomo”, *Rivista di diritto internazionale*, 2019, p. 79 ff.

42 See RUIZ FABRI, “The Use of International Judicial Precedents by the European Court of Human Rights: On the Trail of a Judicial Policy”, *European Journal of Human Rights*, 2017, p. 231 ff.

Rule 39 of the ECtHR Rules of Court provides that “[t]he Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule *may* [...] indicate to the parties any interim measure”.⁴³ The Court took into consideration the *LaGrand* decision in its interpretation of Article 41 of the ICJ Statute⁴⁴ as well as the practice of the Inter-American Court of Human Rights (“IACtHR”),⁴⁵ stating that

the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law.⁴⁶

Through this method, the ECtHR established that a violation of provisional measures constitutes a violation of the European Convention on Human Rights (“ECHR”) itself.⁴⁷

In *Mamatkulov and Abdurasulovic v. Turkey*, the Court expressed its reasoning behind its reference to external precedent, i.e. systemic interpretation under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (“VCLT”).⁴⁸ Indeed, the Court first stated that it “will also have regard to general principles of international law and the view expressed on this subject by other international bodies”⁴⁹ and then, before proceeding to an analysis of external precedents on the topic, explained: “the Convention must be interpreted in

43 ECtHR, Rules of Court, 3 June 2022, available at: <https://www.echr.coe.int/documents/rules_court_eng.pdf>, Rule 39 (emphasis added).

44 *Mamatkulov and Abdurasulovic v. Turkey*, Application No. 46827/99 e 46951/99, Decision of 6 February 2003, para. 116.

45 *Ibid.*, para. 117.

46 *Ibid.*, para. 124.

47 *Ibid.*, para. 129.

48 *Ibid.*, para. 111. Tribunals are however rarely clear on what they are doing by invoking external precedent and more often than not it will be just used to support their reasoning. Any categorization will usually be further added by scholarship for purposes of clarity. See African Court of Human and Peoples’ Rights, *The Matter of Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin*, Application No. 065/2019, Judgment of 29 March 2021, which employed external precedent once again to affirm the binding nature of orders for provisional measures. The decision simply invokes precedents of the ICJ, the ECtHR and the IACtHR in the wider context of its reasoning (paras. 102–104).

49 *Mamatkulov and Abdurasulovic v. Turkey*, *cit. supra* note 44, para. 110.

the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which states that account must be taken of ‘any relevant rules of international law applicable in the relations between the parties’.⁵⁰

In order for systemic interpretation to be carried out, however, some requirements must be fulfilled,⁵¹ as it has been argued that this interpretive method can be employed only under specific circumstances.⁵²

First, Article 31(3)(c) refers to “any relevant rules of international law”. This is read as a reference to the sources of international law as outlined in Article 38 of the ICJ Statute⁵³ and, thus, only to binding rules of international law. Indeed, the choice of the wording “rules” in Article 31 refers to “rules of international law” – thus emphasizing that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations which may not be firmly established as rules.⁵⁴ Consequently, reference to external precedent in the context of systemic interpretation is justified as long as such precedent embodies a practice governed by rules of procedural law. The practice of a tribunal may thus be used in the context of systemic interpretation insofar as it offers a clarification on the content of parallel procedural rules of that tribunal.⁵⁵

When external precedent recalls a treaty rule, in order for the latter to be taken into consideration *ex* Article 31(3)(c), it must be “applicable in the relations between the parties”. The scope of this requirement has been heavily discussed among scholars. According to a first reading of Article 31, systemic interpretation can be carried out only where there is full correspondence between the parties to the treaty object of interpretation and the parties to the one used as an interpretive parameter.⁵⁶ This approach is based on Article 2

⁵⁰ *Ibid.*, para. 99.

⁵¹ MERKOURIS, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave*, Leiden, 2015.

