PREFACE

One would suspect that WTO jurisprudence contains at least a few useful statements relating to general public international law principles and concepts. But just how much useful material would one expect to find? After all, WTO adjudicators are tasked with examining alleged violations of the specific obligations contained in the WTO agreements. And, although Article 3.2 of the DSU expressly instructs adjudicators to clarify the WTO agreements 'in accordance with customary rules of interpretation of public international law', does that allow concepts and principles of public international law apart from those relating to treaty interpretation to be considered? And to what extent does any such consideration merely take the form of passing references,[1] as distinguished from more significant and substantial clarification and application of public international law concepts and principles? Moreover, to what extent are any statements by WTO adjudicators concerning those concepts and principles capable of wider application, as opposed to being inextricably linked to the context of the underlying textual provisions of the WTO agreements?

If WTO jurisprudence contained a very large number of statements relating to general public international law concepts and principles, one might expect to find numerous citations to WTO jurisprudence in public international law treatises, in the jurisprudence of other international courts and tribunals, and in the work of the International Law Commission (ILC). Instead, one finds scant reference to WTO jurisprudence in public international law treatises.[2] There is only one reference to GATT/WTO jurisprudence in all of the decisions

[1] It has been said that 'judgments by the ICJ received only nominal adoption into the GATT regime, simply referred to in the footnotes of decisions as opposed to being directly applied in the body of a ruling'. J. Cameron and K. Gray, 'Principles of International Law in The WTO Dispute Settlement Body' (2001) 50(2) *International and Comparative Law Quarterly* pp. 248–98, footnote 52.

[2] For example, I. Brownlie and J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), pp. 353, 368, 543, 544, 548, 563, 565 and 740. Shaw's *International Law*, 6th edn (Cambridge University Press, 2008), with a 58-page table of cases covering a wide range of international and domestic courts and tribunals, refers to just three Appellate Body decisions.

and advisory opinions of the International Court of Justice (ICJ) (and it is found in a dissenting opinion, and it criticizes the ICJ majority decision for not following WTO panel practice concerning the use of scientific experts).[3] There are not very many references to WTO jurisprudence in the commentaries of the ILC, and one ILC member has recently questioned whether WTO jurisprudence is looked at closely enough by public international lawyers.[4]

Work on this digest was prompted by the suspicion that WTO jurisprudence is an untapped goldmine of jurisprudence on public international law concepts and principles, and that a systematic review of the roughly 60,000 pages of WTO jurisprudence generated to date would unearth a large number of key statements by WTO adjudicators (i.e. the Appellate Body, panels, and arbitrators) relating to a wide range of general international law topics. The resulting mass of material collected in this digest speaks for itself. First, in the context of adjudicating claims of violation under the WTO agreements, WTO adjudicators have considered a wide range of ancillary concepts and principles of general international law, including but not limited to those regarding the law of treaties, State responsibility, and international dispute settlement. Statements by WTO adjudicators on general international law concepts and principles are by no means limited to the customary international law rules of treaty interpretation.[5] Second, many concepts and principles have been the subject of substantial clarification and application, as opposed to simply passing references. Third, many statements and lines of jurisprudence are not inextricably linked to particular provisions of the WTO agreements in a way that would reduce their value to public international lawyers working in different contexts. To quote from Lauterpacht and McNair's preface to an early volume of the *International Law Reports* (which at that time bore the title *Annual Digest and Reports of Public International Law Cases*):

[3] In their joint dissenting opinion in the *Pulp Mills* case, Judges Al-Khasawneh and Simma disagreed with the Court's decision not to appoint experts *proprio motu*, and observed that '[i]t is perhaps the World Trade Organization, however, which has most contributed to the development of a best practice of readily consulting outside sources in order better to evaluate the evidence submitted to it; in fact, it was devised as a response to the needs of the dispute resolution process in cases involving complex scientific questions.' The judges recalled several aspects of WTO panel practice and cited to several panel decisions. *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Merits, 2010 ICJ Reports, p. 14 (20 April), Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, para. 16.

[4] D. McRae, 'International Economic Law and Public International Law: The Past and The Future' (2014) 17(3) *Journal of International Economic Law* 627, at 632.

[5] With respect to the direction in Article 3.2 to apply customary international law 'rules of interpretation', the Panel in *Korea – Procurement* did not read this direction as implying that other rules of international law are necessarily inapplicable. The Panel stated that '[w]e should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply. The language of [Article] 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law.' Panel Report, *Korea – Procurement*, footnote 753.

