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Theory and Theoretical Approaches to WTO Law

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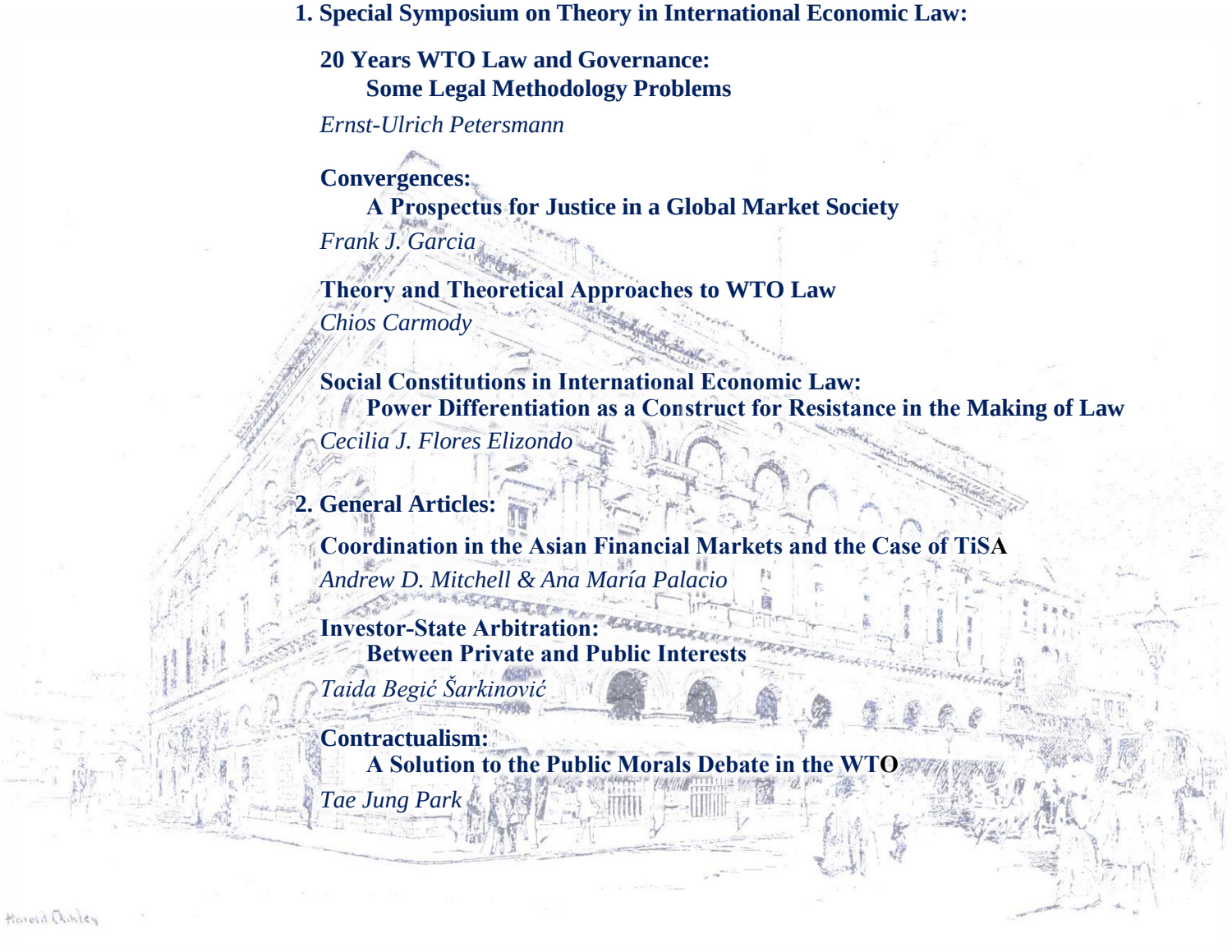

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Theory and Theoretical Approaches to WTO Law

Chios Carmody*

ABSTRACT: *This article examines the role of theory in relation to the law of the World Trade Organization (WTO), and more broadly, international economic law. It posits that an absence of agreement about an underlying theory of WTO law can be traced to lack of clarity about what a 'theory' is as well as the fact that the current vogue for interdisciplinary approaches to law means that WTO law, in particular, is analysed through non-normative frameworks that are removed from the law's legality. The article goes on to examine three theoretic frameworks – textual, political, and economic – that have been used to explain WTO law. The article outlines how, in each case, the theoretic framework comes up short. It then proceeds to outline an 'integrated' theory of WTO law based on interconnected systems of ideas about community, justice and law.*

1. INTRODUCTION

This article examines the role of theory in relation to the law of the World Trade Organization (WTO), and more broadly, international economic law. For some time both treaty interpreters and commentators have noted an absence of any consensus on an underlying theory of the WTO Agreement and its legal system.[1] This article seeks to explain why that is.

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[1] Thomas Cottier *et al.*, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland* (London: Cameron May, 2005), at 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 clearer on the subject of an underlying theory. For instance, John Jackson 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* (2nd ed., Cambridge: MIT Press, 1998), at 339. In later work he 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), at 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 Ronald St. J. Macdonald and Douglas M. Johnston (eds.), *The Structure and Process of International Law* (The Hague: Martinus Nijhoff, 1983), 227-62, at 227; Andrew Caplin and Karla Krishna, 'Tariffs and the Most-Favoured Nation Clause: A Game Theoretical Approach, *Seoul Journal of Economics*, 1988, 1: 267-89; Carolyn Rhodes, *Reciprocity, U.S. Trade Policy and the GATT Regime* (Ithaca: Cornell University Press, 1993); Warren F. Schwartz and Alan O. Sykes,

It posits that an absence of agreement about an underlying theory of WTO law can be traced to two issues. One involves a lack of clarity about what a theory is. The term 'a theory' is used with varying degrees of rigour today. Casual usage means that it often describes ideas, principles or random sets of observations that have only a vague connection with each other. Existing theories or approaches to WTO law therefore do not completely satisfy the definition of a 'system of ideas'. Another issue is that the current vogue for interdisciplinary approaches to law means that WTO law, in particular, is analysed through non-normative frameworks that are somewhat removed from the law's legality. As such, they are only partly successful in accounting for the WTO legal system's principal features. What are some of these?

Ever since its inauguration in 1995 the WTO legal system has elicited attention for a number of its peculiarities. For example, the system, which originated in tariff concessions by countries under the General Agreement on Tariffs and Trade of 1947 (GATT), is subject to a dispute settlement mechanism whose principal remedy is a recommendation to an offending country to bring its measures 'into conformity' with the WTO Agreement.[2] No compensation is payable. This bare direction appears to be at odds with the traditional conception of a legal remedy as corrective.[3] Another peculiarity is the system's insistence on the 'stability and predictability' of concessions and commitments, and by extension, the constancy of the entire legal framework. WTO law has become notable for the way that it stresses the reliability of it and its members' legal obligations, yet why this should be a preoccupation of the system is not entirely clear.[4] A further peculiarity is the way that the system is premised on presumption. There are many instances in WTO law where no evidentiary showing is required.[5]

'Towards a Positive Theory of the Most Favoured Nation Obligation and Its Exceptions in the WTO/GATT System, *International Review of Law and Economics*, 1996, 16(1): 27-51; Petros Mavroidis, '"Like Products": Some Thoughts at the Positive and Normative Levels', in Thomas Cottier and Petros Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law : Past, Present and Future* (Ann Arbor: University of Michigan Press, 2000), 125-50; Meinhardt Hilf, 'Power, Rules and Principles: Which Orientation for WTO/GATT Law?', *Journal of International Economic Law*, 2001, 4(1): 111-30; Kyle Bagwell and Robert W. Staiger, 'The Theory of Trade Agreements' in *The Economics of the World Trading System* (Cambridge; MIT Press, 2002), 13-39. Book-length treatments are also available. See Frank J. Garcia, *Trade, Inequality and Justice: Towards a Liberal Theory of Just Trade* (Ardsley: Transnational Publishers, 2003); Raj Bhala, *Trade, Development and Social Justice* (Durham: North Carolina Academic Press, 2003).

[2] See DSU Art. 19.1.

[3] Cass Sunstein has written, 'Principles of compensatory justice are the staple of Anglo-American legal systems. One person harms another; the purpose of the lawsuit is to ensure that the victim is compensated by the aggressor … It is especially important for present purposes that compensatory principles also embody status quo neutrality. The legal system restores the status quo. It does not attempt to change anything.' Cass R. Sunstein, *The Partial Constitution* (Cambridge, M.A.: Harvard University Press, 1993), at 320-321. See also R. Rajesh Babu, *Remedies under the WTO* (Leiden, Boston: Martinus Nijhoff, 2012).

[4] As we will see, the concern with stability and predictability in WTO law is tied to the system's emphasis on protecting expectations. The protection of expectations is key to its normativity. For instance, in *U.S. – Oil Country Tubular Goods* the WTO Appellate Body expressed the view that a particular document 'has normative value, as it provides administrative guidance and *creates expectations* among the public and among private actors.' WT/DS268/AB/R, adopted 29 November 2004, para.187 [*emphasis added*]. Likewise, in *China – Audiovisual* the panel panel observed that certain administrative guidance of the Chinese government was reviewable under WTO law because it '*creates the expectation* that going forward the government agencies addressed therein will conduct themselves in their administration of foreign investment in the cultural sectors in a manner consistent with the provisions set forth in the *Several Opinions*.' WT/DS363/R, adopted 12 August 2009, para. 7.173.

[5] Perhaps best known of these is the presumption in DSU Art. 3.8, which provides 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.' However, Jeffrey Waincymer has pointed out that there are a number of other presumptions in WTO law, including a presumption of conformity, a presumption against conflict within the treaty, a presumption of consistent usage, a presumption of differential usage, and a presumption against retroactivity. See

Determinations are made despite an absence of proof, although it is a tenet of most legal systems that evidence be presented in order for an adjudicator to arrive at a conclusion.[6] Each of these features is at odds with familiar ideas about what a legal system is.

To seek an explanation for these and other features of the system, this article begins by examining three theoretic frameworks – textual, political, and economic – that have been used to explain WTO law. The article outlines how, in each case, the theoretic framework comes up short. An examination of textualism reveals that key features of WTO law have no textual basis. Political approaches based in regime theory only explain what the law is, not what it should be. Finally, economic approaches premised on bilateralism and equality are at odds with the multilateralism and inequality of the global trading system. In sum, all three of the most popular contemporary approaches to a theory of WTO law are deficient.

Nevertheless, this result is not surprising – or necessarily a bad thing. The shortcomings of existing theories can point where new theoretic work is needed. Existing theories may also yield a composite explanation for the unique phenomena of WTO law. It is worth recalling that no theory will explain everything, if only because a perfect explanation collapses the distinction between theory and reality. A theory, like a science, is not concerned 'with particular cases, as doctors and politicians are, with all the uncertainty that attends these cases. It is concerned instead with what happens "always or for the most part".'[7]

Still, the shortcomings of existing theories leave an intriguing question: what else might help to assemble a convincing theory of WTO law, and beyond that, of international economic law? This article posits that the way forward to such a theory lies not in debates about textual inclusion or political machination or economic calculation, but in a return to normativity.

Law is fundamentally about norms, or in other words, rights and obligations. The International Court of Justice made this point clear in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*[8] when it held that the essence of a legal agreement in international law is whether or not a particular agreement – in that case the minutes of a meeting - discloses an intention to be bound:

> … the Minutes … do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create *rights and obligations* under international law for the Parties.[9]

Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (London: Cameron May, 2002), at 465-66.

[6] Michelle T. Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (New York: Oxford University Press, 2009), at 70.

[7] Marjorie Grene and David Depew, The Philosophy of Biology: An Episodic History (The Evolution of Modern Philosophy) (Cambridge University Press, 2004), at 4.

[8] [1994] I.C.J. Reports 112, 121.

[9] *Ibid*., para. 25 [*emphasis added*]. Similarly, Robert Jennings and Arthur Watts have concluded 'that the decisive factor is still whether the instrument is intended to create international legal *rights and obligations* between the parties ….' Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law* (9th ed., Burnt Mill: Longman, 1996), at 1202 [*emphasis added*].

The Court's reference to 'rights and obligations' is behind my insistence later in this article at focusing on rights and obligations in WTO law. It is rights and obligations that set out the parties' commitments under the treaty and it is therefore rights and obligations that are likely to reveal something about a theory of law. Their arrangement, the contrapuntal stress they create, and the way they simultaneously work to 'constrain and enable'[10] countries' actions, all offer insight into why WTO law is the way that it is.

In law the traditional relationship among rights and obligations is one of correspondence. Each right is considered to be matched by a single offsetting obligation (i.e. Right = Obligation).[11] In WTO law, by contrast, the jurisprudential matrix is more diffuse. The Most Favoured Nation (MFN) obligation causes obligations owed by *one* member country to be owed simultaneously to the *entire* WTO membership. What this creates is a 'public' good that belongs to the membership as a whole. A 'web' or 'network' of obligations arises within which everything else takes place.

WTO law is not exclusively composed of obligations. Here and there under WTO members retain rights. These can involve the right to invoke an exception or to take measures, like safeguards, antidumping or countervailing duties, that are counteractive in some way.[12] These exercises can be likened to recognition of 'private' goods. They operate within the wider network of obligations outlined above. For this reason they must be constrained.[13]

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[10] Jutta Brunnée and Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', *Columbia Journal of Transnational Law*, 2000, 39(1): 19-74.

[11] The idea of a correspondence between rights and obligations was recognized by early philosophers but developed most insightfully by Wesley Hohfeld, who postulated that there are rights and that these are distinct from privileges, powers and immunities, and that they are matched by jural correlatives in the form of duties, no-rights, liabilities and disabilities. See Wesley N. 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* (Cambridge University Press, 2004), at 43 (discussing Edmund Burke's contribution to the idea of right-obligation correspondence). There has been much debate about the need for a primacy of rights in global justice, something which challenges the idea of correspondence. Onora O'Neill has warned about the illusory nature of 'manifesto rights', that is, rights for which there are no associated obligations:

> The most questionable effect of putting rights first is that those rights for which no allocation of obligations has been institutionalized may not be taken seriously. When obligations are unallocated it is indeed right that they should be met, but nobody can have an effective right - an enforceable, claimable or waiveable right - to their being met. Such abstract rights are not effective entitlements. If the claimants of supposed 'rights' to food or development cannot find where to lodge their claims, these are empty 'manifesto' rights.

