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# *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*

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## **Abstract**

*An important, though oft neglected, distinction between multilateral treaty obligations separates obligations of a bilateral nature from those of the collective or erga omnes partes type. Multilateral obligations of the bilateral type can be reduced to a compilation of bilateral, state-to-state relations. They can be compared to contracts. Collective obligations, in contrast, cannot be divided into bilateral components. They are concluded in pursuit of a collective interest that transcends the individual interests of the contracting parties. The standard example of such obligations are those arising under a human rights treaty. In domestic law, collective obligations can be compared to criminal law statutes or even domestic constitutions. This essay examines the origins of the distinction between bilateral and collective obligations, as well as its major consequences, both in the law of treaties and the law on state responsibility. On that basis, a wider typology of multilateral treaty obligations is suggested. In the exercise, obligations arising under the World Trade Organization are used as a case study. The argument is made that WTO obligations remain essentially of the bilateral type; they are not collective in nature.*

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## 1 Introduction

Amidst the storm of discussion over ‘international crimes’<sup>1</sup> and ‘obligations owed to the international community as a whole’,<sup>2</sup> another classification in the International Law Commission (ILC) Articles on State Responsibility has almost gone unnoticed.<sup>3</sup> It is the distinction between (i) multilateral treaty obligations that can be reduced to a compilation or ‘bundle’ of bilateral relations,<sup>4</sup> each of them detachable one from the other; and (ii) multilateral treaty obligations whose binding effect is collective and cannot be separated into bilateral components, on the ground that they are concluded for the protection of a ‘collective interest’, over and above any interests of the contracting parties individually. The former (bundles of bilateral relations) give rise to what we shall name ‘bilateral obligations’, the latter (concluded in the collective interest) lead to what can be referred to as ‘collective obligations’ or obligations *erga omnes partes*.<sup>5</sup>

This essay examines the origins of the distinction between bilateral and collective obligations, as well as its major consequences, both in the law of treaties and the law on state responsibility. The Marrakesh Agreement Establishing the World Trade Organization (WTO) will serve as a case study for this purpose. As further explained below, classifying WTO obligations as either bilateral or collective in nature has crucial legal consequences. It affects (a) rules on standing (who can invoke responsibility for breach of WTO law and what claims can they make?); (b) the permissibility to suspend WTO obligations as a form of countermeasure in response to breach (be it breach of WTO law itself or breach of other obligations of international law); (c) the way in which WTO Members can respond to non-compliance (in particular, the scope for a WTO violation to continue pursuant to a bilateral settlement); and, perhaps most importantly, (d) the possibility that subsequent treaties, between certain WTO Members only, prevail over earlier WTO treaty norms

<sup>1</sup> Article 19 of the 1996 Draft Articles on State Responsibility of the International Law Commission (ILC), ILC Report on the 48th Session, UN Doc. A/51/10, 125 *et seq.* (hereafter ILC Draft). Among the many discussions on Article 19 see, for example, J. Weiler, A. Cassese and M. Spinedi (eds), *International crimes of state: a critical analysis of the ILC’s Draft Article 19 on state Responsibility* (1989) and Pellet, ‘Can a State Commit a Crime? Definitely, Yes!’, 10 *EJIL* (1999), at 425–434.

<sup>2</sup> Article 48 of the 2001 Articles on State Responsibility of the ILC, ILC Report on the 53rd Session, UN Doc. A/56/10, 43 *et seq.* (hereafter ILC Articles). For recent discussions, see the collection of articles in ‘Symposium: The ILC’s State Responsibility Articles’, 96 *AJIL* (2002), at 773, and ‘Symposium: Assessing the Work of the International Law Commission on State Responsibility’, 13 *EJIL* (2002), at 1053.

<sup>3</sup> For a noticeable but limited exception (limited, as it focuses more on peremptory norms and *erga omnes* obligations than collective *versus* bilateral obligations), see Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’, 13 *EJIL* (2002), at 1127–1145.

<sup>4</sup> The notion of a multilateral treaty as ‘bundles of bilateral rights and obligations’ was introduced in Simma, ‘Bilateralism and Community Interest in the Law of state Responsibility’, in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* (1989), at 821–822 (*infra* note 78).

<sup>5</sup> However, as explained below, collective obligations consist of both obligations *erga omnes partes* and obligations *erga omnes*.

(in technical terms, the legality of *inter se* modifications to the WTO treaty). More generally, classifying WTO obligations as bundles of bilateral obligations would bring them closer to the domestic law analogy of a *contract*. Construing WTO obligations as 'collective' in nature would make them comparable to a domestic *criminal law statute* or even domestic *constitutions*.<sup>6</sup>

Our analysis will proceed as follows. Section 2 traces the origins and current relevance of the distinction between bilateral and collective obligations. It ends with two tables setting out a suggested typology of international obligations. Section 3 attempts to answer the question of whether WTO obligations are bilateral or collective in nature. The argument made is that, having weighed the different factors, WTO obligations should be seen as bilateral obligations. Section 4 sums up the consequences of the bilateral nature of WTO obligations, taking into account both general international law and the *lex specialis* provided for in the WTO treaty itself. Section 5 concludes this analysis.

