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# A Theory of WTO Law

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# A THEORY OF WTO LAW

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**ABSTRACT:** The creation of the World Trade Organization in 1994 has left open the question of whether we can identify a theory of its legal system. A theory should help us to better understand what WTO law *is* as well as what it *should be*. This article posits the idea that a theory *can* be identified if we conceive of the WTO Agreement as protecting expectations about trade, facilitating adjustment to realities encountered in trade, and promoting interdependence between economic operators. Each of these purposes is implemented under the WTO Agreement by a specific instrument. In the case of expectations it is *collective obligations*, in the case of realities it is *individual rights*, and in the case of interdependence it is a combination of the foregoing two, a *lex specialis*. The interaction is emblematic of a deeper division within the treaty between opposing modes of law.

# A THEORY OF WTO LAW

By Chios Carmody<sup>1</sup>

## I. INTRODUCTION

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## I. INTRODUCTION

The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)<sup>2</sup> is one of the keystones of international law today, yet more than a decade after its entry into force we continue to lack a coherent theory for it. In short, *why* is the treaty as it is?

To put this question in context, it is useful to remember that we have a generally accepted *economic* theory of the WTO Agreement based on the exchange of trade concessions.<sup>3</sup> We also have a generally accepted *political* theory of the WTO Agreement based upon the Kantian idea of a liberal peace.<sup>4</sup> Nevertheless, we continue to lack a *legal* theory of the WTO Agreement, by which I mean a system of ideas to explain the treaty as a matter of law and justice.<sup>5</sup> The prevailing situation has led Thomas Cottier, Matthias Oesch and Thomas Fischer to observe recently that “the absence of a longstanding legal theory or tradition of international trade regulation explains why even basic questions are still in the open.”<sup>6</sup>

<sup>1</sup> Associate Professor and Canadian Director, Canada-United States Law Institute, Faculty of Law, University of Western Ontario, London, Ontario, Canada N6A 3K7, email: [ccarmody@uwo.ca](mailto:ccarmody@uwo.ca). I would like to thank Jeffery Dunoff for suggesting the particular angle to this article and Janice Ho and Ryan Brown for their research assistance.

<sup>2</sup> 33 I.L.M. 1125 (1994).

<sup>3</sup> Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 3<sup>rd</sup> ed. (London: Routledge, 2005) at 2-3, 37. For an econometric approach see Kyle Bagwell & Robert W. Staiger, “An Economic Theory of GATT”, NBER Working Paper No. 6049 (May 1997).

<sup>4</sup> Kant did not make the argument that democracies will not fight, only that they are not disposed to fight each other. Later theorists recognized the same tendency among countries that conduct trade with each other. See Padideh Ala'i et al. (eds), *Trade as Guarantor of Peace, Liberty and Security? Critical, Historical and Empirical Perspectives* (Washington: American Society of International Law, 2006) vii.

<sup>5</sup> Law is defined as “the aggregate of legislation, judicial precedents, and accepted legal principles” Bryan Gardner (ed.), *Black's Law Dictionary*, 8<sup>th</sup> ed. (St. Paul: Thomson/West, 2004) 900; justice is defined as “giving each their due”, *ibid.*, 881.

<sup>6</sup> Thomas Cottier et al., *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland* (London: Cameron May, 2005) 33, 47. They observe additionally that “Theoretical analysis of the exact contents and confines of the core legal principles governing the current multilateral trading system ... are in full swing in dialogue with the case law and far from settled, despite the fact that these concepts have been in existence for a very long time. An academic body of legal theory of trade regulation is only beginning to be built, dealing with basic structures, institutions and regulatory approaches.” Work of other commentators is hardly more clear on the subject of an underlying theory. For instance, John Jackson has described the WTO Agreement as “a very complex mix of economic and governmental policies, political constraints, and above all an intricate set of constraints imposed by a variety of ‘rules’ or legal norms in a particular institutional setting.” John Jackson, *The World Trading System*, 2<sup>nd</sup> ed. (Cambridge: MIT Press, 1998) 339. In more recent work he has disclaimed the notion of a “grand theory” and focused more directly on “queries rather than theories”: see John Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006) xi. For further attempts at theoretical development of GATT/WTO law see Ernst-Ulrich Petersmann, “International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order” in R. St. J. Macdonald and D.M. Johnston, eds, *The Structure and Process of International Law* (The Hague: Martinus Nijhoff, 1983) 227; Andrew Caplin & Karla Krishna, “Tariffs and the Most-Favoured Nation Clause: A Game Theoretical Approach”, 1 Seoul Journal of Economics (1988) 267; Carolyn Rhodes, *Reciprocity, U.S. Trade Policy and the GATT Regime* (Ithaca:

In other work I have pointed out that the WTO Agreement can be understood as aimed primarily at the protection of expectations concerning the trade-related behaviour of governments, but also, and secondarily, at facilitating adjustment to certain realities encountered in the course of trade. The interaction of these two purposes – one dominant, the other subordinate – achieves a third purpose over time, which is the promotion of interdependence among economic operators.<sup>7</sup>

In this article I want to go on to examine how these each of these purposes is implemented by a distinct element. In the case of expectations it is *collective obligations*, in the case of realities it is *individual rights*, and in the case of interdependence it is a combination of the foregoing two, a ‘special law’ or *lex specialis*. The result is an ongoing tension, or dialectic, between WTO and domestic law.

This identification is important because it helps us to get more directly at a theory of WTO law. One of the consequences of the prevailing theoretic vacuum is that WTO law has to be discussed in either highly specific or very general terms. There is very little in-between.

Thus, there have been many articles on this or that WTO case, on the trend in a series of cases, or on particular WTO provisions.<sup>8</sup> Likewise the treaty has been assessed from a variety of economic, political and international relations perspectives.<sup>9</sup> Much of this

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Cornell University Press, 1993); Warren F. Schwartz and Alan O. Sykes, “Towards a Positive Theory of the Most Favoured Nation Obligation and Its Exceptions in the WTO/GATT System”, 16 Int’l Rev. L. & Econ. (1996) 27; Petros Mavroidis, ““Like Products”: Some Thoughts at the Positive and Normative Levels” in Thomas Cottier & Petros Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (Ann Arbor: University of Michigan Press, 2000) 125; Meinhardt Hilf, *Power, Rules and Principles: Which Orientation for WTO/GATT Law?* 4 J.I.E.L. 111 (2001); Kyle Bagwell and Robert W. Staiger, “The Theory of Trade Agreements” in *The Economics of the World Trading System* (Cambridge: MIT Press, 2002); Darrel Moellendorf, “The World Trade Organization and Egalitarian Justice” in Christian Barry et al. (eds.), *Global Institutions and Responsibilities: Achieving Global Justice* (Oxford: Blackwell, 2005). Book-length treatments are also available: see Frank J. Garcia, *Trade, Inequality and Justice: Towards a Liberal Theory of Just Trade* (Ardsey: Transnational Publishers, 2003); Raj Bhala, *Trade, Development and Social Justice* (Durham: North Carolina Academic Press, 2003).

<sup>7</sup> Chios Carmody, “WTO Obligations as Collective” 17:2 Eur. J. Int’l L. 419 (2006).

<sup>8</sup> For a sampling see Fabian Delcros, *Le statut juridique de l’agriculture à l’OMC*, 36 J.W.T. (2002) 353; Kym Anderson and Tim Josling (ed.), *The WTO and Agriculture: Vol. 1* (Cheltenham: Edward Elgar, 2004); Emily Rome, The Background, Requirements and Future of the GATT/WTO Preshipment Inspection Agreement, 7 Minn. J. Global Trade (1998) 469; Anuwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO* (Cambridge: Cambridge University Press, 2001); Moshe Hirsch, “International Trade Law, Political Economy and Rules of Origin”, 36 J.W.T. (2002) 171; Kyle Bagwell, Petros Mavroidis et al., “It’s a Question of Market Access”, 96 A.J.I.L. (2002) 56; Paul Beynon, “Community Mutual Recognition Agreements, Technical Barriers to Trade and the WTO’s Most Favoured Nation Principle”, 28 Env. L. Rev. (2003) 231; Stefano Inama, “Trade Preferences and the World Trade Organization’s Negotiations on Market Access”, 37 J.W.T. (2003) 959; Joel Trachtman, “The Domain of WTO Dispute Resolution”, 40 Harv. J. Int’l L. (1999) 333; Robert Hudec, “The New WTO Dispute Settlement Procedure”, 8 Minn. J. Global Trade (1999) 1; Georg C. Umbricht, “An ‘Amicus Curiae Brief’ on Amicus Curiae Briefs at the WTO”, 4 J.I.E.L. 773 (2001); Edwin Vermulst, “WTO Dispute Settlement with Respect to Trade Contingency Measures”, 35 J.W.T. (2001) 209; Joost Pauwelyn, “The Use of Experts in WTO Dispute Settlement”, 51 I.C.L.Q. (2002) 325; Hunter R. Clark, “The WTO Banana Dispute and Its Implications for Trade Relations between the United States and the European Union”, 35 Cornell J. Int’l L. (2002) 291; Richard Cunningham, Dispute Settlement Through the Lens of “Free Flow of Trade”, 6 J.I.E.L. (2003) 155; Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford: Oxford University Press, 2003); John Jackson, “International Law Status of WTO Dispute Settlement Reports”, 98 A.J.I.L. (2004) 109; Federico Ortino and Ernst-Ulrich Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003* (The Hague: Kluwer Law International, 2004); Hans Mahncke, “U.S. Steel Tariffs and the WTO Dispute Resolution Mechanism”, 17 Leiden J. Int’l L. (2004) 615; Petros Mavroidis and Alan Sykes (ed.), *The WTO and International Trade Law/Dispute Settlement* (2005); Nicholas Perdikis and Robert Read (eds.), *The WTO and the Regulation of International Trade Law* (2005).