⁵² For years there has been a “general reluctance to refer to Article 31(3)(c)” (SANDS, “Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law”, in BOYLE, FREESTONE (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford, 1999, p. 39 ff., p. 50). See also SOREL, BORÉ EVENO, “Article 31 (1969)” in CORTEN, KLEIN (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford, 2011, p. 804 ff., para. 47.

⁵³ DÖRR, SCHMALENBACH, *cit. supra* note 40, p. 561. MCLACHLAN, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention”, *International and Comparative Law Quarterly*, 2005, p. 279 ff., p. 290.

⁵⁴ MCLACHLAN, *cit. supra* note 53, p. 290.

⁵⁵ DÖRR, SCHMALENBACH, *cit. supra* note 40, p. 564.

⁵⁶ MCLACHLAN, *cit. supra* note 53, p. 315.

VCLT, which defines as “party” a “State which has consented to be bound by the treaty and for which the treaty is in force” and also draws on a parallel with the rule on subsequent practice enshrined in letter b of the same Article 31(3).⁵⁷ This interpretation, although usually preferred, has the inevitable consequence of restricting the scope of application of systemic interpretation, especially with regard to the interpretation of treaties that were broadly ratified.⁵⁸ An alternative is represented by the reading of “parties” as referring solely to the parties to the dispute in the context of which systemic interpretation is carried out.⁵⁹ This approach seems however to find easy application only for what concerns “synallagmatic” treaties, i.e. where “a particular obligation in the treaty is owed in a synallagmatic way between pairs of parties”.⁶⁰ Indeed, these treaties would not suffer from a possible lack of uniformity in the general interpretation of the obligations pending upon all the parties to the treaty, being only the relevant pairs of parties the ones concerned.⁶¹

The treaty rules which overcome this first test must then be “relevant” in order to be employed, i.e. they should concern the same issues of the treaty object of interpretation.⁶² The reference to external precedent will then be possible only when a provision of the constitutive treaty, or of the statute of the court or tribunal, is interpreted through reference to a case which clarified the scope and meaning of another treaty rule of similar content and which

57 DÖRR, SCHMALENBACH, *cit. supra* note 40, p. 566.

58 International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, A/CN.4/L.682, 2006, paras. 470–472.

59 In favor of this second option see *Ibid.*, para. 472. On its shortcomings see LINDERFALK, “Who Are ‘the Parties’?: Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the ‘Principle of Systemic Integration’ Revisited”, *Netherlands International Law Review*, 2008, Vol. 55 (3), p. 343 ff.

60 MCLACHLAN, *cit. supra* note 53, p. 315.

61 This approach is often based on the observation that the treaty used as an interpretive parameter can be considered accepted or implicitly tolerated by States which are members to the treaty object of interpretation, but not of the one being used as an interpretive parameter. See International Law Commission, *cit. supra* note 58, para. 472. MCLACHLAN, *cit. supra* note 53, p. 315.

62 On the meaning of “relevant” see BHAT, “A Study of the Issue of ‘Relevant Rules’ of International Law for the Purposes of Interpretation of Treaties under Article 31(3)(c) of the Vienna Convention on the Law of Treaties”, *International Community Law Review*, 2019, p. 190 ff.

involved a treaty whose State members correspond to those of the treaty object of interpretation.⁶³

Article 31(3)(c) refers also to rules of general international law applicable in the relations between the parties. These, indeed, can always be employed as parameters as they bind all subjects of international law, thus always fulfilling the “parties” requirement of Article 31(3)(c). Moreover, their relevance is based on two presumptions:

- (a) According to the *positive presumption*, parties are taken ‘to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way’
- (b) According to the *negative presumption*, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.⁶⁴

In the field of procedural law, the above theories are faced with the difficulties already mentioned concerning the sources of procedural law:⁶⁵ verifying the existence of a rule of general international law may sometimes be difficult and, for this reason, many judicial decisions do not endeavor to carry out such an operation. Exception made for those general principles of certain existence,⁶⁶ it would therefore seem a stretch to talk about systemic interpretation through rules whose existence itself is debated.⁶⁷

Recourse to external precedent can therefore be made in the context of interpretation, but again it finds limits connected to the underlying issues of systemic interpretation in general and to the peculiarities of international procedural law. It can be presumed that such limits are respected in cases like *Mamatkulov and Abdurasulovic v. Turkey*, where the recourse to external

63 On the limits of systemic interpretation see SAMSON, “High Hopes, Scant Resources: a Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties”, *Leiden Journal of International Law*, 2011, Vol. 24 (3), p. 701 ff.