The main objective of this paper is to draw attention to important differences *between types* of multilateral treaty obligations, and to illustrate the uneasy<sup>7</sup> — yet crucially important — task of deciding which category a particular obligation belongs to. From a normative perspective, the argument that WTO obligations are bilateral obligations has both positive and negative consequences. It may not, therefore, be universally shared, nor should it always remain valid in the light of future developments. Yet it is hoped that presenting this specific WTO puzzle will prove useful both for a better understanding of the WTO system itself and of other multilateral treaty regimes.

## 2 Origins, Forms and Consequences of the Distinction between Bilateral and Collective Obligations

### A Early PCIJ and ICJ Cases

The *Reservations to the Genocide Convention* case (1951) presents one of the first signs of the distinction between bilateral and collective obligations. In that case, the ICJ gave particular importance to the 'objects' of the Convention. It noted that '[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary

<sup>6</sup> The contract *versus* crime analogy is referred to in R. Lawrence, *Crime and Punishments? An Analysis of Retaliation under the WTO*, manuscript on file with the author. The contract versus statute paradigm is not new. See, for example, Reuter, 'Solidarité et divisibilité des engagements conventionnels', in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity — Essays in Honour of Shabtai Rosenne* (Dordrecht, 1998), at 623.

<sup>7</sup> As Oscar Schachter noted, '(t)he distinction [between what we call bilateral and collective obligations] is, of course, a familiar one, although the line between the two categories is sometimes blurred'; Schachter, 'Entangled Treaty and Custom', in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity — Essays in Honour of Shabtai Rosenne* (Dordrecht, 1998), at 735.

principles of morality.’<sup>8</sup> With reference to these ‘objects’, the ICJ laid the foundation of what was to become the distinction between bilateral and collective obligations:

In such a Convention [as the Genocide Convention] the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages to states, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.<sup>9</sup>

It was with reference, *inter alia*, to these ‘objects’ that the Court made its main finding:

The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a state in making the reservation on accession as well as for the appraisal by a state in objecting to the reservation.<sup>10</sup>

The ICJ’s approach to treaty reservations was subsequently incorporated in Article 19(c) of the Vienna Convention. Article 19(c) prohibits reservations to a treaty that are ‘incompatible with the object and purpose of the treaty’.

Other hints at a distinction between bilateral and collective obligations were made in earlier individual opinions by PCIJ judges. In the *Customs Régime Between Germany and Austria* case, Judge Anzilotti questioned whether the parties to the 1922 Geneva Protocol :

were in a position to modify *inter se* the provisions of Article 88 [of the Treaty of Saint-Germain], which provisions . . . form an essential part of the peace settlement and were adopted not in the interests of any given state, but in the higher interest of the European political system and with a view to the maintenance of peace.<sup>11</sup>

Another reference to the distinction can be found in the dissenting opinions of judges Van Eysinga and Schücking in the *Oscar Chinn* case. In contrast to the majority of the PCIJ, judges Van Eysinga and Schücking expressed the view that the 1919 Convention of St Germain relating to the Congo Basin was void between its signatories, on the ground that it modified the earlier General Act of Berlin of 1885 without the assent of all its signatories. Judge Van Eysinga expressed it in the following way:

the Berlin Act presents a case in which a large number of states, which were territorially or otherwise interested in a vast region, endowed it [the Congo Basin] with a highly internationalized statute, or rather a constitution established by treaty, by means of which the interests of peace, those of ‘all nations’ as well as those of natives, appeared to be most

<sup>8</sup> ICJ Reports 1951, at 23.

<sup>9</sup> *Ibid.* In his Dissenting Opinion, Judge Alvarez went even further, classifying treaties such as the Genocide Convention as follows: ‘To begin with, they have a universal character; they are, in a sense, the *Constitution* of international society, the *new international constitutional law*. They are not established for the benefit of private interests but for that of the general interest’ (*ibid.*, at 51, emphasis in the original).

<sup>10</sup> *Ibid.*, at 24.

<sup>11</sup> PCIJ, Series A/B, No. 41, 64 (1931).

satisfactory guaranteed ... [It] does not create a number of contractual relations between a number of states, relations which may be replaced as regards some of these states by other contractual relations ... This régime, which forms an indivisible whole, may be modified, but for this agreement of all contracting Powers is required.<sup>12</sup>

## B *The ILC Reports on the Law of Treaties by Sir Gerald Fitzmaurice*

Fitzmaurice refined the distinction between treaties, referred to in the previous section, and re-phrased it as one between 'reciprocal' or 'concessionary' obligations, on one hand, and 'integral' obligations, on the other. Multilateral treaties of the 'reciprocating type' are those 'providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually'.<sup>13</sup> The standard example given by Fitzmaurice of a treaty of the reciprocating type, was the 1961 Vienna Convention on Diplomatic Relations. In contrast, multilateral treaties of the 'integral type' are those 'where the force of the obligation is self-existent, absolute and inherent for each party'.<sup>14</sup> In other words, 'integral obligations' are those 'towards all the world rather than towards particular parties'<sup>15</sup> and 'do not lend themselves to differential application, but must be applied integrally'.<sup>16</sup> The standard example given by Fitzmaurice of a treaty of the integral type was the 1948 Genocide Convention.