<sup>9</sup> See Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy* (Montreal: International Centre for Human Rights and Democratic Development, 2000); P.K. RAO, *The World Trade Organization and the Environment* (New York: St. Martin’s Press, 2000); Claude E. Barfield, *Free Trade, Sovereignty, Democracy: the future of the World Trade Organization* (Washington: American Enterprise Institute Press, 2001); Steven Shrybman, *The World Trade Organization: A Citizen’s Guide* (Halifax: James

work is insightful, but it has tended to obscure the framework on which the treaty is based: *rights and obligations*. Rights and obligations are the foundation of any system of law, including international law, and so it seems entirely appropriate to focus on their relationship under the WTO Agreement as a means of bringing the discussion at various levels together and discerning what the recurrent patterns of WTO law might be.<sup>10</sup>

Attention to rights and obligations is promising for the development of a theory because references to “rights” and “obligations” appear frequently in WTO law and jurisprudence, but rarely, if ever, have they been subject to serious scrutiny.<sup>11</sup> However, their arrangement, the contrapuntal stress they create, and the way they simultaneously “constrain and enable”<sup>12</sup> state action, all afford us deeper insight into *why* things are as they are.

My principal point in this article is that while we might consider the presumptive relationship between rights and obligations to be one of correspondence – that is, each right is matched by a single, offsetting obligation - two features operate to modify this traditional jural relationship in WTO law.<sup>13</sup> First, the Most Favoured Nation (MFN) clause causes obligations owed under the treaty to become obligations owed to the *entire* WTO membership. This converts them into collective obligations. Second, the dynamic nature of trade-related behaviour works to change their tenor, being apparently bilateral in a few instances but absolute in most others. The modification reveals a

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Lormier, 2001); Gary P. Sampson (ed.), *The Role of the World Trade Organization in Global Governance* (Tokyo: UNU Press, 2001); Thomas Hockin, *The American Nightmare: Politics and the fragile World Trade Organization* (Lanham: Lexington Books, 2003); Lori Wallach and Patrick Woodall, *Whose Trade Organization?: a Comprehensive Guide to the WTO* (New York: The New Press, 2004); Deborah Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, Community* (Oxford: Oxford University Press, 2005); Bradley J. Condon, *Environmental Sovereignty and the WTO: trade sanctions and international law* (Ardley, Transnational Publishers, 2006); John Barton et al., *The Evolution of the Trade Regime: Politics, Law and Economics of the GATT and the WTO* (Princeton: Princeton University Press, 2006); Rorden Wilkinson, *The WTO: Crisis and the Governance of Global Trade* (London: Routledge, 2006); Roman Grynberg (ed.), *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge: Cambridge University Press, 2007); Math Noortman, *Enforcing International Law: from Self-Help to Self-Contained Regimes* (London: Ashgate Publishing, 2005).

<sup>10</sup> The correspondence of rights and obligations as a hallmark of international law has been recognized in many instances. It is implicit in the International Law Commission’s *Draft Declaration on the Rights and Duties of States*, which the U.N. General Assembly “commended to the continuing attention of [U.N.] Member States”, G.A. Res. 375 (IV) (6 Dec. 1949). It has also been pivotal in a number of disputes before the International Court of Justice: see *Case Concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Jurisdiction and Admissibility), [1994] I.C.J. Rep. 12 (discussing the fact that a document between the parties “was not a simple record of a meeting” but something which “enumerat[ed] the commitments to which the Parties have consented. They thus create *rights and obligations* in international law for the Parties.” (emphasis added)). For a case where the absence of rights and obligations precluded the creation of an international agreement see *Anglo-Iranian Oil Co. Case (U.K. v. Iran)*, [1952] I.C.J. Rep. 93.

<sup>11</sup> See for instance *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, p. 15 (10 Feb. 1997) where the Appellate Body described the WTO Agreement on Textiles and Clothing as composed of “carefully negotiated language” reflecting “a carefully drawn balance of *rights and obligations* of Members.”; see also *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, para. 139 (2 Aug. 1999). A sign of the difficulty of assessing what the term means is the Appellate Body’s admission in *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, para. 87 (13 Dec. 1999) that “[I]n these circumstances, we do not consider that the Panel has added to the rights or obligations of any Member of the WTO. Moreover, we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member ... if its conclusions reflected a correct interpretation and application of provisions...”.

<sup>12</sup> Jutta Brunnée and Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, Colum. J. Transnat’l L. 19, 31 (2000).

<sup>13</sup> The idea of a correspondence between rights and obligations was recognized by early philosophers but developed most insightfully by Wesley Hohfeld, who postulated that the term “right” may involve either a claim, privilege, power or an immunity. In Hohfeld’s view the same rights are offset by correlative duties, which may involve either a requirement, a constraint, a liability or a disability. See Wesley Hohfeld, *Fundamental Legal Conceptions, As Applied in Judicial Reasoning and Other Essays* (New Haven, Yale University Press, 1919). Also William A. Edmundson, *An Introduction to Rights* 43 (2004) (discussing Edmund Burke’s contribution to the idea of right-obligation correspondence). For further discussion of the right-obligation correlation see Philip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990) 160ff [hereinafter Allott, *Eunomia*].

curious hybridism about WTO obligations in the sense that they do not fit completely into traditional categories of international legal obligation.<sup>14</sup> Instead, they appear at times to straddle them.

Consideration of rights and obligations under the WTO Agreement also reveals a number of other insights about WTO law. One is that the overarching nature of WTO obligations restricts the ambit of rights. Most rights under the WTO Agreement are highly conditioned. They do not possess the amplitude we normally expect of rights, a quality which probably accounts for perceptions about the relative intensity of WTO law.<sup>15</sup>

Another insight pertains to the substantive divide at the heart of the WTO Agreement. WTO obligations are observed *collectively* whereas WTO rights are exercised *individually*. This promotes two competing visions of justice. Again, in other work I have pointed out that the principal type of justice under the WTO Agreement is *distributive*. In cases of a violation, justice operates to maintain the *distribution* of collective expectations, something which explains the habitual direction to wrongdoers under Art. 19.1 of the WTO Dispute Settlement Understanding (DSU) to bring their laws “into conformity” with the WTO Agreement.<sup>16</sup> In most instances conformity involves withdrawal or amendment of the offending measure, action which results in re-establishment of the equal distribution of expectations.

At the same time, a second type of justice is at work in WTO law and is *corrective* in the sense that it aims to repair harm done. The harm occurs because countries exercise their individual *rights* to take action that, strictly speaking, may disappoint expectations. For instance, the right to impose a safeguard or to levy an anti-dumping duty can arise in WTO law where imports cause the requisite degree of injury and where certain procedural requirements are fulfilled. Here it is easier to see the task of justice being to correct injury to specific interests. This is apparent in the possibility of negotiating temporary compensation for identified violations of WTO law under DSU Art. 22.2, but it is also evident elsewhere.<sup>17</sup>

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<sup>14</sup> The classification of treaty obligations in international law generally follows the scheme proposed by Gerald Fitzmaurice in the 1950s. 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 breach. Bilateral treaties can be suspended or terminated by either party since they involve a simple exchange of obligations. Subsequent inconsistent treaties are valid. The same generally holds for multilateral treaties of a bilateral type, which are said to be ‘reciprocal’. By comparison, multilateral interdependent treaties 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.”<sup>14</sup> 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”. Subsequent inconsistent treaties are also void. See, in particular, Gerald Fitzmaurice, “Third Report on the Law of Treaties”, U.N. Doc. A/CN.4/115, *Yearbook of the International Law Commission*, Vol. II, pp. 20, 27 and 28 (1958).

<sup>15</sup> Claus-Dieter Ehlermann, “Six Years on the Bench of the “World Trade Court”” in Federico Ortino and Ernst-Ulrich Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003* 499, 522-23 (2004).

<sup>16</sup> See DSU Art. 19.1: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”

<sup>17</sup> “If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance ... such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.” As of mid-2008 compensation had only been negotiated in one case under the WTO DSU, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (15 June 2000). For commentary see Bernard O’Connor & Margareta Djordjevic, “Practical Aspects of Monetary Compensation: The U.S. Copyright Case” 8:1 J. Int’l Econ. L. 127 (2005). See also Art. 7.8 of the WTO Subsidies Agreement (“the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.”). This provision was at issue in *Australia – Subsidies provided to Producers and Exporters of Automotive Leather (21.5)*,

Over time the interaction of rights and obligations under the WTO Agreement produces a regime of law that can be described as a *lex specialis*. The combination is a “special law” because in many instances it does not conform to the normal consequences of state responsibility, and justice in this mode is *transformative* because it does not seek to distribute expectations or correct harm exclusively, but rather to resolve conflicts between national interests in a manner that develops and strengthens relationships among those involved.<sup>18</sup>

Evidence of transformative justice is apparent in outcomes under the WTO Agreement. These outcomes may indicate continuing dissatisfaction with the *status quo*, as in the case of the *Hormones* dispute.<sup>19</sup> Alternately, they may involve a limited form of accord – a “pool of consensus” – that serves as a basis for broader agreement, as in Sri Lanka and the EC’s effort to establish a new standard for chemical residues in cinnamon.<sup>20</sup> Finally, the outcome may take the form of a full-blown consensus among the membership, as in the *Doha Declaration on TRIPS and Public Health*.<sup>21</sup>

What each of these outcomes has in common is active or passive agreement. The agreement is not singular or static, but rather in constant flux. The WTO Appellate Body demonstrated indirect awareness of this idea in *U.S. – Shrimp* when it observed

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WT/DS126/RW (21 January 2000).

