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A Theory of WTO Law

theory, as of a system of knowledge.[1]

1.1 Why a Theory?

This book puts forward a theory of the law of the World Trade Organization (WTO). A "theory" is a "system of ideas," with the emphasis being on the "system," or set of relationships, regularly exhibited between those ideas.[2]

In this book I make the principal point that WTO law is about interdependence as reflected in varying conceptions of the good. The theory emphasizes how WTO law reflects regular relationships between classic forms of justice that work to sustain the good.

Before going into detail on this point, however, I think it is important to address some potential objections to a theory, both as a way of providing some background to the subject and underlining the importance of what is advanced here.

One potential objection is the fact that WTO disputes are difficult to assimilate with justice, at least if justice is thought about in corrective terms. Most WTO disputes are initiated by a single complainant country and defended by a single respondent country. If the complaint is made out, the proceedings normally end in a cryptic direction to the wrongdoing country to bring its laws and regulations "into conformity" with the organization's basic treaty, WTO Agreement. No compensation is automatically payable.

[1] S.v. "Basis," in *Webster's New World Dictionary*, 1564 (Simon & Schuster, New York; 1976), quoted in *EC – Sardines*, WT/DS231/R, para. 7.110 (29 May 2002).
[2] S.v. "Theory," *Shorter Oxford English Dictionary* (5th ed.) 3236 (Oxford University Press, Oxford; 2002).

Another potential objection is the lack of any direct reference to "justice" in WTO texts. When the WTO Agreement was concluded in 1994 member governments spoke chiefly of the new treaty as contributing to the rule of law, not justice, and since that time criticism of the treaty by human rights advocates, environmental activists and others has left the impression of it in many quarters as unjust.[3]

A further potential objection is encapsulated in the question, why is such a theory necessary? After all, until recently WTO dispute settlement has functioned reasonably well without a theory, and so it might be queried whether one is required or useful.

Over time, however, eminent commentators have implied that a theory *is* useful, either by alluding to one or trying to define its contents in some preliminary way. For instance, as long ago as 1983 Ernst-Ulrich Petersmann observed with respect to the WTO Agreement's forerunner, the General Agreement on Tariffs and Trade (GATT 1947), that "a comprehensive economic theory of [the international economic system] is not to be found in the (neo) classical treatises on political economy." Petersmann went on to note that:

> an order should be characterized by a coherent system of starting points, objectives, principles, and institutional and instrumental means that can achieve the formulated objectives in an orderly fashion.[4]

More recently in 2005, Thomas Cottier, Matthias Oesch and Thomas Fisher observed that "the absence of a long-standing legal theory or

[3] For criticisms of the WTO, see OXFAM International, *Rigged Rules and Double Standards* (2002), observing:

> The problem is not that international trade is inherently opposed to the needs and interests of the poor, but that the rules that govern it are rigged in favour of the rich . . . Many of the rules of the World Trade Organization . . . on intellectual property, investment, and services protect the interests of . . . countries and powerful TNCs, while imposing huge costs on developing countries. This bias raises fundamental questions about the legitimacy of the WTO.

See also Sarah Joseph, *Blame It on the WTO* (Oxford University Press, Oxford; 2011) (offering a critique of the organization and its legal system from a human rights perspective).

[4] Ernst-Ulrich Petersmann, "International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order" in R. St. J. Macdonald & D. M. Johnston (eds), *The Structure and Process of International Law* 234–235 (Martinus Nijhoff, Boston; 1983).

tradition of international trade regulation explains why even basic questions of international trade law are still in the open."[5]

The statements of Petersmann, Cottier and others infer that whatever the current state of thinking about WTO law, a theory is desirable because it conforms with the general intuition that a theory is rational.

There will be limits to this rationality of course. That is because any theory is a distillation. Anne Peters has pointed out how all theories involve simplification. The benefit of simplification is explanatory. "The simpler the theory, the better you understand [it]."[6]

At the same time, the simplicity of a theory can generate uncertainty about its explanatory power and elicit criticism.[7] No theory will explain everything and as I intend to show, that is certainly true of the theory put forward in this book.