> The work of which this book is the first-fruits was prompted by the suspicion that there is more international law already in existence and daily accumulating 'than this world dreams of' . . . As the work has progressed that suspicion has ripened into a certainty . . . [T]he resulting mass of raw material forms a body of authority which both in quality and in variety has exceeded our expectations.[6]

The purpose of this guide is to make the wealth of statements by WTO adjudicators on general international law concepts and principles more easily accessible, in particular for those working or studying in non-WTO fields of international law. It provides a comprehensive and systematically organized digest of nearly one thousand extracts from WTO jurisprudence covering the following general international law topics: (i) admissibility and jurisdiction; (ii) the attribution of conduct to a State; (iii) the breach of an obligation; (iv) conflicts between treaties; (v) countermeasures; (vi) due process; (vii) evidence before international tribunals; (viii) good faith; (ix) judicial economy; (x) municipal law; (xi) non-retroactivity; (xii) reasonableness; (xiii) the sources of international law; (xiv) sovereignty; (xv) treaty interpretation; and (xvi) words and phrases commonly used in treaties and other international legal instruments.

This work is inspired by several books that have examined the contributions of particular international courts and tribunals to the development of international law. The best-known book of this kind is *The Development of International Law by the International Court*,[7] in which Lauterpacht reviewed the jurisprudential contributions of the Permanent Court of International Justice and the International Court of Justice on a range of concepts and principles of general public international law, including treaty interpretation, the role of judicial precedent, principles of judicial caution and restraint, jurisdictional issues, State responsibility, and sovereignty. In *The Development of International Law by the European Court of Human Rights*,[8] Merrills reviewed that court's jurisprudential contributions to topics such as treaty interpretation, State responsibility, reservations, estoppel and waiver, due process, and the relationship between treaties and general international law. Brower and Brueschke devoted a significant part of their book on *The Iran–United States Claims Tribunal* to examining that tribunal's jurisprudential contributions to general international law, including the treatment of evidence before international

[6] A. D. McNair and H. Lauterpacht (eds.), *Annual Digest of Public International Law Cases, Volume 3, Years 1925–1926* (Cambridge University Press, 1929), at p. ix.

[7] H. Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, 1958), which was a revised version of H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (Longmans, Green and Co., 1934). See also O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005); and J. Sloan and C. J. Tams (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013).

[8] J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, 1988).

tribunals, treaty interpretation, State responsibility and estoppel.[9] Other works have looked at the development of international law by the Permanent Court of Arbitration,[10] the International Criminal Tribunal for Rwanda[11] and the Special Court for Sierra Leone.[12]

There are two ways in which this digest differs from the above-mentioned works that inspired it. First, most of those works examined the particular court or tribunal's jurisprudential contributions not only on general international law, but also with respect to core concepts and principles in specialized fields of international law – international human rights law in the case of the ECHR, international investment law in the case of the Iran–United States Claims Tribunal, and international criminal law in the case of some of the others mentioned above. This digest focuses exclusively on those statements by WTO adjudicators concerning general public international law concepts and principles.[13] It does not, for example, cover the extensive body of WTO jurisprudence relating to national treatment and most-favoured-nation obligations found in the WTO agreements; although that body of WTO jurisprudence is perhaps relevant to the interpretation of national treatment and most-favoured-nation provisions typically found in bilateral investment treaties[14] and other international trade agreements, those are not general public international law concepts or principles. Second, as its title suggests, this work is a 'digest' of relevant WTO jurisprudence, as opposed to an

[9] C. N. Brower and J. Brueschke, *The Iran–United States Claims Tribunal* (Martinus Nijhoff, 1998), Part III, 'Contributions of the Iran–United States Claims Tribunal to Public International Law', pp. 263–368, and Chapter 19, 'The Tribunal's Jurisprudence as a Source of Public International Law', pp. 631–56.

[10] J. G. Merrills, 'The Contribution of the Permanent Court of Arbitration to International Law and to the Settlement of Disputes by Peaceful Means', in P. Hamilton, H. C. Requena, L. van Scheltinga and B. Shifman (eds.), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution, Summaries of Awards, Settlement Agreements and Reports* (Kluwer, 1999), pp. 3–31.

[11] L. J. van den Herik, *Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff, 2005).

[12] C. C. Jalloh, 'The Contribution of the Special Court for Sierra Leone to the Development of International Law' (2007) 15(2) *African Journal of International and Comparative Law*, pp. 165–207.

[13] Consideration was given to inserting the word 'general' before 'public international law' in the title of this work. Sometimes brevity beats precision.

[14] In the context of international economic law, there are various works examining the potential relevance of WTO jurisprudence on national treatment (and other obligations) to the interpretation of similar obligations in other international trade and investment agreements. For example, see G. Cook, *Importing GATT/WTO Jurisprudence into NAFTA Chapter Eleven to Define the Standards of International Investment Law* (University of British Columbia, 2001, available at www.law.libary.ubc.ca); J. Kurtz, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents' (2009) 20(3) *European Journal of International Law* 749; G. Tereposky and M. Maguire, 'Utilizing WTO Law in Investor–State Arbitration', in A. W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff, 2011), pp. 247–83; A. Mitchell, 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law' (2013) 14 *Chicago Journal of International Law* 93.

academic monograph – its added value comes from the identification and systematic organization of the relevant jurisprudence, in such a way as to help researchers quickly identify relevant cases. It is best left to others to critically evaluate that jurisprudence, or draw out the possible implications of that jurisprudence for future cases, or compare and contrast that jurisprudence with the jurisprudence of other international courts or tribunals, and/or engage with the substantial body of literature that exists on some of the topics covered.