<sup>18</sup> “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 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.” *Law Commission of Canada, From Restorative Justice to Transformative Justice: Discussion Paper*, Law Commission of Canada Catalogue No. JL2-6/1999 (1999). Philip Allott speaks of international economic law and administration as “socially transformative law”: Philip Allott, *The Health of Nations* (Cambridge: Cambridge University Press, 2002) 36, 99 [hereinafter Allott, *Health*]. Andrew Robinson and Simon Torney, “‘Horizontals’, ‘Verticals’ and the Conflicting Logics of Transformative Politics” in Philip Hayden and Chamsy el-Ojeili (eds), *Confronting Globalization: Humanity, Justice and the Renewal of Politics* (Houndmills, Basingstoke: Palgrave Macmillan, 2005) 208. Some idea of the successive articulation of GATT/WTO law in dispute settlement and then negotiation (and potentially back again) is given by John M. Weekes, *The External Dynamics of the Dispute Settlement Understanding: Its Impact on Trade Relations and Trade Negotiations – An Initial Analysis* (2004) (on file with author). See also generally Gene Grossman & Elhanan Helpman, *Trade Wars and Trade Talks*, 103:4 J. Pol. Econ. (1995) 675; Steven Woolcock (ed.), *Multilateralism in Neutral: The Interaction between Levels of Rulemaking in International Trade and Investment* (2006).

<sup>19</sup> In 1996 the United States and Canada challenged a ban by the EC on imports of hormone-treated meat and meat products. The challenge centered on the alleged failure of the EC to conduct a risk assessment prior to instituting the ban. The U.S. and Canadian positions were accepted by a WTO panel and the Appellate Body, and in July 1999 both the United States and Canada were authorized to retaliate against the ban. Since the imposition of retaliation the EC has continued to keep its market closed to imports of hormone-treated meat, but has allegedly removed the fact of WTO-inconsistency by implementing new measures and invoking a precautionary approach to regulation. This resulted in a challenge by the EC in November 2004 to the continuing U.S. and Canadian retaliation. A panel examining the matter agreed with the EC position, but a parallel decision rendered at the same time found that EC restrictions on hormone-treated meat are illegal in WTO law. In late May 2008 the EC appealed the decisions concerning its regulatory scheme and the continuing suspensions. See “EU Appeals WTO Hormone Ban Decision, Seeks Clarity on Retaliation”, *Inside U.S. Trade* (May 30, 2008).

<sup>20</sup> A WTO press release noted that the EC maintained a ban on sulphur dioxide in cinnamon, even though it allowed minimal levels in other spices. “The issue arose partly because Codex Alimentarius, the WHO-FAO body where countries negotiate standards for food safety, did not have a standard for SO<sup>2</sup> residues in cinnamon. In July [2006], Codex approved a new standard ... and Sri Lanka praised the EU for “excellent cooperation” in finding a solution, partly through administrative means. In February [2006] the EU offered to help Sri Lanka apply for approval for a standard and to seek support from the European Parliament and the [EU] member states.” See Sri Lankan cinnamon’s future brightens, SPS Committee told (Oct. 11-12, 2006), available at [www.wto.org](http://www.wto.org); see also *Sulphur Dioxide in Cinnamon*, G/SPS/GEN/716 (July 25, 2006).

<sup>21</sup> See *WTO Declaration on TRIPS and Public Health*, WT/MIN(01)/DEC/2 (20 Nov. 2001) and also *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (2 Sept. 2003). For a comprehensive account of the development of these documents see Haochen Sun, *The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health*, 15 EUR. J. INT’LL. 123 (Feb. 2004).

that “[t]he location of the line of equilibrium is not fixed and unchanging; the line moves as the kind and shape of the measures at stake vary and the facts making up specific cases differ.”<sup>22</sup>

While the Appellate Body’s statement in *Shrimp* was made in the context of a dispute about competing *rights*, I posit here that it reflects a continuing tension between rights and obligations in WTO law. That tension is emblematic of a deeper division within the treaty between opposing modes or “idea complexes” of law.<sup>23</sup> On the one hand, the law is obligation-based and is collective, constitutional, dynamic and prospective in nature. Its logic is deductive and its chief value is equality. On the other, the law is rights-based and is individualized, contractual, static and retrospective in nature. Its logic is inductive and its chief value is fairness.

The two idea complexes interact so that WTO law is ultimately both right *and* obligation based, and is a combination of all of the attributes I have just referred to. Its overarching logic is ‘abductive’ and its chief value is understanding.<sup>24</sup> The law always tends towards the collective mode, but at times it will exhibit aspects of the second as it adjusts to real conditions. Over time the outcome results in a mental transformation, or what Philip Allott has referred to as a “revolution of the mind”.<sup>25</sup> (see Fig. 1)

The concepts presented here have much in common with *constructivism*, a school of international relations theory which regards law as the *mutual construction* of agent and structure. This distinguishes it from liberalism, which regards international relations as dictated by various forms of self-interest, or utilitarianism, which regards those identities as involving value maximization. Drawing on the work of Lon Fuller, constructivism maintains that actor identities, rather than self-interest, constitute the core of state behaviour, and that these identities are “shaped and reshaped by action within structures.”<sup>26</sup> The “structures constrain social action, but they can also enable action, and in turn are altered by the friction of social action against the parameters of the structure.”<sup>27</sup> In the case of the WTO Agreement the “social action” in question involves the interplay of rights and obligations within the “structure” of the treaty.

I have chosen to on rights and obligations because they are often pivots of legal discourse and because pronouncements about them in WTO dispute settlement and elsewhere best illustrate the integrated set of ideas – or theory – put forward here.

This article is arranged in four parts. Following the Introduction, Part Two deals with

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<sup>22</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R para. 159 (12 Oct. 1998) [hereinafter *Shrimp*].

<sup>23</sup> Allott, *Health*, above note 18 at 47.

<sup>24</sup> “... [a]bductive logic seeks the best explanation ... in response to novel or interesting data that doesn’t fit an extant model. Deductive or inductive logic might prove such a model true or untrue over time, but in the interim, abductive logic generates the best explanation of the data.” Roger Martin, *The Opposable Mind* (Cambridge: Harvard University Press, 2007) at 146.

<sup>25</sup> This observation is consistent with Philip Allott’s insistence on the ability of international legal arrangements to transform the way people think. “The history of human societies contains many examples of revolutionary change not only in real constitutions of societies but also in their ideal self-constituting, *revolutions of the mind*.” Allott, *Health*, above note 18 at 81 (emphasis added).

<sup>26</sup> Jutta Brunnée and Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, COLUM. J. TRANSNAT’L L. (2000) 19 at 30.

<sup>27</sup> *Ibid.*



the nature of theory and what can be expected from a theory of WTO law. Part Three sets out the theory, emphasizing the contrasting yet complementary roles that rights and obligations play together in the WTO's legal order. The aim is not to identify any *single* relationship as much as it is to uncover the range of potential relationships between them. Part Four offers some concluding thoughts about a theory of WTO law.

## II. WHY A THEORY?

The task of identifying a theory of WTO law naturally raises the issue of what a theory is and how it differs from other concepts about law. A theory has been defined as “a system of ideas”<sup>28</sup> and to the extent that this article presents a system of ideas about WTO law, then we have a theory, or at least the beginnings of one.

Still, a theory of WTO law naturally raises the question of why we *need* a theory at all? Considered carefully, at least five reasons for a theory come to mind.

The first is *descriptive*. A theory of WTO law allows us to fit the various parts of the treaty together in terms of commonly accepted jurisprudential categories. What is observed in WTO law can therefore be understood as more than simply a reflection of political and economic priorities. It can be confirmed as part of a greater legal tradition.

The second reason is *analytic*. A theory of WTO law allows us to systematically identify what the key elements of the law are and how they interact. The result is a new understanding of its coherence and unity. This knowledge can assist with the larger project of assembling a theory of law.

The third reason is *teleologic*. With a theory of WTO law, we will have a better idea of what ends the law serves and how these depart from or cohere with law as a social phenomenon. In this sense, a theory of WTO law offers the possibility of progressing “from the study of *laws* to the study of *law*.”<sup>29</sup>

The fourth reason is *normative*. For virtually the whole of its short history the WTO Agreement has been the subject of intense criticism, particularly from those who claim that it is unjust.<sup>30</sup> To the extent that a theory affords us a better idea of what the law *is* and how this is linked to justice, the theory allows us to envisage what the law *should be*.

A fifth reason for a theory of WTO law is *explanatory*, that is, the failure of other theories to adequately explain all that we see happening in WTO law. Here I refer to

<sup>28</sup> THE NEW SHORTER OXFORD DICTIONARY 3274 (4<sup>th</sup> ed.) (Oxford: Oxford University Press, 1993).

<sup>29</sup> Ian McLeod, *Legal Theory* (3<sup>rd</sup> ed.) (2005) at 2. See also Allott, *Health*, above note 18 at 24.

<sup>30</sup> For example, the WTO is described as “a ‘medieval institution’ more akin to the Roman Catholic Church in the Middle Ages than a modern legal institution. Decisions remain largely within the control of a small number of powerful Western states, and ... only states with access to the informal talks ... have a strong influence on outcomes.” Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community* (2005) at 14; “Good international rules do not create automatic benefits for human development, but they can facilitate policies that are good for the poor. Conversely, bad rules can outlaw such policies. Many of the rules enshrined in the WTO fall into the latter category. They threaten to marginalize developing countries and the world’s poorest people within an already unequal global trading system.” Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight against Poverty* (2002) at 207.

provisions like DSU Art. 3.8, which *presumes* nullification or impairment while other provisions appear to require *strict* proof.<sup>31</sup> Or to occasional references in WTO dispute settlement to the protection of “expectations” while allowing for their disappointment in selected instances.<sup>32</sup> Or to more subtle legal phenomena, like prospectivity and retrospectivity, or dynamism and stasis.<sup>33</sup> These differences are not accounted for by other theories but are undeniably there. They appear to be evidence of a deeper conceptual divide, a divide which bears thinking about if we wish to understand the treaty as a whole.<sup>34</sup>

I would hasten to add, however, that what I am putting forward here is referred to as “a theory”, not “*the* theory”, in order to make clear that what I have to say is not meant to pre-empt other conceptions of what WTO law might be. The term “theory” has a forbidding and clinical aspect to it and may be interpreted by some as preclusive, a view I do *not* hold. The theory also has problems which need to be frankly addressed. It is *not* a perfect prediction of all that happens in WTO law, but I hope it can help to supplement and bring together what we already know.

