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WTO Obligations as Collective

By Chios Carmody*

Abstract

One view of obligations under the WTO Agreement is that they are bilateral, that is, they involve legal obligations between two countries. This is premised on the idea that the object of WTO obligations is 'trade'. According to this view, the WTO Agreement can be considered a 'bundle of bilateral relations' and WTO obligations should be analysed pursuant to rules concerning bilateral obligations under the Vienna Convention on the Law of Treaties and the Articles on State Responsibility. This article takes a different position. It posits that WTO obligations are more appropriately regarded as collective because their principal object is the protection of collective expectations about the trade-related behaviour of governments. These form a common interest over and above the interests of WTO Member States individually. At the same time, while expectations may be the treaty's primary concern, they are not its sole concern. The treaty gives some flexibility to governments to deal with situations actually encountered in the pattern of trade. These two functions – the protection of expectations and the adjustment to realities – combine to produce law in a third mode, something that can be termed a law of interdependence. This is the tendency of the WTO Agreement to promote interaction among producers and consumers in different countries, and thereby to spin an indissoluble web of economic relations that goes beyond the interests of WTO Members individually. For this reason, the WTO Agreement can be thought of as a collective

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undertaking and WTO obligations are more appropriately analysed under VCLT and ASR rules on collective obligations.

1. Introduction

In the last decade we have learned much about the WTO Agreement.¹ We have learned about its complex structure and various parts. We have learned about its scheme of compliance and possibilities for retaliation. We have also learned about its relationship with other regimes of law, including domestic and international law. In all of these respects we know much more than we did.

At the same time, we remain uncertain about numerous aspects of the treaty, and in particular about the nature of its obligations. Are they essentially bilateral in character and therefore independent of one another, or do they constitute a common interest 'over and above' the individual interests of the states concerned? This question appears critical because, as Joost Pauwelyn has pointed out, it may have consequences under the Vienna Convention on the Law of Treaties (VCLT) and the International Law Commission's Articles on State Responsibility (ASR), two of the most authoritative documents concerning the interpretation of treaties today.²

The classification of treaty obligations in international law generally follows the scheme proposed by Gerald Fitzmaurice in the 1950s.³ Fitzmaurice identified treaties as either *bilateral* or *multilateral*, and further divided multilateral treaties into *reciprocal*, *interdependent* or *integral* categories depending on the consequences arising from their

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¹ 33 ILM (1994) 1125.

² Vienna Convention on the Law of Treaties, 8 ILM (1969) 679; the International Law Commission's Articles on State Responsibility, unanimously endorsed by the UN General Assembly in A/RES/56/83 (12 Dec. 2001), reprinted in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002); see also Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 *EJIL* (2003) 907.

³ See, in particular, Fitzmaurice, 'Third Report on the Law of Treaties', UN Doc. A/CN.4/115, *Yearbook of the International Law Commission* (1958), ii, at 20.

breach. Bilateral treaties can be suspended or terminated by either party since they involve a simple exchange of obligations. Subsequent inconsistent treaties are valid subject to appropriate priority rules. The same could be said of multilateral treaties of a reciprocal type. By comparison, multilateral treaties of an interdependent type can be suspended or terminated by any party because they involve 'a mutual interchange of benefits between the parties, with rights and obligations for each'.⁴ Subsequent inconsistent treaties are void. Finally, multilateral treaties of an integral type cannot be suspended or terminated since 'the force of the obligation is self-existent, absolute and inherent for each party'.⁵ Subsequent inconsistent treaties are also void.

The above typology depends fundamentally on the nature of obligations assumed, and was applied in the VCLT of 1969. It was also influential in the drafting of the ASR, completed in 2001. The ASR, however, focus more directly on *obligations* in recognition of the diversity of engagements that countries can undertake.

The classification of obligations according to the categories set out in the VCLT and ASR has a number of important consequences. The classification of WTO obligations as bilateral, for instance, leads to restrictions on which countries have standing to challenge a breach, to limits on the right of countries to retaliate, and to non-entrenched status for the WTO Agreement *vis-à-vis* other treaties. Their classification as collective, on the other hand, leads to something of the opposite result, a result consistent with a conception of the treaty as primate within its own sphere of economic relations. Consequently, the classification we settle upon seems key.

Recently in the pages of this Journal Joost Pauwelyn put forward the view that most WTO obligations are bilateral.⁶ Pauwelyn's principal contention is that the 'object of WTO obligations is trade', that this trade is effectively between pairs of countries and is therefore identifiable, divisible and determinable.⁷ He offers proof of his position by referring to the bilateral way in which trade concessions were traditionally negotiated, by

⁴ *Ibid.*, at 27, Art. 18(2).

⁵ *Ibid.*, at 28, Art. 19.

⁶ Pauwelyn, *supra* note 2, at 930.

highlighting the bilateral form of much WTO dispute settlement, and by pointing out the apparent consistency of certain WTO rules with VCLT and ASR provisions concerning bilateral obligations. His conclusion is 'that WTO obligations are bilateral obligations, even if some of the more recent WTO obligations, especially those of a regulatory type, may have certain collective features'.⁸

I take a different view. I begin with the assumption that WTO obligations are not about trade *per se*, but rather about expectations concerning the trade-related behaviour of governments. These are unquantifiable and indivisible, and therefore fundamentally unitary in nature. They cannot be conceived of as bilateral. Rather, they should be thought of as collective.

I say this for a number of reasons. Chief among them is the Most Favoured Nation (MFN) obligation of GATT Article I. By it WTO Members commit to extend their most favourable trade-related 'advantage, favour, privilege or immunity' to all other WTO Members 'immediately and unconditionally'. WTO obligations thus become something undertaken by one WTO country towards *all* other WTO countries.

Another reason is the shape of WTO dispute settlement. Under the WTO Dispute Settlement Understanding (DSU) WTO Member countries can take other Members before panels where there is reason to believe that a national measure violates the WTO Agreement.⁹ If a panel finds this to be the case, it normally recommends that the wrongdoer bring its measure 'into conformity' with the WTO Agreement. One might legitimately wonder how a bare recommendation to bring laws 'into conformity' embodies justice, especially if justice is conceived of as bilateral and compensatory. Nevertheless, the nature of WTO obligations suggests that something particular is taking place. The real aim of the system is not compensation. That is because the very subject of the system –

⁷ *Ibid.*

⁸ *Ibid.*, at 950.

⁹ WTO dispute settlement also extends to 'non-violation' claims, that is, cases where the measure at issue does *not* directly conflict with the WTO Agreement but may have some indirect effect on negotiated concessions, and to 'any other situation', that is, strictly speaking, any circumstance that may be nullifying or impairing a benefit or impeding the attainment of any objective under the WTO Agreement. See GATT Art. XXIII:1(a)–(c).

collective obligations – are owed to all WTO Members. What dispute settlement is really trying to do is to re-establish the distribution of expectations.

Still another reason in favour of a collective view of WTO obligations is the consistency of WTO law with VCLT and ASR provisions concerning collective obligations. In this respect I would posit that trying to compare WTO rules with VCLT and ASR provisions concerning bilateral obligations leads to a number of problems and that, instead, WTO obligations are much more naturally and easily understood as obligations *erga omnes partes*, that is, obligations undertaken in the collective interest and owed to all members of the treaty system. I acknowledge that this characterization is not problem-free, but I resolve any deviations from the VCLT and ASR by referring to the WTO Agreement as a system of *lex specialis*.

Perhaps the most convincing reason to characterize WTO obligations as collective, however, is their consistency with an integrated understanding of the WTO Agreement, an understanding I refer to as a theory of WTO law. This theory recognizes that the WTO Agreement has three aspects. The treaty serves predominately as a law of expectations, but also in selected instances as a law of realities and ultimately as a law of interdependence. What do I mean?