Instead, what is highlighted by the theory is tendencies as opposed to certainties. As such, some phenomena of WTO law will be explained relatively well by the theory whereas others will not. The theory aims to strike a balance between simplification and explanation. Its shortcomings will spur the quest for other, more accurate theories.

A theory like this one is likely to be useful in a number of ways. First, it will provide an overview, or "map," of the WTO legal system. With it we will no longer be left to "wander around among the differences"[8] of WTO provisions and cases. Rather, there will be something more schematic to guide legal thinking.

Second, reasoning about WTO law often takes place from within the law – its existing texts and jurisprudence – whereas the theory outlined here analyzes the body of law by means of concepts beyond it, notably community and justice. This approach is particularly promising because there continues to be much debate about the future of the WTO as a

[5] Thomas Cottier et al., *International Trade Regulation* 47 (Cameron May, London; 2005).
[6] Anne Peters, "Realizing Utopia as a Scholarly Endeavour" 24:2 *Eur. J. Int'l L.* 533 at 536 (2013), quoting Gregory Chaitin, "The Limits of Reason" 294:3 *Scientific American* 74 (2006).
[7] "[T]here must come a point where gaps between the *explanadum* and the *explanans* cast doubt on the value of the explanation." Peter Cane, "The Anatomy of Private Law Theory" 25:2 *Ox. J. L. S.* 203 at 207 (2003).
[8] H. Patrick Glenn, *Legal Traditions of the World* (5th ed.) at 153 (Oxford University Press, Oxford; 2014).

community and about the ultimate justice of WTO law, issues which, as of the time of this writing, have provoked a variety of reactions, including an impasse over the role of the WTO dispute settlement system's court of appeal, the Appellate Body, which in late 2019 suspended operation. To that extent, the theory may offer a diagnosis for what currently ails the WTO.

Third, a theory is useful because it is predictive. It will provide some indication of how WTO law is likely to evolve in future.

In response then to the question posed at the outset of this chapter, why a theory?, there are several answers. A theory is useful because it is rational as well as analytic, diagnostic and predictive.

There is something else too. This is the possibility of using the theory to outline a theory of law in general. At a time of some pessimism about the likelihood of ever successfully identifying a general theory of law, I will suggest that what is observed in WTO law is in some degree an illustration of how law does justice in *any* community.[9] Such an assertion might appear grandiose – even foolish – but in my view it is nothing more than recognition of the fact that what has happened in the course of WTO law's short history is the emergence of regular relationships expressive of the need for justice in a community.

1.2 The Outline of a Theory

The word "theory" is often associated with abstraction and complexity. It is therefore worthwhile providing a synopsis of what is put forward here in order to summarize the theory's contents and help direct subsequent discussion.

The theory outlined in this book is a three-fold theory. It is, first and foremost, a *theory of community*, a theory about how individual actors come together and depend upon each other to produce certain things they hold together and value that I will refer to as "goods."

Second, the theory is a *theory of justice*, or in other words, a theory about how members of a community regularly conceive of what is right or correct in relation to goods.

[9] Joseph Raz, *Between Authority and Interpretation* 17 (Oxford University Press, Oxford; 2009). In chapter 2, Raz asks the question "can there be a theory of law?" but concludes that he is less than completely confident a workable theory can be identified.

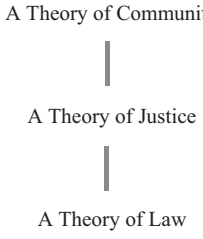

Figure 1.1 A communitarian theory outline

Third, the theory is a *theory of law*, a theory about how legal elements relate to each other in an effort to do justice as it relates to goods.

A preliminary outline of the theory's structure can be summarized as shown in Figure 1.1.

In sum, the theory posits that the law does justice in order to sustain the good of the community.[10] Again, it is helpful for the purposes of subsequent discussion to briefly outline these ideas a little further.