Many commentators appear to make sense of the prevailing situation by describing the WTO Agreement as either a “contract” or a “constitution”. Perhaps the most authoritative reference to contractualism is the Appellate Body’s statement in *Japan – Alcoholic Beverages*<sup>35</sup> that:

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<sup>31</sup> DSU Art. 3(8) states 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. At the same time other provisions, like Safeguards Agreement Art. 6 (provisional safeguard possible “in critical circumstances” and pursuant to a preliminary determination based on “*clear evidence*”), Subsidies Agreement Art. 17.1(b) (provisional measures possible where preliminary affirmative determination that “subsidy exists and that there is *injury* to a domestic industry”) and Antidumping Agreement Art. 7.1(ii) (provisional measures possible where preliminary affirmative determination of “dumping and consequent injury to a domestic industry”). See also the standard for threatened injury: SAF Art. 4.2(a), SCM Arts. 15.7-8; AD Art. 3.7. The level of evidence required was discussed in *U.S. – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177, 178/AB/R (May 1, 2001) at para. 125 (where in interpreting the phrase “threat of serious injury” the Appellate Body emphasized the phrase “clearly imminent” which it considered to mean “that there must be a high degree of likelihood that the anticipated serious *injury* will materialize in the very near future.”).

<sup>32</sup> 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) at para. 45; *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (5 June 1998) at paras. 82-84; *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R (18 Jan. 1999); *Korea – Measures Affecting Government Procurement*, WT/DS163/R (1 May 2000) at para. 7.75; *U.S. – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (10 Nov. 2004) at para. 6.93; *EC – Customs Classification on Frozen Boneless Chicken Cuts*, WT/DS269, 286/AB/R (12 Sept. 2005) at para. 250; .

<sup>33</sup> As noted below, the idea of a system of law based in the first place on unknowable expectations is fundamentally prospective in perspective. It implicitly looks to the future. Because it is prospective, it is also dynamic and ever-changing. See for instance the discussion of the term “directly competitive and substitutable” in *Korea – Taxes on Alcoholic Beverages*, *ibid.* at para. 114 where the Appellate Body declined “to take a static view of the term”. At the same time, there is a secondary order of law at work in the WTO Agreement. This is primarily retrospective and is composed of attempts to re-create the past at one point in time, and is hence static. See for instance *U.S. – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001) at para. 192 where the Appellate Body discussed the term “positive evidence” in ADA Art. 3.1 and observed that “[t]he word “positive” means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.”

<sup>34</sup> The theory put forward here also means to challenge the dominant optic on WTO law. As mentioned, the WTO Agreement was concluded in April 1994 and shortly thereafter its automatic system of dispute settlement began issuing decisions. Suddenly we had something that looked familiar and court-like, and it was probably inevitable that we would come to understand the WTO Agreement as a body of law primarily in terms of *adjudication*. Consequently, much time and intellectual energy have been spent on the outcome of this or that case, on the trend in a series of cases, the burden of proof and so forth. The great bulk of this effort has undoubtedly been worthwhile. It has helped us to appreciate the treaty, and in some sense, to make it our own. At the same time, the fragmented way in which individual cases deal with the law has tended to obscure critical questions that come to mind only when looking at the law *as a whole*. The most important of these is why WTO law looks as it does? What accounts for both dispute settlement *and* negotiation? How can they be understood *together*? In other words, the dominant view has tended to stress the adversarial and corrective aspects of the treaty at the expense of constructive and facilitative ones which, I will suggest, is a more accurate conception of what is happening.

<sup>35</sup> *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R at p. 14 (4 Oct. 1996) [emphasis added].

The *WTO Agreement* is a treaty -- the international equivalent of a *contract*. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.<sup>36</sup>

The Appellate Body's statement emphasizes the minimal nature of the treaty's engagement. The WTO Agreement is a "contract" and sovereignty is limited "according to the commitments" countries have made. Not surprisingly, WTO member countries have found this conception of the treaty attractive and have referred to it on a number of occasions.<sup>37</sup> Accordingly, WTO obligations are bilateral and conditional.

A second theoretical perspective sees the treaty as constitutional. For instance, John Jackson has referred to the WTO Agreement as a "constitution" and Gail Evans has gone on to hypothesize that "the WTO may be explained as a trade constitution having the capacity to provide for the universalization of norms of substantive law."<sup>38</sup> Accordingly, obligations are more collective in nature, and thus more uniform and absolute.

A few commentators have gone on to speculate about the WTO Agreement as a "constitutional contract", that is, an amalgam of the preceding two classifications, but they have not supplied much detail concerning this combination.<sup>39</sup> This is behind my

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<sup>36</sup> Ibid.

<sup>37</sup> See statement by Brazil in WT/DS69/AB/R, para. 15 (describing the WTO Agreement as "an international treaty laying down contractual obligations and not *erga omnes* obligations."); Argentina in WT/DSB/M/42, pp. 14 (referring to SPS obligations as "contractual international obligations"). The contractual optic was also evident in *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) [the *Sutherland Report*]. See for instance "contractual requirements of membership" (para. 3), "the contractual detail of the WTO" (para. 200), "an institution founded on negotiated contractual commitments among governments" (para. 206), "countries should have contractual entitlement to capacity building support" (para. 306), "the WTO, in future, should contain provisions for a contractual right" (para. 311). For commentators supportive of this view see Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14:5 E.J.I.L. 907 (2003) p. 938 ("Put differently, the values, aspirations and priorities of close to 150 WTO Members remain far too diverse for WTO norms to be streamlined into constitutional-type obligations ..."). Similarly, Petros Mavroidis has referred to the WTO Agreement as an "incomplete contract". See Petros Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (Oxford: Oxford University Press, 2005). 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 Warren F. Schwartz & Alan O. Sykes, "The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization", 31 J. Legal Stud. S179 (2002) (arguing that the concept of efficient breach is a "central feature" of WTO dispute settlement).

<sup>38</sup> See John Jackson, *The World Trade Organization: Constitution and Jurisprudence* (1998); Gail Evans, *Lawmaking under the Trade Constitution* (1999) 44; Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community* (2005). Also Peter Gerhart, "Two Constitutional Visions of the World Trade Organization", 24 U. Pa. J. Int'l Econ. L. (2003) 1. For a critical appraisal of the constitutional view see Jeffrey Dunoff, "Constitutional Concepts: The WTO's Constitution and the Discipline of International Law", 17:3 E.J.I.L. (2006) 647. Robert Howse and Kalypso Nicolaidis have asserted that while it is possible to articulate "the challenge of global economic governance in constitutional terms" the real challenge is that "the legitimacy of the multilateral trading order requires greater democratic contestability." See Robert Howse & Kalypso Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?" in Marco Verweij and Tim Josling (eds.), 16:1 *Governance* 73 (2003).

<sup>39</sup> This is the understanding of the WTO Agreement by several GATT Contracting Parties. See Xu Yu-Chong and Patrick Weller, *The Governance of World Trade: International Civil Servants and the GATT/WTO* (Cheltenham: Edward Elgar, 2004) at 67-68. The term has also been used in international environmental law: Catherine Redgwell, "Multilateral Environmental Treaty-Making" in Vera Gowland-Debbas (ed.), *Multilateral Treaty Making: The Current Status of Challenges and Reforms Needed in the International Legislative Process* (The Hague: Martinus Nijhoff 2000) 81 at 91.

insistence to go beneath convenient rubrics like ‘contract’ or ‘constitution’ and to do the hard work of examining rights and obligations under the WTO Agreement. It is rights and obligations that set out the parties’ binding commitments under the treaty, and it is likewise rights and obligations that serve as the basis for the treaty’s theory.

I go on to suggest, however, that a purely dyadic conception of WTO law inherent in rights and obligations is incomplete. This is because over time we have to see these instruments working *together*, creating something that is, in effect, triadic. The law itself is composed of many additional elements – good faith and the like - that must be applied in order to achieve justice.<sup>40</sup> Once all of this is understood, we will have a preliminary conception of what WTO law is about.

Generally speaking, we might assume that the WTO Agreement and therefore WTO law are about *trade*. After all, the origins of the WTO Agreement lie in GATT, the General Agreement on Tariffs and *Trade* of 1947, which was later reformulated and expanded to become the General Agreement on Tariffs and *Trade* 1994, now part of the WTO Agreement. But as I will explain, the principal concern of the treaty is with something much more extensive than trade alone.

At base, the point I seek to make emphasizes a difference in regulatory perspective. The treaty's obligations do not operate *directly* to require specific quantities of trade as much as *indirectly* to maintain *conditions that promote trade*.<sup>41</sup> This changes the optic. To say that the treaty is about “trade” is to adopt a frame of reference in the here and the now. It is to conceive of the treaty's chief purpose as being to protect individual transactions taking place in the present, or perhaps more accurately, in the immediate past, since trade cannot be accurately quantified unless it has already been conducted.<sup>42</sup> On the other hand, to say that the treaty protects expectations concerning trade-related behaviour comes at matters a little more generally. It abstracts them and renders them timeless. The treaty is no longer about trade *per se*. Rather, it is about trade and all that trade depends upon, including, most vitally, the *freedom* to trade.<sup>43</sup>

This point was confirmed by the panel in *United States – Section 301*.<sup>44</sup> The issue there was the consistency of certain U.S. trade remedy legislation with the WTO Agreement. The complaint asserted that s. 304 of the U.S. Trade Act *required* the U.S. Trade Representative to determine whether another WTO member denied U.S. rights under the WTO Agreement irrespective of dispute settlement timelines. The panel disagreed and decided instead that the Trade Representative had the *discretion* to make such a determination. However, the panel went on to examine whether there remained a *risk* to private economic operators that the U.S. would invoke its discretionary law in a WTO-

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<sup>40</sup> This point was originally made by Edmund Burke, who recognized that rights and their jural correlatives, obligations, must be appreciated in the greater context of the legal and social environment in which they operate: William A. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004) at 43. See also Allott, *Eunomia*, above note 13 at 158ff.