The principal aim of the WTO Agreement is to protect expectations. That much is clear. However, while expectations may be the treaty's primary concern, they are not its *sole* concern. There is some merit to a bilateral view of WTO obligations and it arises from the fact that notwithstanding emphasis on protecting expectations, the WTO Agreement is also secondarily about realities. By this I mean that the treaty gives some flexibility to governments to respond to discrete situations encountered in the actual pattern of trade. These situations often resolve themselves bilaterally despite their role in reinforcing the greater collective whole.

The WTO Agreement as a law of expectations and a law of realities combines to serve a third, overarching purpose, something I term a law of interdependence. Here I refer to the tendency of the WTO Agreement to protect and promote interaction among producers and consumers in different countries, and thereby to spin an indissoluble web

of economic relations that goes beyond the interests of WTO Members individually. In doing so, the treaty acts to transform thinking about the common interest. We see evidence of this in increased product differentiation and consumer choice, in global supply chains and just-in-time delivery.

The aim of this article, then, is to explain why WTO obligations are most appropriately thought of as collective. Following the introduction, Section 2 presents the WTO Agreement as a law of expectations. Sections 3 and 4 go on to examine the role of the WTO Agreement as a law of realities and a law of interdependence respectively. This theory provides an alternative to thinking about WTO obligations according to the matrix of the VCLT and ASR, something I examine in Section 5. To conclude, I make some observations about WTO obligations as collective in the context of a theory of WTO law.

2. The WTO Agreement as a Law of Expectations

A. A Law of Expectations

The WTO Agreement was concluded in 1994 to replace looser arrangements for the conduct of international trade originally embodied in the General Agreement on Tariffs and Trade of 1947 (GATT). GATT was an attempt by 23 developed and developing countries to make a decisive break with previous policies concerning international trade.

GATT therefore represented something new, something keyed not only to economic peace – that is, the absence of war – but also to the maintenance of generalized conditions of well-being. This required, most importantly, a commitment over time.¹⁰ The critical value was not the flow of current trade, since most trade is conducted between

¹⁰ Analogy can be made between GATT and the UN Charter if one conceives of GATT as reinforcing ‘security’ or the ‘positive’ peace: ‘If “peace” is narrowly defined as the mere absence of a threat or use of force against the territorial integrity of political independence of any State ... the term “security” will contain parts of what is usually referred to as the notion of “positive peace” ... generally understood as encompassing the activity which is necessary for the maintaining of conditions of peace’: Wolfrum, in B. Simma (ed.), *The United Nations Charter: A Commentary* (2002), at 41.

private traders and can rise and fall independent of government action. Rather, the chief value was the protection of *expectations* that governments and traders form about *future* trade.¹¹

That aim is clear from GATT's principal provision for dispute settlement, Article XXIII:1(a), which reads in part:

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement ...

Article XXIII linked state responsibility to the failure of a member to carry out its obligations. There was no requirement of any particular material *effect*. Instead, the basis

¹¹ Four decades ago John Jackson identified the centrality of expectations in GATT as follows: 'An important goal of international agreement is the fulfillment of expectations of the parties to the agreement. These expectations may have been aroused or engendered by a variety of factors, but one can empirically observe the effect of the practice of the institution upon the expectations of national representatives to that institution and the effects that these expectations have in turn upon national governments. It is clear to anyone who has observed this practice closely that these effects are significant.'

J. Jackson, *World Trade and the Law of GATT* (1969), at 19. See also Ruessmann, 'The Place of Legitimate Expectations in the General Interpretation of the WTO Agreements', K.U. Leuven Institute for International Law Working Paper No. 36 (Dec. 2002).

of state responsibility was the failure of a country to realize certain *conduct*, thereby leading to a breach of expectations belonging to other GATT Contracting Parties.¹²

GATT dispute settlement panels were quick to recognize such a focus. International trade usually evokes images of trade flows – Ricardo’s wines-for-woollens example comes to mind¹³ – but successive panels were able to see beyond this and to acknowledge that the treaty’s true purpose was something much more profound: the protection of expectations.¹⁴ Under GATT ‘expectations’ meant the expectations formed by both governments and traders about the trade-related behaviour of other governments.¹⁵

The basis for protecting expectations was set out in GATT. The treaty provides for a range of disciplines concerning border measures and market access, trade-related

¹² For this reason, John Jackson has observed that ‘the prerequisite to invoking Article XXIII does not depend upon a breach of the GATT agreement’: Jackson, *ibid.* at 179.

¹³ David Ricardo’s famous exposition of the theory of comparative advantage in 1817 involved two countries’ exports to each other of products they were comparatively more efficient at producing, in that case Britain’s exports of wool for Portugal’s exports of wine: see J.R. McCulloch, *The Works of David Ricardo* (1888), at 76.

¹⁴ For cases where panels stated that the purpose of GATT is to protect expectations see Working Party Report, ‘Brazilian Internal Taxes’, adopted 30 June 1949, BISD II/181, at para. 16; Panel Report, *United States—Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136, at para. 5.1.9; Panel Report, *Canada—Administration of the Foreign Investment Review Act*, adopted 7 Feb. 1984, BISD 30S/140, at para. 6.6; Panel Report, *Japanese Measures on Imports of Leather*, adopted 15/16 May 1984, BISD 31S/94, at para. 55; Panel Report, *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted 10 Nov. 1987, BISD 34S/83, at para. 5.11; Panel Report, *European Economic Community—Restrictions on Imports of Apples*, adopted 22 June 1989, BISD 36S/135, at para. 5.25; and Panel Report, *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 Oct. 1994, DS44/R, at para. 99. For some WTO dispute settlement reports referring to the protection of expectations see *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (5 Sept. 1997), paras 45-62; *EC—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (5 June 1998), paras 83-84; *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R (18 Jan. 1999), paras 125-127; *Korea—Measures Affecting Government Procurement*, WT/DS163/R (1 May 2000), paras 7.9ff, 7.75.

¹⁵ So sure were panels of this position that by 1962 they had all but dispensed with the need for evidence to found state responsibility. There was no need for evidence where vast, and essentially indeterminate, expectations were the centrepiece of the system. The presumption is now embodied in DSU Art. 3(8) which says that ‘[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment’. The presumption has never been successfully rebutted.

conduct, economic development, exceptions and regional trading arrangements. Membership required, for instance, that countries should not subject foreign products to 'internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products', a commitment which naturally created expectations in other countries that foreign products would not be so treated.¹⁶

Still, some means of arranging expectations was necessary. This was provided by the General Most Favoured Nation (MFN) obligation of GATT Article I, which required GATT members to extend the most favourable trading concessions negotiated with one trading partner to all other GATT members. GATT Article I reads in relevant part:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, *any advantage, favour, privilege or immunity* granted by any contracting party to any product originating in or destined for any other country shall be accorded *immediately and unconditionally* to the like product originating in or destined for the territories of all other contracting parties (emphasis added).

The wording of GATT Article I is significant in several respects. First, the MFN obligation is described in the article's title as 'general', suggesting that it aspires to broad application notwithstanding the exceptions that follow.¹⁷ This reveals the degree to which its drafters sought to create something uniform for the entire membership. Second, the

¹⁶ GATT Art. III:2.

¹⁷ *United States—Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128, at para. 6.9; *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139-142/AB/R (31 May 2000), at para. 69; *United States – Section 211 Appropriations Act*, WT/DS176/AB/R (2 Jan. 2002), at para. 297.

term '*any* advantage, favour, privilege or immunity' was evidently drafted to have the widest possible meaning and in practice was interpreted consistent with such intent.¹⁸ Third, and perhaps most importantly, the advantages, favours, privileges and immunities extended in one bilateral relationship were to be extended under GATT Article I to all other GATT members '*immediately and unconditionally*', that is, without any temporal lapse or requirement of reciprocity.

