A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS AND PRINCIPLES

In its first twenty years, the WTO dispute settlement system generated over 350 decisions totalling more than 60,000 pages. These decisions contain many statements by WTO adjudicators regarding the law of treaties, state responsibility, international dispute settlement and other topics of general public international law. This book is a collection of nearly one thousand statements by WTO adjudicators relating to admissibility and jurisdiction; attribution of conduct to a State; breach of an obligation; conflicts between treaties; countermeasures; due process; evidence before international tribunals; good faith; judicial economy; municipal law; non-retroactivity; reasonableness; sources of international law; sovereignty; treaty interpretation; and words and phrases commonly used in treaties and other international legal instruments. This comprehensive digest presents summaries and extracts organized systematically under issue-specific sub-headings, making this jurisprudence easily accessible to students and practitioners working in any field of international law.

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FOREWORD

The panther is a cat! But is it a leopard or a lion?

Not too long ago, one could make waves by claiming that WTO rules are, after all, just treaty rules. They are, in biological terms, but a 'genus' of the broader 'family' of public international law, much like panthers are a genus of the broader cat family.

Many GATT negotiators thought differently. They portrayed their agreement as special, a self-contained economic contract setting out a balance of concessions, rather than legally binding rules part of international law. In many ways, this remains the approach today in, for example, most of international financial regulation: highly technical, detailed rules, but not considered by their drafters as 'binding' or 'international law'.

Reading this digest, one realizes just how fast and comprehensively perceptions have changed. Graham Cook's extraordinary work offers a structured overview of nearly one thousand statements by WTO panels and the WTO Appellate Body on topics of general public international law. To the extent they are still out there, this digest should silence those who continue to believe that WTO law is a self-contained regime, that WTO panels can only consider WTO covered agreements, or that one can be an effective WTO lawyer without knowing public international law.

Yet, Mr Cook's message goes beyond the idea that WTO law is part of public international law, i.e. that public international law plays a role also in WTO dispute settlement. His work demonstrates to specialists in other fields of international law (say, human rights or environmental lawyers) that they too can actually learn something about public international law by looking at WTO jurisprudence. It is, to come back to my biological metaphor above, not just that the panther, finally, realizes that it is part of the cat family; other cats (even domestic cats) can actually learn something about what it means to be a cat by observing the panther's features, habits and behaviour.

Changing metaphors, and contemplating this time the cover picture of this digest, within the four walls of the WTO building grew a surprisingly rich and vigorous tree of public international law; a tree that few insiders would have predicted when they constructed the WTO edifice in 1994. The tree has deep

and long roots that reach way beyond the WTO covered agreements. It is nurtured by customary international law, general principles of law and even non-WTO treaties. Given its size and strength today the tree should also inspire other fields of international law. The tree may have been hidden from sight. With this work, everyone is on notice.

How can one summarize the WTO's approach to general international law? In the 1990s, many public international law commentators lamented the proliferation of specialized international tribunals. They feared that these tribunals would develop their own rules of international law in an unstoppable process of fragmentation. The reality, at least when looking at WTO jurisprudence twenty years later, turned out differently. If anything, the WTO has taken a rather traditional, conservative view of general international law, following as much as it could statements by the International Court of Justice or the UN's International Law Commission. No WTO-specific approach to general international law topics has really developed. Rather than distancing itself from general international law or giving general rules a trade-specific interpretation, WTO jurisprudence has used public international law as a centralizing or uniting factor, bringing (the panther of) WTO law closer to the broader (cat) family of public international law. If anything, what marks the WTO approach to, for example, treaty interpretation is an almost obsessive sticking to what the Vienna Convention provides for, not a liberal approach of adjusting rules of interpretation to the specifics of trade. As the author puts it (at paragraph 15.32), 'WTO adjudicators have been wary of certain forms of reasoning by reference to object and purpose, and have generally been cautious about attaching too much weight to the object and purpose of a treaty as a basis for its interpretation.'

More WTO-specific may be the heavy reliance on a *de facto* rule of precedent of especially WTO Appellate Body rulings and a complete neglect in panel and Appellate Body reports of academic scholarship or 'teachings of the most highly qualified publicists' for anything other than general international law.