Onora O'Neill, *Bounds of Justice* (Cambridge University Press, 2000), at 126.

[12] Safeguards are measures invoked temporarily by a government where a surge of imports threatens or causes 'serious injury'. Safeguard disciplines are included in GATT Art. XIX and the WTO Safeguards Agreement. Subsidies are bounties bestowed by a government on production of a good or service. In the case of goods export subsidies, import-substitution subsidies and actionable subsidies, a country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects pursuant to the WTO Subsidies Agreement. In addition, a country can launch its own investigation and ultimately charge an countervailing duty on subsidized imports that are found to be hurting domestic producers. Dumping is the action of selling goods at less than fair value in a foreign market. The policy response to dumping is anti-dumping duties imposed under the WTO Anti-Dumping Agreement, which allows governments to act against dumping where there is genuine ('material') injury to the competing domestic industry.

[13] Rights in WTO law are subject to requirements that may be express or implied, collectively referred to as 'conditionality'. This conditionality can be identified as involving clusters of obligations pertaining to notification, behaviour, and termination of legislation. Thus, under TBT Art. 2.9.4, members proposing technical regulations not in accordance with international standards have notification obligations to the WTO membership. A second technique limiting the extent of rights in the WTO system is the doctrine of proportionality. See Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law in Comparative Perspective', *Texas International Law Journal*, 2007, 42: 371-423, at 378; Andrew D. Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2011),

Obligations and rights work together so that it can be said that the treaty's overarching purpose is to promote interdependence, an interdependence inherent in the Right/Obligation relationship. The protection of expectations by obligations and the promotion of adjustment through the exercise of rights tend to facilitate interaction between governments and among producers and consumers in different countries, thereby spinning a web of political and economic relations that goes beyond the interests of any one WTO member. In doing so, the treaty acts transformatively to modify thinking about both the individual and common interest.

At the same time, something more is required to explain the shape the law. That is because traditionally the law is understood to do justice. In order to assemble a viable theory of law, we need a theory of justice.

In this article I go on to develop such a theory. I do so by drawing on the work of Herbert Hart, who observed in 1958 that justice consists of equality plus fairness (i.e. Justice = Equality + Fairness).[14] In addition to the theory of law outlined above, I outline a second 'system of ideas' involving equality and fairness. In short, I posit that in an obligation-oriented mode WTO law pursues the value of equality whereas in a rights-oriented mode it pursues what I refer to as 'fairness'.[15]

The particular distribution of obligations and rights – and of equality and fairness – is ultimately a function of 'community', or what WTO members hold together. Consequently, to the above ideas about a theory of law and the theory of justice must be joined a third order of theory, something I term a 'theory of community'. According to it, actors come together to protect the things they hold together and value in communities. Protection demands justice, which is expressed in law in the shape of specific obligations and rights. What WTO members hold in common is the WTO *acquis*, the ensemble of concessions and commitments as well as institutional practices, procedure and history which constitute the body of the law.

Consequently, the theory of WTO law I develop in this article is a threefold one. At the first and most general level it is a *theory of community*, a theory about why, as a matter of biology and evolution, humans and countries might need to come together as they do. The explanation lies in interdependence. At the second, more applied, level, the theory is a *theory of justice*, a theory about why what is considered to be 'right' or 'correct' within a community might repeatedly turn to its justification in terms of equality or fairness. At the third and most practical level, the theory is a *theory of law*, a theory about how rights and obligations give expression to ideas of justice within a community. (Fig. 1)

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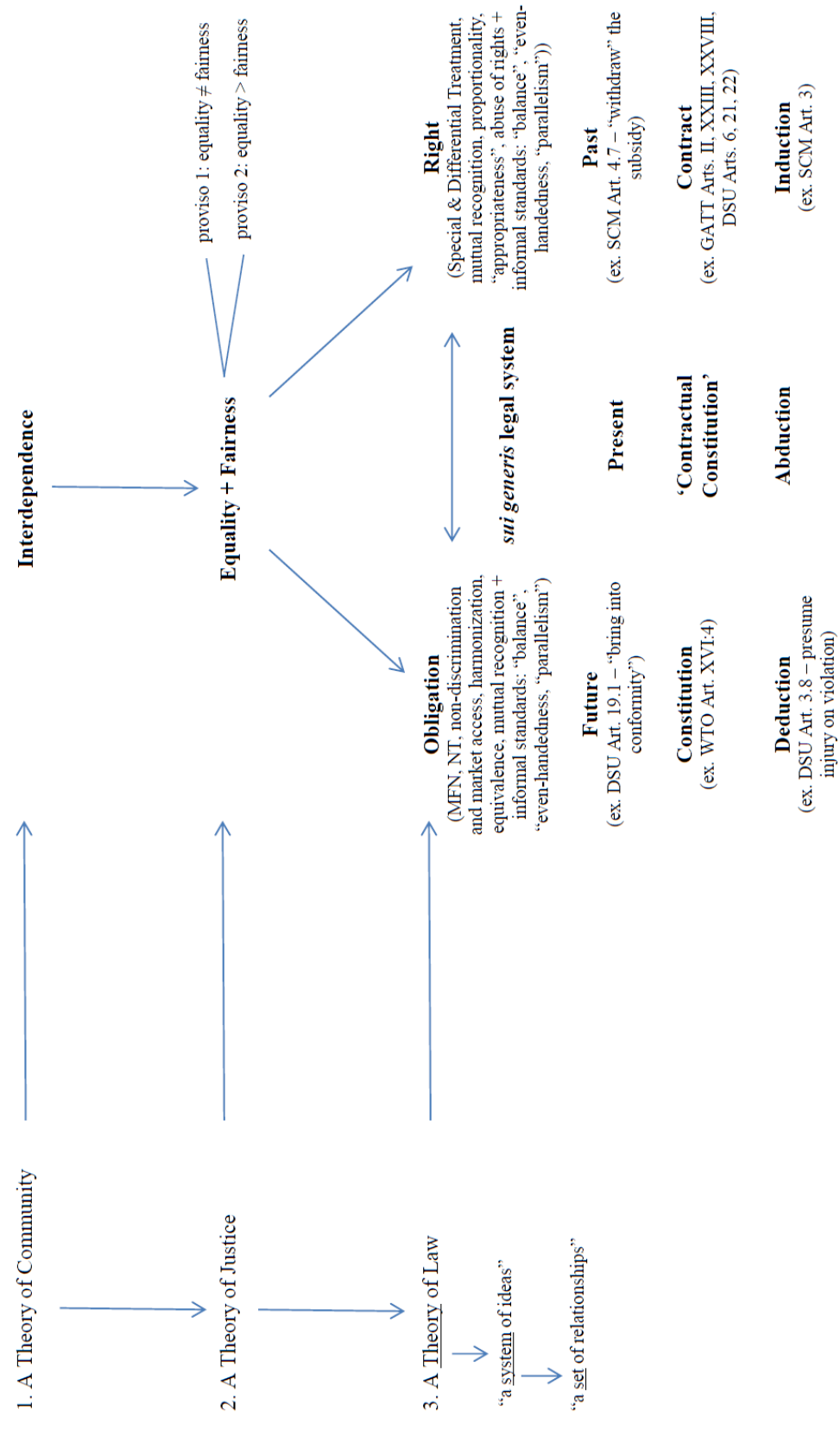
at 177. A third characteristic of WTO law as a law of rights is its mutuality, meaning the exercise of rights needs to be constrained in order not to undermine other rights. Mutuality is frequently embodied in the doctrine of abuse of rights (*abus de droit*). See *U.S. – Shrimp*, WT/DS DS58/AB/R, adopted 12 October 1998, para. 156.

[14] Herbert L. A. Hart, *The Concept of Law* (2nd ed., Oxford: Clarendon Press, 1994), at 160. The same idea – that is, of justice as the combination of equality plus fairness – has been mentioned by others. See for instance Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), at 73.

[15] Fairness, from the Gothic *fagr*, is that which is appropriate in particular circumstances. Shirley R. Letwin, *On the History of the Ideal of Law*, edited by Noel B. Reynolds (Cambridge, New York: Cambridge University Press, 2005), at 43.

Fig. 1


An Integrated Theory of WTO Law
1. A Theory of Community
Interdependence
2. A Theory of Justice
Equality + Fairness
proviso 1: equality ≠ fairness
proviso 2: equality > fairness
3. A Theory of Law
Obligation
(MFN, NT, non-discrimination and market access, harmonization, equivalence, mutual recognition + informal standards: "balance", "even-handedness, "parallelism")
Future
(ex. DSU Art. 19.1 – "bring into conformity")
Constitution
(ex. WTO Art. XVI:4)
Deduction
(ex. DSU Art. 3.8 – presume injury on violation)
sui generis legal system
Present
'Contractual Constitution'
Abduction
Right
(Special & Differential Treatment, mutual recognition, proportionality, "appropriateness", abuse of rights + informal standards: "balance", "even-handedness, "parallelism"))
Past
(ex. SCM Art. 4.7 – "withdraw" the subsidy)
Contract
(ex. GATT Arts. II, XXIII, XXVIII, DSU Arts. 6, 21, 22)
Induction
(ex. SCM Art. 3)
"a system of ideas"
"a set of relationships"

As we will see, how a community chooses to envision something – as either 'public' or 'private' – is pivotal to its treatment in terms of justice, and beyond that, in terms of law. I have already mentioned how justice can be expressed in the equation Justice = Equality + Fairness. To this must be added two provisos: first, that equality is not the same as fairness (i.e. Equality ≠ Fairness), and second, that equality is prior to fairness since we engage in individual acts of fairness, or what is 'appropriate', in order *to attain* equality (i.e. Equality > Fairness).[16]

Because WTO law's chief attainment is the creation of something 'public' in the form of concessions and commitments that belong to the membership as a whole, its dominant ethos is equality-oriented. We observe this in the leading standards in the WTO legal system such as MFN, national treatment, non-discrimination, equivalence and mutual recognition, all of which are inspired by equality, and also in the default standards adopted by panels and the Appellate Body ('even-handed'[17], 'parallelism'[18], 'balance'[19]) as well as the frequently invoked direction that the system seeks to maintain 'the *equality* of competitive conditions'.[20]

The egalitarian and 'public' character of WTO arrangements also means that the operation of justice in WTO law is distinct. Because the underlying good involved is fundamentally 'public', it makes little sense to argue in any situation of breach about what has been 'lost' since any such loss is borne by the membership as a whole. A distributive and prospective ethos prevails. The remedy aims to restore the notional equality of competitive conditions. This is often contrasted with justice in relation to what is fundamentally 'private',

[16] A number of commentators go on to observe that equality and fairness are not the same thing, and that fairness plays a role in *attaining* equality. Confirmation of this point comes from common definitions, which do not always equate fairness with equality. Instead, they tend to suggest that fairness plays a supplementary role in achieving equality. For example, Ioana Tudor observes, 'the common understanding given to fair treatment is that of right and reasonable treatment that sometimes *may achieve equality* between the parties, although this is not always the case.' Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008), at 126 [*emphasis added*]. Joseph Henrich refers to behavioural fairness as 'whatever combination of motivations and expectations yields *more equal divisions*'. Joseph Henrich *et al*., 'Markets, Religion, Community Size, and the Evolution of Fairness and Punishment', *Science*, 19 March 2010, 327: 1480-4, at 1483 [*emphasis added*]. 'Fairness relates to (but does not identify with) the propriety of distribution between burdens and benefits. Just outcomes are generally those that flow from fair processes. A "fair trade" (as a "fair fight") is one conducted under *roughly equal conditions*.' Americo Beviglia-Zampetti, *Fairness in the World Economy: US Perspectives on International Trade Relations* (Edward Elgar Publishing, 2006), at 27.

[17] The term 'even-handed' has been used by panels in varying situations suggesting either equal or fair treatment. See for example *U.S. – Gasoline*, WT/DS2/AB/R, adopted 29 April 1996, p. 21; *U.S. – Hot-Rolled*, WT/DS184/AB/R, adopted 24 July 2001, para. 148 ('the discretion must be exercised in an even-handed way that is fair to all parties affected by an anti-dumping investigation.'); *China – Raw Materials*, WT/DS WT/DS394/R, adopted 5 July 2011, para. 7.462.

[18] 'Parallelism' has been identified as an obligation arising under WTO Safeguards Agreement Art. 2. The obligation of parallelism mandates that where, for the purposes of applying a safeguard measure, a WTO member has conducted an investigation considering imports from all sources, that member may not, subsequently, exclude imports from free trade area partners from the application of the safeguard. For discussion see *U.S. – Steel Safeguards*, WT/DS248/AB/R, adopted 14 August 2003, para. 433*ff*. See also *U.S. – Line Pipe*, WT/DS202/AB/R, adopted 15 February 2002, paras. 178-181.

[19] Panels and the Appellate Body most often have referred to the concept of 'balance' as a general requirement of WTO dispute settlement – namely, that dispute settlement results should not upset the balance of rights and obligations attained in the WTO Agreement: see DSU Art. 3.3.

[20] See for instance *Chile – Alcoholic Beverages*, WT/DS87, 110/AB/R, adopted 13 December 1999, para. 52; *Korea – Alcoholic Beverages*, WT/DS75, 84/AB/R, adopted 18 January 1999, 119-120, 127; *Canada – Autos*, WT/DS139/R, WT/DS142/R, adopted 11 February 2000, para. 10.87; *China – Audiovisual*, WT/DS363/AB/R, adopted 21 December 2009, para. 305.

which appears only episodically in WTO law. There, a certain corrective and retrospective tension is manifested. The remedy aims to restore the plaintiff's individual injury.

The emphasis on obligation, equality and distributive justice in WTO law gives rise to a legal system that is oriented in a certain way. The law is most directly concerned with the observance of obligations, the attainment of equality and distributive justice. It is primarily prospective, constitutive and deductive in nature. However, it is offset to some degree by law in a second mode which is concerned with the assertion of rights, is fairness-oriented and aims to do corrective justice. There the law is more retrospective, contractual and inductive.