64 International Law Commission, *cit. supra* note 58, para. 465.

65 MAROTTI, “The International Court of Justice Role in Influencing the Approach of other Courts on Fundamental Procedural Matters”, *cit. supra* note 7, p. 13. See, in detail, Section 2 of this paper.

66 For example, the principle *audiatur et altera pars*. For an overview of those principles of sure application see International Law Commission, *cit. supra* note 58, paras. 468–469.

67 SANDS, *cit. supra* note 52, p. 57: “It is only after the existence, relevance and applicability of a customary norm has been recognized by an adjudicatory body that its precise impact upon the interpretation of a treaty falls to be determined in application of Article 31(3)(c)”.

precedent is expressly made in the context of interpretation under Article 31(3)(c) VCLT. When the reasons for recourse to external precedent during interpretation are not clear, its use may be a way of exceeding the limits of Article 31. Indeed, the rules taken into consideration as interpretive parameters cannot substitute those subject to interpretation, but merely clarify their meaning.⁶⁸ Even when all the requirements of Article 31 are met, tribunals should still exercise caution and avoid using systemic interpretation as a tool to escape the application of the relevant treaty.

A good example, although concerning a matter of rules of substantive law, is the ICJ decision in the *Oil Platforms* case,⁶⁹ where the ICJ employed Article 31(3)(c) to interpret Article XX (1)(d) of the Treaty of Amity,⁷⁰ referring to measures “necessary to protect [a State’s] essential security interests”. By recurring to systemic interpretation, the ICJ affirmed that its jurisdiction to decide on Article XX also extended “where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law”.⁷¹ The ICJ thus effectively found a way to analyze whether the US actions were in line with the rules concerning self-defense.⁷²

This strategy by the Court was at the center of different separate opinions,⁷³ all stressing that systemic interpretation can be employed but maintaining that it is necessary that the original treaty rules always keep their central role. In particular, according to Higgins, Article 31(3)(c) does not legitimize an incorporation into the rule object of interpretation of any rule of international law on the same subject matter, when it is not mentioned in the interpreted rule and the Court does not offer sufficient explanations.⁷⁴ In cases such as the *Oil*

68 *Ibid.*, pp. 57–58. See also International Law Commission, *cit. supra* note 58, paras. 473–474.

69 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November, ICJ Reports, 2003, p. 161 ff.

70 Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, 15 August 1955, entered into force 16 June 1957, Art. xx (1)(d).

71 *Oil Platforms*, *cit. supra* note 69, para. 41.

72 ВОТНЕ, “Oil Platforms Case (Iran v United States of America)”, Max Planck Encyclopedia of Public International Law, 2011, para. 12.

73 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November, Separate Opinion of Judge Kooijmans, ICJ Reports, 2003, p. 246 ff., para. 42: “the approach taken by the Court is putting the cart before the horse”. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November, Separate Opinion of Judge Higgins, ICJ Reports, 2003, p. 225 ff.

74 *Separate Opinion of Judge Higgins*, *cit. supra* note 73, para. 46: “It is not a provision that on the face of it envisages incorporating the entire substance of international law on a topic not mentioned in the clause”.

