A COMMUNITARIAN THEORY OF WTO LAW

Since 1995 there has been intense debate about whether the World Trade Organization (WTO) Agreement is just. Many observers point to the association of the treaty with intensive interdependence and the disruptive effects of globalization to assert that it is unjust, particularly when viewed from the perspective of human rights.

Nevertheless, justice in sovereign terms is different from justice in human terms. This book puts forward a theory of WTO law to explain the difference. The theory explains how economic interdependence gives rise to an interactive view of the relationship between different forms of justice and generates interdependent obligations under WTO law.

In an era of fresh concern about interdependence, however, the international trading system appears to be uncoupling. The theory's emphasis on interdependence accounts for the way in which this development is happening and how in response the WTO Agreement appears to be evolving away from a constitutive framework towards something more contractual. In the meantime, the theory also suggests how WTO dispute settlement might have continuing relevance as a locus for transformative solutions to international economic problems.

Taken together, the theory's insights may assist in outlining a general theory of law.

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For my parents

Zoë Chios Carmody (1939–) and George Richard Carmody (1938–2011),

who sought a better world

We are people because of other people.

Tswana proverb

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PREFACE

> Can you see anything? . . .
> Yes, wonderful things.[1]

This book puts forward a theory of the law of the World Trade Organization (WTO). It began with my doctoral dissertation on remedies in WTO law at Georgetown University Law Center in 1997–2001, which was a short, hurried piece of work I was dissatisfied with.

A remedy is traditionally given by a court or tribunal to correct an injury. However, the remedial formula set out in Art. 19.1 of the WTO Dispute Settlement Understanding (DSU) simply recommends that a WTO member country found to be non-compliant with the WTO Agreement bring its laws "into conformity" with its commitments under the treaty. Such a formula seemed too cryptic and open-ended to be completely corrective.

At the time there was a lot of interest in DSU provisions, which provide for the possibility of countermeasures should a defendant country be unable to bring itself into immediate compliance with the WTO Agreement. In WTO dispute settlement a successful complainant country is given the option of negotiating temporary compensation if immediate withdrawal of the impugned measure is impracticable. If compensation cannot be agreed, then as a "last resort" the complainant is permitted to selectively close its market to the defendant by temporarily suspending concessions or other obligations.

Commentators were intrigued by the possibility of countermeasures since they seemed to fulfill a long-held desire to make international law more afflictive, and, to that extent, presumably more effective. There was

[1] Remarks between the archeologist Howard Carter and his patron, George Herbert, Earl of Carnavon, on Carter's initial glimpse into the tomb of Tutankhamun, Pharaoh of Egypt (reigned 1334–1325 BCE) in the Valley of the Kings, December 1922. Howard Carter & A. C. Mace, *The Tomb of Tutankhamen*. 35 (Barrie & Jenkins, London; 1972).

a lot written about countermeasures under the DSU and some early WTO litigation involving them in cases such as *EC – Bananas III* and *EC – Hormones*.

Still, the enormous attention devoted to countermeasures seemed to me to obscure the deeper pattern of what was happening in WTO law. As time passed it became apparent that rather than retaliating against each other, WTO member countries were using individual disputes or groups of disputes to work out accommodative solutions. These solutions were often arrived at obliquely and elicited only intermittent attention in commentary but in my thinking they were evidence of a creative, flexible legal system at work.

I struggled for several years to find some way of rationalizing this facilitative role as the ultimate purpose of remedies under the WTO Agreement. There seemed to be no easy way to explain it.

This, then, was the genesis for the theory set out in this book. It began in an effort to explain the peculiar shape of remedies in WTO dispute settlement.

At the same time, there were a number of other themes that attracted my interest. One was interdependence. Interdependence has always been important in human and international affairs. At the end of the Cold War, however, the inclination to depend on others for economic benefit appeared to go into overdrive. Immense, highly sophisticated supply and value chains emerged that spanned the globe and wove together producers and consumers. I wondered how this intensive reliance might condition the legal engagements entered into under the WTO Agreement and influence its remedies.

I was also interested in the shape of WTO obligations. In an exchange with Joost Pauwelyn in the *European Journal of International Law* in 2003–2006, Pauwelyn suggested that WTO obligations are fundamentally bilateral and "private" since they are about "trade" between pairs of countries.[2] He made reference to the bilateral way in which trade concessions are negotiated, to the bilateral form of much WTO dispute settlement and to the apparent consistency of certain WTO rules with leading restatements of international law concerning bilateral obligations.

In response I made the opposite case.[3] I referred to the way in which a key feature of the WTO Agreement – arguably its most important innovation – is nondiscrimination obligations that make one WTO

[2] Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations" 14:5 *E.J.I.L.* 907 (2003).
[3] Chios Carmody, "WTO Obligations as Collective" 17:2 *E.J.I.L.* 419 (2006).

member country extend trade concessions and commitments "immediately and unconditionally" to the entire WTO membership. These effectively create a "public" good in the special and limited sense of the WTO membership as a relevant "public." I backed up my position by referring to the way in which certain features of WTO law are more consistent with classic descriptions of multilateral obligations in international law.