I go on to suggest that neither of these modes – or dyads – of law is wholly sufficient to explain the workings of a legal system. That is because, as mentioned, obligations and rights work *together* in real time, creating a third thing, or *tertium quid*.[21] Thus, out of modes that are respectively obligation- and right-oriented, the law creates an order which is *sui generis*, just in the present, assuming the form of a 'contractual constitution', and rationalized according to abductive reasoning.

This system of ideas explains many prominent features of WTO law. It explains why WTO dispute settlement assumes the odd form that it does (because it is primarily distributive in nature), why 'stability and predictability' are a recurrent concern in the WTO system (because they are vital to the protection of expectations that underpin the treaty) and why the use of presumptions is so important (because the system is primarily deductive). All of this is ultimately a reflection of the WTO Agreement's creation of a 'public good'. Still, there are many things that continue to evade explanation in WTO law. What is related in this article is perhaps best understood in light of other theories and ideas about the nature of the WTO *acquis*.

This article is arranged as follows. Following this Introduction Part 2 examines the question of a theory. It suggests that confusion about a theory of WTO law can be traced, at least in part, to confusion about what a 'theory' is. A theory exhibits at least five characteristics – unity, exclusivity, self-regulation, distinction and purpose – but many theories of WTO law do not demonstrate these attributes, or do so only partially. Part 3 goes on to examine three popular theoretical frameworks used to analyse WTO law. It suggests that each of these frameworks falls short because their ultimate explanation lies outside the law. Part 4 goes on to develop the 'integrated theory' of WTO law previewed above. Finally, Part 5 suggests how an integrated theory can also explain leading developments in other areas of international economic law, notably international investment law, and offers some concluding remarks.

[21] Alan Brudner (with Jennifer Nadler), *The Unity of the Common Law* (2nd ed., Oxford University Press, 2013), at 2.

2. WHAT IS A THEORY?

The subject of a theory of WTO law naturally raises the question, what is a theory? How does it differ from an 'account' or an 'approach' to the law?[22] A theory is a 'system of ideas'[23] with the emphasis being on the *system*, or set of relationships, regularly exhibited between those ideas. The aim in identifying a theory is to highlight the r*ecurrent relationships* among actors within a legal system that distinguish them from relations among actors outside the system.

We are interested in identifying a theory of law because a theory conforms with the generally accepted intuition in many disciplines that theory is instructive. As G. Edwards Deming noted, '[w]ithout theory, experience has no meaning. Without theory, one has no questions to ask. Hence, without theory, there is no learning.'[24]

A theory of law is likely to be instructive in at least three ways. First, a theory will identify the law's basic elements and furnish a 'system of ideas' about their inter-relationship. This is the *analytic* function of a theory. Second, a theory will explain the law in terms of something other than itself, in this case justice. This is the *normative* function of a theory. Third, a theory will indicate how the law is likely to evolve. This is *predictive* function of a theory.

A theory of law should also offer something additional. This is insight about a theory of law *in general*. A viable theory of law derived from the law in one area should be able to reveal something about the theoretical underpinnings of law as a whole. To the extent it does, it will be more convincing and worthy of attention than one that does not.

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[22] An 'account' is defined as an 'estimation, importance; consideration', s.v., 'Account', *Shorter Oxford English Dictionary* (5th ed., Oxford University Press, 2002), at 15. An 'approach' is defined as 'a way of addressing a task, dealing with a subject', s.v., 'Approach', *Shorter Oxford English Dictionary* (5th ed., 2002), at 105. Perhaps because of the intimidating aura of theory, there has been a tendency in contemporary work to cloak theoretical work in less blatantly ambitious terms. See Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press, 2010), at 5 (using the terms 'theory' and 'account' interchangeably). Possibly for the same reason, there is also been a tendency for commentators to suggest 'adjacency' in their work, thereby disclaiming any intent to identify a complete and definitive theory: Frank J. Garcia, *Trade, Inequality and Justice: Towards a Liberal Theory of Just Trade* (New York: Transnational Publishers, 2003).

[23] S.v., 'Theory', *Shorter Oxford English Dictionary* (5th ed., Oxford University Press, 2002), at 3236. I prefer this basic definition of a theory to others that are often phrased in figurative or impressionistic terms. According to Hans Kelsen a theory of law would 'furnish concepts by which the positive law of a definite legal community can be described. The subject matter of a general theory of law is the legal norms, their elements, their interaction, the legal order as a whole, its structure, the relationship between different legal orders, and, finally, the unity of the law in the plurality of positive legal orders.' Hans Kelsen, *General Theory of Law and State* (Cambridge, MA.: Harvard University Press, 1949), at xiii; Sanne Taekema states that 'an adequate theory of law must identify the distinctive work done by law in society, the special resources of law, and the characteristic mechanisms that law brings into play.' Sanne Taekema, *The Concept of Ideals in Legal Theory* (The Hague: Kluwer Law International, 2003), at 113; Philip Soper refers to a theory of law as 'an explication of the concept of law rather than a purely stipulative definition.' Philip Soper, *A Theory of Law* (Cambridge, MA: Harvard University Press, 1984), at 14. For discussion of the characteristics of a 'system' as 'composed of several elements' which are 'integrated', none of which would be able to perform the function of the 'system' on its own see *China – Electronic Payment Services*, WT/DS413/R, adopted 16 July 2012, paras. 7.58-59.

[24] W. Edwards Deming, *The New Economics for Industry, Government, Education* (2nd ed., London, Cambridge, MA: The MIT Press, 1993), at 103. Ronnie Yearwood has referred to the rationality involved in assembling a theory of law, '… the "normative order [of law] is not a natural datum of human society but a hard won production of organising intelligence." Law comes into being the moment it is defined as the law. "Hence the task of producing a rationally coherent view" of the international legal system calls for "imaginative insight into the possibility of a principled and structured ordering of material which is potentially chaotic despite itself, in each fragmentary part, the output of intrinsically rational activity."' Ronnie R. F. Yearwood, *The Interaction between World Trade Organisation (WTO) and External International Law* (Routledge, 2011), at 50.

As is probably already apparent, the idea of a 'system' is vital to any concept of theory. Systems theory suggests that a system exhibits at least five key characteristics.[25] First, a system displays coherence or unity. Components within a system relate to each other rationally in comparison with those outside the system.[26] Second, a system is exclusive. It is 'closed' to external influence in varying degrees. Third, a system is regulative. Regulation may take the form of correspondence, as in symmetry, or conditionality, as in a sequence, or it may take no particular form at all but be linked to a common regulating factor such as a constitution. Fourth, a system displays properties that are distinct from those of its constituent elements. These may take the form of new properties such as an independent personality. Fifth, a system aims to achieve a certain purpose. In biologic systems, for instance, the principal purpose of an organism is said to be the transmission of genes.[27]

A theory therefore offers commonality and coherence. The various elements of a viable theory will be linked to each other by common features. Those features will be coherent in that they will relate to each other in a particularly integrated way that presents the prospect of a unity. Unity has substantive consequences. As Philip Allott has noted, 'A theory makes theory-conforming ideas seem naturally reliable, naturally coherent, naturally fruitful.'[28]

Despite these advantages, a theory of law is not uncontroversial. There is much scepticism about the value of theory in law today.[29] Ronald Dworkin observed a decade ago:

> … our intellectuals distrust theory perhaps more than any earlier age has. We hear, wherever we turn, the injunctions and disclaimers of the post-modernists, the pre-structuralists, the deconstructionists, the critical legal students, the critical race scholars, and a thousand other battalions of the anti-theory army. Some say that theory is phoney, and others that it is oppression, and many that it is both.[30]

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[25] These criteria are adapted from Donella Meadows, *Thinking in Systems*, edited by Diana Wright (Chelsea Green Publishing, 2008). Meadows defined systems as consisting of elements, interconnections, and a function or purpose. She gave as an example a football team which 'is a system with elements such as players, coach, field, and ball. Its interconnections are the rules of the game … The purpose of the team is to win games …' See *ibid*., at 11. Meadows added: 'You can see from [this example] that there is an integrity or wholeness about the system and an active set of mechanisms to maintain that integrity. Systems can change, adapt, respond to events, seek goals, mend injuries, and attend to their own survival in lifelike ways … Systems can be self-organizing, and often are self-repairing over at least some range of disruptions. They are resilient, and many of them are evolutionary. Out of one system other completely new, never-before-imagined systems can arise.' *Ibid*., at 12. I prefer Meadow's definition of system as more accurate and comprehensive than that of Herbert Hart, *supra* note 14, who defined a legal system as simply the union of primary and secondary rules – primary rules creating obligations and secondary rules creating rules the ascertainment or existence of other rules. See Hart, *supra* note 14, at 94.

[26] Hart, *supra* note 14, at 160.

[27] Marjorie Grene and David Depew, *supra* note 7, at 313.

[28] Philip Allott, *Eunomia: New Order for a New World* (Oxford University Press, 1990), at 31.

[29] In many fields the rise of 'Big Data' and new forecasting techniques such as 'nowcasting' have raised questions about the continuing validity of theory. Some authorities assert that virtually all phenomena can be understood through 'data exhaust'. A source observes, 'Cheerleaders for big data have made four exciting claims … that data analysis produces uncannily accurate results, that every single data point can be captured, making old statistical sampling techniques obsolete; that it is passé to fret about what causes what, because statistical correlation tells us what we need to know; and that scientific or statistical models aren't needed because … with enough data the numbers speak for themselves.' Tim Harford, 'Big Mistake?', *Financial Times*, 29-30 March 2014, at 18. The author emphasizes the difference between correlation and causation. For a discussion of nowcasting, a neologism used in both economics and meteorology to describe current conditions and those in the immediate future see 'What is Nowcasting?', International Monetary Fund, *Finance & Development*, March 2014, 51(1): 4-7, at 6.

[30] Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006), at 73.

Dworkin's observation conveys well the contemporary mood of hostility to theory. A theory can be explanatory and illuminating, but it can also be perceived as constraining and 'hegemonic'.[31]

A theory of law can appear wanting from at least two perspectives. One view may be to regard it as presumptuous – in effect, an attempt to do too much. The conventional approach is to analyze legal problems case-by-case or provision-by-provision, with only the slimmest of generalizations offered. A theory of law that explains the broad overarching features of WTO law in terms of related theories of justice and community is likely to upset incremental orthodoxy and to be regarded with suspicion. In addition, one side-effect of increasing interdependence is a marked bias in many field of research towards 'participation', 'inclusiveness' and collaborative development.[32] In the prevailing research climate nothing – let alone anything as fundamental as a theory of law – is thought to be the product of a *single* explanation projected by a theory. To the extent that it is, it will be attacked as exclusive and simplistic.

Another view is likely to criticize a theory as insufficient. The novelty of a full-blown theory means that it risks being greeted by all sorts of inflated expectations about what a theory is supposed to furnish, as the following description of a theory of international law implies:

> … the theory of international law must take account of law's functions in regime design and maintenance: establishing rules as focal points that provide an equilibrium in situations requiring coordination, where thereafter no participant has an incentive to defect from the rule, providing transparency and monitoring and some sanctioning in ways that make possible the capture of gains from cooperation without excessive cost; embedding international agreements in national law that can have more direct purchase on relevant actors; drawing systemic linkages among otherwise unrelated issues so as to raise the cost of violation; aiding powerful states to make commitments that others have confidence will be adhered to, by enmeshing them in deeper structure of legal obligation.[33]

The foregoing description may appear overwrought, but it is symptomatic of the unstated demand in contemporary legal scholarship that a theory of law should explain *everything*. No theory can explain everything, if only because theory is distinct from reality.

Implicit in both of the above views then is the idea that a theory is somehow deficient or immodest. Yet as Dworkin noted:

> We are modest, not when we turn our back on difficult theoretical issues about our roles and responsibilities as people, citizens, and officials, but when we confront those issues with an energy and courage forged in a vivid sense of our own fallibility. Our

[31] Philip Allott has described theory's 'hegemonic explanatory power', see Philip Allott, *The Health of Nations* (Cambridge University, 2002), at 143.

[32] Susan Cain outlines the difference between introversion and extroversion and discusses how in a human environment naturally oriented towards extroversion there is the rise of a 'New Groupthink' that chokes off creativity. Susan Cain, *Quiet: The Power of Introverts in a World That Can't Stop Talking* (New York: Broadway Books, 2012), at 71.

[33] See Benedict Kingsbury, 'The International Legal Order', in Mark Tushnet and Peter Cane (eds.), *Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 271-97, at 294

> reflective judgment may charge us with self-restraint in a hundred dimensions, but accepting these is an act of modesty only if that judgment was itself truly and thoroughly reflective.[34]

A theory of law is, therefore, *an assumption of responsibility*. It takes responsibility for supplying an explanation for the law. A theory also expresses the view that an ongoing 'conversation' about the nature of law is to be welcomed, but it insists that participants have the duty to step back from time to time in order to distil experience into a rationality of ideas, principles and relationships, and to connect their conclusions to other developments, traditions and patterns of thought.

3. WTO LAW AS A SUBJECT OF THEORY

At the outset I mentioned three frameworks that have garnered attention in terms of a theory of WTO law: textual, political, and economic. The first of these, textualism, derives its legitimacy from the text of the WTO Agreement. The treaty text is considered to be the supreme expression of the intent of WTO members. Consequently, an obligation located in the text is presumptively considered valid.