Platforms one – according to Higgins – a tribunal would be invoking interpretation in order “to displace the applicable law”.⁷⁵

4 Inherent Powers and the Autonomous Value of External Precedent

A final context in which external precedent can be of use is that of inherent powers, i.e. the powers which are “intrinsic” to the activity of a judicial body and that, as such, do not need an express rule providing them.⁷⁶ For example, in *Hrvatska Elektroprivreda d.d. v. Slovenia*, an ICSID tribunal outlined its inherent power to implement measures to ensure the integrity of the procedure.⁷⁷ In this case the tribunal referred to the notion of tribunal and resorted to the case law of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) to affirm that such power existed even in the absence of an express reference in its statute. Furthermore, the ICSID tribunal did not limit itself to referring to a specific case (*Prosecutor v. Beqa Beqaj*),⁷⁸ but went further, mentioning an “established ICTY jurisprudence” on the subject.⁷⁹ It should be emphasized that the decision does not offer reasons for the choice to use this precedent, taking into consideration the ICTY exclusively because it was a “tribunal” as well.

Likewise, with regard to the power of revision,⁸⁰ the Iran-United States Claims Tribunal in *Ram International Industries*⁸¹ resorted to the practice of other bodies in order to identify the possibility of subjecting its decisions to revision. The Tribunal noted that “similar conditions for revision have been

75 *Ibid.*, para. 49.

76 PALOMBINO, *Introduzione al diritto internazionale*, Bari-Roma, 2021, p. 125; BROWN, “Inherent Powers in International Adjudication”, *cit. supra* note 2, p. 832: “An inherent power of a court might, then, derive ‘from its nature as a court of law.’” See also BROWN, “The Inherent Powers of International Courts and Tribunals”, *cit. supra* note 9, p. 244; MAROTTI, “I poteri inerenti”, *cit. supra* note 9, p. 525.

77 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel of 6 May 2008, para. 33: “the integrity of its proceedings”.

78 Trial Chamber I, *Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations of 27 May 2005, paras. 9–10.

79 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, *cit. supra* note 77, para. 33.

80 On the inherent power of revision see PALOMBINO, “Il potere inerente di riesame dei tribunali internazionali: in margine al caso Celebici”, *La Comunità Internazionale*, 2004, p. 707 ff.

81 *Ram International Industries, Inc., Universal Electronics, Inc., General Aviation Supply, Inc., Galaxy Electronics Corp. v. The Air Force of the Islamic Republic of Iran*, IUSCT Case No. 148, Decision No. DEC 118-148-1 of 28 December 1993.

resorted to in the practice of international tribunals⁸² even in the absence of specific provisions on the matter and, sometimes, even when in presence of treaty rules making the awards final and binding.⁸³ On the basis of these observations, the Tribunal outlined the power “to revise decisions induced by fraud”.⁸⁴

The use of external precedent in this context is of great interest due to the peculiarities of inherent powers themselves and its role is mostly connected to the definition of the scope of these powers, rather than to their existence. Although the legal basis of inherent powers is still debated,⁸⁵ their existence and their attribution to judicial organs is in fact well established.⁸⁶

For example, there is no doubt that the ICJ has a number of inherent powers, outlined in its own case law and never challenged by States, on issues such as the integrity of the arbitral procedure, the ability to raise issues *proprio motu* and many others.⁸⁷ Inherent powers are also found in other contexts, such as commercial⁸⁸ and investment arbitration.⁸⁹ In this second case, for example, the only indication offered by the case law on the subject is that these powers should not go against clear directives of the Arbitration Rules.⁹⁰ This statement alludes to the case in which there is an irremediable contrast between the power exercised by the tribunal and the rules that expressly regulate the

82 *Ibid.*, para. 19.

83 *Ibid.*, para. 19.

84 *Ibid.*, para. 20.

85 See BROWN, “The Inherent Powers of International Courts and Tribunals”, *cit. supra* note 9, p. 196; BROWN, *A Common Law of International Adjudication*, *cit. supra* note 6, p. 55 ss.; MAROTTI, “I poteri inerenti”, *cit. supra* note 9, p. 525 ss.

