

# **THE WTO AND INTERNATIONAL LAW: MAPPING THE RELATIONSHIP**

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I could perhaps have subtitled my paper “The adventures of an international lawyer in the WTO dispute settlement system”. I have been an international law practitioner since the 1980s. However, it is only in the last few years that I have been involved in work to do with the World Trade Organisation (WTO), in particular, the WTO dispute settlement system.

I have worked with the Department of Foreign Affairs and Trade on a number of disputes involving Australia as a party principal or third party. I have been on teams appearing before WTO panels and the Appellate Body. I am currently working on the sugar dispute with the EC, in which Australia is a co-complainant with Brazil and Thailand.

I have found the opportunity to work across many subjects to be a great benefit of practicing international law. It allows you to develop a broad perspective on the relationship between the different fields of international law.

I would say that my perspective has certainly been broadened by working on WTO disputes. I have had to consider the nature of the relationship between WTO law and other fields of international law. In doing so, I have come to recognise the importance of this relationship and its potential.

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<sup>1</sup> The views expressed by the author are his own and should in no way be taken as representing the views of the Australian Government.

I would like to provide you with a sketch map of this relationship in the brief time I have available today. This map will not have every contour marked on it, even the major features will only be dealt with in broad outline. But I offer this map as a preliminary guide to the relationship, which will encourage you I hope to undertake a more detailed exploration.

Let me start by placing WTO law firmly within the boundaries of international law. The map does not show two land areas separated at great distance by water or situated next to each other, divided by a common border. There is one area shown and it depicts international law and all its fields, including WTO law.

The WTO is an international organisation established by the Marrakesh Agreement to provide “the common institutional framework for the conduct of trade relations among its Members”<sup>2</sup> in matters related to treaties annexed to the Marrakesh Agreement.

Membership of the WTO entails acceptance of the Marrakesh Agreements and the treaties and associated legal instruments included in Annexes 1, 2 and 3 to the Agreement as ‘a single treaty instrument’<sup>3</sup>, creating rights and obligations binding under international law. These rights can be protected and obligations enforced through recourse to compulsory dispute settlement. The Dispute Settlement Understanding (DSU) forms Annex 2 to the Marrakesh Agreement, providing “an integrated dispute settlement mechanism”<sup>4</sup>.

The region on the map encompassing WTO law had previously been, at least in part, occupied by GATT law. The history of the region shows that GATT law had existed for several decades, forming a major part of the wider region known as international trade or economic law, which itself had developed over centuries.

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<sup>2</sup> Article II of the Marrakesh Agreement.

<sup>3</sup> Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, p. 13; Article II.2 of the Marrakesh Agreement.

<sup>4</sup> Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, p. 13.

GATT law emerged in the aftermath of the Second World War, in a period which saw international institutions established with the hope of preventing another global conflict. Institutions such as the World Bank and the International Monetary Fund had an economic and financial focus. A new institution was conceived to regulate international trade, to be known as the International Trade Organisation (ITO). History shows that the ITO never came into existence. Apart from the negotiations on the stillborn ITO Charter, countries also negotiated a multilateral agreement to reduce tariffs reciprocally, with clauses imposing obligations on countries 'to refrain from a variety of trade-impeding measures'.<sup>5</sup> The agreement on tariffs and the trade obligations became the General Agreement on Tariffs and Trade.

The GATT was to be a treaty, not an organisation.<sup>6</sup> However, in the absence of the ITO, the Members of the GATT developed an informal organisational structure which survived until the creation of the WTO in the 1990s.

The relationship between GATT law and the broader realm of international law was an uncertain one. As one commentator has observed, GATT law was 'not perceived as part of the mainstream of international law'.<sup>7</sup> The reports of GATT dispute panels, for various reasons, did not receive attention in the broader international law community. Robert Hudec, a pioneer in the academic analysis of the GATT, spoke of a distinctive trade 'diplomat's jurisprudence' which was 'puzzling to lawyers'.<sup>8</sup> However, as John Jackson, another pioneer, has observed:

In the 1980s, the dispute settlement panels were for the first time assisted by a new legal section of the GATT Secretariat. The panels began to write reports that were much more precise and better reasoned (and much longer!).<sup>9</sup>

Unlike GATT jurisprudence, WTO jurisprudence has attracted significant interest in the broader international law community.

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<sup>5</sup> Jackson, *The World Trading System*, 1989, pp 32-33.

<sup>6</sup> *Ibid.*, p. 33.

<sup>7</sup> McRae, 'The WTO in International Law: Tradition Continued or New Frontier', *Journal of International Economic Law* (2000), pp. 27-28.

<sup>8</sup> Hudec, 'The GATT Legal System: a Diplomat's Jurisprudence', *Journal of World Trade Law*, Vol. 4, p. 615.