The significance of this immediate and unconditional extension cannot be underestimated. It transformed bilaterally *negotiated* concessions into collectively *applied* ones. Countries usually negotiated trade concessions in bilateral pairs, but then subsequently applied them multilaterally.¹⁹ For this reason, countries beyond the original bilateral relationship could rely upon them, a reliance that was sure to shape their expectations just as much as it would shape the expectations of the state that had initially negotiated the concession.

In light of the above it is not surprising that in recent times the WTO Appellate Body has referred to MFN as 'central', 'essential'²⁰ and as 'a cornerstone of the world trading system'.²¹ MFN is a key feature of the treaty. One could assert that MFN has little to do with the underlying structure of GATT/WTO obligations in the sense that it fails to uncover whether those obligations are a bundle of bilateral obligations or a collective right. However, such an assertion seems at odds with the treaty's operation which, as I have explained, was designed to go beyond the boundaries of any one country or pair of countries in promoting the protection of collective expectations.

B. Expectations and Justice

¹⁸ For discussion see Jackson, *supra* note 13, at 251–255.

¹⁹ '[M]ost tariff concessions are negotiated bilaterally, but the results of the negotiations are extended on a multilateral basis': *EC – Measures Affecting the Importation of Certain Poultry Products*, TW/DS69/AB/R 13 (July 1998), at para. 94.

²⁰ *US— Section 211 Appropriations Act*, *supra* note 18, at para. 297.

²¹ *Canada—Certain Measures Affecting the Automobile Industry*, *supra* note 18, at para. 69.

The idea of GATT and its successor, the WTO Agreement, as a unity of obligations conveys the uniqueness of what is at stake. At the same time, this identification raises the question of how justice is organized under the treaty. We usually think of justice as working interpersonally to promote the return of *something* to *someone*, but if WTO obligations are essentially *one* thing belonging to *all*, then how are they fairly and properly administered?

The nature of justice was considered two millennia ago by Aristotle, who identified two types of justice: *corrective* and *distributive*. Corrective justice applies to private interests and plays a rectificatory role in transactions. Thus, when people are wrongly deprived of their property they are entitled to have it returned or to be compensated. The implicit metric is equality: you get what you've lost. Distributive justice, by comparison, applies to the distribution of public interests such as 'honour or money or other things that have to be shared among members of the political community'.²² It presupposes some socially agreed means of allotment. Consequently, the implicit metric is proportionate: you get what you're entitled to. A modern example of distributive justice would be the assignment of broadcast licences. In most countries such licences are only awarded to well-established companies that can meet the public interest by carrying on continuous service while conserving spectrum.²³

Distributive justice has profound implications for outcomes. This is because remedies invoked to protect an individual's interest in private property are altogether different from remedies invoked to protect public property. The usual remedy in corrective justice is compensation for the victim; in distributive justice, it is to deny the wrongdoer their proportionate share.²⁴ Thus, while the breach of an individual right between two parties requires either specific performance or an award of damages,²⁵ the

²² Aristotle, *Nicomachean Ethics* (R. Crisp ed.) 85 (2000) For a treatment of distributive justice see N. Rescher, *Fairness: Theory and Practice of Distributive Justice* (2002).

²³ 'Freeing the Airwaves', *The Economist*, 31 May 2003, at 76. See also R. Posner, *Economic Analysis of Law* (4th edn., 1992), at 45–47, 672–674.

²⁴ *International Encyclopedia of Comparative Law*, xi, Ch. 8, 8-2.

²⁵ 'Although a judgment awarding a sum of money as damages is the most common judicial remedy for breach of contract, other remedies, including equitable relief in the form of specific

breach of a collective right requires a change of behaviour by the wrongdoer. That change can be prompted by a deprivation, or possibly by a remedial programme to ensure that the wrongdoer and others never breach again.²⁶ The distributive remedy is, in particular, more ambitious than its corrective counterpart since it seeks to go beyond the one-off response of compensation and to change the wrongdoer's conduct at every point in the future. The law must be more interventionist, and more attentive to considerations of jurisdiction, timing and resource allocation.

Notwithstanding this difference, the natural tendency is to think of justice in corrective terms. That predisposition is an outgrowth of the presence of corrective justice in daily life. Like the bilateralism inherent in thinking about international trade, it is a device for comprehending the world. By comparison, distributive justice is relatively unfamiliar. It appears strange and suspect, principally because we are not used to thinking about the collective interest. Yet if we conceive of the WTO Agreement as protective of collective expectations, then distributive justice must apply.

Distributive justice prevails under WTO rules that extended and formalized GATT practice in relation to dispute settlement. Distributive justice explains why it is that the principal remedy under the WTO Agreement is a recommendation of conformity: in classic distributive fashion a recommendation insists on a return to desired behaviour, nothing more. There is diminished concern with the *consequences* of wrongful behaviour; the immediate emphasis is on re-establishing the *conditions* originally upset. Furthermore, distributive justice explains why WTO remedies focus on prospective as opposed to retrospective relief: their aim is not to repair prior or existing damage, but rather to correct

performance or an injunction, may also be available': *Restatement of the Law (2d)— Contracts* 110 (1981).

²⁶ The relative ambition of this aim is to be contrasted with the more limited aim in domestic contract law where '[t]he traditional goal of ... remedies has not been compulsion of the promisor to perform his promise but compensation of the promise for the loss resulting from the breach': *ibid.*, at 100. More recently the compensatory orientation of contract law has been extended by the notion of 'efficient breach'. For an application of this idea in the trade context see Schwartz and Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', 31 *J Legal Stud* (2002) S179 (arguing that the concept of efficient breach is a 'central feature' of WTO dispute settlement).

future behaviour. Finally, distributive justice explains why the ultimate sanction of the system is retaliatory suspension: it denies the wrongdoer their proportionate share.

Still, developments in WTO dispute settlement have tended to obscure the predominately distributive character of justice under the treaty. This is largely due to procedural changes. Ready recourse by countries to dispute settlement has promoted a practice of framing claims in terms that are unique to the litigants, implicitly bilateralizing them.²⁷ The evident bipolarity of dispute settlement has tended to work in a limitative way by promoting views of the treaty as involving identifiable interests specific to individual litigants and making it less likely that WTO obligations will be respected in their original collective character. A corrective view of the treaty ensues.

To appreciate how this happens, it is important to recall what the WTO Agreement actually 'distributes'. As already seen, the principal interest protected by the WTO Agreement is expectations. In essence, all WTO Member countries are supposed to enjoy the *same* expectation of trade with a given Member country.

At the same time, expectations are notoriously difficult to identify and do not always mirror trade flows. As a definitional matter, the WTO Agreement is formally silent about them. The indeterminacy of expectations undoubtedly explains the inconsistent behaviour of panels and the Appellate Body in dealing with them. While a number of panels under GATT made reference to the protection of expectations, the stridency of WTO dispute settlement has made litigants insistent about knowing what they are, and consequently, panels and the Appellate Body more cautious in interpreting them.²⁸ In *India – Patent Protection*, for instance, the Appellate Body noted that the term

²⁷ Pauwelyn, 'The Limits of Litigation: "Americanization" and Negotiation in the Settlement of WTO Disputes', 19 *Ohio St J on Dispute Resolution* (2003) 121, at 129–132.

²⁸ For violation cases referring to expectations under GATT Art. XXIII:1(a) see *EC—Computer Equipment*, supra note 15; *EC—Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002); *India—Patent Protection*, supra note 15; *Korea—Alcoholic Beverages*, supra note 15; and *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (2 Aug. 1999). Likewise, for cases involving expectations in non-violation under GATT Art. XXIII:1(b) see *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (21 Mar. 1998), *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (12 Mar. 2001).

'expectations' was absent from the treaty text and observed that they 'are [instead] reflected in the language of the treaty itself'.²⁹ Although the Appellate Body did not disavow expectations as a substantive basis of WTO law, it pointed out that they should only be considered as a basis of state responsibility under GATT Article XXIII:1(b) non-violation cases. To do otherwise, it said, 'confuses the bases of liability'.³⁰

Some commentators appear to have interpreted these remarks as implying that expectations have *no* place in violation cases.³¹ Yet the Appellate Body did not say this. All it said was that 'expectations are reflected in the language of the treaty itself', clarifying that they play no role as a matter of pleading in violation cases.