86 BROWN, “The Inherent Powers of International Courts and Tribunals”, *cit. supra* note 9, p. 205.

87 See, on the ICJ’s powers, FORLATI, *The International Court of Justice*, Cham, 2014.

88 ILA, INTERNATIONAL COMMERCIAL ARBITRATION COMMITTEE, *Conference Report Johannesburg 2016 (as 2014 with recommendations)*, available at: <<https://www.ila-hq.org/index.php/committees>>, p. 3. On the possibility of applying these powers both in commercial and investment arbitration see *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2 of 30 May 2008, para. 46.

89 In this field inherent powers are introduced through the text of the ICSID Convention itself. According to Art. 44 of the Convention, “[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question”. After outlining the procedural rules that should be followed, the Convention leaves a residual power of the tribunal, almost codifying the possibility to employ inherent powers. Art. 19 of the ICSID Arbitration Rules further provides that “[t]he Tribunal shall make the orders required for the conduct of the proceeding”.

90 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in response to a Petition for Participation as Amicus Curiae of 19 May 2005, para. 7.

arbitral procedure, but the fact that the single power is not foreseen or that only a reduced version of it is provided for in the rules does not mean that the tribunal incurs a limitation on the exercise of its inherent powers.⁹¹

Matters change when it comes to the scope of inherent powers, which is far from defined. These, in fact, refer to a series of unspecified powers, often aimed at fulfilling “case management” functions⁹² and, therefore, managing the case from a procedural point of view.⁹³ Although the theory of inherent powers has been the subject of various works of doctrine,⁹⁴ there is no clear methodology for reconstructing their content: they are the powers that courts need to fulfil their judicial functions, but it is extremely complicated to identify them and outline their limits.⁹⁵ To this end – as it emerges already from the case law at the beginning of the Section – tribunals may refer to external precedents in order to clarify the scope of their own powers, even the most obvious one. For example, in *Arbitration between the Republic of Croatia and the Republic of Slovenia*, the Permanent Court of Arbitration (“PCA”) held that it had the inherent power to decide whether the proceedings had been irreparably compromised to such an extent that they could not continue.⁹⁶ To reach this conclusion, the Court carried out a detailed analysis of the precedents of other bodies, starting with those of *Nottebohm*⁹⁷ (ICJ) and *Tadić*

91 PAPARINSKIS, “Inherent Powers of ICSID Tribunals: Broad and Rightly So”, in WEILER, LAIRD (eds.), *Investment Treaty Arbitration and International Law*, V, New York, 2012, p. 13.

92 MISTELIS, “Efficiency – What Else?: Efficiency as the Emerging Defining Value of International Arbitration: between Systems Theories and Party Autonomy”, in SCHULTZ, ORTINO (eds.), *The Oxford Handbook of International Arbitration*, Oxford, 2020, p. 349 ff., p. 359: “Management of the case’ refers to the procedural decisions of arbitrators, namely those planning, organizing, and structuring the conduct of the process, and those made during the proceeding as a response to requests of the parties”.

93 HANEFELD, DE JONG, “Inherent Powers to Streamline the Proceedings” in FERRARI, ROSENFELD (eds.), *Inherent Powers of Arbitrators*, New York, 2019, p. 247 ff., p. 252: “it is understood that arbitral tribunals also retain a supplementary discretionary power to control arbitral procedure. This power exists notwithstanding express conferral and arises from the tribunal’s adjudicatory function and position as a quasi-judicial actor”.

94 Other than the works of Brown (“The Inherent Powers of International Courts and Tribunals”, *cit. supra* note 9) see also GAETA, “Inherent Powers of International Courts and Tribunals”, in VOHRAH, et al. (eds.), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, Den Haag, 2003, p. 353 ff.

95 In *Nuclear Tests (Australia v. France)* (Judgment of 20 December, ICJ Reports, 1974, p. 253 ff., para. 23) the Court refers to powers which derive “from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded”.

96 *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, para. 168.

97 *Nottebohm Case (Preliminary Objection)*, Judgment of 18 November, ICJ Reports, 1953, p. 111 ff.

