

Chapter One

A Theory of WTO Law

By Chi Carmody¹

The greater our knowledge, the more obscure the overall scheme.²

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1. Introduction

[provided as Abstract]

2. Why a Theory?

So why then a “theory” of WTO law? What can we hope to learn from theorizing about WTO law? A theory is defined as “a system of ideas or statements explaining something, especially as distinguished from the practice of it”³, and to the extent that the ideas put forward above constitute a system, then we have a theory of WTO law, or at least the beginnings of one. This may appear natural, as indeed I intend to show that it is. But we have to remember at the outset that there are many reasons why such a theory might seem unnatural and therefore suspect.

One is the very idea of law itself. Law appears alien in an environment where negotiation and the “settlement” of disputes are always so close at hand.⁴ In such a milieu there may be difficulty in identifying a place for law, let alone an entire theory of it.

Another reason is complexity. The WTO Agreement runs more than 26,000 pages in its official version and contains a large number of obligations, few of which fit together neatly. Simply put, the treaty is so large and unkempt that it often defies the legal imagination.

Still another reason is WTO dispute settlement. Because the WTO Agreement is so complex and because the legislative organs of the organization are frequently deadlocked, countries have resorted to resolving their differences about interpretation through the dispute settlement system. The system is generally considered to work well, but litigation does not always raise underlying principles of WTO law in the most

¹ Associate Professor and Canadian Director, Canada-U.S. Law Institute, Faculty of Law, University of Western Ontario, London, Ontario, Canada. This excerpt is taken from CHIOS CARMODY, A THEORY OF WTO LAW (forthcoming 2006). Reproduction is prohibited without consent.

² CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 89 (1962).

³ THE NEW SHORTER OXFORD DICTIONARY, 3274.

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comprehensive or consistent manner.

Then too there are habits of thinking that shape the way the WTO Agreement is conceived of. There is, for example, the surprisingly common idea that the treaty is about “trade”, which of course, in some sense, it is. But as I will demonstrate, the central aim of the treaty goes beyond trade flows per se. That aim must be kept in mind.

There is also the idea that the WTO Agreement “changed” GATT, an idea which is, again, only partly correct.⁵ I say this because while the WTO Agreement may have put an end to the fractured nature of GATT, extended the reach of GATT-type disciplines and created the WTO as an international organization, it did very little to modify the basic substantive concepts underlying the treaty. In fact, substantively speaking, many things remain as they were.

There is, finally, the tendency to view what is happening in the WTO against the backdrop of current events, that is, the decisions, meetings and pronouncements, as well as the debates, disputes and demonstrations. From this perspective “all is constantly swirling”.⁶ Consequently, the task of identifying a unified theory of WTO law becomes difficult.

At the same time, there are reasons why a theory of WTO law might be necessary and useful. Perhaps the most important is the idea of the WTO Agreement as *law*. Much was made of this at the time of Marrakesh. In the aftermath of the Cold War the WTO Agreement was supposed to be the exemplar of a new kind of international law, an international law that in many ways similar to domestic law, an international law “with teeth”.

Still, as a system of law the treaty seemed to lack a theoretical foundation. This is evident in the fact that although a lot has been written about the WTO Agreement, surprisingly little of it examines the treaty as a function of justice or jurisprudence, that is, the general or fundamental elements of a legal system. Instead, what we have is a discussion of this or that WTO rule, of the interaction of various WTO rules, or of their relationship with other systems of law. Such work is helpful, but it does not provide an integrated understanding of the system itself.

The WTO Agreement also appeared to lack coherence. We have an accepted economic theory of the WTO Agreement based on comparative advantage.⁷ We also have an accepted political theory of the WTO Agreement based on national interest, reciprocity and the promotion of peace.⁸ However, we do not have a *legal* theory of the WTO Agreement in the sense of an inter-related set of ideas based upon justice to explain how and why the treaty works as it does. A theory is necessary if we are to take the treaty seriously as law.