Support for my position comes from the Appellate Body's treatment of expectations in subsequent violation cases, a treatment which would not have been necessary had expectations been irrelevant. In *EC – Computer Equipment*, for instance, the panel referred to the US's legitimate expectations of access to the EC as a contextual source for interpreting the EC's tariff schedule.³² On appeal the Appellate Body reversed this reasoning, observing that '[t]he security and predictability of tariff concessions would

²⁹ *India—Patent Protection*, supra note 15, at para. 45.

³⁰ The reason for this distinction is clear. GATT Art. XXIII:1, the principal provision ascribing responsibility under GATT, is silent about 'expectations'. Instead, the language at issue in any dispute is whether a WTO member has failed 'to carry out its obligations' or, less likely, whether it impeded 'the attainment of any objective of the Agreement'. Breach of either of these bases of responsibility is what violates expectations. However, the Appellate Body has conceded that, in practice, 'panels ... have frequently stated that the purpose of these articles is to protect the expectations of Members concerning the competitive relationship between imported and domestic products, as opposed to expectations concerning trade volumes'. It added that 'this statement is often made *after* a panel has found a violation': *India—Patent Protection*, supra note 15, at para. 40.

³¹ See Cottier and Schefer, 'Good Faith and the Protection of Legitimate Expectations in the WTO', in M. Bronckers and R. Quick (eds), *New Directions in International Economic Law* (2000), at 60, who identify the Appellate Body as rejecting the use of 'legitimate expectations' or 'reasonable expectations' outside non-violation cases. They observe that '[i]nstead of generalizing the recognition of the existence of legitimate expectations throughout the WTO, the Appellate Body has recognized it only in the realm of non-violation, denying its applicability elsewhere. This segregation of uses of legitimate expectations is at odds with the current integration of WTO rules into international law, and deserves closer examination': *ibid.*

³² *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/R, at paras 8.24-8.26. For further commentary see Ruessmann, supra note 12.

be seriously undermined if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views of certain exporting Members alone'.³³ Rather, the Appellate Body chose to rest its interpretation on the methodology set out in Article 31 of the VCLT, the purpose of which the Appellate Body identified as being 'to ascertain the *common* intentions of the parties'. The Appellate Body went on to note that '[t]hese *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty'.³⁴ Instead, recalling earlier reasoning in *India – Patent Protection*, it stated that '[t]he legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties'.³⁵ On this basis the Appellate Body went on to identify other sources of common intent. It referred not only to the intentions of exporting countries such as the US, but also to the practice of EC countries as *exporters*, to that of third parties participating in the case, and to multilateral instruments such as the Harmonized System and its Explanatory Notes. Most significantly, the Appellate Body referred to classification decisions of the World Customs Organization arising out of disputes between countries *other than* the EC and the US, the two disputants in *EC – Computer Equipment*. In other words, the Appellate Body mentioned a wide range of sources in arriving at a meaning of the EC's tariff concession, a meaning that went beyond the 'expectations' of any *one* country in the litigation and ultimately approximated the *common* intent of *all* parties to the treaty.

The interpretative method fashioned by the Appellate Body can be regarded as a straightforward application of the Vienna Convention. VCLT Article 31.1 refers to the 'context' as an element to be taken into account in determining the meaning of a treaty provision, and VCLT Article 31.2(a) further provides that:

³³ The Appellate Body had observed 'we disagree with the Panel that the maintenance of the security and predictability of tariff concessions allows the interpretation of a concession in the light of the "legitimate expectations" of exporting Members, i.e., their *subjective* views as to what the agreement reached during tariff negotiations was': *EC—Computer Equipment*, *supra* note 15, at para. 82 (emphasis in original).

³⁴ *Ibid.*, at para. 84 (emphasis in original).

³⁵ *Ibid.*, at para. 83.

The context, for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty ...

Given what we know about negotiations leading to the conclusion of GATT and the WTO Agreement, and in light of VCLT Article 31.2(a), it would be wrong to interpret each bilateral relationship in isolation without taking into account the greater 'context' of other bilateral relationships entered into and applicable to 'all' via MFN. This implies that a view of the WTO Agreement as a bundle of bilateral relations – in effect, a view of each trading relationship as separate and distinct – is inaccurate. Such a conclusion is reinforced by WTO case law.³⁶

Despite the significance of its holding, *EC – Computer Equipment* did not definitively resolve the role of expectations under the WTO Agreement. One remaining issue is that of quantification. Expectations are ambiguous things. They necessarily embody an element of the future, an aspect which current measures of expectation value imperfectly or not at all.³⁷

The idea of the WTO Agreement as a law of expectations thus presents something of a paradox. While breaches of the WTO Agreement can be said to give rise to breaches

³⁶ For application of the same interpretative methodology in other cases see *Korea—Government Procurement*, supra note 15, at para. 7.75 ('if it is necessary to go beyond the text in a violation case, the relevant question is to assess the objective evidence of the mutual understanding of the negotiating parties. *This involves not just the complaining and responding parties, but also involves possibly other parties to the negotiations.* It is also important to note that there is a difference in perspectives of the reasonable expectations of one party as opposed to the mutual understanding of all the parties. The information available at the time of the negotiations may be available to some parties but not all. In other words, the evidence before the panel may be different in the two analyses and the weighting and probative value may also differ.') (emphasis added). See also *EC — Poultry Products*, supra note 20, at para. 94 ('The bilateral character of the Oilseeds Agreement does not, by itself, constitute evidence of a *common* intent that the tariff-rate quota was for the exclusive benefit of Brazil.') (emphasis added).

of expectations, there is no commonly agreed means of calculating what expectations are, and therefore, what the damage caused by any violation will be. Thus, on the one hand, GATT and the WTO Agreement have come to rely on a substitute remedy: the withdrawal or amendment of an offending measure. Where some estimate of damage is required, such as in the case of authorized retaliation, the practice has been to collapse the distinction between expectations and trade flows and to refer to them as the same thing.³⁸ This practice is apparent in DSU Article 22.4, which states that the level of suspension of concessions or other obligations in cases of authorized retaliation 'shall be *equivalent to* the level of nullification or impairment'.³⁹

On the other hand, equivalence detracts from a collective theory of WTO obligations because it presupposes that WTO obligations *can* be specifically identified and quantified. Not surprisingly, Joost Pauwelyn relies on examples of quantification in WTO dispute settlement to support his view that WTO obligations are essentially bilateral in character.⁴⁰

³⁷ For discussion of the challenges of estimating expectations and, more generally, probabilities and risk see A. Porat and A. Stein, *Tort Liability under Uncertainty* (2003).

³⁸ Thus, arbitrators under DSU Art. 22.6 have observed that their task is 'very different from that of a panel examining the WTO conformity of certain measures ... [w]hat normally counts for a panel is competitive opportunities and breaches of WTO rules, not actual trade flows. A panel does not normally need to further assess the nullification or impairment caused; it can presume its existence. We, in contrast, have to go one step further ... we have to focus on trade flows': *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/ARB (12 July 1999), at para. 42; *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB (9 Apr. 1999), at paras 6.9–6.11.

³⁹ For discussion of this requirement see *EC—Bananas*, *ibid.*, at para. 6.12 where the arbitrators stated that losses of US exports in goods or services between the US and third countries did not constitute nullification or impairment of indirect benefits accruing to the US under the GATT or the GATS..

⁴⁰ 'Studies can calculate what a country has gained or lost by acceding to the WTO Treaty or what a country gains or loses from the imposition or withdrawal of a trade restriction. As a result, the interest aimed at by WTO obligations is *not* one that, in the words of the ILC Commentary, 'transcend[s] the sphere of bilateral relations of the states parties'; it is *not* a 'collective interest' in the sense of 'a common interest, over and above any interests of the states concerned individually'. Rather, performance of WTO obligations can be, and actually is (as noted earlier), 'differentiated or individualized': Pauwelyn, *supra* note 2, at 933.