Textualism receives additional support as a theoretic framework from Art. 31(1) of the Vienna Convention on the Law of Treaties (VCLT), which provides that a treaty is to be interpreted according to 'the ordinary meaning to be given to the *terms* of the treaty in their context and in the light of its object and purpose.'[35] The WTO Appellate Body has reinforced this understanding by indicating that the text is the starting point for interpretation under the treaty.[36]

Nevertheless, a commitment to textualism does not designate text as the exhaustive theoretic frame of WTO law if only because no treaty can cover *every* conceivable contingency. For one, there will be situations where provision must be made for eventualities lying beyond the text. Recourse to other interpretive aids is then necessary. Second, the wording of VCLT Art. 31 makes clear that 'text' is conjoined with other factors – context, object and purpose – that, taken together, have the effect of diminishing the pre-eminence of text. Asif Qureshi has pointed out, for example, that VCLT Art. 31 can be read either sequentially or holistically, 'masking a preference either for a textual/literal approach or for a teleologic approach.'[37] While the WTO Appellate Body appears to have come down in favour of interpretation under VCLT Art. 31 as a 'holistic exercise'[38], there remain many instances where text continues to be

[34] Ronald Dworkin, *supra* note 30, at 73.
[35] *Emphasis added*.
[36] See *Japan – Alcoholic Beverages*, WT/DS8/AB/R, adopted 4 October 1996, p. 11 ('interpretation must be based above all upon the text of the treaty', citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment*, (1994) I.C.J. Reports, p. 6 at 20; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment*, (1995) I.C.J. Reports, p. 6 at 18).
[37] Asif Qureshi, *Interpreting WTO Agreements* (Cambridge University Press, 2006), at 15.
[38] 'Interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.' *EC – Chicken Cuts*, WT/DS269/AB/R, adopted 12 September 2005, para. 176.

significant, leaving some residual uncertainty in the interpretive endeavour.[39] Third, the WTO Agreement needs to be read in light of customary international law since '[h]istorically, treaties are the second source of international law; they developed as the means whereby states could give to rules for their mutual conduct a greater particularity … .'[40] Although custom does not apply to the extent it has been displaced by the treaty, it remains residually important in qualifying the obligations and rights of WTO members.[41]

These considerations imply that textualism serves merely as a point of departure for a theory of WTO law. Developments in WTO law beyond the text reinforce this conclusion. One example is the burden of proof. WTO rules do not expressly provide for a burden of proof in WTO proceedings. Still, in *U.S. – Shirts and Blouses*[42] the Appellate Body clarified that it is up to the complainant to present evidence and argument 'sufficient to establish a presumption' that a measure is inconsistent with WTO obligations. The Appellate Body went on to state that 'it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.'[43] The rule has enjoyed widespread application in WTO proceedings ever since. A second development is the right of appeal of WTO DSU 21.5 compliance decisions. Such a right is not expressly included in the DSU text. Nevertheless, in *Brazil – Aircraft (21.5 - AB)*[44] the Appellate Body identified such a right notwithstanding the objection of certain WTO members.[45] Finally, a third innovation is various rulemaking activities that seek to bypass the formal amending mechanism in WTO Agreement Art. X.[46] Since the inauguration of the WTO in 1995 countries have engaged instead in creative rulemaking to avoid Art. X's onerous requirements. These 'work-arounds' have included the

[39] See for example *U.S. – Sec. 301*, WT/DS152/R, adopted 22 December 1999, para. 7.22. Qureshi notes that 'as a matter of practice, a sequential approach [as opposed to a hierarchical approach in terms of text, context and objects and purposes] is tolerated … it is the case that the Panel in *U.S. – Section 301 of the Trade Act* did not qualify 'holistic' in this fashion, neither did any of the previous panel and AB pronouncements'. See Asif Qureshi, *supra* note 37, at 16.

[40] Robert Jennings and Arthur Watts, (1992). *Supra* note 9, at 31

[41] 'Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.' *Canada – Continued Suspension*, WT/DS321/R, adopted 31 March 2008.

[42] *U.S. – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 25 April 1997.

[43] *Ibid*., at 14.

[44] WT/DS46/AB/RW, adopted 21 July 2000.

[45] The appeal was pursuant to an agreement between Brazil and Canada concerning the conduct of compliance proceedings. The EU accepted that parties can make agreements relating to procedural issues in dispute settlement, but asserted that 'such agreements may not, in its view, affect the rights of third parties.' The EU was concerned that Brazil and Canada had agreed bilaterally to dispense with formal consultations, something which, in the EU's view, would be 'inconsistent with the DSU and … prejudice third party rights.' WT/DS46/AB/RW, para. 29 (21 July 2000). The WTO website notes that '[a]lthough not specifically mentioned in Article 21.5 of the DSU, the practice has shown that appeals against compliance panel reports are possible and even quite frequent.' See also Jason Kearns and Steve Charnovitz, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5', *Journal of International Economic Law*, 2002, 5(2): 331-52.

[46] Under the WTO Agreement Art. X, once a proposal for amendment is adopted by the WTO Ministerial Conference or General Council, the proposal is submitted to WTO members for their acceptance. Amendments are only effective with respect to those members which have accepted them. In addition, WTO Art. X:2 lists a number of key provisions which have to be accepted by all WTO members before they can take effect.

Doha Declaration on TRIPs and Public Health,[47] the WTO Agreement on Basic Telecoms,[48] and the WTO Agreement on Trade Facilitation.[49] None of these agreements has been universally accepted by the membership. Consequently, the normative shadow they cast on the WTO text itself remains uncertain.

Textualism as a theory thus falls short. As a 'system of ideas' it is unsystematic. How different parts of the text relate coherently or create something new co-ordinately is difficult to see, apart perhaps from the decision to include or relate provisions to one increasingly unwieldly instrument. Text is simply words on a page. Moreover, the usual rule of textual interpretation that ordinary meaning is to be assessed at the time of conclusion of the treaty is insufficient because it does not account for the many ways in which WTO interpretation has taken place inter-temporally.[50] Thus, it would be wiser to regard WTO law as evolutionary.[51] The fact that there is so much that is new – and unanticipated – in the treaty framework means that the text serves simply as a beginning, not the end, for theoretic consideration.

A second theoretic framework seeking to overcome the limits of textualism is political and is associated with regime theory. Regime theory emerged in the 1980s in response to analytical shifts in the study of international organizations.[52] One definition of a 'regime' offered by Stephen Krasner is as follows:

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[47] WTO member governments broke a deadlock over intellectual property protection and public health in August 2003 by agreeing on legal changes that make it easier for poorer countries to import cheaper generics made under compulsory licensing if they are unable to manufacture the medicines themselves. Under the agreement, known as the Decision on Implementation of Paragraph 6, WTO countries wanting to import under the 'paragraph 6' system have to notify the WTO in two ways. They have to announce once that they intend to make use of the system, and then they have to supply information each time they use it. This will now be formally added to the WTO TRIPs Agreement when two-thirds of the WTO's members have accepted the change. They originally set themselves until 1 December 2007 to do this. The latest General Council decision of 30 November 2015 (document WT/L/965), the fourth such decision, extends the deadline to 31 December 2017.

[48] The WTO Agreement on Basic Telecommunications Services (BTA), which is an annex to the Fourth Protocol of the General Agreement on Trade and Services (GATS), was concluded on 5 February 1998. It improves market access for telecommunications equipment suppliers, vendors and service providers by ensuring that all service suppliers seeking to take advantage of scheduled commitments have reasonable and non-discriminatory access to and the use of public basic telecommunications networks and services. As of May 2016 a total of 108 WTO members have made commitments to facilitate trade in telecommunications services. This included the establishment of new telecoms companies, foreign direct investment in existing companies and cross-border transmission of telecoms services. Out of this total, 99 members had committed to extend competition in basic telecommunications (e.g. fixed and mobile telephony, real-time data transmission, and the sale of leased-circuit capacity). In addition, 82 WTO members had committed to the regulatory principles spelled out in the 'Reference Paper', a blueprint for sector reform that largely reflects 'best practice' in telecoms regulation.

[49] WTO members concluded negotiations on a Trade Facilitation Agreement (TFA) in December 2013. The TFA contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area. The implementing protocol is to take effect upon acceptance by two-thirds of WTO members for members that have accepted the Protocol, and thereafter, for each other member upon acceptance by it. As of May 2016 the TFA had 78 acceding members.

[50] See *EC – Chicken Cuts*, WT/DS269/R, adopted 30 May 2005, para. 7.99 ('In our view, the "ordinary meaning" is to be assessed at the time of *conclusion* of the treaty in question, being the time which is at the focus of both Articles 31 and 32 of the Vienna Convention.') [*emphasis in original*].

[51] Perhaps the best known example of this evolutionary method is derived from *U.S. – Shrimp*, where the Appellate Body interpreted the words 'exhaustible natural resource' in GATT Art. XX(g) 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.' See *U.S. – Shrimp*, WT/DS58/AB/R, adopted 12 October 1998, para. 129.

[52] Footer details four shifts as follows: 1) abandonment of a formal institutional approach in order to identify the precise role international organizations play in international governance, 2) a move to more generalized examination of such things as patterns of influence, 3) the turn towards objective identification of developments in the process of

> A regime is composed of sets of explicit or implicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations and which may help to coordinate their behavior.[53]

Regime theory is politically as opposed to normatively focused, meaning its emphasis is on power. What are its benefits in relation to the WTO? Mary Footer explains:

> Regime theory may contribute to our understanding of why an institution like that WTO has developed in the way it has and what functional benefits members may derive from its normative and procedural bases. It may also help us to gain a better insight into what principles, rules and standards induce members to cooperate and why certain decision-making practices that were developed at the time of the GATT continue in the WTO, which is something that theoretical aspects of international institutional law, with its positivist emphasis on systems of norms and rules … cannot do.[54]

She adds:

> By reading the WTO as a regime it is possible to move beyond the formality of the legal texts of the WTO Agreement … and focus on *the practice* of the Members … This should help us to gain a better understanding of how the WTO operates institutionally, thereby expanding our perspective on the organization's proper vocation and allowing us to question the belief that the WTO could become a key pillar of global governance.[55]

Despite the allure of additional insight, regime theory's focus on 'practice' is potentially problematic. On one level what should matter is the practice *of the organization* as recorded in its decisions and pronouncements. On a second level, in international law 'practice' is considered a term of art. For instance, in *Japan – Alcoholic Beverages II* the Appellate Body stated that 'subsequent practice' within the meaning of VCLT Art. 31(3)(b) entails a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern.[56] Focusing on individual acts (or a few of them) by certain countries as required by regime theory splinters the objective frame of reference and reveals little about what is 'concordant, common and consistent'. With regime theory there is then the

international governance, 4) a move away from identifying international organizations as a separate field of study and instead considering them as part of institutional arrangements inherent in international regimes. See Mary E. Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Martinus Nijhoff publishers, 2006), at 81-82.

53 Stephen D. Krasner, *International Regimes* (1980), at 185.

54 See Footer, *supra* note 52, at 88. Footer also refers to the work of Winifried Lang, who provides six additional reasons why regime theory may have important for international law: 1) treaties alone provide an insufficient basis for the comprehensive regulation of complex subject matter, 2) the notion of regime suggests an organization should be up to evolve beyond its legal basis in order to adapt its constituent instruments to changing circumstances, 3) the idea of a regime may help us to understand the emergence of different levels of normativity in international law, 4) regimes may highlight latent conflicts of interest, 5) regimes may allow ambitious states to accept meagre initial results that can be offset by eventual gains over the longer term, 6) regimes may allow a combination of treaties of different origins in one regulatory scheme. See Footer, *supra* note 52, at 88 referring to Winifried Lang, 'Regimes and Organizations in the Labyrinth of International Institutions' in Konrad Ginther *et al.*, *Volkerrecht zwischen normativen Anspruch under politischer Realität, Feschrift für Karl Zemanek zum 65* (Berlin: Duncker und Humblot, 1994), 275-89.

55 Footer, *supra* note 52, at 88 [*emphasis added*].

56 *Japan – Alcohol II*, WT/DS8/AB/R, adopted 4 October 1996, at 13.

prospect of being treated to a continuing 'soap opera' of varying national behavior, a random 'set' of acts rather than action within a 'system'.

Regime theory also provides little idea about whether what is happening is right or correct. A theory based on state practice inevitably measures the behaviour of an international organization according to the behaviour of a state. Footer makes this clear in questioning 'the belief that the WTO could become a key pillar of global governance'.[57] In her view, the organization has not been allowed to develop independence of functions. In Footer's account the WTO is depicted as an international organization lacking 'a will of its own, separate and distinct from that of its individual Members'.[58] No idea is provided about why exactly the failure to live up to some ideal of sovereign independence is wrong. In fact, few international organizations do.

The difficulty with a regime-based theory, at least as it is articulated by Footer, is that it runs contrary to what we know of international law. In the *Reparations Case* the ICJ made clear that independent legal personality – the ability to exercise rights and obligations on the international stage – is bestowed according to the 'needs of the community'.[59] Today, these needs are premised on accountability and popular legitimacy, qualities which the 'community of the WTO' (i.e. its members) have chosen not to fully accord to the organization, at least for the time being.[60] The fact that the WTO does not operate in the mirror image of a state should not render it deficient. Indeed, from a theoretic perspective, the fact that the WTO is not state-like says little about its ability to solve complex problems of the international trading order that go beyond the boundaries of any single state. Rather, in thinking about WTO law from the perspective of theory we should be constantly aware of the way in which membership, in creating the organization and its legal system, evidently sought to create something new. This newness was meant to address something exceeding the powers of any one state. A state-based paradigm for assessing the organization is therefore inadequate.

One last theoretic framework for the analysis of WTO law is that of economics. Economics would appear to be a natural framework through which to comprehend what is observed in WTO law. After all, WTO law is commonly considered a branch of international *economic* law, a body of law whose origins lie in economic analysis and modelling. Many commentators have pointed out that the original commitments that created the GATT/WTO were based on reciprocal negotiations involving equivalent concessions exchanged among countries.