General international law, as this digest demonstrates, fills the gaps left by treaties. It is the glue that binds the different sub-branches together. General international law ensures the existence of international law as a 'legal system'. The fact that the WTO applies it is not trivial or meaningless. It confirms that the WTO treaty is part of 'the family'.

At the same time, so far, only one of the two core lessons have been drawn from the fact that the WTO is part of public international law. Today, WTO jurisprudence clearly confirms that the WTO treaty must be applied and interpreted in the broader context of general international law. This centralizing or uniting theme has given us ample and rich references to rules on burden and standard of proof, evidence, good faith, due process, attribution, jurisdiction, countermeasures and treaty interpretation. Features and insights common to the

broader cat family have played their role in our assessment and analysis of the panther. But there is a second lesson to be drawn from the fact that WTO law is part of the system of international law. That is, its unavoidable interaction not just with general international law but also with other, non-WTO treaties and other sub-branches of international law, including free trade agreements between a sub-set of WTO Members.

In other words, that the panther (genus *panthera*) is part of the cat family also unites it with other subfamilies or genera within the family such as the cougar, the cheetah or the domestic cat. What is more, also the panther is, in turn, but a genus that includes several species, *in casu*, the jaguar, leopard, lion and tiger, all four of which are *panthera* but after all quite distinct. The WTO may have found its place as part of the broader international law family; it is still struggling to learn from and find its place *vis-à-vis* other sub-branches of international law including sub-branches within its own field of international trade law, in particular free trade agreements.

This second lesson or consequence of being part of the international law 'system' is not a centralizing or uniting theme ('we are all cats'). It is a centrifugal or distinguishing force, calling for the recognition of the diversity between States and the contractual freedom of States to add to WTO rules or 'change their minds', waive or adapt pre-existing WTO rules and to decide for themselves to which treaty or norm they want to give preference. This second theme, still largely unresolved in the WTO today, is not a centralizing or uniting one, but a centrifugal one allowing for regional and State-to-State differences in legal relationships amongst WTO Members ('as panthers we may all be cats, but some of us are lions, others jaguars, leopards or tigers'). With 160 WTO Members, including more recently China, Saudi Arabia and Russia, such *inter se* diversity is unavoidable. For WTO dispute settlement to impose the same one-size-fits-all straitjacket on all WTO Members is unrealistic. It does not correspond to reality (WTO Members are party to a panoply of very diverse trade and non-trade agreements) and is normatively undesirable (it denies the sovereign right of countries to consent to other treaties in fulfilment of their own, diverse preferences).

At this juncture, the big question is how to combine the benefits of a multilateral treaty like the WTO with the undeniable existence of plurilateral, regional and bilateral agreements on trade and non-trade issues, in the WTO (e.g. bilateral settlement agreements or agreements to hold open hearings in deviation from the DSU) and outside the WTO (e.g. free trade agreements with WTO-plus and WTO-minus elements)? As the Appellate Body put it in one of its most recent statements on the issue (see paragraph 4.24 in this Digest): '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.' The Appellate Body left it at this, without providing its view on the issue of whether 'relevant rules of international law *applicable in the relations between the parties*' in Article 31.3(c) of the Vienna Convention allows WTO panels to refer only to non-WTO treaties binding on *all WTO Members* (in practice, almost impossible) or also to non-WTO agreements between a sub-set of WTO Members *party to the dispute* (in the case at hand, a bilateral EU–US agreement on aircraft subsidies).

Three guiding principles should be followed to solve this dilemma.