<sup>41</sup> “It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.” *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (22 Dec. 1999) at para. 7.78.

<sup>42</sup> Alexander Keck and Alexander Raubold, “Forecasting Trade”, WTO Working Paper ERSD-2006-05 (May 2006).

<sup>43</sup> “The purpose of many [GATT/WTO] disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.” *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (22 Dec. 1999) at para. 7.73.

<sup>44</sup> *Ibid.*

inconsistent manner. The panel concluded that while there was such a risk, it was not a real one due to official assurances that the U.S. would never do so.<sup>45</sup> The decision emphasizes how the security and predictability afforded under the treaty are a vital part of its greater purpose, and how they together contribute to what is referred to in the preamble of the U.N. Charter as “life in larger freedom”.<sup>46</sup>

Nevertheless, the danger of founding a theory of law on an abstract concept such as the freedom to trade is potential confusion. Trade and the freedom to trade are closely related ideas, and when mixed up with the parade of ongoing events in the WTO, they make it hard to identify a theory of WTO law. We have to think deeply and carefully.

In this respect what I present in this article can be thought of as a meta theory, from the Greek *meta*, or afterwards, meaning that which is of a more fundamental character and which subsists after all is said and done. Such a theory requires us to conceive of matters broadly. We have to assess many things, keeping one eye on the particular and the other eye on the general, and needless to say, that is hard to do. At some point we must go beyond positive law. The real value of the exercise is not the ability to determine what this or that case says, but to look at the whole of the treaty and discern its “overall scheme”.<sup>47</sup>

### III. A THEORY OF WTO LAW

A theory is a “system of ideas”, and so in order to identify a theory of WTO law, we have to identify its principal ideas.

#### A. *Protecting Expectations: A Law of Obligations*

The starting point of a theory of WTO law is the realization that the principal aim of the WTO Agreement is the protection of expectations. An example is a concession by the United States to grant a certain tariff on textiles. The tariff is not about textile imports *today*. Rather, it is a promise by the U.S. government to treat textile imports in a certain way *in the future*. That promise gives security to textile producers and exporters in foreign countries that their goods will encounter a predictable kind of treatment when entering the U.S. In effect, the tariff serves as a basis for upstream decisions about investment, production and exports.<sup>48</sup> They may decide to invest in certain machinery, or use certain inputs, or locate their manufacturing in certain countries. Whatever the outcome, many decisions will turn on the expectations created by the U.S. tariff.

As to whom these expectations belong, it might be thought that expectations arising from WTO concessions or commitments are the “property” of the country or countries

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<sup>45</sup> “Accordingly, we find these statements by the U.S. express the unambiguous and official position of the U.S. representing, in a manner that can be relied upon by all Members, an undertaking that the discretion of the USTR has been limited so as to prevent a determination of inconsistency before exhaustion of DSU proceedings.” *Ibid.* at para. 7.125.

<sup>46</sup> The preamble of the U.N. Charter states “We the peoples of the United Nations determined ... to promote social progress and better standards of *life in larger freedom* ...”.

<sup>47</sup> “The greater our knowledge, the more obscure the overall scheme.” Claude Lévi-Strauss, *The Savage Mind* (1962) at 89.

<sup>48</sup> Warrick Smith and Mary Hallward-Driemeier, “Understanding the Investment Climate”, *Finance & Development* (March 2005) at 40.

that actually negotiate them. After all, those countries would be the ones most directly involved in the negotiations and would be the most likely to benefit. But as I will demonstrate, that is not at all the way in which expectations have been interpreted under the WTO Agreement. By virtue of the fact that the promises made under the treaty give rise to complex interactions that cannot be neatly disaggregated, it becomes effectively impossible to sort out whose expectations arise from the operation of the treaty or who should be compensated when they are breached. Bilaterally negotiated obligations thus become multilateral and absolute in application.<sup>49</sup>

In *India – Patent Protection*<sup>50</sup>, for example, a WTO panel concluded that the legitimate expectations of each of India’s trading partners could be taken into account in interpreting India’s compliance with the TRIPS Agreement. However, this position was later overruled by the Appellate Body which held that “[t]he legitimate expectations of the parties to a treaty are reflected *in the language of the treaty itself*.”<sup>51</sup> In *EC – Computer Equipment* the Appellate Body went on to suggest that the assessment of expectations had to be conducted with the collective membership of the WTO in mind.<sup>52</sup>

The great collectivizing mechanism is the General Most-Favoured-Nation Clause (MFN) of GATT Art. I:1, which states:

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.

The wording of the MFN clause makes clear that the obligations owed by one WTO member country to another “immediately and unconditionally” become obligations owed to *all* WTO countries.

Such a configuration has important consequences. To start with, it tends to stress *obligation*. The idea of a generalized obligation is something encountered in a number of legal traditions, most notably in the Hindu notion of *dharma*.<sup>53</sup> Likewise in WTO

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<sup>49</sup> “... most tariff concessions are negotiated bilaterally, but the results of the negotiations are extended on a multilateral basis.” *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R (13 July 1998) at para. 94.

<sup>50</sup> WT/DS50/R (5 Sept. 1997).

<sup>51</sup> WT/DS50/AB/R (19 Dec. 1997) at para. 45.

<sup>52</sup> *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (5 June 1998) at para. 109; for application in the context of GATS see *U.S. – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (7 Apr. 2005) at paras. 159-160.

<sup>53</sup> *Dharma* is difficult to define, but it has always been closely associated with the idea of duty. In traditional Hindu society individuals

law, the sense of duty upon member countries in the treaty system is all-pervasive. The law is more likely to be perceived as a body of obligations than as a balance of rights *and* obligations.

A second point is that the generality of obligations influences the kind of justice available. Under the DSU countries have the right to take each other before panels where they assert that a national law violates the WTO Agreement. If a WTO panel or the Appellate Body agrees with the claim, a recommendation can be made that the defendant bring its laws “into conformity” with the treaty. There is no automatic requirement of compensation. Instead, the defendant is left to modify its law, in many cases by withdrawal or amendment of the impugned measure.

The traditional explanation for this structure has been one of diplomatic convenience. It would be too difficult to sort out which countries have been harmed by the impugned measure, and a bare direction to bring the law “into conformity” allows the defendant some leeway in adjusting the law as it sees fit.<sup>54</sup>

The theory of WTO law put forward here regards matters differently. It recognizes that the system’s principal concern is not with individual expectations *per se*, but rather with how collective expectations are distributed among the WTO membership *as a whole*. The prevailing model is therefore one of *distributive justice*.<sup>55</sup> Distributive justice works to re-establish the arrangement of expectations according to the applicable metric of distribution, which in the case of the WTO Agreement is the equality mandated by MFN. When this can be done consensually, then the system is taken to work justly.<sup>56</sup>

An interesting aspect of the law’s operation in this mode is its logic. Traditionally, GATT and WTO law have functioned according to deductive logic, or the ‘logic of what must be’, based on presumptions about what is likely to happen. Thus, DSU Art. 3.8 states the presumption that a breach of WTO rules causes nullification or impairment. This gets at the fact that it is difficult to know with certainty what is

possess a *dharma*, or duty, and are charged with upholding it for the greater good of society. All of life is thus suffused with obligation: to one’s kin, to one’s associates, and to the wider forces of the cosmos. See H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000) 262ff.

<sup>54</sup> The idea is that it would be too difficult to disaggregate protective or discriminatory trade effects from other effects in the international trading system, a system which is by definition always changing: see *United States – Taxes on Petroleum and Certain Imported Substances*, B.I.S.D. 34<sup>th</sup> Supp. 136, para. 5.1.9 (adopted June 17, 1987). See also Robert Hudec, *The GATT Legal System and World Trade Diplomacy* 30 (Salem: Butterworths Legal Publishers, 1990) (discussing the evolution of GATT dispute settlement from “techniques of the diplomat’s jurisprudence”).

<sup>55</sup> 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 a person is 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.” It presupposes some socially agreed means of allotment. Consequently, the implicit metric is proportionate: you get what you’re entitled to. See Aristotle, *Nicomachean Ethics* (R. Crisp ed.) (Cambridge: Cambridge University Press, 2000) at 85. See also Nicholas Rescher, *Fairness: The Theory and Practice of Distributive Justice* (New Brunswick: Transaction Publishers, 2002).

<sup>56</sup> This is undoubtedly behind the stated preference in DSU Art. 3.7 for “a solution that is *mutually acceptable* to the parties ... and consistent with the covered agreements.” It is further reinforced by the statement in Art. 3.7 that “the aim of the dispute settlement mechanism is to secure a *positive* solution to a dispute.” What “positive” means in the context is unclear, but its traditional connotation as something affirmative suggests that the outcome is not only “mutually acceptable to the parties” in the manner of a win-win solution, but also that it “develop[s] and strengthen[s] relationships among those involved.” Note also the wording of DSU Art. 3.5, which specifies that all solutions to matters raised in dispute settlement are not to “nullify or impair benefits accruing to *any* Member”, thereby emphasizing the idea that solutions must be broadly acceptable and beneficial to the *entire* WTO membership.

actually happening. Instead, the law is based on what is assumed to occur rather than any careful inquiry into what actually occurs.