(ICTY).⁹⁸ One may even say that such use of external precedent assists tribunals in defining the very notion of judicial organ on which the concept of inherent powers is based.

Thus, in the context of inherent powers, external precedent assumes a much different role than the one outlined in the previous Sections. Its use is not expressly provided for – like in Article 38(1)(d) of the ICJ Statute – but it is not of marginal role – like for systemic interpretation. Its flexible and argumentative nature makes it an ideal tool for the tribunal invoking inherent powers, thus contributing to the procedure of the tribunal. Indeed, as inherent powers are not bound by the same formal constraints as the sources and interpretive techniques outlined in the Sections above, they make it possible to ensure that purely procedural obstacles do not paralyze the work of international courts and tribunals⁹⁹ and that proceedings continue according to the canons of the “good administration of justice”.¹⁰⁰

5 The Use of External Precedent on Procedural Matters and the Tribunals’ Legitimacy

The analysis carried out so far has focused on the interaction between external precedent and the need to fill the *lacunae* of procedural law. The use of external precedent is, however, also strictly intertwined with the idea of the “legitimacy”¹⁰¹ of a tribunal, especially in its relations with States.

The need for a complete legal framework is indeed not absolute and must be balanced with another core characteristic of international adjudication, i.e. its consent-based nature. States are ultimately those who accept the jurisdiction of an international court or tribunal, allowing it to function. Particular caution must thus be exercised when dealing with *lacunae* in order to avoid incurring additions to procedures *contra* what States originally accepted as limitations to their sovereignty. This worry became all too real with the events that involved the WTO Dispute Settlement Body. Its Appellate Body is currently

98 *Prosecutor v. Dusko Tadić*, *cit. supra* note 25, para. 18.

99 RUIZ FABRI, PAINE, *cit. supra* note 4, p. 14.

100 KOLB, “Le principe de la ‘bonne administration de la justice’ dans la jurisprudence internationale”, *L’Observateur des Nations Unies*, 2009, p. 5 ff.

101 Legitimacy is meant as “the justification of the exercise of public authority”. For a recollection of the lively debate around the concept of “legitimacy” see HAMAMOTO, “Legitimacy of International Adjudication”, *Max Planck Encyclopedia of International Procedural Law*, 2020.

unable to function due to the United States' blockage of appointments,¹⁰² which is due – among a number of other reasons – to the various procedural practices implemented by the Appellate Body without the expressed consent of Member States.¹⁰³ This is just the most recent manifestation of the fact that States do not simply accept that judicial (or quasi-judicial) bodies freely expand their procedure, unless otherwise provided and within the limits of the constitutive instruments.

In this context, arguments can be made both that the use of external precedent on procedural matters increases a tribunal's legitimacy in the eyes of States and that it poses a serious threat to it.

The first position is in line with the most common theories concerning the use of external precedent on substantive matters: external precedent increases the legitimacy of the decision, contributing to the acceptance of the latter by the parties involved.¹⁰⁴ It helps the tribunal in justifying its course of action, showing parties that it is not merely acting out of its own agenda. This can easily apply to the uses of external precedent analyzed in Sections 2 and 3.

With regard to its employ as a subsidiary means, it has been shown that it does not *per se* cause many issues nor does it need an explanation as to its meaning, being a typical use under Article 38(1)(d) of the ICJ Statute. As long as the tribunal's reasoning on its determination of the applicable rule of law is correct, external precedent can often increase the legitimacy and clarity of the decision.

When used in the context of systemic interpretation, external precedent again does not cause issues and can help streamline the reasoning of the tribunal. Its use will be legitimate or excessive based on whether all the criteria of Article 31(3)(c) VCLT were met or whether external precedent is employed in the context of an interpretive operation aimed at displacing the applicable law. These, however, are characteristics of systemic interpretation, external precedent thus being nothing more than an instrument which should not be able to negatively influence the legitimacy of the decision and at most should increase it.