The reply to this practice must be that any such calculation is engaged in purely as a matter of approximation and convenience. In no way does it represent a *desiratum* of the system. Calculation is instead a default, something that serves to quantify expectations temporarily pending the return to compliance. The preferred outcome remains a settlement consistent with the covered agreements. In *EC – Bananas*, for example, the arbitrator assessing the proposal for retaliation considered four potential counterfactuals ranging from \$326 million to \$619 million worth of market share, each of which was described as 'WTO-consistent'.⁴¹ The arbitrator ultimately settled on a fifth sum, \$191.4 million, without providing any details of how that sum was arrived at.⁴² Other results at this stage have been similarly unpredictable.⁴³ The pattern of outcomes is a good example of the fundamental indeterminacy of WTO obligations and the fact that, at the end of the day, they cannot be properly individualized. As collective obligations, they were never meant to be.

3. The WTO Agreement as a Law of Realities

I have identified the WTO Agreement as a law of expectations, but that identification is not exclusive because the operation of the WTO Agreement is complex. We can think of the WTO Agreement as being primarily about the protection of expectations, as it undoubtedly is, yet here and there under the treaty are rules that simultaneously allow

⁴¹ *EC – Bananas*, supra note 39, at para.77.

⁴² The arbitrator indicated that it had evaluated various counterfactuals and decided to choose 'a reasonable counterfactual' in the circumstances. It then concluded that '[u]sing the various data provided on US market shares, and our knowledge of the current quota allocation and what we estimate it would be under the WTO-consistent counterfactual chosen by us, we determine that the level of nullification and impairment is US\$191.4 million per year': *ibid.*, at para. 7.8.

⁴³ Thus, arbitrators have described their work as 'a reasoned estimate' (*EC—Hormones*, supra note 39, at para. 41), and have avoided claims that are 'too remote', 'too speculative', or 'not meaningfully quantified': *US—Antidumping Act of 1916*, WT/DS136/ARB (24 Feb. 2004), at para. 5.57. There is also recognition of the 'inflation' that such claims are subject to: see *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/ARB (17 Feb. 2003), note 90 (observing that apart from *US—FSC* arbitrators have always rejected the level

governments to respond to specific realities.⁴⁴ By realities I mean conditions as they actually *are*.

The idea of the WTO Agreement as a law of realities emphasizes what is happening at a given point in time. In this respect, it is essentially static, and in so being, is more likely to coincide with a bilateral view of WTO obligations. A good example are non-violation claims made pursuant to GATT Article XXIII:1(b). There the issue is whether a measure that may not formally violate GATT is nevertheless causing nullification or impairment. Unlike violation claims under GATT Article XXIII:1(a), the complainant's reasonable expectations at the time of negotiation *are* taken into account. Non-violation claims also require the complainant to present 'a detailed justification' in support, and where the claim is successful, the panel or Appellate Body examining the matter is to recommend 'a mutually satisfactory adjustment'. This last requirement, in particular, could give rise to the perception of a 'deal' between a pair of parties. Other cases involving reality-based rules are still more evidently bilateral. WTO rules on safeguards, subsidies and anti-dumping, for example, often present the spectacle of a single, discrete injury and bipolar dispute settlement in response.

Not surprisingly, the WTO Agreement as a law of realities suggests a different model of justice. The impulse becomes subtly corrective. Partly for this reason countries and commentators have pointed out that under existing dispute settlement procedures something is 'missing' and that the deficit could be remedied by the introduction of more corrective justice under the treaty.⁴⁵

proposed by the member requesting the right to suspend concessions or other obligations and set a new level, based on their own assessment

⁴⁴ See for instance *Turkey—Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/R (1999), at para. 9.184 ('The WTO system of rights and obligations provides, in certain instances, flexibility to meet the specific circumstances of Members. For instance, the ATC has grand-fathered certain MFA derived rights regarding import restrictions for specific Members and Articles XII, XIX, XX and XXI of GATT authorize Members, in specific situations, to make use of special trade measures.').

⁴⁵ See for instance Bronkers and van den Broek, 'Trade retaliation is a poor way to get even', *Financial Times*, 24 June 2004, at 15 ('Financial compensation should be high on the agenda of every trade negotiator at the WTO.');

Pauwelyn, 'Enforcement and Countermeasures in the WTO:

Without entering into the debate on this point, a couple of observations may be made. First, the idea of the WTO Agreement as a law of realities is somewhat deceptive in the sense that while realities can manifest themselves bilaterally, they have an impact upon general expectations. For instance, a decision by a country to take anti-dumping action against the goods of a single producer in another country might be thought of as an action against that country or producer alone. Yet if the application of the law, either in specific instances or more generally, gives rise to apprehension of doubt, then something more is taking place. The right to market access protected by the WTO Agreement is being put in question.

Second, the WTO Agreement as a law of realities is expressed explicitly in the treaty. That is, realities are negotiated in advance and agreed upon in order to constitute permissible derogations from the treaty's disciplines. This arrangement confirms that the underlying structure of WTO obligations is collective. For instance, the option of entering into a free-trade arrangement or customs union under GATT Article XXIV is spelled out precisely because in its absence there would be no justification for derogating from MFN.

Third, bilateralism is a by-product of the need to make adjustments and is superficial in the sense that all settlements must be consistent with the covered agreements, even if in practice they are not always so.⁴⁶

It is therefore possible to conclude that the WTO Agreement as a law of realities is supplementary and assistive to the dominant task of protecting expectations. Reality-based rules offer the option of seeking selective release from WTO disciplines, and hence work to reinforce the collectivity of the greater whole. Put differently, the freedom to derogate from this or that WTO rule, and therefore occasionally to disappoint collective

Rules are Rules—Toward a More Collective Approach’, 94 *AJIL* 335, at 345–346 (‘Why not, therefore, make compensation compulsory and automatic the way that countermeasures currently are?’). See also WTO member proposals on greater compensation made in the Doha Development Round by the African Group, TN/DS/W/15 (25 Sept. 2002), at 2; Ecuador, TN/DS/W/9 (8 July 2002), at 3; and China, TN/DS/W/29 (22 Jan. 2003), at 1.

⁴⁶ See DSU Art. 3(5) (‘All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements ... shall be consistent with those agreements’).

expectations, is an integral part of the WTO package. No country would have agreed to it otherwise.

4. The WTO Agreement as a Law of Interdependence

The identification of the WTO Agreement as a law of expectations and secondarily as a law of realities describes two aspects of the treaty. However, it does not describe everything. This because we need to understand the WTO Agreement over time, and in the course of time the protection of expectations and the adjustment to realities results in something more than their simple combination, something I term a law of interdependence.

I refer here to the tendency of the treaty to protect and promote interaction among producers and consumers in different countries, and thereby to spin an indissoluble web of economic relations that goes beyond the interests of WTO members individually. In so doing, the treaty acts to transform thinking about the common interest. We see evidence of such a tendency in increased product differentiation and greater consumer choice, in global supply chains and just-in-time delivery. We also see it in the objections that accompany proposals to retaliate under the WTO Agreement and in negotiations over emerging issue areas. In sum, the treaty works to create a new situation.

An important feature of this new situation is the commitment to justice. I have referred to the WTO Agreement as a law of expectations involving distributive justice. There justice functions prospectively. I have also referred to the treaty as a law of realities. There justice functions more retrospectively. In the third, and overarching, aspect of the treaty's operation, justice integrates both of the other temporal perspectives in a system that can be described as *transformative*.

See also Busch and Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes', 24 *Fordham Int'l LJ* (2000) 158.