### B. *Facilitating Adjustment: A Law of Rights*

I have described WTO law as a law of obligations, something which is accurate as a preliminary description. This is because countries assume obligations towards other countries under the treaty, and these are extended to all other WTO members by virtue of MFN.

Still, if we examine the treaty closely, it is also possible to identify something else happening. Rules exist under the WTO Agreement that allow governments to respond to certain realities arising in the course of trade. By realities I mean the world as it is *actually encountered* versus the way it is *prospectively expected or perceived*. The law in this mode is more evidently a regime of *rights*.

This point was made by the panel in *Turkey – Textiles*, where the issue was whether Turkey had the *right* to adopt certain import restrictions on textiles and clothing prior to entering into a customs union with the EC. Turkey's argument was that it could adopt the EC's restrictions without the need for renegotiation with third countries because the restrictions were already part of the EC's WTO commitment. The panel observed:

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. We consider that, even if the formation of a customs union may be the occasion for the constituent member(s) to adopt, to the greatest extent possible, similar policies, the specific circumstances which serve as the legal basis for one Member's exercise of such a specific right cannot suddenly be considered to exist for the other constituent members.<sup>57</sup>

The panel's comments suggest an important distinction in the law. This is that WTO law as a law of rights is much less cohesive than WTO law as a law of obligations. A reality for one country will not be the same reality for every other country.<sup>58</sup> Consequently, WTO law in this second mode is made up of a range of apparently unconnected rights arising in different circumstances. Their variability makes them more difficult to discern.

Rights under the WTO Agreement are further diminished by their *conditionality*. The

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<sup>57</sup> *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/R (31 May 1999) at para. 9.184 [emphasis added].

<sup>58</sup> This tension was at the heart of *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (7 April 2004) where the Appellate Body had to distinguish between treatment of developing countries as a group and their treatment as members of sub-groups or individually. The Appellate Body observed at para. 169 that: “[W]e are of the view that the objective of improving developing countries’ “share in the growth in international trade”, and their “trade and export earnings”, can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, *as well as* those interests shared by sub-categories of developing countries based on their particular needs.” [emphasis in original].



right might be the right of a country to take anti-dumping or countervailing duty action. Most often the issue in dispute settlement is whether the conditions precedent to an exercise of that right - such as a properly conducted investigation - have been fulfilled.

These aspects of the law were highlighted in *Argentina – Footwear Safeguard*.<sup>59</sup> In that case the issue was whether Argentina had met requirements to impose safeguards on imports of footwear from the EC. The Appellate Body observed:

... it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of the GATT 1994, which are fundamental to the *WTO Agreement*. As such, safeguard measures may be applied only when *all* the provisions of the *Agreement on Safeguards* and Article XIX of the GATT 1994 are clearly demonstrated.<sup>60</sup>

The Appellate Body's comments in *Argentina – Footwear Safeguard* also demonstrate another feature of reality-based disciplines: the insistence on a “clear showing”.<sup>61</sup> This differs markedly from the presumption of nullification or impairment observed in the law of expectations.<sup>62</sup> The logic in this mode is inductive, or the ‘logic of what is’, based on empiric evidence. This is particularly true where the right is exercised provisionally or anticipatorily.<sup>63</sup> The exact requirements to satisfy such a need for evidence will vary according to the discipline involved and the particular circumstances of each case.<sup>64</sup>

<sup>59</sup> *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (14 Dec. 1999).

<sup>60</sup> *Ibid.* (Dec. 14, 1999) at para. 95.

<sup>61</sup> See for example *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (10 Jan. 2001) at para. 162-164 (“determination of whether a measure determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying *impact of the law or regulation* on imports or exports.”). Evidentiary obligations can also be found in ADA Arts. 3.4 (impact examination to include an evaluation of all relevant economic factors and indices”), 3.5 (causal relationship determination “shall be based on an examination of all relevant evidence before the authority”), Annex II (determinations permissible on the basis of facts available), 5.3, 5.8 and 6 (accuracy and adequacy of evidence, and opportunity to present), 10.7 (sufficiency of evidence) and 11.2 (evidence required for revocation). For various instances of application see *U.S. – Measures Affecting Imports of Softwood Lumber from Canada*, B.I.S.D. 40<sup>th</sup> Supp. 358 (27-28 October 1993) at para. 332; *U.S. – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAM) of One Megabit or Above from Korea*, WT/DS99/R (29 Jan. 1999) at para. 6.43; *Mexico – Anti-Dumping Investigation on Imports of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (28 Jan. 2000) at para. 7.97; *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R (19 June 1998) at para. 7.77; *U.S. – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS 184/R (28 Feb. 2001) at para. 7.153; see also application of SCM Arts. 4.2, 11 and 12, CVA Art. 8.3, and Annex 1; SPS Art. 3.3 (scientific justification) and *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26,48/AB/R (16 Jan. 1998) at para. 184; PSA Art. 2.2 (evidentiary standards for price verifications); DSU Art. 26.1 (detailed justification in support of non-violation claims).

<sup>62</sup> See DSU Art. 3.8 (“In 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.”)

<sup>63</sup> See for example Safeguards Agreement Art. 6 (provisional safeguard possible “in critical circumstances” and pursuant to a preliminary determination based on “clear evidence”), Subsidies Agreement Art. 17.1(b) (provisional measures possible where preliminary affirmative determination that “subsidy exists and that there is injury to a domestic industry”) and Antidumping Agreement Art. 7.1(ii) (provisional measures possible where preliminary affirmative determination of “dumping and consequent injury to a domestic industry”). See also the standard for threatened injury: SAF Art. 4.2(a), SCM Arts. 15.7-8; AD Art. 3.7. In this respect see also *U.S. – Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia*, WT/DS177,178/AB/R (1 May 2001) at para. 125 (where in interpreting the phrase “threat of serious injury” the Appellate Body emphasized the phrase “clearly imminent” which it considered to mean “that there must be a high degree of likelihood that the anticipated serious *injury* will materialize in the very near future.”).

<sup>64</sup> This has led to concern about fact-finding ability in WTO dispute settlement. See Claus-Dieter Ehlermann & Lothar Ehring, “WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body’s Experience”, 26 *Fordham Int’l L.J.* 1505 at 1542 (2003) (observing that “[d]espite the extensive right to seek information of every panel, it is generally believed that the

The requirement of evidence is linked to the law's aspect in this mode as contractual and justice's aspect as *corrective*, that is, as seeking to repair harm done. We can easily see how the exercise of a right by one country could give rise to a claim for reparation from another country, a possibility contemplated in the remedy of negotiated compensation under DSU Art. 22.2.<sup>65</sup> It is also easy to see how the underlying ethos of the law is justice-as-fairness, that is, the system seeks to repair *to the extent appropriate in the circumstances*. This is not necessarily equal to the harm done.<sup>66</sup>

A further feature serving to limit rights under the WTO Agreement is their *mutuality*. WTO law as a law of rights cannot be exercised in such a way as to eviscerate the rights of other WTO members, a doctrine known as abuse of rights (*abus de droit*).<sup>67</sup> This point was emphasized in *U.S. – Shrimp* where the issue was the right of the U.S. to invoke the exception in GATT Art. XX(g) involving conservation measures.<sup>68</sup> The U.S. raised the exception as a defence to its violation of GATT Art. XI:1, the prohibition on quantitative restrictions, since the U.S. legislation in question effectively prohibited the importation of shrimp that was not caught in a “turtle-friendly” manner.

The Appellate Body agreed that the U.S. had met the terms of the exception, but then went on to analyze whether it had fulfilled the conditions of the preamble, or “chapeau”, of Art. XX.<sup>69</sup> In doing so the Appellate Body observed:

Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under

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investigation of facts is among the weakest spots of the panel procedure.”). Petros Mavroidis, “Essay: Dispute Settlement Procedures and Mechanisms”, 16 *Ariz. J. Int'l & Comp. L.* 225 at 258 (1999) (“The WTO has been criticized ... for its fact-finding defects ...”).

<sup>65</sup> “If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance ... such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.”

<sup>66</sup> The possibility that GATT and WTO dispute settlement might offer less than the harm done was adverted to in *United States – Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82 (9 July 1992) at para. 5.43 where the panel suggested that there could be situations where a corrective remedy would be onerous due to the passage of time and the difficulty of calculating reimbursement. It has also been implicit in several other instances of authorized retaliation under the WTO. In those cases recovery was permitted only to the extent determinable or where recovery would not impair the trading system. These recall outcomes experienced in Anglo-American contract law where the plaintiff is *not* entitled to recover the full value of their loss due to the greater social cost in making the plaintiff whole: *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962); *Ruxley Electronics and Construction Limited v. Forsyth*, [1996] A.C. 344 (H.L.). Consequently, fairness is a variable standard tailored to the circumstances.

<sup>67</sup> Reference to the doctrine can be found in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R at para. 152 (12 Oct. 1998). It is traditionally a doctrine of the civil law. Its application in international law is discussed in Ian Brownlie, *System of the Law of Nations: State Responsibility – Part I* 52 (1983).

<sup>68</sup> *U.S. – Shrimp*, *ibid.*

<sup>69</sup> The preamble to GATT Art. XX provides that “Subject to the requirement that such measures 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 international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...”.

Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.<sup>70</sup>

A similar observation was made in *U.S. – Line Pipe Safeguards*, where the dispute involved the U.S.'s right to impose safeguards against imports of certain steel pipe from Korea. The Appellate Body observed:

There is, therefore, a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against "fair trade" beyond what is necessary to provide extraordinary and temporary relief. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the *Agreement on Safeguards*.<sup>71</sup>

The Appellate Body's statements in *U.S. – Shrimp* and *U.S. – Line Pipe Safeguards* illustrate the fact that the WTO Agreement as a law of rights involves action that is highly conditioned and contextualized, and that exists within a larger matrix of rights *and* obligations.