First, a WTO panel should normally refer to a non-WTO treaty only if both disputing parties have consented to this treaty (the principle of State consent). To interpret or apply the WTO treaty in a particular way with reference to a non-WTO treaty that one of the disputing parties never consented to can only be done with extreme caution (but see paragraphs 4.11, 4.17, 4.27–4.36 and 15.31 of this Digest, in each case giving meaning to the WTO treaty as it applies to *all WTO Members* with reference to a non-WTO treaty that is *not* binding on all WTO Members). Crucially, where the WTO treaty is interpreted or applied in a given way with reference to a non-WTO treaty binding on the disputing parties, this interpretation or application cannot affect other WTO Members, not party to the dispute, since they may not have consented to the non-WTO treaty nor were they party to the dispute. In other words, an EU–US bilateral agreement on aircraft, where it is relevant, may well influence the outcome of an EU–US dispute before the WTO; it cannot influence the outcome of a WTO dispute between any other pair of WTO Members. Not to give effect to the EU–US bilateral agreement, where it is relevant, would contravene the contractual freedom of States. As long as a WTO panel refers to the bilateral agreement for the purpose of deciding *claims under WTO covered agreements*, a WTO panel would then not 'add to or diminish the rights and obligations provided in the covered agreements' contrary to DSU Article 3.2; it was the EU and the US as sovereign States who did so. As Graham Cook points out (at paragraph 14.2, with reference in particular to the *China – Raw Materials* case), 'panels and the Appellate Body emphasized that States may exercise their sovereignty by negotiating and entering into treaties. In this regard, there is support in WTO jurisprudence for the proposition that the right of entering into international engagements is an attribute of State sovereignty, such that restrictions on the exercise of sovereign rights that a State voluntarily accepts through a treaty cannot be considered as an infringement of its sovereignty.'

Countries genuinely worried about the Appellate Body 'adding or diminishing' their WTO rights should be concerned not so much about reference to non-WTO treaties they explicitly consented to, and more about the WTO's *de facto* rule of precedent (where the Appellate Body, not WTO Members, is 'making

law') or reference to non-WTO treaties as facts or to general principles (such as good faith or due process) they never explicitly consented to.

Second, a WTO panel should only refer to a non-WTO treaty if such treaty is both valid and legal. The treaty cannot violate *jus cogens* or be concluded by coercion, fraud or corruption or be based on error, nor can it be explicitly prohibited in the WTO treaty (such as voluntary export restraints prohibited in Article 11 of the Safeguards Agreement; in contrast, free trade agreements are explicitly permitted in GATT Article XXIV, GATS Article V and the Enabling Clause). The non-WTO treaty should also be legal in the sense that it does not affect the rights or obligations of third parties (the principle of *pacta tertiis nec nocent nec prosunt*): a bilateral agreement cannot exchange an exclusive concession in violation of the MFN rights of third parties unless it meets GATT Article XXIV; also a settlement agreement under the DSU must comply with MFN.

Third, a non-WTO treaty can only disapply or prevail over a WTO provision if such non-WTO treaty amounts to a valid waiver of WTO rights or takes precedence over the WTO provision pursuant to conflict rules of international law. That a State can waive its WTO rights or consent to something that would otherwise constitute WTO breach (e.g. waive the DSU right to confidential Appellate Body proceedings as in *US – Continued Suspension*) is explicitly permitted in the ILC Articles on State Responsibility (Article 20 on consent as a circumstance precluding wrongfulness and Article 45(a) on waiver as loss of the right to invoke State responsibility) as well as the Vienna Convention (Article 41 on *inter se* modification of multilateral treaties). In both cases, they are subject to the *pacta tertiis* rule stated earlier: the waiver or modification cannot affect third-party rights. As discussed in paragraphs 15.44 and 15.45 of this Digest, the Appellate Body (in *US – Clove Cigarettes* and *US – Tuna II (Mexico)*) recognized that Article IX:2 of the WTO Agreement on authoritative interpretations is not the only way for WTO Members to further interpret or clarify the WTO treaty. They can also do so pursuant to simple 'subsequent agreements between the parties' as provided for in Article 31.3(a) of the Vienna Convention (as memorialized, for example, in the Doha Ministerial Declaration or a TBT Committee decision, neither of which refers to Article IX:2). Similarly, the fact that the WTO Agreement has specific rules on waiver or treaty amendment does not prevent WTO Members from waiving their rights unilaterally or by agreement, or from modifying the WTO treaty *inter se* as long as they do so in line with the relevant rules of general international law, especially the *pacta tertiis* rule (such waiver or modification agreement could then also be referred to as 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' under Article 31.3(a)).