¹⁰² The latest news on the matter is of 28 March 2022: "Members Continue Push to Commence Appellate Body Appointment Process", wto.org, available at: <https://www.wto.org/english/news_e/news22_e/dsb_28mar22_e.htm>.

¹⁰³ For an analysis of procedural law and the Appellate Body crisis see: ADINOLFI, "Procedural Rules in WTO Dispute Settlement in the Face of the Crisis of the Appellate Body", QIL, 2019, p. 39.

¹⁰⁴ PALOMBINO, MINERVINI, "Il ruolo del precedente", *cit. supra* note 11, p. 946; RUIZ FABRI, PAINE, *cit. supra* note 4, pp. 55–56; COHEN, *cit. supra* note 15, pp. 288–289.

The effects of the use of external precedent outlined in Section 4 – in order to clarify the notion of tribunal and the scope of inherent powers – are however less straightforward.

In the sense that it allows to root an inherent power in a shared practice among judicial bodies, it does increase the legitimacy of the decision in the eyes of the parties. This is particularly true when, as often happens, the category of inherent powers turns out to overlap with rules of general international law or treaty law on procedural matters. For example, in *Nottebohm*,¹⁰⁵ the ICJ stated that *compétence de la compétence* is one of the inherent elements of the judicial function, but it also referred to a rule “consistently accepted by general international law in the matter of international arbitration”,¹⁰⁶ to the point of affirming that the Court would enjoy this power even if it were not provided in Article 36 (6) of its Statute.¹⁰⁷ This was further observed with regard to provisional measures: it has been demonstrated that they are the object of an inherent power of international courts and tribunals, but it was also noted that the concept of binding provisional measures can be linked to a general principle.¹⁰⁸ External precedent in these cases serves the purpose of reaffirming an already established rule.

The use of external precedent in the context of inherent powers, however, can also be argued to pose a threat to legitimacy. In detecting the existence of an inherent power, the peculiarities of the individual bodies¹⁰⁹ must be taken into account and particular caution must be exercised when borrowing from the jurisprudential elaboration of other courts and tribunals on procedural matters.¹¹⁰ The proliferation and diversification of international adjudication makes it increasingly difficult to refer to a single notion, in terms of procedure, of “tribunal”. A relevant example is found in the rules aimed at protecting equality of arms in international adjudication. These are historically canons developed for disputes between States and derived from the customary rule

105 *Nottebohm Case*, *supra cit.* note 97.

106 *Ibid.*, p. 119.

107 *Ibid.*, p. 120.

108 See, on this latter topic, MILES, *Provisional Measures before International Courts and Tribunals*, Cambridge, 2017, pp. 4 and 298.

109 GAËTA, *cit. supra* note 94, p. 370: “in assessing the inherent nature of an ‘unexpressed’ power, the unique features of each particular court or tribunal should be taken into account”.

110 GUILLAUME, *cit. supra* note 10, p. 20.

of sovereign equality.¹¹¹ Consequently, their automatic application to disputes involving also individuals or investors could lead to some difficulties.¹¹² In cases of this kind, any cross-fertilization operation, whether or not made through reference to external precedent, must be carried out with extreme caution in order to avoid adding elements that are incompatible with the rationale of a specific tribunal.¹¹³

Recourse to external precedent cannot be used as a *panacea* for an abuse of the category of inherent powers. The latter, in fact, must not clash with the essential canon of the parties' consent. As established by the Iran-United States Claims Tribunal:

in order to determine which powers international courts and tribunals may exercise as inherent powers one must take into account the particular features of each specific court or tribunal, including the circumstances surrounding its establishment, the object and purpose of its constitutive instrument, and the consent of the parties as expressed in that and related instruments.¹¹⁴

In light of the above, the idea that external precedent simply increases the legitimacy of tribunals' decisions should be revisited. It usually provides a basis for gap-filling operations and serves the purpose of legitimizing the decision before the parties. However, it can also be the means of importing procedural mechanisms extraneous to a specific system, with the risk of overriding the consent of Member States. As mentioned in the Introduction, this issue is particularly pressing for the area of procedural law: the argument that external precedent responds to a need for coherence in the decision of similar if not

¹¹¹ FORLATI, "Fair Trial in International Non-Criminal Tribunals", in SARVARIAN et al. (eds), *Procedural Fairness in International Courts and Tribunals*, London, 2015, p. 101 ff., pp. 108–110.