### C. Promoting Interdependence: A Regime of *Lex Specialis*

The classification of WTO law into a law of obligations and a law of rights is attractive since it emphasizes both the WTO regime's *legality* (i.e. as an order of rights *and* obligations) and unity (i.e. as a network of obligations countered by rights). At the same time, the theory's coherence implies that there is something else arising from the interaction of its parts, something which only becomes apparent across time. This is the idea of WTO law as a regime of *lex specialis*.

<sup>70</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Oct. 12, 1998) para. 156 (emphasis in original).

<sup>71</sup> *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (15 Feb. 2002) at para. 83 (emphasis in original).

The term *lex specialis* has no fixed meaning in international law.<sup>72</sup> We can take from its Latin roots, however, that it is a ‘special’ or ‘exceptional’ body of law distinct from the law that which is regularly applied. The extent of displacement is determined by the *lex specialis*.<sup>73</sup> Some idea of the special character of this regime comes by comparing WTO obligations with those typically found in international law.

The International Law Commission’s Articles on State Responsibility suggest that in the typical bilateral relationship rights are linked to corresponding obligations. Thus, ASR Art. 2(1) provides that a country’s wrongful act imposes upon it an *obligation* of state responsibility. ASR Art. 42(a) further specifies that this obligation is owed in the first place to the “injured state”, the injured state being defined as “the State whose *individual right* has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act.”<sup>74</sup> ASR Art. 42(b) goes on to specify that the obligation may be owed to the international community as a whole, or to a subset thereof, and Art. 48 contemplates that responsibility may be invoked by a state *other than an injured state* provided that the obligation is owed to a group of states and is established for the group’s collective interest, or is an obligation owed to the international community as a whole.

The dominant impression left by ASR is therefore that obligations under international law are of two types: either bilateral *or* collective, not both. Yet if we look carefully at the WTO Agreement, it becomes clear that WTO obligations have a dual quality. To be sure, MFN operates to presumptively multilateralize all obligations under the treaty. Nevertheless, there remain significant bilateralizing tendencies that work to counter this.

For instance, a purely collective arrangement would allow *any* country that is a member to contest a breach since the fundamental interest at stake belongs to *all*, yet the WTO Agreement does not do this. Instead, it requires individual countries to launch claims and only permits them to retaliate where they have actual trade with the defendant.<sup>75</sup> Likewise, countries invoking third party status in dispute settlement are required to show a “substantial interest”.<sup>76</sup> More generally, the Appellate Body has made references to “countries *concerned*”, a phrase which suggests that there are issues of concern within the treaty that extend to some, but not necessarily all, WTO members.<sup>77</sup>

This intermediate position can be understood by referring to the ASR and its

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<sup>72</sup> Instead, it is often transliterated directly as a “special law” to distinguish it from the more usual consequences of state responsibility. See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 34 (13 April 2006).

<sup>73</sup> “It will depend on the special rule to establish the extent to which the more general rules on State responsibility ... are displaced ...”. James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* 307 (2002) [hereinafter *Crawford*].

<sup>74</sup> *Crawford*, *ibid.*, 254.

<sup>75</sup> “... a [WTO] Member’s legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU.” *EC Regime for the Importation, Sale and Distribution of Bananas (Recourse to Arbitration under Art. 22.6)*, WT/DS27/ARB (April 9, 1999) at para. 6.10.

<sup>76</sup> Chi Carmody, “Of Substantial Interest: Third Parties under GATT”, 18 *Mich. J. Int’l L.* 615 (1997).

<sup>77</sup> *EC – Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R (Mar. 7, 2003) at para. 7.125; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) at para. 7.55.

accompanying Commentary. ASR Art. 33(1) provides that obligations “may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.” The Commentary goes on to clarify that the scope of the obligation is dictated both by the *nature* of the primary rule and the *situation* encountered in its breach. Thus, it is entirely conceivable that WTO obligations might have a dual character and, strictly speaking, be neither wholly bilateral nor wholly collective, but rather some combination of the two.

I take the view that hybridity or combination is a good way to think about WTO obligations: bilateral in some instances, multilateral in most others. Elsewhere I have suggested that such dualism may be evidence of WTO obligations as fundamentally interdependent, that is, conditioned on the observation by other countries of their obligations under the treaty.

What does this peculiar regime of law amount to? The immediate overarching purpose of WTO law is the promotion of interdependence.<sup>78</sup> That comes about as a result of the interaction of rights and obligations and is apparent in two respects: one is the way in which national bureaucracies *function*, the other is the way in which economic operators *think*.<sup>79</sup> In both instances, the treaty creates a new situation.

A “new situation” is a catchall phrase employed in law to denote a shift in thinking. The shift occurs because national bureaucrats are more likely to take account of international law and to consult, or at least to advert to, international standards, while economic operators are more likely to look for trading partners that offer the most attractive terms regardless of nationality. In both cases, bureaucrats and economic operators are more likely to know, or at least rely upon, the rights and obligations of foreign governments. The result is greater interdependence.

The type of logic at work here is abductive logic, or the ‘logic of what might be’. This demands neither presumptions nor proof in all instances. Instead, the law is based on what *will* occur in the future based on the transformative framework arrived at.

One notable example of transformation is the *Doha Declaration on TRIPS and Public Health*. The *Declaration* was something arrived at gradually through efforts in many fora, but eventually took its final shape in a consensual pronouncement by the WTO membership in November 2001. Outwardly, the *Declaration* would appear to confirm an event-driven, interstitial view of the treaty, or in other words, a sort of “big bang” theory about the origins of WTO law. Reality, however, is different.

Haochen Sun has done a masterful job of tracing the transformation at work in the

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<sup>78</sup> Donald McRae has written: “... international trade highlights the concept of *interdependence*. In fact, when we talk of international trade law and of international law we are dealing with two regimes, with two systems that in quite a fundamental way are talking about different things.” Donald M. McRae, *The Contribution of International Trade Law to the Development of International Law* 260 Recueil des Cours 99, 117 (1996) [emphasis added].

<sup>79</sup> This observation is consistent with Philip Allott’s insistence on the ability of international legal arrangements to transform the way people think. “The history of human societies contains many examples of revolutionary change not only in real constitutions of societies but also in their ideal self-constituting, *revolutions of the mind*.” Allott, *Health*, above note 18 at 81 (emphasis added).

drafting and adoption of the *Declaration*.<sup>80</sup> He illustrates how a number of countries and non-governmental organizations were concerned about the hard-line approach to pharmaceutical patent protection in *India – Patent Protection*<sup>81</sup> and how they sought to recast the issue of compulsory licencing as one of human rights by discussing it in the World Intellectual Property Organization, the Office of the U.N. High Commission for Human Rights, the U.N. Sub-Commission on Human Rights, the World Health Organization and its Assembly, and the U.N. General Assembly.<sup>82</sup> These discussions had the desired effect. Each body adopted statements broadly supportive of a country’s right to compulsorily licence in order to protect public health.

Sun also details how litigation launched by the branded pharmaceutical companies in South Africa in 1998 and by the United States against Brazil in the WTO in February 2001 effectively backfired because it depicted the branded pharmaceutical companies as profit-driven and the global public in many developing countries as denied the right to human health.<sup>83</sup> These perceptions were reinforced by the apparently self-interested behaviour of certain developed countries in response to an anthrax scare in the fall of 2001.<sup>84</sup>

The outcome of these events was a certain ripening of the compulsory licencing issue internationally. A new “balance” embodying the emerging global consensus about intellectual property protection was ready to be struck. The *Doha Declaration on TRIPS and Public Health* of November 2001 achieved this by acknowledging that “intellectual property protection is important for the development of new medicines” and also confirming that “the TRIPS Agreement does not and should not prevent [WTO] Members from taking measures to protect public health.”<sup>85</sup> Proceeding from these principles, the *Declaration* recognized that the flexibility inherent in the TRIPS Agreement allows each member “the *right* to grant compulsory licences and the freedom to determine the grounds on which such licences are granted.” The *Declaration* likewise recognized that “[e]ach Member has the *right* to determine what constitutes a national emergency or other circumstances of extreme urgency”, specifically mentioning “those relating to HIV/AIDS, tuberculosis, malaria and other epidemics ...”.

The *Doha Declaration on TRIPS and Public Health* was able to establish a framework for resolving many questions in a far more comprehensive manner than the typical result in WTO dispute settlement. It possessed the added advantage of being interpretative in nature and therefore not necessarily requiring immediate action on implementation. However, one issue that it did not resolve was identified in paragraph 6 of the *Doha Declaration*:

We recognize that WTO Members with insufficient or no manufacturing

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<sup>80</sup> Haochen Sun, “The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health”, 15 Eur. J. Int’l L. (2004) 123 [hereinafter *Sun*].

<sup>81</sup> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (19 Dec. 1997).

<sup>82</sup> *Sun*, above note 79 (Feb. 2004) at 127-32.

<sup>83</sup> *Ibid.*, 132-133.

<sup>84</sup> *Ibid.*, 133-134.

<sup>85</sup> *WTO Declaration on TRIPS and Public Health*, WT/MIN(01)/DEC/2 (20 Nov. 2001).

capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licences under the TRIPS Agreement.

The *Declaration* therefore instructed “the [WTO] Council for TRIPS to find an expeditious solution to this problem and report to the General Council before the end of 2002.”