Statements by WTO adjudicators on general public international law concepts and principles should be taken into account by lawyers working in other fields of public international law, for at least two reasons. First, as Schwarzenberger observed in *International Law as Applied by International Courts and Tribunals*, '[c]ompared with the dicta of textbooks and the practice of this or that State, the decisions of international courts have an authority and reality which cannot be surpassed'.[15] WTO panels, arbitrators and the Appellate Body function as international judicial tribunals. They are required to resolve the disputes that come before them exclusively on the basis of law and legal reasoning. It is true that the WTO agreements use a considerable amount of non-judicial terminology when describing the dispute settlement system,[16] but WTO adjudicators function in essentially the same way as any other international judicial tribunal. In the words of one panel, 'an inquiry of a peculiarly economic and political nature' is 'notably ill-suited' to WTO panels, 'whose function is fundamentally legal'.[17] In the words of the Appellate Body, WTO adjudicators are engaged in the exercise of 'the judicial function'.[18] A second reason why statements by WTO adjudicators on public international law concepts and principles should be taken into account is that WTO adjudicators have developed a body of jurisprudence that is remarkably consistent and coherent. The role and influence of the WTO Appellate Body has been important in this regard. As others have explained, '[t]he repeated quotation and citation of earlier decisions in standing tribunals will result in a *jurisprudence constante* which, precisely because it is repeated and *constante*, tends to acquire a certain natural authority and influence that even the most carefully crafted award of an *ad hoc* tribunal is unlikely to command.'[19]

[15] G. Schwarzenberger, *International Law. Volume I: International Law as Applied by International Courts and Tribunals* (Stevens & Sons, 1945), p. 2. See also *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Merits, Separate Opinion of Judge Sir Gerald Fitzmaurice, 1970 ICJ Reports, p. 64, para. 2 ('judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development').

[16] In the WTO dispute settlement system, 'panels' and the 'Appellate Body' issue 'reports' that contain 'recommendations' addressed to a plenary organ (i.e. the Dispute Settlement Body), which then adopts those recommendations (unless all WTO Members agree otherwise).

[17] Panel Report, *Brazil – Aircraft*, para. 7.89.

[18] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at para. 36.

[19] V. Lowe and A. Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice', in J. Sloan and C. Tams (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), pp. 177–93, at p. 186.

This digest aims to be comprehensive, and is based on a review of all WTO decisions generated over the period 1995–2014. By my count,[20] a total of 352 decisions were issued during this period. These include: (i) 191 panel reports (including 162 panel reports in original proceedings, and 29 panel reports in compliance proceedings under Article 21.5 of the DSU to determine the existence and WTO-consistency of measures taken to comply with earlier rulings); (ii) 112 Appellate Body reports (including 94 Appellate Body reports reviewing original panel reports, and 18 Appellate Body reports in Article 21.5 proceedings); and (iii) 49 arbitral awards and decisions (including 27 arbitration awards under Article 21.3(c) of the DSU to determine the reasonable period of time for implementing rulings and recommendations, 19 arbitration decisions in proceedings under Article 22.6 of the DSU and Articles 4 and/or 7 of the SCM Agreement to determine the level of retaliation in the event of non-compliance, 1 arbitration award under Article 25 of the DSU, and 2 arbitration awards under special procedures). This digest also contains extracts from about a dozen panel reports from the GATT era.

Stating that this digest aims to be comprehensive does not amount to a representation that it presents all relevant statements by all WTO adjudicators on all of the topics covered herein. It does not. To the contrary, considerable care has been taken to identify and exclude from this digest those statements and lines of jurisprudence that are linked to specific provisions of the WTO agreements in a way that potentially reduces their relevance for those working in other fields of public international law. As a result, for some of the topics covered, the statements collected in this digest only represent a fraction, and in some instances a very small fraction (e.g. countermeasures), of what WTO adjudicators have had to say on the topic. In addition, care has been taken to keep this digest to a manageable length, keeping the extracts as short as possible, and avoiding duplication as far as possible. For all of the topics covered, it aims to highlight the cases and statements that are likely to be of the greatest interest and utility to lawyers working in other fields of public international law. In other words, this digest tries to present all the 'greatest hits' of WTO jurisprudence for public international lawyers working in other fields of international law.

[20] A note on the figures presented here: (i) when the parties to a WTO dispute reach a bilateral settlement during the course of a proceeding, the WTO adjudicator still issues a report/award, which simply notes that a bilateral agreement was reached and does not contain any findings or analysis by the adjudicator – such reports are not counted in these figures; and (ii) when there are multiple complainants challenging the same matter, the WTO adjudicator may issue its separate reports in the form of a single document – these are counted as only one report in these figures; and (iii) WTO panels sometimes issue preliminary rulings on jurisdiction (or other points) as separate documents, which are then deemed to be an integral part of their final report – such rulings are not counted separately in these figures.