1.2.1 A Theory of Community

The foundation of a theory of law lies in interdependence, a phenomenon rooted in biology. Humans are members of a uniquely interdependent species.[11] We create and rely upon many goods that could not be produced by one individual in a single human lifetime. These include vaccines, jet travel and the internet.

[10] The theory's three-fold structure prioritizing community is dictated by the fact that "[w]e treat community as prior to justice and fairness in the sense that questions of justice and fairness are regarded as questions of what would be fair or just within a particular community." Ronald Dworkin, *Law's Empire* 208 (Belknap Press, Cambridge, MA; 1986).

[11] Paul Seabright has written:

> *Homo sapiens sapiens* is the only animal that engages in elaborate task-sharing – the division of labour as it is sometimes known – between genetically unrelated members of the same species. It is a phenomenon as remarkable and uniquely human as language itself. Most human beings now obtain a large share of the provision of their daily lives from others to whom they are not related by blood or marriage.
>
> (Paul Seabright, *The Company of Strangers* 1 (Princeton University Press, Princeton, NJ; 2004)).

In the latest phase of interdependence from 1990 on the "blend of Western industrial know-how and Asian manufacturing muscle" has fueled a "hyper-globalisation of supply chains" that has left an impression of the world as "flat."[12] Although there are some indications that this hyper-globalizing trend has moderated, interdependence in the form of global supply and value chains remains enormously important.[13]

Some idea of its importance was given in *US – Aircraft*, a WTO dispute concerning subsidies granted to the US aircraft industry. There, a WTO dispute settlement panel detailed the multinational list of suppliers involved in assembling the Boeing 787:

> Completion of sub-assemblies and integration of systems takes place in Everett, Washington, with many components being pre-installed before delivery to Everett. The 787 composite wings are being manufactured by Mitsubishi Heavy Industries. The horizontal stabilizers are being manufactured by Alenia Aeronautica in Italy, and various parts of the fuselage sections are being built by Alenia in Italy, Vought in Charleston, South Carolina, Kawasaki Heavy Industries and Fuji Heavy Industries in Japan, Alenia in Italy and Spirit Aerosystems in Wichita, Kansas. The main landing gear and nose landing gear are being supplied by the French company Messier-Dowty, while passenger doors are being made by

[12] "Flatness" is Thomas Friedman's metaphor for viewing the world today as a level-playing field in terms of commerce wherein all competitors have an equal opportunity. Thomas L. Friedman, *The World Is Flat* (Farrar, Straus & Giroux, New York; 2005). See also Vijay Vaitheeswaran, "A Slow Unravelling" 432:9151 *The Economist* 3 (13 July 2019).

[13] David Brooks, "Globalization Is Over. The Global Culture Wars Have Begun" *The New York Times* (8 Apr. 2022) Brooks notes how in the immediate aftermath of the Cold War:

> [i]t seemed as if there would be a global convergence around a set of universal values – freedom, equality, personal dignity, pluralism, human rights. . . . The world is not converging anymore; it's diverging. The process of globalization has slowed and, in some cases, even kicked into reverse . . . Sure, globalization as flows of trade will continue. But globalization as the driving logic of world affairs – that seems to be over.

For a more equivocal account, see Jeanna Smialek & Ana Swanson, "The Era of Cheap and Plenty May Be Ending" *The New York Times* (3 May 2022) (noting how if supply chain turmoil and geopolitical conflicts result in a reversal or reconfiguration of global production a decades-long decline in the prices of many goods could come to an end).

> Latécoère in France, and the cargo, access and crew escape doors by Saab in Sweden.[14]

The panel noted that as a result of globalized manufacturing, Boeing has "shifted responsibility for detailed component design to suppliers, and focuses on systems integration, managing overall requirements, as well as the assembly process. The 787 is essentially assembled from large sub-structures designed and produced by suppliers."[15]

The panel's description of the Boeing 787's assembly process is emblematic of the way that what has arisen through interdependence is an elaborate network of relationships. Much modern production and consumption is characterized by them. They value coordination and integration so that delivery of the final product becomes a unity.