Nevertheless, on that occasion my ultimate conclusion was that WTO obligations are not purely bilateral *or* multilateral. Instead, they can be identified as "interdependent," an intermediate category of obligation wherein the relationship is not one-to-one as in bilateral obligations, nor one-to-all as in multilateral obligations, but one-to-some.

The interdependent label seemed to be consistent both with the way that the obligations arose (i.e. through the interdependence of states and economic operators) and the way that WTO member behavior is in fact carefully calibrated to the behavior of other WTO members, particularly major ones. Over time this identification seemed to offer a particularly accurate description of what was happening under the WTO Agreement as intensive interdependence exposed certain vulnerabilities and the possibility of its "weaponization," and how in response, certain member states appeared to be "dialing back" their WTO obligations.

Finally, I was interested in whether or not any link or connection could be drawn between my observations about WTO law and those pertaining to classic Aristotelian ideas of corrective and distributive justice.

Eventually, I came to the conclusion that WTO remedies are broad and open-ended because the law is chiefly distributive and obligation-oriented. Its aim is to ensure the equal distribution of expectations of market access *ex ante* rather than the fair correction of trade injury *ex post*. This is for the greater purpose of facilitating interdependence. In the intervening years, however, experience has exposed what amounts to a crisis of faith in the value of interdependence, with the result that the community of the WTO Agreement now appears to be decoupling.

Again, I searched for a plausible way to fit these features of the law together. The most appropriate way to do so appeared to be to devise a theory. The result is what is outlined in succeeding chapters.

ACKNOWLEDGMENTS

To see is itself a creative operation, requiring an effort.[1]

Henri Matisse's words above convey something of the effort it has been to "see" both the theory and its operation in WTO law and write this book.

The book would not have been completed without the insight and encouragement of many people. Several deserve special mention.

I am grateful to the late John Jackson (1932–2015), who taught for many years at the University of Michigan Law School before moving to Georgetown University Law Center in 1998. John was my doctoral supervisor at Georgetown and originally directed me toward the subject of remedies in WTO law as a thesis topic. I am thankful for his direction and insight.

Frieder Roessler, formerly Legal Advisor to the General Agreement on Tariffs and Trade (GATT) and subsequently Executive Director of the Advisory Centre for WTO Law (ACWL), was also an inspiration. Frieder gave a course on WTO law that I attended at Georgetown Law in the fall of 1997. His approach was very clear and systematic, and as a result, I began to wonder if it might be possible to outline a system of ideas in the form of a theory to describe WTO law as a whole.

Another person to whom I owe great thanks is Peter Gerhart at Case Western Reserve University School of Law. Peter is a wonderfully rigorous thinker, who has written several books on legal theory himself.[2] In an exchange in 2000 he was the first person to suggest that rather than characterize WTO obligations as "either/or" – that is, as *either* bilateral *or* multilateral – they might have a dual nature.

[1] Henri Matisse in Hilary Spurling, *The Unknown Matisse*, xx (Knopf, New York; 1998)
[2] See Peter Gerhart, *Tort Law and Social Morality* (2010); Peter Gerhart, *Property Law and Social Morality* (2013); Peter Gerhart, *Contract Law and Social Morality* (2022).

I would also like to make special mention of my father, George Carmody (1938–2011), a geneticist who taught for several decades at Carleton University. In a discussion with him in March 2005 I related Gerhart's observation about the dual nature of WTO obligations. My father suggested to me that what arises in the treaty isn't a dualism so much as a hybrid. He insisted that I would have to derive a series of "third" values arising from the interaction and interdependence of the various elements of the hybrid. I proceeded to follow his suggestion, which provided the framework outlined in Fig. 1.6 and the essential structure of this monograph.

In addition, there are a number of other people to acknowledge.

I am very grateful to Cherise Valles of the ACWL, who organized a mini-symposium on an early version of the ideas outlined in my response to Pauwelyn in 2005. The symposium was an opportunity to obtain valuable feedback and convinced me that a more complete exposition of the ideas involved was feasible.

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Drafts of the first chapter were written while I was on sabbatical at the Jean Monnet Center, New York University (NYU), in 2005–2006. I am

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I am also grateful for a second sabbatical leave spent at the University of Toronto Faculty of Law in 2012–2013, where the middle chapters of this book began to take shape. During that time Associate Dean Ian Lee and his successor in post, Jim Phillips, as well as Jutta Brunnée, graciously extended the Faculty's resources to me.

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I must add that a strong, well-financed system of public education is a tremendous asset, one vital to the creation of community. I must therefore thank the people and government of Ontario for their continuing support of my institution and others like it.

I would be remiss if I implied that anyone above is responsible for any errors found in this book. Those are wholly my own.

Chios Carmody
London, Ontario
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