Transformative justice is a term developed recently to overcome limitations inherent in the classical concepts of justice.⁴⁷ Its aim is to fashion accommodative relationships between groups with competing interests. This type of justice is appropriate in situations where there is no discrete wrong, a situation which describes the WTO Agreement since all WTO disputes arise over 'measures' taken by a sovereign government. Consequently, wrongfulness cannot be presumed.

Transformative justice brings together all of the interests affected by a conflict. Participants are allowed considerable freedom to control the process, to establish the dispute's boundaries as well as its applicable rules. Interests are discussed and negotiated. There is no absolute requirement to restore the relationship by repairing the harm done. Instead, relief is fashioned along flexible and broadly remedial lines. The goal is to arrive at an agreement acceptable to all of the parties.⁴⁸

One study of transformative justice observes:

Transformative justice must be driven by the needs of participants. Decisions on how to resolve the conflict ought to be based on a consensus. By consensus, we mean an agreement on how to move forward that is acceptable to all parties. A consensus cannot be imposed. Nor is a consensus just a middle ground position. The goal will be to find common ground on which a mutually acceptable resolution can be established. This is the power of transformative justice: the possibility of using the substance

⁴⁷ Traditionally, judicial procedures have presumed that the goal of litigation is to discern the facts that relate to a particular situation of conflict, and then to identify the law that applies to these facts. The adjudicative process is two-sided, adversarial and backward looking. It works to produce winners and losers. ... A transformative approach to conflict resolution would encourage accommodative relationships between groups with competing interests. The conflict situation would be transformed from one in which groups are in competition with one another to one in which groups recognise their mutual interests in arriving at workable solutions': Law Commission of Canada, 'From Restorative Justice to Transformative Justice: Discussion Paper', Law Commission of Canada Catalogue No. JL2-6/1999 (1999). For discussion internationally see N.J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1995), i.

of a conflict as a means of exploring options and establishing responses that are not only acceptable to all parties but develop and strengthen relationships among those involved.⁴⁹

Thought about carefully, transformative justice seems to best describe the overall operation of the WTO Agreement. It explains the centrality of MFN, the shape of dispute settlement, the insistence on consensus and so forth. It also explains the reflexive relationship between dispute settlement and negotiation evident in such documents as the WTO Declaration on TRIPS and Public Health.⁵⁰ Finally, it explains the nature of obligations that are being applied to transform trading relationships into deeper networks of interdependence.

The result of this system of justice is something of a *via media*. This outcome is most evident in the treaty's integration of future- and past-oriented perspectives into a present-based consciousness concerned with the protection of interdependence. Likewise, the relevant kinetic perspective is diachronic. The sum of its references is the idea of law as a condition. In this environment WTO obligations are *erga omnes partes*. They are predominately collective, but they must also accommodate certain realities and therefore occasionally assume a bilateral appearance. This blend produces obligations that are plurilateral when considered in the larger scheme of things. And whereas obligations that are predominately collective or bilateral could be regarded as either constitutional or contractual, the applicable way of describing the WTO Agreement as a body of law is as *lex specialis*. I will return to this idea below.

All of these points illustrate that what is manifested under the WTO Agreement is a dialectic, that is, a process involving thesis, antithesis and synthesis. The thesis is one of collectivity as expressed in collective obligations. This is met by an antithesis of

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ WT/MIN(01)/DEC/2 (20 Nov. 2001), 41 ILM (2002) 755.

bilateralism. The final synthesis is of WTO obligations as plurilateral wherein their varying qualities converge and cohere.

5. Critical Considerations

The foregoing theory of WTO law is presented as a way of thinking about WTO obligations in an integrated manner. My aim is to explain why the view of WTO obligations as collective makes sense when seen against the broader background and operation of the treaty.

However, this idea of WTO obligations as collective is at odds with the position of Joost Pauwelyn, who has concluded 'that WTO obligations are bilateral obligations, even if some of the more recent WTO obligations, especially those of a regulatory type, may have certain collective features'.⁵¹ Given the difference in opinion, it is worth examining some of his arguments.

At the outset it is important to note that Pauwelyn presents his typology of obligations and analysis as a way of clarifying the nature of WTO obligations. This is an ambitious undertaking. At the same time it is also problematic in the sense that WTO obligations are difficult things to quantify and so his conclusion – indeed *any* conclusion about the substantive nature of WTO obligations – must necessarily be impressionistic. Both he and I are forced to rely on indirect evidence to advance our views.

Pauwelyn's analysis also relies heavily on a comparison of WTO rules with provisions of the VCLT and ASR. His analysis takes pre-existing categories in the VCLT and ASR to be fixed and exhaustive, and therefore downplays the possibility that WTO obligations might deviate from them in certain respects. Such reliance also tends to neglect the vital systemic aspect of the WTO Agreement, that is, the fact that the treaty's obligations must be understood in an integrated manner and over time.

More fundamentally, Pauwelyn and I differ as to the relative importance of the VCLT and ASR. Neither document is a binding code. With respect to the VCLT, for

instance, Ian Sinclair observed that 'many of the provisions of the Convention are expressed as residual rules which are to operate unless the treaty otherwise provides, or it is otherwise agreed by the parties, *or a different intention is otherwise established*'.⁵² That intention can be discerned from the existence of MFN, which must be kept in mind during the operation of most other WTO obligations. Likewise with respect to the ASR, the Special Rapporteur has observed that it seems 'inaccurate to describe the articles as adopting 'one-size-fits-all' rules'.⁵³

Both the VCLT and ASR also contemplate deviation. For example VCLT Article 5 provides that:

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

The drafting record reveals that this article was inserted to take account of the fact that international organizations might develop rules which differed from those in the Vienna Convention.⁵⁴ Comments also indicate that the phrase 'without prejudice to any

⁵¹ Pauwelyn, *supra* note 2, at 950.

⁵² I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), at 6 (emphasis added).

⁵³ Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', 96 *AJIL* (2002) 874, at 878. See also Crawford, *supra* note 2, at 59 (referring to the ASR as 'a statement of secondary rules of international law, abstracted from any specific field of primary legal obligations *but with wide-ranging and diffuse implications*' (emphasis added)). See also Bodansky, Crook, and Caron, 'The ILC's Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority', 96 *AJIL* (2002) 857, at 868, 873 ('Recognizing that the ILC articles are not themselves a source of law is critical because, as I see it, arbitrators can otherwise defer too easily and uncritically to them. ... The ILC's work on state responsibility will best serve the needs of the international community only if it is weighed, interpreted, and applied with much care').

⁵⁴ Ian Sinclair also observes that 'in their comments on what is now Article 5 of the Convention, representatives of such disparate international organizations as the F.A.O., the Council of Europe, the League of Arab States, B.I.R.P.I. and the International Bank had all pointed to the existence

relevant rules of the organization' was intended to embrace both the constituent instruments of an international organization *as well as* the customary rules developed in practice.⁵⁵ This implies that VCLT rules need to be interpreted appropriately in relation to an international organization like the WTO.

Similarly, the ASR recognize some room for alternative development in the form of *lex specialis*. This is set out in ASR Article 55:

These articles do not apply where and to the extent that the conditions for the existence of an international wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Again, the drafting record reveals that Article 55 was inserted to take care of the same concern addressed in VCLT Article 5.⁵⁶ Hence in both situations – that of the VCLT and of the ASR – the applicable provisions should be regarded as indicative rather than dispositive, and care should be taken with statements that 'in case the treaty concerned does not "contract out" of them, they *must* apply'.⁵⁷

This observation is important because a recurring theme in Pauwelyn's analysis is the locus of default. He readily admits that 'the WTO treaty may deviate by way of *lex specialis* (as long as it does not contradict *jus cogens*)' and that '[t]his is explicitly

of rules or practices operating within their organizations which were, or might be, contrary to the general rule proposed': Sinclair, *supra* note 53, at 34–35.