Unity places demands on supply and value chain participants. They need to consider matters differently than they would if acting independently. Regular reliance means that actors have to pay at least as much attention to what they are required to do as to what they want to do.

The experience of Boeing and other actors demonstrates the way that interdependence modifies thinking. Similarly in this book, I maintain that the modification generated by WTO law is primarily mind-driven. The "security and predictability"[16] that are repeatedly identified as

[14] *United States – Civil Aircraft (Second Complaint)*, WT/DS353/R, appendix VII.F.1, para. 25 (31 Mar. 2011). For similar observations of the Boeing 787 as emblematic of interdependence, see Michele Ruta & Mika Saito, "Chained Value" *Finance & Development* 52 (Mar. 2014).

[15] *United States – Civil Aircraft (Second Complaint)*, WT/DS353/R, appendix VII.F.1, para. 24 (31 Mar. 2011). WTO Director-General Pascal Lamy has described a similar phenomenon in the global textiles value chain. See "What Cannot Be Counted Does Not Count" (speech by WTO Director-General Pascal Lamy to the Economic Development Foundation (IKV) and the Economic Policy Research Foundation of Turkey (TEPAV), Istanbul, 14 Mar. 2013).

[16] In *EC – Computer Equipment*, WT/DS62/AB/R, para. 82 (5 June 1998) the Appellate Body observed that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994." This reference has been cited in numerous other decisions: see *EC – Chicken Cuts*, WT/DS269/AB/R, para. 243 (12 Sept. 2005); *EC – Bananas III*, WT/DS27AB/RW2/ECU, para. 433 (26 Nov. 2008). In *China – Automobile Parts* the panel referred to it as the "*main* purpose" of the WTO Agreement: see *China – Automobile Parts*, WT/DS339, 340, 342/R para. 7.460 (18 July 2008) [emphasis added].

Figure 1.2 A theory of community

constituting the core of WTO disciplines are closely linked to interdependence in that they afford officials, producers and consumers in member countries an extended horizon on which to plan. The ultimate purpose of this coordination is to produce goods.[17]

In light of these ideas, it is possible to begin outlining a theory of community as shown in Figure 1.2.

In economics goods are characterized by different degrees of exclusivity and rivalry.[18] Exclusivity refers to the way in which a good's use may be limited or restricted to some individual or group. Rivalry refers to the way a good's use may diminish its benefits for others.

The combination of exclusivity and rivalry results in four different categories of goods. First, there are exclusive, rivalrous private goods such as real estate. Second, there are exclusive, nonrivalrous "club" goods such as toll roads or the internet. Third, there are nonexclusive, rivalrous common goods such as natural resources. Fourth, there are nonexclusive, nonrival "public" goods such as public health.[19]

As I will explain, the arrangements establishing the WTO Agreement create a "club" good. This is in the sense that the concessions and commitments made by member countries under it are reserved to the WTO membership, and that at least in theory, one member's access does not diminish the treaty's benefits for others.

At the time of the WTO Agreement's inauguration in 1995, there was broad consensus about the advantages of this good. Over time, however, the sense of benefit and mutual advantage from it has decreased due to misgivings about unconditional interdependence. As a result, the club good of the WTO Agreement now appears to be splintering into a

[17] Aristotle posited that all human actions can be traced to some good. "Every art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim." Aristotle, *Nicomachean Ethics* (2nd ed.) 1094a1 (Terence Irwin, trans., 1999).

[18] Moya Chin, "What Are Global Public Goods?" 58:4 *Finance & Development* 62 (Dec. 2021).

[19] Ibid.

series of bilateral relationships more appropriately likened to private goods. This evolution is emblematic of the way in which the conception of the good can change and how it reflects the changing nature of the community.

1.2.2 *A Theory of Justice*

Notwithstanding these ideas, actors are unlikely to come together to produce goods without some assurance that they are better off by doing so. This gives rise to a preoccupation in a community with justice.