There are certainly places in the WTO Agreement where the calculation and empiricism emblematic of this equivalence appear to play a major role. This is most evidently on display in situations of negotiation, renegotiation, compensation and retaliation under the treaty. There,

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[57] Footer, *supra* note 52, at 88.
[58] Footer, *supra* note 52, at 78.
[59] *Reparations for Injuries (Ad. Op.)*, ICJ Rep. 1949, p. 174 at 178 ('The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the *needs of the community*.') [*emphasis added*]
[60] Indeed, much has been noted about the WTO's deficits in this respect. Robert Howse and Kalypso Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity', in Robert Howse, *The WTO System: Law, Politics & Legitimacy* (Cameron May, 2007), 247-72.

the concession or commitment of one country is exchanged for another, compensation may be negotiated as a temporary solution pending a return to compliance, or as a last resort, retaliation may be authorized in the form of reciprocal suspension of concessions and commitments in order to induce compliance.[61] The treaty also references empiricism elsewhere, particularly in relation to the invocation of WTO 'rules' disciplines (safeguards, countervailing, antidumping) where certain thresholds concerning 'serious' or 'material injury' must be met in order for governments to take action against imports.[62]

Commentators have also taken the equivalence understanding derived from economics and applied it to a number of different domains in WTO law. For example, Kyle Bagwell and Robert Staiger have put forward an economic theory of GATT in which reciprocal tariff concessions deliver an efficient outcome.[63] According to their model, reciprocity is 'recognized as one of the most vital concepts in GATT practice' and 'refers to the 'ideal' of mutual changes in trade policy which bring about *equal* changes in import volumes across trading partners.'[64] Governments will seek lower tariffs if the workplace implications of their liberalization can be neutralized. They will also seek efficient politically optimal outcomes in GATT renegotiation since, by neutralizing the world price effects of a government's decision to raise tariffs, reciprocity eliminates the externality that causes governments to make inefficient trade policy choices in the first place. Other commentators such as Petros Mavroidis have also adopted economic insights to explain discrete features of GATT/WTO law.[65]

On closer scrutiny, however, economic models of WTO law do not stand up. They are focused on discrete phenomena, not the generalized explanation we might expect of a viable theory. For one, the equivalence that underlies the image of reciprocity in WTO law is chimeric. No measure of reciprocity has ever been agreed upon in either GATT or the WTO system. Arthur Dunkel, Director-General of GATT from 1980-92, stated, 'Reciprocity cannot be determined exactly; it can only be agreed upon.'[66] The strategic use of vagueness in relation to such a key concept became apparent during the Uruguay Round (1986-1994) when national delegations 'widely but informally accepted that ... targets [for tariff reduction] were average

[61] WTO member countries' commitments are negotiated in rounds and enshrined in various protocols. Renegotiation is permitted under GATT Art. XXVIII. Compensation may be negotiated under DSU Art. 22 as temporary measures in the event that recommendations and rulings are not implemented within a reasonable period of time. If this possibility fails, retaliation may be authorized under DSU Art. 22.6.

[62] For instance, the WTO Safeguards Agreement Art. 4 requires a determination of 'serious injury' or threat thereof. In cases of alleged threat, the analysis must be future oriented and based on 'the most recent data available, combined with factual information as to expected future developments concerning imports and the condition of the domestic industry'. *U.S. – Lamb Safeguards*, WT/DS177, 178/R, adopted 24 October 2000, para. 7.132.

[63] See Kyle Bagwell and Robert Staiger, 'An Economic Theory of GATT', *NBER Working Paper*, No. 6049, May 1997.

[64] *Ibid*. at 2.

[65] See Petros C. Mavroidis, *Trade in Goods* (Oxford University Press, 2007).

[66] GATT Press Release 1312, 5 March 1982. Anwarul Hoda observes '… [N]either the provisions of GATT 1994 nor the procedures of the eight rounds of tariff negotiations indicate how reciprocity is measured or defined. At the Review Session [of 1955], Brazil had proposed a formula for measurement of concessions for determining reciprocity. On this 'the Working Party noted that there was nothing in the Agreement, or in the rues for tariff negotiations which has been used in the past, to prevent governments from adopting any formula they might choose, and therefore considered that there was no need for the CONTRACTING PARTIES to make any recommendation in this matter.' No further attempt has been made to give greater definition to the manner in which reciprocity is to be measured and it has been left to each country to develop its own yardsticks.' Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO* (Cambridge University Press, 2001), at 53.

reductions of one-third for industrial countries and one-fourth for developing countries.'[67] J. Michael Finger and L. Alan Winters state the reduction targets employed in the Uruguay Round were 'guidelines' and note that:

> The GATT/WTO members seem to have policed these guidelines rather softly. Interviews with more than a dozen delegations after the round found none that had attempted to calculate the depth of cut by each country, or even for major trading partners. Likewise, no delegation had tabulated concessions received – that is, the coverage of its exports by concessions scheduled by other countries.[68]

This illustrative example reveals that economic theories of GATT/WTO law are likely to rest on a flawed premise – the premise of equality. WTO arrangements are *not* equal in the sense that obligations do not equal rights (i.e. Obligations ≠ Rights). Reciprocity under the WTO Agreement appears to contemplate a degree of *inequality*. The negotiating history suggests that countries were *not* expected to grant equivalent concessions. How can this be rationalized? Political scientists and game theorists make a distinction between 'specific reciprocity … in which specified partners exchange items of equivalent value in a specified sequence' and 'diffuse reciprocity' where, as Robert Keohane explains:

> … the definition of equivalence is less precise, one's partners may be viewed as a group rather than as particular actors, and the sequence of events is less narrowly bounded.[69]

Diffuse reciprocity is a more fitting description of reciprocity under the WTO Agreement. Keohane goes on to observe that in diffuse reciprocity 'Obligations are important. Diffuse reciprocity involves conforming to generally accepted standards of behaviour.'[70]

There is much in WTO law that economic models cannot explain. This is particularly true in an era when new areas of coverage such as services and intellectual property evade accurate quantification.[71] The self-evident basis for thinking about WTO law as economic begins to fall away. Indeed, the failure of economics to say much about GATT/WTO law is plainly admitted by Mavroidis, one of the leading exponents of an economic approach to the discipline, who has noted:

> The end result is that economic theory has not, as of yet, come up with a comprehensive explanation for the GATT, as we know it. This does not mean that we should disregard it, far from it. For a start, the terms of trade theory explains in a satisfactory manner the heart of the tariff bargain in the various legal instruments committed to this endeavor. It might not be very helpful in explaining some other GATT legal instruments, such as AD for example, but this does not mean that we should not be using it where appropriate. Moreover … it might have underpinnings in the negotiation of the GATT as well. Economic theory, more generally, has been particularly helpful in helping us

[67] J. Michael Finger and L. Alan Winters, 'Reciprocity in the WTO', in Bernard Hoekman *et al*. (eds.), *Development, Trade and the WTO* (Washington, DC: World Bank, 2002), 50-60, at 55
[68] *Ibid*., at 55.
[69] Robert Keohane, 'Reciprocity in International Relations, *International Organization*, 1986, 40(1): 1-27, at 4.
[70] *Ibid*.
[71] See Aaditya Mattoo and Marcelo Olarreaga, 'Reciprocity across Modes of Supply in the World Trade Organization', *World Bank Policy Research Working Paper*, No. 2373, June 2000 (noting limited application of the traditional negotiating principle of reciprocity in WTO services negotiations due to the absence of empiric measures of reciprocity; suggesting a formula through which concessions across modes and sectors could be linked).

> understand the gains from trade liberalization: we know that welfare gains are greater multilaterally than unilaterally, and that the multilateral system helps invigorate domestic export lobbies to add political weight to trade liberalization. What we still lack is an internally consistent theory that we can use as guidance to understand and interpret *all* of the GATT instruments.[72]

The problem with this observation is that Mavroidis does not indicate where economic analysis of international economic law would be 'appropriate'. Without that specification, the type of certainty that is desired of a viable, regularly applicable theory is largely missing. We may be able to draw a few tentative conclusions in areas of empiric attention like the renegotiation of tariff concessions under GATT Art. XXVIII or retaliation under DSU Art. 22, but apart from these, it is difficult to say anything meaningful in terms of theory about the structure of the law from the viewpoint of economics.

In addition, in 2008 a deep recession in many developed countries left conventional models of economic behaviour looking seriously flawed. Today, theorists are much less likely than in the past to assert that individuals or states are purely 'rational' actors, that is, prone to acting in a purely self-interested manner.[73] The true picture is more nuanced. Given this, there seems to be a requirement for integrative thinking. Much has been heard about the need to develop stronger, more robust models of economic behaviour, possibly along the lines of 'biological frameworks that will evolve over time.'[74]

The foregoing survey of popular theoretic frameworks of WTO law suggests several points. Earlier, I highlighted the way that a system exhibits at least five characteristics: unity, exclusivity, self-regulation, distinction and purpose. None of the theories surveyed so far have provided an especially unified or coherent account in relating various WTO obligations to one another. They do not tell us exactly how or in what degree such obligations are 'closed' to external influence nor how or why they might be self-regulating. They do not reveal how WTO arrangements are distinct from their constitutive origins in bilateral concessions and

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[72] Mavroidis, *supra* note 65, at18 [*emphasis in original*].

[73] One commentator has described the shortcomings of neoclassical economics as follows: 'The methodology of neoclassical economics is built on the idea that an economy can be understood as an aggregate of independent, optimising individuals. This approach precludes considering group behaviour, including competitive behaviour. It largely ignores the half of the economy that is controlled by the government and entirely neglects the institutional arrangements of our economy. It also entirely fails to explain why some economies are successful and others are not. It has no mechanism for analysing the role of debt within the economy. It therefore fails to provide a scientific framework for understanding the current economic predicament. ... This is not a reasonable state of affairs for a field seeking to describe our economic system scientifically. There may be a better economic system available than the one we have, but the job of economics as a science is first to understand and describe the one we've got. This cannot be achieved by building abstract models of imaginary alternative economies, where governments are absent, markets are perfect and people act as machines rather than humans.' George Cooper, *Money, Blood and Revolution* (Harriman House Publishing, 2014), at 191-92

[74] Kevin Carmichael, 'Two Men and a Mountain', *The Globe and Mail, Report on Business – Magazine*, June 2011, 42; see also Edward O. Wilson, 'The Biological Basis of Morality', *The Atlantic*, April 1998. The biologic metaphor is especially apt a time when civil society groups following the negotiations for the latest generation of trade agreements, including the Transpacific Partnership (TPP), have called for the conclusion of 'living agreements' that welcome additional parties and evolve to address new trade and investment issues as they arise. See U.S. Business Coalition for TPP, 'Transpacific Partnership (TPP) Agreement Principles' (n.d.). The reference demonstrates the view of trade agreements, in some sense, as organic, that is, as possessing an independent personality with distinct powers. The difficulty with this idea lies in its logical extension, which arrives at the view that anything 'living' is autonomous and therefore constitutes an implicit threat to other independent bodies, notably states.

commitments. Finally, they say little about how any of what is observed is truly 'new' or how these theories are related to the purposes expressed in the WTO Agreement's preamble.

Despite these shortcomings, existing theories remain useful. Textualism serves as a point of departure so long as there is text. Political theories can fulfil the need for description. Economic explanations can be useful so long as the 'islands' of bilateralism on which they are premised are discovered, charted, and recognized. In other words, existing theories provide *something*. Still, examined at as a whole, existing theories of WTO law are unsatisfying. The persistent question has to be why?

The answer appears to lie in the nature of the inquiry. We are seeking a theory – a 'system of ideas' – about *law*. In addition to their failure to meet the criteria of a system, all of the foregoing theories have as their basis something non-normative. To identify a viable theory of law it seems only logical to refocus attention on the law. The problem with doing so, of course, is that law is interpreted in a variety of ways today: as entitlement, as liberalism, as respect etc. We need some standard means of reference to serve as a foundation upon which such a system might be built.

4. TOWARDS AN INTEGRATED THEORY OF WTO LAW

A way forward is to recognize that the law is composed, at base, of rights and obligations. These elements and their arrangement are fundamentally reflective of justice, which is itself a reflection of community. A theory of law therefore involves three constituent theories: of law, of justice, and of community. These must be integrated in order to identify what we are interested in – a theory of WTO law. For this reason, the theory presented here is referred to as an 'integrated theory'

An integrated theory begins its analysis at the broadest level of generality in community. The need for a theory of community arises from biology and from the fact that actors are interdependent. They flourish within communities.[75] What is a community *in law* and how does it differ from other arrangements? Thomas Franck observed:

> The difference between a rabble or even a primitive association and a developed community is that in the latter members accept specific reciprocal obligations as a concomitant of membership in that community, which is a structured, continuing association of interacting parties. Individuals in a rabble or primitive society do not ordinarily attempt to imagine the reality of those with whom they share a space, nor do they concern themselves with how they may be perceived by those others. There is no expectation that a single, limited transaction will establish a continuing, structured relationship, nor is each such interaction thought to occur within a framework in which

[75] Natalie Heinrich and Joseph Heinrich, *Why Humans Cooperate: A Cultural and Evolutionary Explanation (Evolution and Cognition)*(Oxford University Press, 2007), at 5 (citing 'a large and growing body of evolutionary theory that views our "evolved minds" as a result (at least in part) of the coevolutionary interaction of genes and culture.'). See also Samuel Bowles and Herbert Gintis, *A Cooperative Species: Human Reciprocity and Its Evolution* (Princeton University Press, 2011), at 1 (advancing the proposition that moral sentiments have arisen among humans because their 'ancestors lived in environments, both natural and socially constructed, in which groups of individuals who were predisposed to cooperate and uphold ethical norms tended to survive and expand relative to other groups …').

many have a stake, including even those not directly involved.[76]

Franck's description highlights the way that a community creates *obligations* out of an *expectation* of continuity. Actors in a community are prepared to assume obligations because they anticipate repeated transactions with each other over time.[77]

A community is therefore distinctive from an association because it involves the creation of *obligations*. These are of two types. One is owed specifically among actors 'bilaterally' or contractually, the other is owed by actors to all other actors within a community 'multilaterally' or constitutively.[78] The two apply *together*. In this way the legal matrix of a community may be said to approximate 'a network of infinite density and complexity in which everything, without exception, is subject to countless legal relations.'[79] Thus, '… the relationship between two legal persons can be analysed in many different ways and … an analysis in terms of one particular legal relation always *implies the existence of many other supporting legal relations* …'[80]

The arrangement of obligations in a community is not entirely undifferentiated. Constitutive, 'multilaterally' oriented obligations take precedence over contractual, 'bilateral' ones.[81] The reason for the priority is dependence, or the fact that actors come together in community because they depend upon each other to meet their needs and must be able to reliably do so over time in an agent-neutral manner.[82]

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[76] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990), at 197.

[77] *Ibid*. 'A developed community … differs from other forms of association in that each party expects an ongoing relationship to persist for as long as he or she is affiliated with the community.'

[78] 'A community arises whenever two or more persons have interests in common.' G. Merle Bergman, 'The Communal Concept of Law', *Yale Law Journal*, 1947, 57: 55-82, at 61.

[79] Allott, *supra* note 31, at 85.

[80] Allott, supra note 28, at162 (para. 10.50) [*emphasis added*].