⁵⁵ Ian Sinclair also observes that the phrase "any relevant rules" of an international organization ... embrace not only written rules but also "unwritten customary rules" (quoting from the explanation given by Mr Yasseen, chair of the Drafting Committee): *ibid.*, at 66. See also *ILC Yearbook* (1963 II), at 213, *ILC Yearbook* (1965 I), at 31, 308, and *ILC Yearbook* (1965 II), at 160. Henry Schermers and Nils Blokker observe that 'rules of the organization' have been defined in subsequent conventions to mean, 'in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization': H. SCHERMERS AND N. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* (3rd edn., 1995), at 713.

⁵⁶ The Commission noted the 'residual character' of the provisions of Part IV, including Art. 55. See Crawford, *supra* note 2, at 306.

⁵⁷ Pauwelyn, *supra* note 2, at 926 (emphasis in original).

recognized in Article 5 of the Vienna Convention and Article 55 of the ILC Articles'.⁵⁸ However, his practical recognition of these provisions is less liberal than might be expected. He agrees that 'the parties to the treaty in question can *explicitly deviate* from the general rule', but in his view any change is apparently limited to *express* deviations alone. 'True, if there is one, the *lex specialis* will prevail', he observes, but 'the nature of an obligation remains crucial for those legal questions on which the treaty *remains silent*'.⁵⁹ This conclusion is at odds with the scheme of both the VCLT and ASR and with the general tenor of the drafting record.

Another default is bilateralism. Pauwelyn's position is that when characterizing obligations the presumption 'is that treaty obligations are normally of the bilateral type'.⁶⁰ He asserts:

It is, therefore, for those claiming that WTO obligations are collective or *erga omnes partes* obligations, to prove it. If they fail to do so, the consequences usually attached to bilateral obligations will follow, unless, of course, explicit WTO provisions were to change or neutralize these consequences.⁶¹

Nevertheless, to presume bilateralism in the face of an MFN clause is to overlook one of the treaty's 'central and essential' features.⁶² MFN changes the usual matrix of international relations, a fact that the ILC was aware of when it decided to exclude MFN from the scope of its work on the Vienna Convention.⁶³ All of this suggests that the VCLT and ASR cannot be applied mechanically in the circumstances.

⁵⁸ *Ibid.*, at 925.

⁵⁹ *Ibid.*, at 926 (emphasis in original).

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, at 927.

⁶² *United States – Section 211 Appropriations Act*, supra note 18, at para. 297.

⁶³ The MFN clause subsequently became the subject of work by a separate preparatory committee, which submitted the Draft Articles on Most-Favoured-Nation Clauses to the UN

It is therefore entirely possible to take the view that WTO rules which deviate from the VCLT or ASR say very little about the nature of obligations because WTO rules constitute *lex specialis*. Support for this position comes from the work of Gabrielle Marceau, who has posited that the WTO Agreement constitutes a system of *lex specialis* because Members provided for a *sui generis* body of law, including specific rights and obligations, mandatory dispute settlement and remedies.⁶⁴ This conclusion would dovetail the theory of WTO law I presented above.

Nevertheless, it is important to examine some of Pauwelyn's specific arguments. Pauwelyn's analysis proceeds by a process of elimination. He identifies WTO obligations as potentially either *jus cogens*, interdependent, integral or bilateral, and concludes that WTO obligations are not *jus cogens*, that is, fundamental norms from which no derogation is permitted. I agree.

He goes on to also conclude that they are not of the collective interdependent type, principally because WTO rules deviate from VCLT and ASR provisions concerning interdependent obligations. To take one example, he refers to the fact that VCLT Article 60.2(c) allows all parties to walk away from their obligations *vis-à-vis all* other parties upon breach. He observes, however, that WTO rules do not allow this. At best, WTO rules on retaliation only allow the Member that has brought the matter to dispute settlement to suspend concessions *vis-à-vis the wrongdoer*. He then relies on this rule to support his conclusion that WTO obligations are not of a collective and interdependent type – an example of the default in action.

Having apparently eliminated *jus cogens* and obligations of an interdependent type, Pauwelyn then seeks to disprove that WTO obligations are collective obligations of

General Assembly in 1978: see *The Work of the International Law Commission* (3rd edn., 1980), at 73–77.

⁶⁴ Marceau, 'WTO Dispute Settlement and Human Rights', 13 *EJIL* (2002) 753; see also Kuijper, 'The Law of GATT as a Special Field of International Law—Ignorance, Further Refinement or Self-Contained System of International Law', 25 *Netherlands Yearbook Int'l L* (1994) 227. See *contra* Pauwelyn, 'The Rule of Public International Law in the WTO: How Far Can We Go?', 95 *AJIL* (2001) 595; Bartels, 'Applicable Law in WTO Dispute Settlement', 35 *J World Trade* (2001) 499.

an integral type. First, he postulates that the object of WTO obligations is 'trade'. Second, he refers to the origin and heterogeneity of WTO obligations. Third, he asserts that the objective of WTO obligations is not a genuine collective interest because WTO obligations can be individualized. Fourth, he maintains that WTO dispute settlement does not tackle breach, but rather the nullification or impairment of benefits accruing to a particular Member. There is, in addition, his observation that WTO dispute settlement is conducted generally in a bilateral fashion and that retaliation happens, in most instances, against a single state.

I disagree with Pauwelyn on all of these points. As demonstrated, the object of WTO obligations is the protection of expectations about trade-related behaviour, not trade *per se*. I also differ with him regarding the relevance of the origin or heterogeneity of trade obligations, given that what we are ultimately concerned with is how WTO obligations *operate*, not how they *originate*. That operation is collective in light of MFN, something which minimizes heterogeneity under the agreement. And individualization is an ad hoc exercise subject to considerable uncertainty. Finally, the fact that WTO dispute settlement tackles nullification or impairment of benefits does not automatically mean that those benefits extend to one Member alone.

Nevertheless, Pauwelyn's conclusion that WTO obligations must be bilateral has several implications. First, it limits standing to that envisaged in ASR Article 42(a), that is, where the obligation is owed to a state *individually*. Again, I disagree. The WTO Agreement is about collective expectations concerning trade-related behaviour, and by virtue of MFN, all WTO countries have such an expectation. Consequently, any breach will automatically impair the benefits accruing to them collectively. A claim therefore can be mounted by *any* WTO member.⁶⁵ The more appropriate provision on standing would be that applicable to collective obligations under ASR Arts. 42(b) and 48.1(a).⁶⁶

⁶⁵ Thus, in *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (9 Sept. 1997), at para. 135, the Appellate Body observed: 'we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such

Pauwelyn's second point is that suspension of obligations is permissible under the WTO Agreement because these are, in effect, bilateral obligations and therefore suspension is authorized without impermissibly affecting the rights of third parties, as per VCLT Article 58.1(b). However, there are no third parties *within* a treaty. There are simply parties. The rule against affecting third-party interests is not applicable and countermeasures can be authorized to reinforce collective obligations, as per VCLT Article 58.1(a) and DSU Article 22.7. Indirect effects of WTO action must be regarded as part of the WTO *acquis*.

Pauwelyn's third point is that remedies for breach of a WTO obligation are generally bilateral in nature. That is, in the normal course of events only one country is permitted to retaliate against another by suspending concessions. That may be true as a

action would be “fruitful”. See also *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (17 Mar. 2000) (where the EC did not assert that only European intellectual property was being insufficiently protected by the Canadian regulatory review and 'stockpiling' exception). The ability of any member to bring a claim is particularly evident in facial challenges to legislation: *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (22 Dec. 1999) (where the EC contested US legislation without asserting any harm to exclusively European interests); *United States—Anti-Dumping Act of 1916*, *supra* note 43 (where the EC contested US legislation prohibiting international price discrimination. The legislation provided for civil complaints as well as criminal prosecutions, but there had never been a successful private complainant or criminal prosecution under the legislation, and therefore, no harm to European interests).