¹¹² See the difficulties encountered by the ICJ in *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion of 1 February, ICJ Reports 2012, p. 10 ff.

¹¹³ BROWN, "The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals", *cit. supra* note 7, p. 243.

¹¹⁴ *The Islamic Republic of Iran v. The United States of America*, IUSCT Case No. B61, Decision No. DEC 134-A3/A8/A9/A14/B61-FT of 1 July 2011.

identical issues¹¹⁵ does not find particular footing, being rooted in the observation that tribunals will apply the same set of substantive law.¹¹⁶

6 Conclusions: The Multiple Roles of External Precedent on Procedural Matters

This paper has delved into some of the main scenarios in which external precedent can be employed in order to fill a *lacuna* in a tribunal's procedure. The analysis has focused on both the general characteristics and the shortcomings of these scenarios.

It has first outlined the difficulties encountered while using external precedent as a subsidiary means for the determination of rules of law and as part of systemic interpretation both in general and with regard to the peculiarities of international procedural law. These two scenarios show that, while it is true that the recourse to external precedent does not come with any requirement or formality, when it is employed in connection to very technical operations – whether determining or interpreting the applicable law – it is inevitably invested with the requirements peculiar to those operations. In these cases, external precedent is just a tool in the tribunal's hands: if the tribunal's reasoning fulfils the technical requirements outlined above, then the decision will be legitimate and external precedent will have an instrumental role in streamlining the work of the tribunal and increasing the legitimacy of the decision. On the other hand, in absence of some of the mentioned requirements, external precedent will not be able to clear the final decision from a lack of legitimacy, nor should it be enough to mask possible shortcomings.

The paper has then analyzed the use of external precedent in the context of inherent powers, where it seems to take center stage. These powers are strictly connected to the notion of judicial body. Such notion, however, is not easily found on the international plane and one logical solution is for international courts and tribunals to look at each other's practices in order to distil this notion. While still being a mere instrument for the tribunal, external precedent

¹¹⁵ PALOMBINO, *Introduzione al diritto internazionale*, *cit. supra* note 76, p. 282. See also PALOMBINO, MINERVINI, "Apropos of the External Precedent", *cit. supra* note 16, p. 136 where the authors link the use of external precedent to "interpretative fragmentation", stating that "[a]s for interpretative fragmentation, we use this wording to describe the situation where different international courts, adjudging the same legal or factual issue, render contradictory decisions on a single rule or body of law".

¹¹⁶ CHARLOTIN, *cit. supra* note 7, p. 284. See also FOCARELLI, *Costruttivismo giuridico e giurisdizioni internazionali*, Milano, 2019, p. 90.

assumes a very different role. A decision to invoke inherent powers supported by vast judicial practice will inevitably have a higher degree of legitimacy than one based on a purely abstract idea of judicial function. External precedent has thus here the role of increasing the legitimacy of the tribunal's decision on matters of procedure. This role, however, is not based on the substantive law idea of coherence in the application of the same rules but is rather a matter of applying a shared notion of tribunal. Caution must be however exercised in order to avoid incurring the opposite excess of overstepping States' consent to jurisdiction by forcing them into procedural frameworks to which they never agreed.

In conclusion, external precedent can take on very different roles. Although never binding, it is a flexible instrument which allows tribunals to fill the *lacunae* in their procedure and increase the legitimacy of their decisions. As a degree of freedom is needed for tribunals to exercise their gap-filling role, external precedents help them navigate the tensions of international procedural law, balancing the need for an efficient functioning of the tribunal with the consent-based nature of international adjudication.