⁵ See for example the Appellate Body's statement in *Brazil – Dessicated Coconut*, WT/DS22/AB/R, p. 11 (Feb. 21, 1997) describing the WTO Agreement as “fundamentally different from the GATT system which preceded it.”

⁶ H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 100 (2000).

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The WTO Agreement is a relatively brief document composed of 16 articles that furnish the organization's basic institutional framework. They provide for the organization's personality in international law, its legislative, administrative and executive organs, rules on voting, amendment, and membership, and certain miscellaneous provisions. Appended to this are four annexes that contain most of the substance of the agreement. Annex One contains three sub-annexes covering trade in goods, services and intellectual property. Annex Two contains rules on dispute settlement. Annex Three contains a trade policy review mechanism. Annex Four contains two plurilateral agreements, one on government procurement and the other on trade in civil aircraft.

The foregoing framework is backed up by the WTO Dispute Settlement Understanding (DSU) in Annex 2. Under the DSU member countries can take each other before WTO panels where there is reason to believe that the laws of a member violate the WTO Agreement.⁹ If a panel finds a violation, it normally recommends that the wrongdoer bring its law “into conformity” with the WTO Agreement. This can be followed by an appeal to a standing Appellate Body, which has the power to uphold, modify or reverse the legal findings and conclusions of the panel. If the finding stands however, then conformity is supposed to involve “a solution mutually acceptable to the parties and consistent with the covered agreements”.¹⁰ In the absence of any solution, the DSU goes on to specify that “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure concerned.” The wrongdoer is then given a reasonable time to comply, failing which the parties to the dispute can negotiate compensation for ongoing damage or, as a last resort, the plaintiff can request permission from the organization to retaliate. Retaliation usually consists of the suspension of trade concessions. There are also a number of remedies that are specific to certain causes of action and sub-disciplines under the WTO Agreement.¹¹

The overall response to the dispute settlement system has been generally positive. More countries have engaged in WTO dispute settlement than did under GATT and a number of decisions have prompted the withdrawal or amendment of offending measures.¹² In some cases immediate compliance has not been possible and compensation has been negotiated.¹³ In others, the ultimate remedy of retaliation has been authorized, although

⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112 (1994).

¹⁰ Ibid., Art. 3.7.

¹¹ A number of these can be found in Appendix 2 of the DSU, which contains special or additional rules and procedures applying to disputes that involve one or more of the Multilateral Agreements on Trade in Goods. They prevail over the DSU in the event of conflict. For instance, Art. 4.7 of the WTO Subsidies Agreement provides that if a measure “is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay.” Other particular remedies include DSU Art. 25 (arbitration, where the parties “shall agree to abide by the arbitration award”), DSU Art. 26.1 (in non-violation cases there is no obligation to withdraw the measure but “the panel or Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment.”), DSU Art. 26.2 (in situation complaints the panel is to circulate a report to the DSB addressing the complaint) and Art. XX.7 of the Agreement on Government Procurement (which requires signatory countries to provide challenge procedures in tendering situations with the possibility of “rapid interim measures to correct breaches”, decision-making on any allegation of breach and “correction of the breach ... or compensation for the loss or damages suffered, which may be limited to costs for tender preparation and protest.”).

¹² As of August 2004 312 complaints had been notified to the WTO, of which 80 had been the subject of dispute settlement reports, 44 were the subject of mutually agreed solutions, and 26 others settled or inactive. See “Statistical Overview” in *Update of WTO Dispute Settlement Cases*, WT/DS/OV/21 ii (June 30, 2004).