⁶⁶ ASR Art. 42(b) entitles a country to invoke state responsibility where the breach of an obligations 'specially affects that State' or where the breach is 'of such a character as to radically change the position of all other States to which the obligation is owed'. Applied to WTO obligations as collective, the possibility exists that a WTO member launching a claim could be 'specially affected' under ASR Art. 42(b)(i), which is a matter of interpretation, or that the breach 'radically' changes the position of every other WTO member under ASR Art. 42(b)(ii), something which could be said to occur, given selective non-observance of the WTO Agreement and the idea of 'balance' inherent in the WTO Agreement. The possibility also exists that WTO members might be able to invoke the responsibility of the injured state under ASR Art. 48.1(a) by demonstrating a purely *legal* interest as 'other than injured', in which case they would be able to claim cessation and reparation on behalf of the injured state. The Special Rapporteur mentions the overlap between ASR Arts 42 and 48, observing that 'article 48 refrains from qualifying the position of States identified in article 48 ... The term “legal interest” would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests': Crawford, *supra* note 2, at 276–277.

matter of fact, but plurilateral retaliation is not unknown in the WTO, and in any event, we have to keep in mind that perfect consistency with the VCLT and ASR is *not* required.

Pauwelyn's fourth point is that subsequent treaties, and particularly those that may be inconsistent with the WTO Agreement, can contract out of it. This conclusion is arrived at as a consequence of the finding that WTO obligations are bilateral and through application of the *lex posterior* rule in VCLT Article 30. Here too I disagree, principally because his position runs up directly against the integrity of WTO obligations. The WTO Agreement is generally difficult to amend and includes a formal withdrawal clause.⁶⁷ Neither of these features would have been necessary if WTO Members retained the unfettered right to negotiate other international agreements in derogation of their treaty obligations. One could argue that the WTO Agreement has no express supremacy clause like Article 103 of the UN Charter and that therefore later-in-time treaties should prevail, but this position appears contrary to the scheme and substance of the treaty as well as to WTO case law.⁶⁸ The legally correct view, in line with Fitzmaurice's original conclusion, would appear to be that subsequent inconsistent treaties are void. Still, I recognize the considerable diversity of practice on this point and, consistent with the intermediate position inherent in the WTO Agreement as a law of interdependence, my view is that the exact relationship between the WTO Agreement and subsequent inconsistent treaties is something to be worked out on a case-by-case basis, keeping in mind a presumption of consistency with the remainder of public international law.

6. Conclusion

⁶⁷ See WTO Agreement Arts X (amendment) and XV (withdrawal).

⁶⁸ See *Turkey— Textiles*, supra note 45, at para. 9.178 ('In our view, however, a bilateral agreement between two Members ... does not alter the legal nature of the measures at issue or the applicability of the relevant GATT/WTO provisions'); *EC— Bananas*, supra note 39, at paras 164–170 (the Appellate Body, in examining the Lomé Convention, concluded that unless explicitly authorized by a waiver, provisions of the Convention could not alter rights and obligations of WTO members).

In this article I have sought to present the idea of the WTO Agreement as embodying collective obligations. I have done so chiefly by putting forward a theory of WTO law. I submit that this theory offers a more satisfying account of the nature and function of WTO obligations than a simple comparison of WTO rules with either the VCLT or ASR.

I recognize that this theory is at variance with strict insistence on an 'obligation by obligation' analysis, but I would observe that existing categories of the VCLT and ASR do not completely capture the systemic way in which the WTO Agreement needs to be understood.⁶⁹ WTO obligations apply coordinately. The Appellate Body has shown awareness of this in referring to the WTO Agreement as 'an integrated system'.⁷⁰

This feature also explains my reluctance to focus on what I would call 'exceptional' events – the negotiation, renegotiation and suspension of obligations – and instead my desire to emphasize the treaty in *operation*. It is in operation that legal obligations acquire their nature and substantive force. It is also in operation that legal obligations create interdependence.

Does this mean that I take the view that WTO obligations are collective obligations of an interdependent type? I think there is considerable merit to such a view. The classification of WTO obligations as collective obligations of an interdependent type encounters the immediate objection that a breach of WTO rules is not 'of such a character as radically to change the position of all other States to which the obligation is owed', as per ASR Article 42(b)(ii) and VCLT Article 60.2(c). However, the reply must be that a breach of the WTO Agreement *is* of such a character, given the phenomenon of selective non-observance of the treaty and the preoccupation with 'balance' in WTO dispute settlement.⁷¹ Again, we have to remember that perfect correspondence with the VCLT and ASR is *not* required. It is also interesting to observe that the classic example that

⁶⁹ Pauwelyn, *supra* note 2, at 925 ('it must be kept in mind that the distinction between bilateral and collective is to be determined *obligation by obligation*, not treaty by treaty' (italics added)).

⁷⁰ *Brazil—Measures Affecting Dessicated Coconut*, WT/DS22/AB/R (21 Feb. 1997), at 11.

⁷¹ *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998), at paras. 157, 159.

Fitzmaurice gave of an interdependent treaty is a disarmament treaty.⁷² Thought about carefully, 'disarmament' is one of the WTO Agreement's chief functions. The treaty seeks to discipline the use of trade weaponry in order to protect expectations. In the case of the WTO Agreement, the key difference is that the aim is mercantile as opposed to military.

There are, of course, a number of objections that could be raised to the arguments I have put forward here. One could, for instance, continue to assert that the WTO Agreement's object is 'trade', but that is not clear from the evidence. Neither trade nor the protection of trade flows is the subject of a legal obligation under the treaty. Instead, the WTO Agreement works indirectly to promote conditions favourable to trade. Almost 60 years after the creation of GATT, surveys conducted by the International Monetary Fund indicate that policy uncertainty remains the main deterrent to business investment in most countries.⁷³ WTO disciplines are designed to reduce such risk.

One could also assert that my emphasis on expectations under the WTO Agreement is misguided in the sense that all international law could be said to protect expectations. There is no clear link between the *source* of obligations and their *nature*. If there were, all multilateral treaties would be composed exclusively of collective obligations. I do not go that far, however. International law protects expectations in different ways according to the structure of the engagement. For example, the ICSID Convention protects individual expectations of investor protection, despite its status as a multilateral treaty.⁷⁴ The same could be said for NAFTA Chapter 11.⁷⁵ While there may

⁷² Fitzmaurice, 'Third Report on the Law of Treaties', , *ILC Yearbook* (1958 II), at 20.

⁷³ Smith and Hallward-Driemeier, 'Understanding the Investment Climate', *Finance & Development*, Mar. 2005, at 40, 43.

⁷⁴ See *Tenicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, award, 29 May 2003, at para. 154: 'This provision of the Agreement ... requires the Contracting Parties to provide to international investments treatment that does not affect *the basic expectations that were taken into account by the foreign investor to make the investment*' (emphasis added)).

⁷⁵ See the definition of 'investment' in NAFTA Art. 1139 ('investment means ... (g) real estate or other property, tangible or intangible, acquired in the *expectation* or used for the purpose of economic benefit or other business purposes' (emphasis added)). See also *Metalclad v. United Mexican States*, Case No. ARB(AF)/97/1 (30 Aug. 2000), at paras 99–101. ('Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and

be no direct link between the source of obligations and their nature, the fact that WTO obligations arise in a multilateral treaty cannot be ignored. Multilateralism is vital to appreciating their interdependent and systemic quality.

There are, in addition, a number of points that arise out of my description of a theory of WTO law. Why should we be concerned with justice under the WTO Agreement at all? What is the exact relationship between the protection of expectations, realities and interdependence, and in particular, between the primacy of expectations and the *via media* of interdependence? What WTO provisions are expectation - versus reality-based? These and other questions await fuller treatment elsewhere. I will simply say here that the theory fulfils the need for a comprehensive understanding of the WTO Agreement. To that extent, it may be a sign of the treaty's maturity as a legal system.

investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the *expectation* that it would be treated fairly and justly in accordance with the NAFTA. ... The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.' (emphasis added)).