[81] This idea has been captured in Neil MacCormick's memorable observation that 'what is private is not itself a private question'. Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), at 76. The priority is usually expressed in domestic systems in the form of obligations to pay taxes, to pledge allegiance, and to serve in the military. It will also be expressed in doctrines such as escheat, mortmain and eminent domain which allow the public right to override private ones in certain instances, usually for some greater public purpose. For a discussion of the law of eminent domain see Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (Basic Books, 2008), at 108-130

[82] Michael Tomasello has explained how early humans 'were at some point forced by ecological circumstances into more cooperative lifeways, and so their thinking became more directed towards figuring out ways to coordinate with others to achieve joint goals or even collective group goals.' Whereas most human thinking was probably done in a 'second-person' mode, that is, 'one individual evaluating another', among modern group-minded individuals 'these evaluations became conventionalized and so applied in an agent-neutral, transpersonal mode, that is, applied by all to all …' Tomasello infers from this a natural progression in human thinking which can be represented as follows:

individual intentionality → joint intentionality → collective intentionality

In the ultimate phase of their evolution humans have become '"thoroughly group-minded individuals" who "coordinate with their entire cultural group via collectively known cultural conventions, norms and institutions.' Michael Tomasello, *A Natural History of Human Thinking* (Harvard University Press, 2014), at 80-1. The 'collective turn' in human thinking is vitally important since it explains the origins of the ability to think *objectively*. Tomasello relates: 'As modern human individuals were building their cognitive models [to] the world, the use of simple causal and intentional relations was not enough. To explain such things as chiefs and marriage, not to mention language and culture, they needed some understanding of things created by collective agreement and maintained by collective normative judgment. Said another way, they needed some new conceptualizations of collective realities that transcended the thoughts and attitudes of single individuals, even multiple individuals. Constructing such models would lead naturally to judgments, such as *real*, *true*, and *right* that come not from the individual herself but rather from her appropriation of the transpersonal, "objective" perspective engendered by her cultural world.' *Ibid*., at 115-6. Tomasello continues: '… the individual no longer contrasted her own perspective with that of a specific other – the view from here and there; rather, she contrasted her own perspective with some kind of generic perspective of

The obligations that individual actors assume within a community (as well as any corresponding rights) relate to 'goods'. Goods are often thought about in law as involving 'tangible or movable personal property'[83], but I use the term here in a somewhat broader sense here to mean interests in various types of property. The exact arrangement of rights and obligations differs depending on whether the good is considered to be public or private, and hence, on whether the corresponding rights to them belong to *one* or belong *to all*. That depends, in turn, on how a particular good is conceived. In certain U.S. states, for instance, water rights are organized either on the basis of riparian or prior appropriation doctrines. In the former, water is regarded as a public good that all actors have usufructory rights in. In the latter, water rights belong to whomever puts the water to beneficial use.[84] The first doctrine regards water as public, the second regards it as private.

The conception of a good is a product of a community. Some communities may have no conception of a particular good whereas others may have highly refined ones.[85] A related observation is the fact that the conception of goods in a community is not necessarily uniform.[86] On some goods there may be substantial consensus while on others there may be very little. The conception can also change over time.[87]

To understand how all of this displays in WTO law, it is important to consider the 'good' that the community of the WTO Agreement creates. As mentioned, WTO law originates it the law of GATT, which was founded on the idea of reciprocal exchange of tariff concessions subject to MFN. This modification created a 'public good' out of the concessions and commitments made under the WTO Agreement.[88] In sum, the obligation owed to one country is owed to *all* countries in the system.

In many legal systems the idea of the 'good' – the ultimate well-being of the legal system – is too complicated and contested to be defined. In any one moment there are multiple goods – adequate living accommodation, a high birth rate, a low death rate – which vie for legal

anyone and everyone about things that were objectively real, true, and right from any perspective whatsoever – a perspectiveless view from nowhere.' *Ibid*., at 122.

83 S.v., 'Goods', Bryan Garner (ed.), *Black's Law Dictionary* (7th ed., West Group, 1999), at 701.

84 William Goldfarb, *Water Law* (Butterworth, 1984), at 7, 15.

85 See for instance H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th ed., Oxford University Press, 2010), at 77 (discussing of the divine nature of the environment in chthonic conception, which does not allow it 'to be chopped down, dug up, extracted and burned, or dumped upon.')

86 For discussion of the presence of competing views of a good see Heller, *supra* note 81, at 125-129 (contrasting indigenous and Western legal conceptions of property as ending up with 'fractionation' and 'checkerboarding' of traditional 'Indian land' in the U.S.).

87 Heller, *supra* note 81, at 175-176. Discussing the way in which 19th-century New Englanders ultimately reversed the depletion of valuable oyster beds, Heller notes, 'Law is not powerful enough by itself to switch a resource from open access to private property. Instead, oysters' diminished survival depends on a constantly shifting matrix of strategies – simultaneously public and private, individual and community – and on their constant renegotiation.'

88 '[W]hen you look closely at any resource, you will see a jigsaw puzzle of commons, private and state ownership, along with elements of anti-commons ownership. What's tricky is fitting the pieces together so the resource is reasonably well managed from a social perspective. We need an array of finely honed tools to conserve a single depleting resource or to assemble rights in a newly emerging one. The challenge is most acute when values and technologies are shifting. We don't necessarily require optimal use (not the goal because there are genuinely competing conceptions of the term). Instead, the best we may be able to achieve is tolerably good use – avoiding extremes of overuse in a tragedy of the commons and underuse in a tragedy of the anticommons.' Heller, *supra* note 81.

protection. They can be impossible to harmonize in the form of a single, overarching concept.[89] The situation in WTO law is very different. The sense of the system's *acquis*, and more specifically, its insistence on returning to equal expectations in cases of breach, introduces an ultimate good in the system. This may be expressed in its most abstract form as 'equality', or as it is frequently referred to in WTO dispute settlement, 'the equality of competitive conditions'.[90]

How are the above ideas about community and goods linked to a theory of justice? To answer this question I make reference to Aristotle's theory of justice. Aristotle posited that any community will exhibit justice in two primary forms, *corrective* and *distributive*. *Corrective justice* applies to private property and plays a rectificatory role in transactions. It is the justice most familiar in day-to-day life. Thus, when people are wrongfully deprived of their property they are entitled to have it returned or to be compensated. *Distributive justice*, by contrast, applies to public property such as 'honours or wealth or anything else that can be divided among members of a community who have a share in the political system.'[91] When a breach of public property occurs, the wrongdoer is usually deprived of 'community'. They may be sent to prison or prohibited from engaging in certain activities.[92]

While accepting Aristotle's two-fold arrangement of justice, the integrated theory put forward here does so with some important modifications. Aristotle's original formulation inferred that the metric of corrective justice is *equality* – you get back what you've lost – whereas the metric of distributive justice is *fairness* – you get back what you're entitled to. His position on these points has caused centuries of confusion among commentators, who often note the plain fact that the outcomes of many corrective operations are *not* equal.[93] How can

[89] As Tony Judt and Timothy Snyder observed, 'all political choices entail real and unavoidable costs. The issue is not whether or not there is a right and wrong decision to be taken, nor even whether you face a choice such that the 'right' decision consists in avoiding the worst mistakes. *Any* decision - including any right decision - entails forgoing certain options. … If there is no single good, then there is likely no single form of analysis that captures all the various forms of the good, and no single political logic that can master all of ethics.' Tony Judt (with Timothy Snyder), *Thinking the Twentieth Century* (Penguin Books, 2012), at 196-197 [*emphasis in original*].

[90] See for instance *Chile – Alcoholic Beverages*, WT/DS87, 110/AB/R, adopted 13 December 1999, para. 52; *Korea – Alcoholic Beverages*, WT/DS75, 84/AB/R, adopted 18 January 1999, at 119-120, 127; *Canada – Autos*, WT/DS139/R, WT/DS142/R, adopted 11 February 2000, para. 10.87; *China – Audiovisual*, WT/DS363/AB/R, adopted 21 December 2009, para. 305.

[91] Aristotle, *Nicomachean Ethics* (2nd ed., Terence Irwin trans., 2000), at 1131a25-29. I am grateful to Kendall Sharp for bringing the translation to my attention.

[92] An example of distributive justice is the criminal law, which traditionally involves a class of acts designated as 'crimes' that are considered to injure the peace, or 'public property', of whole community. The distinctive penalty for crime is imprisonment – in effect, a deprivation of community. Outlawry and renegade behaviour as emblematic of distinctive outcast communities have populated the folklore of many traditions, from Icelandic sagas to the masterless samurai (*ronin*) of medieval Japan to the postwar 'dharma bums'. Famous depictions of prison 'communities' include Arthur Koestler's *Darkness at Noon* (Macmillan, 1940) and Alexander Solzhenitsyn's *One Day in the Life of Ivan Denisovitch* (Signet Classic, 1962).

[93] See in Izhak Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press, 2009), at ix. Perhaps the clearest indication of this approximation is the way in which the law of costs in many jurisdiction implicitly offers less than full remuneration to an aggrieved plaintiff. In Ontario, for instance, case law has held that '[t]he court should seek to balance the indemnity [i.e. recovery] principle with the fundamental objective of access to justice.' *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557 at para. 22 (Ont. S.C.J. (Div. Ct)). What this means in practice, one set of authors has observed, is that '[p]artial-indemnity costs are the usual scale of costs to be awarded' and: … it is common to consider 'partial indemnity' costs as coming to a little more than half of the solicitor and client costs (usually around 60%) and 'substantial indemnity' costs as coming to about three-quarters of the solicitor and client costs. Gordon Killeen *et al*., *A Guide to Costs in Ontario* (Toronto : CCH Canadian, 2002), at 66.

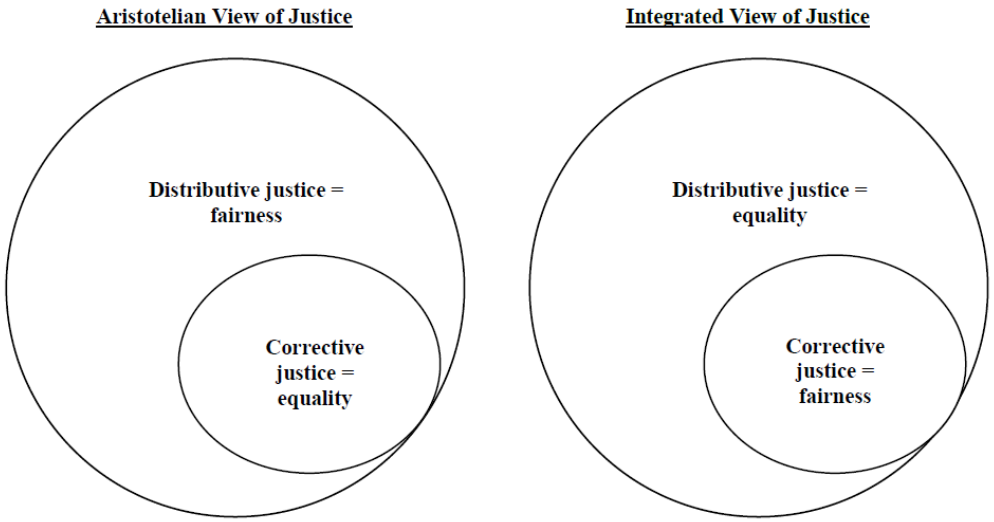
this be? I suggest instead that the metric of corrective justice is *fairness*, or the 'appropriate' satisfaction of any private claim. In essence, you get back what the law is prepared to protect, which is *not* always equal to what was lost. This metric reflects the intensity of the relationship and the competing communal demands present in any corrective operation.[94] The metric of distributive justice, by contrast, is *equality*, or whatever operation is required to restore the equal good of the community. In sum, my views *invert* Aristotle's original metrics.[95] (Fig. 2) At the same time, the re-arrangement solves many problems traditionally associated with Aristotle's position and coheres more naturally with the formula of justice introduced above (i.e. Justice = Equality + Fairness, and the proviso Equality > Fairness).

[94] 'Full compensation is an appealing goal, but it is not one that the law of remedies must necessarily fulfill. The available remedial means of ensuring full compensation, such as injunction, specific performance and restitution, are issued at a price, not just to the defendant but also to the community, and thus their imposition constitutes a transfer from third parties to the victims of harm.' Jeffrey Standen, 'The Fallacy of Full Compensation', *Washington University Law Quarterly*, 1995, 73: 145-226, at 225.

[95] This is not the first time this particular re-conceptualization has been put forward. Izhak Englard reveals how outlines of this same re-conceptualization of Aristotle's work – the core of which constitutes an inversion of values underlying the traditional distinction and their eventual reconciliation – was prefigured in a fragmentary way by a number of renaissance and humanist scholars. Their views are surveyed in Izhak Englard, *supra* note 93. For references to Jean Bodin's reconceptualization see Englard, *supra* note 93, at pp. 131-133, for Valentin Wudrian's reconceptualization see Englard, *supra* note 93, at pp. 133-135, for Giambattista Vico's reconceptualization see Englard, *supra* note 93, at pp 156-58.

Fig. 2

Reconfiguring Aristotelian Justice



Debate about Aristotle's views of justice is based on confusion over what distributive and corrective justice apply to. Aristotle was fairly clear: distributive justice → public goods, corrective justice → private goods.

The predominance and awareness of private property shapes the way justice is conceived of as corrective when, in fact, it is *both* corrective and distributive. This is because one person's right to private property is linked to common recognition of *other* people's rights in private property. Private property is not absolute and can either become someone else's (i.e. repeated trespass → adverse possession) or public property (i.e. expropriation). Private property is also not protected absolutely through justice. This reflects the fact that corrective justice is performed against the broad background of all communal priorities. Courts often discount compensation to reflect 1) difficulties of quantification, 2) the value of 'strategic ambiguity' (i.e. getting the parties to settle), 3) the general sense of what is 'appropriate' (or fair).

Aristotle suggested that underlying value in distributive justice is a variable one of *fairness* whereas the underlying value in corrective justice is a stable one of *equality*. The suggested view of the underlying values should be the *inverse*: distributive justice = underlying value is *equality* whereas corrective justice = underlying value is *fairness*. The integrated view yields the following problem: if justice = equality + fairness, then by definition there must be some just results that are *unfair*. It is suggested that this 'residual' unfairness in a legal system provides ongoing impetus for legal reform.

Despite reliance on a modified form of Aristotle's ideas about justice, the integrated theory developed here goes beyond Aristotle's original forms of justice in some degree. That is because Aristotle's forms are innately conservative. They do not envisage any greater communal transformation in the workings of justice *across time*. Contemporary thinking recognizes this deficiency. It appreciates that a just legal system, as the hallmark of a sustainable community, must adapt to evolving ideas about what is equal and what is fair. Over the six decades of GATT and the WTO Agreement much of what is considered equal or fair has changed.[96] Hence, *time* is an active element in the theory.