This statement provided impetus for negotiation and agreement on the *Decision on the Implementation of Paragraph 6 of the Doha Declaration* in August 2003.<sup>86</sup> The *Decision* solved the problem of exporting compulsorily licenced pharmaceuticals to countries with little pharmaceutical manufacturing capacity by waiving the requirement in TRIPS Art. 31(f) that “any such use shall be authorized *predominately for the domestic market of the Member authorizing such use.*”<sup>87</sup> The *Decision* effectively allows – but does not require – countries to identify whether they will be eligible “importing Members”, that is, whether they will use the system established by the *Decision* to import compulsorily licenced pharmaceuticals, and in parallel, whether they wish to be designated as “exporting Members” to produce pharmaceuticals for export to eligible importing WTO members.<sup>88</sup>

What is striking about both the *Declaration* and the *Decision* in light of the theory put forward above is the way in which they are documents about the arrangement of *rights and obligations*. Importing countries are obliged to notify the WTO TRIPS Council of the quantities of products needed, to confirm insufficient manufacturing capacity, and then proceed to grant compulsory licences. Exporting countries are likewise obliged to issue compulsory licences, to indicate how much product is being produced, to ensure distinctive packaging, and so forth.

The obligations set out in the *Decision* - and the rights they infer - are fundamentally about the way in which countries *will work together in future*, a key feature of *transformative justice*. Transformative justice does not presume wrongdoing. Instead, it aims to resolve conflicts of interest through the exploration of options and the formulation of acceptable responses. A vital attribute of transformative justice is that it seeks to develop and strengthen relationships among those involved.<sup>89</sup> In the case of the *Decision* this is further emphasized by overarching obligations of technical and financial cooperation to prevent the re-exportation of compulsorily licenced products, to develop systems of regional patents, and to “cooperate in paying special attention to the transfer of technology and capacity-building in the pharmaceutical sector.”<sup>90</sup>

<sup>86</sup> *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (2 Sept. 2003).

<sup>87</sup> The *Decision* also waives TRIPS Art. 31(h) which provides that in securing a compulsory licence for a patented product “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization.”

<sup>88</sup> The *Decision* was supplemented in December 2005 by a move to permanently incorporate the operative provisions of the *Decision* into the TRIPS in the form of a projected TRIPS ‘Art. 31bis’. The amendment requires ratification by two-thirds of the WTO membership, or approximately 100 countries. As of the deadline for doing so in December 2007 only 13 countries had ratified. In December 2007 the ratification deadline was postponed until 31 December 2009. See WT/L/711 (21 Dec. 2007).

<sup>89</sup> *Law Commission of Canada, From Restorative Justice to Transformative Justice: Discussion Paper*, Law Commission of Canada Catalogue No. JL2-6/1999 (1999).

<sup>90</sup> *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540, Art. 7 (2 Sept. 2003).

The *Decision* is a useful example of what the interaction of rights and obligations under the WTO Agreement can achieve. At the same time, it is not problem-free. To recall the Appellate Body's statement in *U.S. – Shrimp*, “[t]he location of the line of equilibrium ... is not fixed and unchanging.” This suggests that the balance struck in documents like the *Decision* is fluid and may, or may not, be broadly acceptable depending upon its ability to reflect the deeper moral sense of what is required. In the aftermath of the *Decision*, for instance, there continues to be skirmishing over compulsory licencing apparent in the way that countries have implemented the *Decision* and the small number of notifications received from importing countries so far.<sup>91</sup>

#### IV. CONCLUSION

In this article I have put forward a theory of WTO law. It is a *juridical* theory, or in other words, a theory of law based on justice. The analysis involves identification of the fundamental elements of WTO law and seeks to answer the principal question of analytic jurisprudence: the question of what the law *is*.

The development of a theory is facilitated by the close correspondence in WTO law between collective obligations and distributive justice on the one hand, and individual rights and corrective justice on the other. When observed together, the two idea complexes can be seen to operate reflexively in the manner of moieties. A “moiety” is a borrowing from the French term *moitié*, or half, and in its standard English meaning is used to suggest the greater whole that the half is a part of.<sup>92</sup>

I offer these ideas not only as a means of thinking more clearly about the treaty as a whole, but also to explain phenomena that are observed in relation to WTO law. At a glance, few of them appear entirely rational: the bare requirement in dispute settlement to bring laws “into compliance”, the relatively liberal rules on third-party standing, the generality witnessed in so many instances, the particularity in others, the evidentiary presumptions versus the requirements of proof, the debate over the WTO Agreement as a “contract” versus as a “constitution”, and so forth.

The identification of these two moieties – of rights and obligations, of “real” and “ideal” – at the heart of the treaty yields an important insight. So far we have struggled to understand it largely in terms of the debate between the treaty as a contract or as a constitution.

In this article, however, I have posited that the two conceptions work jointly so that the WTO Agreement is in reality a hybrid. This hybridism is apparent at every level: juridically in the interplay between distributive and corrective justice and between and justice-as-equality and justice-as-fairness, substantively in the characterization of WTO obligations as either collective or bilateral, temporally in the gaze of the law to the

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<sup>91</sup> In July 2007 Rwanda made the first notification under the Paragraph 6 system when it notified the WTO about the importation of 260,000 doses of TriAvir, a combination anti-retroviral, from Canada. See IP/N/RWA/1 (19 July 2007).

<sup>92</sup> “Moiety”, *The Oxford English Dictionary*, 5<sup>th</sup> ed. (Oxford: Oxford University Press, 2002) at 1809.



future and the past, and kinetically in the application of law to subject matter that is thought of as either dynamic or static. To be sure, the distributive, equality-based, prospective and dynamic aspect of the law takes priority, but this is matched in many instances by a secondary aspect that is corrective, fairness-based, retrospective and static, so that the two ultimately function *together*.

Of course, to say all of this casts much of what is currently accepted about WTO law in question. The received account of WTO law is largely historical and suggests that what has arisen has been created by the will of states and findings of dispute settlement, so that the law is understood something willful and positive.<sup>93</sup> Accordingly, it follows no independent ‘design’.

For the reasons set out here, however, I disagree. This article has suggested that an underlying theory of WTO law *is* discernible, even if it does not always exhibit perfectly or systematically. The remaining hurdle to overcome is how we tend to view WTO law, which is textually, according to individual cases, so that conceptual coherence is often lost.

It is also true that the theory put forward here is not something easily understood. As mentioned, a theory is a complex undertaking and is subject to many simplifying assumptions, in particular, that the principal purpose of WTO law is to protect expectations, that its subsidiary purpose is to adjust to realities, and that these two purposes interact to promote interdependence. The simplicity of this theoretical framework immediately raises many questions and leads to the frustrating tendency that “everything must be discussed at the same time.”<sup>94</sup>

And even if all of the ideas I have put forward are accepted, it is still possible to say, in effect, so what? How does a theory of WTO law make any difference, or help us win cases? Here the answer is that a theory can help to make sense of what we see happening. It allows us to explain, to categorize, and from the resulting arrangement to make connections between the treaty's disparate features. Things fall into place. Order becomes apparent.

Order is important because there is something very slight, almost surreal, about the WTO Agreement. Heavy reliance on expectations makes the treaty appear at times like an “emperor with no clothes.” That impression is reinforced by continuing examples of non-compliance, and by the stark fact that, at least in the short term, international trade has produced both winners and losers. All of this taken together makes it hard to escape the sense that we are being asked to believe in too much.<sup>95</sup>

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<sup>93</sup> See for instance Robert Hudec, *The GATT Legal System and World Trade Diplomacy* (London: Praeger, 1975) and Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem: Butterworths, 1993); John Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969); Kenneth Dam, *The GATT: Law and International Economic Organization* (Chicago: The University of Chicago Press, 1970).

<sup>94</sup> Robert Skidelsky, *John Maynard Keynes: The Economist as Saviour 1920-1937* 585 (New York: Penguin, 1992).

<sup>95</sup> It may be that this thinking takes us to the edge of myth. Much work has been done by anthropologists on the role of myths in societies, and in particular, on the way in which they served to shape a collective consciousness. Karen Armstrong, *A Short History of Myth* (Toronto: Knopf, 2005). For a recent view of economics as a “faith” see Duncan K. Foley, *Adam's Fallacy: A Guide to Economic Theology* (Cambridge: Harvard University Press, 2006).

Again, however, it is important to consider carefully what the treaty involves to see that its basic arrangement *does* make sense. The real issue is one of balance between the idea-complexes, or moieties.

In saying this I do not want to be taken to be describing something perfect. The theory of WTO law conceives of the law's subjects – countries – as fixed in their relations with each other. All countries are formally equal, and all are bound together in a steadily growing web of interdependence.

A critical eye will recognize, however, that the equality of MFN masks great *inequality* and that the interdependence fostered by WTO law can then, by virtue of structural flaws inherent in the pattern of international economic relations, be accused of consigning the majority of countries to their existing status and not some brighter future. Consequently, the theory I have posited here starts to look a lot less organic and acceptable and a lot more artificial and objectionable. The central question of normative jurisprudence - that is, what WTO law *should be* – suddenly, and very forcefully, reasserts itself.<sup>96</sup>

Yet the issue of what law *should be* is complex and cannot be dealt with fully here. My aim in this article has been to set out a general theory of what WTO law *is* and to explore some of its details. That focus originates in dissatisfaction with the state of our current understanding and with the conviction that “the greater our knowledge, the more obscure the overall scheme.”<sup>97</sup> One could be skeptical about the possibility of such a comprehensive explanation and its ability to solve existing problems, but if all that I have described is simply a coincidence, then it is doubtless a very great one.

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<sup>96</sup> “Nor can you rely on any embedded notion of equality to escape the role which the tradition accords you. If no one can create the tradition, no one can escape its teaching and the roles it defines, except by departure (and there may be no place to go). This represents a classic problem that no one, anywhere, has solved. How can a communal form of organization avoid disequilibrium, and inequality, of social role?” H. Patrick Glenn, *Legal Traditions of the World* 67-68 (Oxford: Oxford University Press, 2000).

<sup>97</sup> Claude Lévi-Strauss, *The Savage Mind* 89 (1962).