¹³ As of January 2004 compensation had been negotiated as a temporary measure in *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34 (where Turkey agreed to remove certain quantitative restrictions on textiles from India and to carry out agreed tariff reductions, as well as a commitment to strive towards early compliance with DSB recommendations and rulings); *United*

the number of instances where retaliation has been actually invoked remains few.¹⁴

Despite the popularity of WTO dispute settlement, the system raises many questions. In law we presume that a judgment will give some indication of what needs to be done, but a recommendation of conformity does not do this.¹⁵ Naturally, we want to know why. We also want to know why a recommendation is silent about past damage and therefore at odds with ideas about compensation, and why WTO retaliation is strictly equivalent and therefore lacking in deterrence.¹⁶ All of these questions suggest the need for a theory of WTO law.

Something else is also apparent. This is the need for theory to explain the *totality* of law under the treaty. By this I mean the need to fit all of WTO law together. Dispute settlement is one – but only *one* – aspect of law under the treaty. There are others. They take form, for instance, in the Ministerial Conference's practice of issuing periodic declarations, in the authority of the WTO Ministerial Conference or General Council to issue binding interpretations of WTO law, and in the negotiations that are constantly taking place both inside and out of the WTO and that lead to the creation of new rules concerning international trade. Each of these forms works reflexively with the others to protect expectations, to promote adjustment and to enhance interdependence. All of them should be accounted for in any comprehensive theory of WTO law.

So what should a theory of WTO law look like? Hans Kelsen described a theory of law as furnishing:

... the fundamental 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.¹⁷

For Kelsen as well, a theory of law was primarily “a structural analysis of positive law” rather than a “psychological or economic explanation of its conditions, or a moral or political evaluation of its ends.”¹⁸ Consequently, Kelsen insisted that a theory be concerned with what *is* as opposed to what *should be*:

A science has to describe its object as it actually is, not to prescribe how it should be or should not be from the point of view of some specific value judgments. The latter is a problem of politics, and, as such, concerns the art of government, an activity directed at values, not an

States – Section 110(5) of the U.S. Copyright Act, WT/DS160 (the U.S. agreed to make a payment of \$3.3 million to the EC for the period 2001-2004 to a fund to be established for the promotion of authors' rights and provision of general assistance to members of EC performing rights societies. See WT/DS160/18/Add.16).

¹⁴ As of January 2004 retaliation had been authorized in seven cases among 305 complaints reported to the WTO.

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¹⁷ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* xiii (1949).

¹⁸ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* xiii-xiv (1949).

object of science, directed at reality.¹⁹

I will return to Kelsen's point later, but I think it is important because it hints at a danger in setting out a theory of law. This is the danger of trying to do too much. A theory of WTO law requires the distillation, assimilation and organization of a vast amount of material and is a complex undertaking. Unfortunately, it is also one that can easily succumb to a totalizing ambition. There is the inevitable, and very human, temptation to try to explain *everything* according to theory, and to hide, or downplay, those things that cannot. For this reason I too will try to focus on what *is*.

Generally speaking, we might assume that the treaty is about “trade” and in some sense, as I have already explained, it is. After all, GATT was originally the General Agreement on Tariffs and *Trade* of 1947 and this was reformulated and expanded to become the General Agreement on Tariffs and *Trade* 1994, now an integral part of the WTO Agreement. But as I will demonstrate, the principal concern of the treaty is with something much more far-reaching than trade alone. Fundamentally, the principal concern of the treaty is with expectations concerning trade.²⁰

The observation I have just made may seem minor but it is of considerable significance. At base it highlights a difference in regulatory approach. The treaty's norms do not operate *directly* to require specific quantities of trade as much as they do *indirectly* to maintain conditions that promote trade.²¹ This changes the perspective. To say that a treaty is about “trade” is to adopt a frame of reference in the here and the now. It is to conceive of the treaty's chief purpose as being to protect individual transactions taking place in the present. On the other hand, to say that the treaty is about the protection of expectations concerning trade comes at matters more generally. It abstracts them and renders them timeless. The treaty is no longer about trade per se. Rather, it is about trade and all that trade depends upon, including, most vitally, the *freedom* to trade.