Thus, the interaction of distributive and corrective justice across time yields a third type of justice – *transformative justice* – which is fundamentally concerned with transformation. What does transformative justice transform? At the most basic level it transforms *thinking* about legal relationships, or in other words, the conception of rights and obligations. They become interdependent.[97] In the process, the very notion of community itself is transformed.

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[96] For instance, consider the treatment of a subsidy under GATT Art. XVI:1 which, in the original text, was subject to nothing more than a reporting requirement to the GATT membership. Subsequent amendment to GATT and reformulation of the entire package of concessions and commitments means that subsidies are now much more carefully disciplined, being classified as either prohibited, actionable or permitted. See WTO Agreement on Subsidies and Countervailing Measures.

[97] Earlier I mentioned the traditional configuration of rights and obligations in law (i.e. Right = Obligation). Confirmation of this point comes from the work of Gerald Fitzmaurice on the nature of treaty obligations in the 1950s. Gerald Fitzmaurice, 'Law of Treaties (agenda item 4), Document A/CN A/115: Third Report', *Yearbook of the International Law Commission*, 2: 20-46, (New York: United Nations, 1958). Fitzmaurice divided treaties into two types, *bilateral* and *multilateral*, and further subdivided multilateral treaties into three basic subtypes – *reciprocal*, *interdependent* and *integral* – based on the consequences of their breach. For instance, in the case of a bilateral treaty the treaty can be suspended or terminated by either party because it involves a simple exchange of obligations. Subsequent inconsistent treaties are valid, subject to applicable rules concerning priority. The same could be said for multilateral treaties of a *reciprocal* type. In such cases, the treaty is conceived of as a bundle of bilateral obligations. In both bilateral and multilateral reciprocal treaties the underlying arrangement is a 'contract'. At the other extreme, 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. Here, the underlying arrangement can be thought about as a 'constitution', that is, something unconditional and unalterable. In the residual category – multilateral treaties of an *interdependent* type – 'the obligation of each party [is] dependent on a correspondent performance by *all* the parties; and therefore, in the case of a fundamental breach by one party, the obligation of the other parties would not merely cease towards that particular party, but would be liable to cease altogether and in respect of *all* the other parties.' Subsequent inconsistent treaties are void. Does this characterization as a multilateral treaty of an interdependent type accurately explain the nature of WTO obligations? Due to the interdependence it promotes, I suggest that it does. Fitzmaurice gave as examples of multilateral interdependent treaties disarmament treaties, nuclear free zone treaties, 'or any other treaty where each parties' performance is effectively conditioned upon and requires the performance *of each of the others*.' To recall, he also noted that in the case of fundamental breach the obligation under the treaty would cease 'not merely cease towards that particular party, but would be liable to cease altogether and in respect of *all* the other parties.' One could argue that this statement is not accurately reproduced in WTO law since WTO members are required to continue observing their obligations towards *other* WTO members when they suspend concessions towards *one* breaching member under DSU Art. 22. Nevertheless, there are at least three other considerations which work to sustain a view of the WTO Agreement as a multilateral treaty of an interdependent type and WTO obligations themselves as likewise interdependent. First, there is the idea of a breach of a multilateral interdependent treaty leading to 'radical change', something which is reproduced in WTO law in a number of disputes where panels and the Appellate Body have referred to a breach of the treaty as potentially upsetting the 'balance' of rights and obligations among *all* members. Second, there is the phenomenon of selective non-observance. It is well known that WTO member countries do not fulfil their WTO obligations to the letter. Member countries' compliance with their WTO obligations is highly variable. Third, there is the careful way in which countries have crafted their international obligations subsequent to the conclusion of the WTO Agreement so as to avoid conflict. In a number of instances, WTO member countries have sought waivers or 'workarounds' to avoid the spectre of subsequent inconsistent agreements. This practice would suggest that member countries recognize treaty's primacy within its own sphere of international economic relations and tends to confirm the fact that the WTO Agreement, as an interdependent treaty, renders subsequent inconsistent treaties void.

The process of transformation gives rise to interdependence both legally in the form of interdependent obligations and materially in the form of interdependent production and consumption. Out of the resulting tension, the constant push-and-pull, what becomes apparent in law is a 'middle way', or third thing, that can be likened to the struggle of an organism, or a community, to maintain itself between polarities of unity and diversity. The law in operation does this by means of a dialectic.

The dialectic is a process of reasoning dependent upon opposing concepts of thesis, antithesis, and their integration in synthesis. It has been a regular feature of law and moral philosophy since at least the time of the ancient Greeks.[98]

Dialecticism is particularly evident in the use of contrasting concepts at the level of a theory of law. 'Obligation' and 'right' are one such pairing. However, there are a number of others. Equality/fairness, distributive/corrective, prospective/retrospective, constitution/contract, and deduction/induction, are all examples of dyadic pairings that function to distinguish the WTO legal system, differentiating it from other legal systems. What do I mean?

What is observed in this third, overarching mode is the emergence of new phenomena composed of the elements I have referred to above, but also distinct from them. Temporally, WTO law as a legal order integrates both a prospective view (derived from its emphasis on obligations) and a retrospective view (derived from its emphasis on rights) into a contemporary perspective, a perspective which is tightly bounded around the present. If conditions evolve, the law evolves with them.[99] Structurally, the law integrates both constitutional architecture (again, derived from the emphasis on obligations) and contractual architecture (derived from the emphasis on rights). Thus, WTO law has been described as hard to amend and therefore constitutive, but it has also been described as negotiable and therefore 'contractual'.[100] It is a 'contractual constitution'.[101] Finally, WTO law is reasoned deductively according to

[98] It was famously revived by Hegel who maintained that mental patterns will manifest themselves over time in pairs of contradictions that ultimately resolve themselves in the form of reconciliation. See Charles Taylor, *Hegel* (Cambridge, New York: Cambridge University Press, 1975), at 225.

[99] In *Japan – Alcoholic Beverages*, WT/DS8/AB/R, adopted 4 October 1996, p. 31, the Appellate Body observed, 'WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind.'

[100] For references to the WTO Agreement and its legal system as 'constitutive' and therefore relatively rigid and fixed see WTO Art. XVI:4 (conformity requirement); *U.S. – Stainless Steel*, WT/DS344/AB/R, adopted 30 April 2008, para. 160 (observing that in the course of developing their legislation WTO members take into account legal interpretations developed by panels and the Appellate Body). For statements of WTO law as 'contractual' and therefore relatively flexible and fluid see *Japan – Alcoholic Beverages*, p. 14 (noting that the WTO Agreement is a treaty 'the international equivalent of a contract'); *U.S. – Line Pipe*, WT/DS202/R, adopted 29 October 2001, para. 7.40 (noting that 'WTO Members have *contracted* a package of rights and obligations …').

[101] An important realization is that the contrasting ideas of 'contract' and 'constitution' used to describe WTO law or the WTO Agreement are reductible to competing visions of the treaty as an order of rights and an order of obligations. Drawing on terminology adopted in international environmental law, some commentators have prefigured the characterization of the treaty I advance here by referring to the WTO Agreement as a 'constitutional contract'. A constitutional contract has been defined as 'an agreement setting forth an interlocking system of behavioral prescriptions expected to remain operative over an indefinite period.' Oran R. Young and Gail Osherenko (eds.), *Polar Politics* (Ithaca: Cornell University Press, 1993), at 2 (n3). See also Catherine Redgwell, who has written that a 'constitutional contract' refers to the dynamic force of negotiated treaties, treaties that are not one-off events but dynamic instruments that evolve over time. The 'constitutional contract' is relational rather than discrete. See Catherine Redgwell, 'Multilateral Environmental Treaty-Making' in Vera Gowland-Debbas (ed.), *Multilateral*

presumptions (from the emphasis on obligations) and also inductively according to proof (from the emphasis on rights). The result is abductive reasoning.[102]

How exactly does this dyadic structure *transform* WTO law? Earlier I mentioned that the chief distinction between an integrated theory and the others examined above is that an integrated theory is *systematic*. This quality can be assessed according to the five criteria set out above: unity, exclusivity, self-regulation, identity and purpose. Before doing so, however, is useful to acknowledge the WTO's self-understanding as a system.

The word 'system' appears frequently in WTO law. The WTO Agreement preamble notes, for instance, the desire to 'develop an integrated, more viable and durable multilateral trading *system*'. Numerous references have also been made in the case law to the 'WTO trading *system*'[103] , the world trading *system* that is served by the WTO'[104] and the intention of the WTO Agreement's drafters 'to create an integrated *system* governing multilateral trade relations.'[105]

These many references suggest that what is perhaps most important about the WTO Agreement is the way that its parts work together substantively as a unified whole. In *Brazil – Dessicated Coconut*, for instance, the Appellate Body observed that:

> The WTO Agreement is fundamentally different from the GATT *system* which preceded it. The previous system was made up of several agreements, understandings and legal instruments, the most significant of which were the GATT 1947 and the nine Tokyo Round Agreements, including the Tokyo Round SCM Code. Each of these major agreements was a treaty with different membership, an independent governing body and a separate dispute settlement mechanism … Unlike the previous GATT system, the WTO Agreement is a single treaty instrument which is accepted by the WTO Members as a 'single undertaking'.[106]

Treaty Making (London: Kluwer Law International, 2000), 89-107, at 91. I have chosen to *invert* the term to suggest that, in fact, the dominant aspect of the WTO Agreement is in fact obligation-oriented and constitutive.

[102] In the first instance WTO law can be said to be characterized by *deductive logic* – the logic of what 'will be' – based on assumptions about the way things are. This preoccupation is expressed in WTO law's heavy reliance on presumptions and inference. Thus, for instance, a major presumption in the WTO system is the injury upon breach of the rules embodied in DSU Art. 3.8. In a second instance WTO law can be characterized by *inductive logic* – the logic of what 'is' or 'was' – based on proof. The demand for proof is most evident in WTO rules disciplines where proof is often a precondition for some form of government action – a safeguard, a countervailing measure or an anti-dumping duty. As some commentators have noted, however, induction is hard to sustain in a legal system with limited fact-finding ability. Therefore, in a third instance WTO law is characterized by *abductive logic* – the logic of what 'might be' – based on the combination of both presumption and proof, or in other words, on the reconciliation of what will be with what was. Abductive logic is not watertight. Instead, it offers the 'best' or most intelligent explanation on existing evidence and provides the possibility of change as new information becomes available. Abductive reasoning is open, tentative and provisional, and in this way, allows the WTO system a degree of adaptive flexibility as law and fact change. In a few instances the Appellate Body appears to have actually given credence to this idea. In *Japan – Alcoholic Beverages*, for example, in discussing the idea of 'likeness' under GATT Art. III:2, first sentence, it observed that 'in considering other criteria that may also be relevant in certain cases, [WTO] panels can only apply their *best judgment* in determine whether in fact products are "like".' *Japan – Alcoholic Beverages*, at 20-21.

[103] See for instance *Canada – Autos*, WT/DS139, 142/AB/R, adopted 31 May 2000, para. 69; *EC – Tariff Preferences*, WT/DS246/AB/R, adopted 7 April 2004, para. 101.

[104] *U.S. – Section 211*, WT/DS176/AB/R, adopted 2 January 2002, para. 240.

[105] *Guatemala – Cement*, WT/DS60/R, adopted 19 June 1998, para. 7.26. See also the description of the WTO Agreement as an 'Integrated System' in *Brazil – Dessicated Coconut*, WT/DS22/AB/R, adopted 21 February 1997, at 11.

[106] *Brazil – Dessicated Coconut*, WT/DS22/AB/R, p. 11 (21 Feb. 1997).

The Appellate Body went on to detail how the WTO system alters behaviour through the coordinate operation of rights and obligations, in that case involving disciplines on subsidization:

> The [GATT and WTO] SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures.[107]

What is apparent from these references is the idea that WTO obligations as a system function 'concurrently and cumulatively' to shape the subjects' behaviour in every moment.[108] No one element is individually responsible for doing so. Instead, all elements work *together* to modify the relationships in question. The Appellate Body confirmed this understanding in *Brazil – Dessicated Coconut* by referring to the WTO Agreement as 'an *integrated system*'.[109]

At the same time systems are 'complex. They include as well as exclude. Exclusivity is conferred in WTO law by application of a distinct body of rights and obligations to relationships between member countries that do not apply to countries beyond. These legal relationships also enjoy a primacy within the system. In *Argentina – Footwear*, for instance, the Appellate Body considered an argument that Argentina was unable to comply with GATT Art. VIII concerning import and export fees because of pre-existing commitments to the International Monetary Fund (IMF). The Appellate Body stated:

> We note that certain provisions of the GATT 1994, such as Articles XII, XIV, XV and XVIII, permit a WTO Member, in certain specified circumstances relating to exchange matters and/or balance of payments, to be excused from certain of its obligations under the GATT 1994. However, Article VIII contains no such exception or permission.[110]

In essence, the Appellate Body concluded that a country's IMF membership did not exempt a WTO member country in Argentina's position from administering a statistical tax in accordance with the WTO Agreement.

The exclusive aspect of WTO law as a system is also linked to the system's regulatory character. This character is most evidently manifested in the notion of WTO law as a 'balance'. Perhaps the most frequent examples of the metaphor occur in WTO dispute settlement where breaches of the treaty are often problematized as 'imbalances', meaning that in most instances a country will have to do something in order to correct the alleged 'balance'.[111] Balance, and

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[107] Ibid., p. 17.

[108] *U.S. – OCTG*, WT/DS268/RW, para. 7.129 (30 Nov. 2006). Similar language has been used in *U.S. – Clove Cigarettes*, WT/DS406/AB/R, para. 91 (24 April 2012); *EC – Sealing Products*, WT/DS400, 401/AB/R, para. 5.121 (22 May 2014) (observing that the TBT and GATT 1994 should be interpreted in a 'coherent and consistent manner').

[109] *Brazil – Dessicated Coconut*, WT/DS22/AB/R, adopted 21 February 1997, at 17.

[110] *Argentina – Textiles*, WT/DS56/AB/R, adopted 27 March 1998, para. 73.