I would like now to examine the map more closely by considering some of the major features of the relationship between WTO law and other fields of international law.

The DSU and other WTO Agreements establish links between WTO law and other fields of international law.

Article 3.2 of the DSU states, in part, that the WTO dispute settlement mechanism:

serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Of critical importance is the reference to “the customary rules of interpretation of public international law”. The WTO Appellate Body has recognised that Articles 31 and 32 of the Vienna Convention on the Law of Treaties have attained the status of customary rules of interpretation.<sup>10</sup> In doing so, the Appellate Body cited judgments by judicial bodies such as the International Court of Justice in *Libya v. Chad*.

I note that Article 31.3(c) of the Vienna Convention requires ‘any relevant rules of international law applicable in the relations between the parties’ to be taken into account, together with the context, in interpreting a treaty. This provision appears to open, for interpretative purposes, access to rules of international law beyond WTO law. However, there is little WTO jurisprudence on the application of Article 31.3(c).

The Appellate Body has also had recourse to some general principles of interpretation such as the principle of effective interpretation, stating in its Report in *US – Gasoline* that:

One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.<sup>11</sup>

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<sup>9</sup> Jackson, ‘The World Trade Organization: watershed innovation or cautious small step forward?’, *The Jurisprudence of GATT and the WTO*, 2000, p. 407.

<sup>10</sup> See Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, p.17 and Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p.10.

<sup>11</sup> Appellate Body Report, *US – Gasoline*, p. 23.

In support of its statement, the Appellate Body again cited, amongst other sources, the ICJ judgment in *Libya v Chad*.

The amount and quality of the Appellate Body's jurisprudence on treaty interpretation 'provides a rich source for the development of that law'.<sup>12</sup> An export, if you like, to other fields of international law.

The WTO agreements also incorporate by reference parts of a range of other agreements.

In some cases, the relevant WTO provision should be interpreted as requiring obligations in other agreements to be enforced as WTO obligations. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides a good example of this approach, incorporating obligations arising in a series of pre-existing intellectual property treaties.<sup>13</sup> For example, Article 9.1 of the TRIPS Agreement requires WTO Members to comply with Articles 1 through 21 of the Berne Copyright Convention.

Clearly, the obligations in other agreements incorporated into WTO agreements may be the subject of dispute settlement action. Where panels and the Appellate Body consider those obligations, jurisprudence on their interpretation and application will be developed.

In this regard, panels and the Appellate Body are dealing with such obligations as WTO obligations, not obligations under the outside agreements. Under Article 7 of the DSU 'the mandate of panels is to examine claims made under any of the "covered agreements"', a term which encompasses WTO agreements not outside agreements.<sup>14</sup> Panels and the Appellate Body 'are not courts of potentially general jurisdiction'.<sup>15</sup>

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<sup>12</sup> McRae, 'The WTO in International Law: Tradition Continued or New Frontier', *Journal of International Economic Law* (2000), p. 36.

<sup>13</sup> Marceau, 'A Call for Coherence in International Law', *Journal of World Trade* 33(5), p. 112.

<sup>14</sup> *Ibid.*, p. 113.

<sup>15</sup> *Ibid.*

Apart from the incorporation of obligations contained in other agreements, there are circumstances where an obligation from an outside agreement 'is explicitly referenced to define or delimit an obligation whose locus is within a WTO agreement'<sup>16</sup>. This often happens when, pursuant to Article IX of the Marrakesh Agreement, Members adopt a waiver 'which will then refer to an outside treaty (or set of obligations) to justify or explain the purpose, object and scope of the WTO waiver'.<sup>17</sup> In this regard, I note, by way of example, the case in *Bananas III*, where the Panel and the Appellate Body examined the Lome Convention to determine the scope of the Lome waiver granted to the EC.<sup>18</sup>

I would also like to address briefly the operation of Article XX of the GATT 1994. It provides an exception to substantive GATT obligations, allowing Members to adopt and enforce measures for a range of purposes, including the protection of human, animal or plant life or health; the protection of national treasures or artistic, historic or archaeological value; and the conservation of exhaustible natural resources. Such measures may be taken subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade.

Many of you may be familiar with the *Shrimp* case which involved the interpretation and application of Article XX. The Appellate Body jurisprudence in *Shrimp* merits a much longer presentation in its own right.

Article XX is a critical provision in analysing the relationship between WTO law and other fields of international law. Although it does not refer to other agreements, such agreements come into play where Members take measures listed in Article XX pursuant to their obligations under them.

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<sup>16</sup> Ibid, p. 112.

<sup>17</sup> Ibid, p. 113.

<sup>18</sup> Ibid.

I hope this limited mapping of the relationship between the WTO and international law has whetted your appetites to engage in a more extensive investigation of the relationship. I am sure you will find it a stimulating and rewarding enterprise.