Conflict rules of international law, in turn, start from the assumption that all treaties are of the same hierarchical value but that the parties may explicitly agree on which treaty prevails (e.g. that an FTA prevails over the WTO or that an

FTA in violation of GATT Article XXIV remains subject to MFN in the WTO), in the absence of which principles such as *lex posterior* or *lex specialis* will decide on priority.

So far WTO Members have been reluctant to invoke non-WTO treaties as self-standing defences against allegations of WTO breach. They have preferred to invoke such treaties to influence the interpretation of, for example, general exceptions in the GATT itself. To date these exceptions (GATT Article XX), allowing for *unilateral* deviations from the GATT with reference to health, environmental or public morals concerns, have been interpreted so broadly as to arguably cover most issues that WTO Members may *mutually* agree on in non-WTO treaties. More pressing is the question of whether the Appellate Body would be willing to defer to, for example, a forum exclusion clause in a free trade agreement such as NAFTA or the EU treaty (treaties explicitly allowed for under GATT Article XXIV) that prevents a State from filing a particular dispute to the WTO (e.g. because it was filed previously under the FTA). The Appellate Body has not directly answered this question. Yet, its jurisprudence, as listed in this Digest, shows the way.

Firstly, WTO panels have exclusive subject-matter jurisdiction over WTO claims. This jurisdiction may be hard to contract-out from in another treaty. Yet, a WTO panel may have jurisdiction over a claim, but that claim may be inadmissible. As Graham Cook puts it (in footnote 4 of Chapter 1): 'jurisdiction refers to the scope of the subject-matter that a complaining party can bring before a particular adjudicative body (which is constant and does not change from case to case), whereas inadmissibility concerns an alleged action or omission by a particular complaining party in a particular set of circumstances that may or must lead that adjudicative body to decline to examine a particular claim that otherwise falls within its subject-matter jurisdiction'. A forum exclusion clause in an FTA may not take away a WTO panel's jurisdiction. However, it can still lead to the inadmissibility of a claim before the WTO.

Second, the Appellate Body has confirmed that a restriction to a WTO Member's 'right to a WTO panel' cannot be 'lightly inferred' and that 'there should be a clear and unambiguous basis in the relevant legal instruments for concluding that such a restriction exists' (paragraph 1.3 in this Digest, quoting *US – FSC*). At the same time, the Appellate Body acknowledged that there may be 'a legal impediment to the exercise of a panel's jurisdiction' and that mutual understandings between WTO Members could preclude 'complainants . . . from initiating Article 21.5 proceedings . . . if the parties to these Understandings had, either explicitly or by necessary implication, agreed to waive their right to have recourse to Article 21.5' (paragraph 1.5, quoting *Mexico – Taxes on Soft Drinks* and *EC – Bananas III (Article 21.5 – Ecuador II)*). Since settlement understandings are outside 'WTO covered agreements' as much as FTAs are, a forum exclusion clause in an FTA could, therefore, be a 'legal impediment' to the

exercise of a panel's jurisdiction (i.e. can make a claim inadmissible) to the extent this clause expresses an agreement to waive specific WTO rights. In other words, the question is not whether an FTA clause can waive the right to a WTO panel (it can); the question is whether 'the language' in such clause 'reveal[s] clearly that the parties intended to relinquish their rights' (paragraph 1.5) and whether the waiver leaves third-party rights unaffected. As the Appellate Body found in *US – Continued Suspension* (Annex IV, paragraph 6), a WTO Member can waive its right to a closed Appellate Body hearing (even though DSU Article 17.10 mandates that Appellate Body proceedings 'shall be' confidential) for as long as 'the right to confidentiality of third participants *vis-à-vis* the Appellate Body is not implicated by the joint request'.

These are core issues that remain to be decided in WTO dispute settlement. After 20 years, there can be no doubt that the panther is a cat. In the years ahead, we will know whether the WTO offers the flexibility for panthers to be jaguars, leopards, lions or tigers.

Joost Pauwelyn
Geneva, 2 December 2014.

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Any opinions expressed or implied in what follows reflect the author's personal opinions and should not be attributed to the WTO Secretariat.

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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.