[111] 'The object and purpose of Article XIX is, quite simply, to allow a Member to readjust temporarily the *balance* in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances …': *Argentina – Footwear*, para. 94; '… a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the *balance* of concessions among Members.' *Argentina – Textiles*, *ibid*. 'It should be pointed out that the various exceptions provided for in the WTO Agreement are an integral and important part of the carefully negotiated *balance* of rights and obligations of Members.' *Brazil – Aircraft*, WT/DS46/RW/2, adopted 26 July 2001, n. 131. The metaphor of 'balance' is also occasionally employed

the associated idea of bipolarity, manifest themselves in notional departure from the equilibrium and the law's insistence on re-establishing it. Systemic thinking thus imparts a dynamic in the treaty that can be thought of as a sort of 'momentum', or *vis vitae*, within the arrangement.

Nevertheless, despite degrees of exclusivity and primacy, debate continues over the relative 'closure' or 'openness' of WTO law, that is, the extent to which the system is watertight. An intermediate view recently forwarded by Ronnie Yearwood is one of 'constrained openness', a view which comports with James Crawford's observation that 'there cannot be, at the international level, any truly self-contained regime, hermetically sealed against bad weather.'[112] In Yearwood's view WTO law often 'translates' doctrines of external public international law, 'reconstructing' them in significant ways. For instance, the precautionary principle in public international law is reassembled in WTO law in light of its own trade-related rationality.[113] In this manner WTO law constitutes a special body of law, a body that departs from ordinary consequences of international law and functions as a *sui generis* system.

A further characteristic of a system is its degree of internal ordering. The great mass of WTO obligations makes some regular ordering of WTO law a necessity. This order is accomplished in four principal ways. First, WTO members are explicitly required to comply with the WTO Agreement and are subject to periodic assessment of their commitments by means of peer review. Second, the WTO Agreement contains rules that establish an internal hierarchy of norms. Third, the WTO Agreement also contains certain rules about its interaction with other systems of law. Fourth, dispute settlement is often resorted to where express rules may be lacking. It provides interpretations where the treaty is silent or unclear. In the process, it instils consistency and regularity – 'stability and predictability' – to the tenor of WTO rights and obligations, reinforcing the idea of unity.

Finally, there is the idea that WTO law as a 'system' creates something new, or different, from its constituent parts, that is, something that none of them individually would be able to achieve on their own. This idea is occasionally hard to discern in relation to WTO law because of the WTO's institutional commitment to remain a 'member-driven' organization and, consequently, its self-effacing character as an international legal person.[114] Still, thought about carefully, the organization achieves a wide range of objectives that could not be fulfilled by any one member country on their own, including coordination within a multilateral agenda, coherence among a range of state and non-state actors, and compliance with WTO and

to identify the tension between competing values in, for instance, the confidentiality of administrative proceedings: *Argentina – Floor Tiles*, WT/DS189, 28 September 2001, para. 6.38.

[112] Daniel Bodansky, John Crook and James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', American Journal of International Law, 2002, 96(4): 874-90, at 880.

[113] For instance, Yearwood refers to SPS Art. 5.7 which requires that provisional SPS measures be adopted 'on the basis of available pertinent information.' This formulation implies risk assessment *before* action can be taken. Yearwood points out that this 'reverses to a degree the temporal relationship between information and action that is at the core of the precautionary principle.' It is contrasted with Principle 15 of the Rio Declaration on Environment and Development which proceeds from the basis of 'lack of full scientific certainty' and makes no mention of risk assessment. See Yearwood, *supra* note 24, at 147.

[114] Footer, *supra* note 52, at 334 ('institutional developments would suggest that the WTO does not sufficiently fulfil the role of an international organization, with the will of its own and identity separate from that of its Members').

international law.

The idea of systemic transformation produced by a legal system therefore helps to convey much of what otherwise evades existing accounts of WTO law. These accounts tend to regard the system as a set of discrete rules that are not necessarily connected by anything more than the fact of their inclusion in the treaty. According to this view, it can be difficult to discern any larger system or what the system accomplishes. In WTO practice the analysis of law is mainly 'obligation by obligation'.[115] The counterpoint approach proposed here is more integrated and comprehensive, and therefore more in line with the real-world fact of growing interdependence. Interpretive analysis of the treaty is conducted against the greater background or context of *all* obligations, as required by the VCLT. The result is occasionally referred to as the principle of 'systemic integration'.[116]

Is this 'system-ness' so exceptional? No. A number of commentators have observed, for instance, that a similar phenomenon is evident in EU law where several clauses lay down duties of cooperation, often described as duties of 'community solidarity', on member states (*Gemeinschaftstreue*) or on EU organs (*organtreue*).[117] These duties go beyond the normal obligation to fulfil treaties in good faith. EU states and organs must constantly remain aware of the need to act in a general way that reinforces the underlying idea of community.[118] Something similar occurs in WTO law, although it is composed of many seemingly unrelated phenomena that so far have received no single doctrinal designation.[119]

5. CONCLUSION

The idea of a theory of law is both attractive and elusive. It is attractive because of its promise of coherence and unity. It is elusive because few 'systems of ideas' can claim the ability to harmoniously reconcile so many disparate parts. This is especially true of a theory of WTO law. WTO law is sourced primarily in the WTO Agreement, a complex instrument that runs more than 30,000 pages and that contains a large number of obligations, few of which fit together neatly. The treaty is so large and sprawling that it often exceeds the legal imagination.

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[115] '… the distinction between bilateral and collective [obligations] is to be determined *obligation by obligation*, not treaty by treaty.' Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' *European Journal of International Law*, 2003, 14(5): 907-51, at 925 [*emphasis added*].

[116] Campbell McLachlin, 'The Principle of Systemic Integration and Article 31(3)(c)', *International and Comparative Law Quarterly*, April 2005, 54(2): 279-320, at 280. McLachlin refers to the principle as 'an inarticulated major premise in the construction of treaties' having 'the status of a constitutional norm within the international legal system.'

[117] See John Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty', *Common Market Law Review*, 1990, 27: 645.

[118] As Jan Klabbers puts it, 'Much in the same way as marriage is somehow more than a mere contractual arrangement, so too the creation of an organization is an act which involves not just the normal good-faith duty to give effect to one's commitments, but also a spirit of loyalty, camaraderie and mutual respect.' Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed., Cambridge University Press, 2009), at 176.

[119] Indeed, the WTO dispute settlement system has reserved some of its harshest criticism for situations where legislators have apparently failed to consider the compliance burden on foreigners as opposed to domestic interests, indicating the modification in *thinking* required by the treaty: see *U.S. – Gasoline*, *supra* note 17, at 28-9; *U.S. – Clove Cigarettes*, WT/DS406/R, adopted 4 April 2012, para. 7.289; *EC – Sealing Products*, *supra* note 108, para. 5.337.

In this article I have posited that the difficulty of identifying a theory of WTO law emanates both from confusion about what a theory is and the way that WTO law is traditionally analyzed in terms of theory. Commentators either seek a 'perfect' theory, a sort of line-by-line prediction that will explain everything, or they will disclaim the possibility of a theory at all, thereby leaving room for explanations from outside the law.

I reviewed three popular frameworks of the analysis of WTO law – textual, political and economic – and demonstrated how they come up short, principally because they are based on non-normative considerations. These considerations are at odds with the law. This is not necessarily a criticism. It simply makes the point that all theories will suffer from some deficiency. The task of identifying a theory is ultimately one of responsibility. We assume responsibility for the law by identifying the ideas that circulate within it systematically. We do the best we can.

In this article I have put forward a jurisprudential approach to theory based on integrated ideas about community, justice and law. They account for the most prominent features of WTO law reasonably well. The initial basis of such an 'integrated theory' lies in interdependence that takes the form of 'community'. I have described how members of the WTO have created an especially strong and durable form of community through their reciprocal trade concessions. That, in turn, gives rise to the need for justice expressed as values of equality or fairness and taking the shape of specific obligations and rights in law. The resulting arrangement is not undifferentiated. Obligations and rights do not rest in equipoise. They are oriented towards what is public – towards the 'community' – meaning that the whole is directed in a certain way. The orientation of WTO law emphasizes obligation, equality, prospectivity, constitutionalism and deduction. As indicated, the theory does a reasonably good job of explaining the peculiarities of WTO law outlined at the beginning of this article.

One further test of a theory is its generality, or in other words, its ability to explain phenomena in diverse areas. Confirmation of the above integrated theory comes from an application of the foregoing ideas to explain the principal features of international investment law. If a broad view is taken of what is happening in that area versus what has emerged in WTO law, it is clear that it is the difference about what is protected – the underlying *res* - that hold the key to their mutual intelligibility in terms of an integrated theory. As explained, WTO law is the reflection of a well-developed community which has given rise to a single, reasonably unified good that all members possess together and recognize the value of. This is often embodied in the phrase 'the equality of competitive conditions'. Unity and 'publicness' in the underlying good give rise to distributive justice.

International investment law, by contrast, is the product of a much more novel and fragmented regime.[120] The law is sourced primarily in thousands of 'contract-type' treaties,

[120] International investment law has emerged from pre-existing customary international law and principles of law. Today, however, it is primarily sourced in thousands of bilateral and pluralilateral investment treaties as well as other instruments, many of which have their own dispute settlement mechanisms. The extent to which these are coherent is debatable. The resulting network of treaties is also highly controversial. There has been visible backlash against foreign direct investment and the international law regime governing international investment. José Alvarez

typically concluded between pairs of countries, that often reproduce each other but that also differ in important ways. For example, the definition of 'investment' varies widely.[121] Likewise, the 'good' is normally conceived of as the protection of specific investments composed of rights to something – to land, assets, or more controversially, intangibles such as intellectual property , profits, goodwill, even treatment – that vary from country to country. As a result, the underlying sense of what is common – of community – is harder to discern. Not surprisingly, dispute settlement in international investment law is about the vindication of individual rights. The pluralism and 'private' nature of the interests at stake give rise to corrective justice.

These differences suggest that what is observed in international investment law is, from the point of view of the integrated theory put forward above, very much the diametric opposite of WTO law. Whereas WTO law is a law of the future, of equality, obligations, constitution and deduction, international investment law is a law of the past, of fairness, rights, contract and induction. The manifestation of these same oppositions beyond the WTO Agreement, albeit in a slightly different key, tends to highlight the contrasts that are at the heart of the theory, and in the process, to confirm its understanding.

They also tend to explain the recent trend in international investment law towards 'constitutionalization'. Many commentators have pointed out how, despite its rights-oriented, retrospective and corrective tendencies, international investment law is fundamentally 'public'. They point, for example, to the way in which investors are using 'networks' of treaties to launch claims[122], the way arbitral awards are having precedential effect[123], and the way that decisions are tending to constrain national governments.[124] In other words, aspects of a 'system' are emerging.[125] For this reason, a number of commentators have called for changes to

notes, for example, that 'adverse reactions to some forms of FDI have emerged everywhere.' José E. Alvarez, *The Public International Law Regime Governing International Investment* (Brill, 2011), at 22

[121] In international investment law an investor must satisfy the requisite link to an investment in order to maintain a claim. What has been noted is that arbitrators are resorting to different conceptions of an investment based on differing conceptions of property rights in their decision-making: see Zachary Douglas, 'Property, Investment and the Scope of Investment Protection Obligations', in Zachary Douglas *et al*. (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014), 363-406.

[122] In international investment law an investor must maintain a claim under an investment treaty they are protected by. Coverage is usually extended by virtue of nationality. However, use is often made of MFN clauses by investors to access some benefit, such as a limitation clause, contained in *another* treaty. In an attempt to stem this practice, some countries have narrowed the scope of MFN clauses in their model investment treaties: see Pia Acconci, 'Most-Favoured-Nation Treatment' in Peter Mulchinski *et al*. (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 363-406, at 387

[123] As mentioned, international investment law is primarily founded in thousands of bilateral investment treaties, most of which have their own dispute settlement systems. Therefore, the extent to which decisions rendered under one treaty have binding effect on decision-making under another is something of an open question. See Christoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?', *supra* note 122, Mulchinki *et al*. (eds.), 1189-95, at 1196. Some commentators have likened the precedential effect of international investment law to a *jurisprudence constante* encountered in civil law systems. See for example Alvarez, *supra* note 120, at 256 (questioning how 'how the [ICSID] annulment process contributes to the *jurisprudence constante* expected of the investment regime.').

[124] See Alvarez, *supra* note 120, at 75 (discussing critiques of the investment regime arising largely from the investment regime's increasing normative effects on governments).

[125] Some commentators have been inclined to doubt whether international investment law constitutes a 'system': see Christoph Schreuer and Matthew Weiniger, *supra* note 123 ('The system, if it can be even called a system, of investment treaty arbitration is not unitary in the sense of each tribunal sitting under the same source of jurisdiction.'). According to others, international investment law is more loosely described as a 'network' or a 'regime': see Alvarez, *supra* note 120, at 359 (citing the work of Charles Brower II).

acknowledge international investment law's true nature as collective and communal.[126] These calls may be regarded as illustrative of the dialectic between communal and individual, obligation and right, mentioned above.[127]

Still, it would be easy to caricature different systems of law as either exclusively obligation- or right-oriented. The truth is more complex. The true character of legal systems is not described as lying at the extreme of either of the polarities identified here. No legal system is composed entirely of obligations and is purely equality and expectation-based. Likewise, no legal system is composed entirely of rights and is purely fairness and reality-based. WTO and international investment law exhibit aspects of *both* polarities, simply in different degrees.

It remains to be seen how this same system of ideas can be projected into other legal systems and whether it can fulfil its potential as a theory of law in general.

[126] See for instance David Schneiderman, *Constitutionalizing Economic Globalization* (Cambridge University Press, 2008). Recent evidence of this trend comes from the EU's efforts to establish an international investment 'court' for the review of arbitral awards: see for instance, *Canada-EU Free Trade Agreement* (CETA), Art. 8.29. See also Stephan W. Schill, 'The European Commission's Proposal of an "Investment Court System" for TTIP', *American Society of International Law, Insights*, 22 April 2016, 20:9.

[127] For reference to dialecticism in international investment law see Alvarez, *supra* note 120, at 426 (noting that 'today's struggles over [bilateral investment treaty] texts, over conflicting interpretations of these treaties, and over the enforcement of controversial arbitral awards suggest … that what is at work is *a dialectical process* that is inherently unstable.')