This point was made by the panel in *United States – Section 301*²², where the issue was the consistency of certain U.S. trade remedy legislation with the WTO Agreement. The chief complaint of the EC was that ss. 301-310 of the U.S. Trade Act of 1974 mandated certain unilateral action by U.S. authorities in breach of the “recourse and abide” provisions of DSU Art. 23(a).²³ In particular, the complaint asserted that s. 304(a)(2)(A) of the Act *required* the U.S. Trade Representative to determine whether another WTO member denied U.S. rights or benefits under the WTO Agreement irrespective of whether a dispute settlement report to that effect had already been adopted. The panel disagreed with the EC's position, holding that the law did not require such a determination but instead left the Trade Representative with the discretion to do so.

¹⁹ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* xiv (1949).

²⁰ “The purpose of many [GATT/WTO] disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.” *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.73 (Dec. 22, 1999).

²¹ “It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.” *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.78 (Dec. 22, 1999).

²² *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

²³ DSU Art. 23(a) requires in part that WTO members shall “not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding”

One remaining issue was whether this potential exercise of discretion by the Trade Representative created an unacceptable threat of uncertainty.²⁴ To assess whether it did, the panel had to identify the objects and purposes of the DSU and the WTO Agreement. The panel observed:

The most relevant in our view are those which relate to the creation of market *conditions* conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system.²⁵

The panel focused on the treaty's "providing security and predictability to the multilateral trading system" as a central object and purpose. Why? The panel explained:

Indirect impact on individuals is, surely, one of the principal reasons. In treaties which concern only the relations between States, State responsibility is incurred only when an actual violation takes place. By contrast, in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable "chilling effect" on the economic activities of individuals.²⁶

It was for this reason, the panel observed, that GATT and WTO law developed a doctrine of "indirect effect" whereby the mere *risk* of infringement to operators under domestic law could constitute a violation. The panel illustrated its reasoning as follows:

An individual would simply shift his or her trading patterns – buy domestic products, for example, instead of imports – so as to avoid the would-be taxes announced in the legislation or even the mere risk of discriminatory taxation. Such risk or threat, when real, was found to affect the relative competitive opportunities between imported and domestic products because it could, in and of itself, bring about a shift in consumption from imported to domestic products ...²⁷

The security and predictability afforded by the treaty is then critical to the freedom to trade. For this reason the panel ultimately concluded that s. 304(a)(2)(A) did *not* violate the WTO Agreement, but only after securing an undertaking from the U.S. that the law would not be used to pose the risk it had identified to the U.S.'s WTO partners.²⁸

The danger of founding a theory of law on abstract concepts such as the freedom to trade is, of course, potential confusion. Trade and expectations concerning trade are

²⁴ *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.35ff(Dec. 22, 1999) (emphasis added).

²⁵ *Ibid.*, para. 7.71.

²⁶ *Ibid.*, para. 7.81.

²⁷ *Ibid.*, para. 7.84.

²⁸ *Ibid.*, para. 7.115 ("In response to our very insistent questions, the US explicitly, officially, repeatedly and unconditionally confirmed the commitment ... namely that the USTR would "... base any section 301 determination that there has been a violation or denial or U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB").

closely related ideas, and as I have already pointed out, when they become mixed up with the spectacle of events in the WTO, it is hard to discern the underlying theory of WTO law. We have to think deeply and carefully.

In this respect what I present in this book can be thought of as a meta theory, from the Greek *meta*, or afterwards, meaning that which is of a more fundamental character and which subsists after all is said and done. To identify such a theory, however, requires us to conceive of matters broadly. We have to consider many things, keeping one eye on the particular and the other eye on the general, and needless to say, this is hard to do. At some point we must go beyond positive law and enter into the realm of what can only be described as legal anthropology. The real value of the exercise is not the ability to distill what this or that case says, but to look at the whole of the WTO Agreement and spot the underlying patterns.