In this book I take the view that the idea of justice can be distilled into the essence proposed by Herbert Hart in 1958 when he observed that justice consists:

> of two parts: a uniform or constant feature, summarized by the precept "Treat like cases alike" and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.[20]

A respected body of opinion championed by a number of scholars including Neil MacCormick later refined these ideas to assert that justice is fundamentally composed of values of equality plus fairness.[21] The basic relationship can be represented as follows:

$$\text{Justice} = \text{Equality} + \text{Fairness}$$

As I will show, the experience of WTO law suggests that the basic relationship above is accompanied by two provisos:

$$\text{Proviso \#1: Equality} \neq \text{Fairness}$$
$$\text{Proviso \#2: Equality} > \text{Fairness}$$

[20] Herbert L. A. Hart, *The Concept of Law* (2nd ed.) 160 (Oxford University Press, London; 2006).

[21] Sanne Taekema observes that the combination of equality and fairness at the core of the concept of justice is also forwarded by Neil MacCormick, *Legal Reasoning and Legal Theory* 73 (Clarendon Press, Oxford; 1978). Fairness as the core of justice is proposed by David Miller, *Principles of Social Justice* (Harvard University Press, Cambridge, MA; 1976). Justice as equal treatment can also be found in Gustav Radbruch, *Legal Philosophy* 278 (Quelle & Meyer, Leipzig; 1932), Herbert L. A. Hart, *The Concept of Law* 159 (Oxford University Press, Oxford; 1994), James Harris, *Property and Justice* 171 (Clarendon Press, Oxford; 1996), and Aristotle in the *Nicomachean Ethics*. See Sanne Taekema, *The Concept of Ideals in Legal Theory* 192 n. 31 (Kluwer Law International, The Hague; 2003).

Proviso #1 (i.e. Equality ≠ Fairness) emphasizes how the distinction ordinarily made between "equality" and "fairness" implies that the two terms do not mean the same thing.

The ascription of distinct meanings to equality and fairness dovetails with recent research in anthropology and evolutionary psychology, which indicates that fairness, in particular, is a uniquely human trait, something not observed in our closest genetic relatives.[22] As David Schmidtz has noted, what makes a result "fair [is] not that our slices are equal – they may not be – but that neither of us has grounds for complaint."[23] From this set of insights, some evolutionary psychologists hypothesize that it is a sense of fairness – a sense that all participants will be treated "appropriately," if not equally – that is key to explaining individuals' extraordinary ability to cooperate.

Still, this set of observations leaves open an important question: if fairness is so important and if it has played such a central role in human evolution, why are human communities not entirely fairness-based? Many commentators have observed that fairness cannot serve as the basis for all human relations otherwise the law risks becoming purely subjective.[24]

[22] "Patience, Fairness and the Human Condition" 385:8549 *The Economist 67* (6 Oct. 2007); Keith Jensen et al., "Chimpanzees Are Rational Maximizers in an Ultimatum Game" 318 *Science* 107 (2007).

[23] David Schmidtz, *Elements of Justice* 186 (Cambridge University Press, Cambridge; 2006).

[24] Thus, Ronald Dworkin has observed:

> Some philosophers deny the possibility of any fundamental conflict between justice and fairness because they believe that one of these virtues in the end derives from the other. Some say that justice has no meaning apart from fairness, that in politics, as in roulette, whatever happens through fair procedures is just. That is the extreme of the idea called justice as fairness. Others think that the only test of fairness in politics is the test of result, that no procedure is fair unless it is likely to produce political decisions that meet some independent test of justice. That is the opposite extreme, of fairness as justice. Most political philosophers – and I think most people – take the intermediate view that fairness and justice are to some degree independent of each other, so that fair institutions sometimes produce unjust decisions and unfair institutions just ones.
>
> (Dworkin, *Law's Empire* (177)

Herbert Hart observed:

> The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words "fair" and "unfair." Fairness is plainly not coextensive with morality in general;