Fitzmaurice attached two important legal consequences to the distinction between reciprocal and integral treaties: one in the field of termination/suspension of treaties, the other in the field of conflict between treaties. Treaties of the reciprocating type could, in Fitzmaurice's view, be suspended or terminated as a result of a fundamental breach.<sup>17</sup> Moreover, later treaties conflicting with previous ones of the reciprocal type were, in his view, *not* null and void (instead, priority rules applied).<sup>18</sup> Integral treaties, in contrast, could *not*, in Fitzmaurice's draft, be terminated or suspended by the other parties as a result of a breach ('the juridical force of the obligation is inherent, and not

<sup>12</sup> PCIJ, Series A/B, No. 63, at 132–134 (1934). For other cases where a treaty was characterized as transcending the interests of the parties directly concerned and as constituting a so-called objective regime, binding even on non-parties, see the *Wimbledon case*, where the PCIJ found that the international regime for the Kiel Canal (set out in the Versailles Peace Treaty) was binding also on Germany, even though Germany was not a party to the treaty (PCIJ Reports 1923, Series A, No. 1) and the *Dispute on the Regime of Demilitarization for the Aaland Islands*, where an *ad hoc* Committee of Jurists decided that the Paris peace settlement of 1856 setting out international obligations on demilitarisation was also binding on, and could be invoked by, Sweden and Finland, even though they were not party to the settlement (see Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, *League of Nations Official Journal*, Special Supplement No. 3, October 1920).

<sup>13</sup> Third Report on the Law of Treaties by Gerald Fitzmaurice, UN doc. A/CN.4/115, YILC, Vol. II, 20 (hereafter 'Fitzmaurice, Third Report'), 27, Art. 18, para. 2.

<sup>14</sup> *Ibid.*, at 27, Art. 19. On the specific notion of 'integral obligations' in the law of treaties, see F. Coulée, *Droit des traits et non-réciprocité: recherche sur l'obligation intégrale en droit international public* (thesis, Université Paris 2, 1999, forthcoming with Editions Bruylant, 2003).

<sup>15</sup> Second Report on the Law of Treaties by Gerald Fitzmaurice, UN doc. A/CN.4/107, YILC, Vol. II, 16 (hereafter, 'Fitzmaurice, Second Report'), at 54.

<sup>16</sup> *Ibid.*, at 55.

<sup>17</sup> *Ibid.*, Art. 19.

<sup>18</sup> Fitzmaurice, Third Report, Art. 18.

dependent on a corresponding performance by the other parties to the treaty’).<sup>19</sup> In addition, any subsequent treaty concluded *inter se* by a few (but not all) parties to such integral treaty which ‘conflicts directly in a material particular with the earlier [integral] treaty will, to the extent of the conflict, be null and void’.<sup>20</sup>

Fitzmaurice also added a third type of multilateral treaties, namely those of an ‘interdependent nature’, where ‘the participation of all the parties is a condition of the obligatory force of the treaty’.<sup>21</sup> He gave treaties on disarmament as an example of interdependent treaties. In terms of termination/suspension as a result of breach, interdependent treaties could, in Fitzmaurice’s view, be terminated in their entirety by the other parties in case of fundamental breach (not just partly suspended or terminated, as was the case for reciprocal treaties), since, for these treaties, ‘performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties’.<sup>22</sup> However, much like ‘integral treaties’ (and unlike ‘reciprocal treaties’), a later *inter se* treaty which ‘conflicts directly in a material particular with the earlier [interdependent] treaty will, to the extent of the conflict, be null and void’.<sup>23</sup>

### *C The Vienna Convention on the Law of Treaties*

Fitzmaurice’s distinction between reciprocal, integral and interdependent treaties was not, in so many words, maintained in the Vienna Convention as it was finally concluded. It left manifest traces, however, in not less than six different provisions.<sup>24</sup> The Convention deals with termination/suspension as a result of ‘material breach’ in Article 60 and conflict with earlier treaties in Articles 30, 41, 53, 58 and 64.<sup>25</sup>

Firstly, in the event of a material breach of a multilateral treaty by one of the parties, Article 60.2(b) allows a party ‘specially affected’ by the breach to suspend the treaty in whole or in part in relations between itself and the defaulting party. Article 60.2(c), however, goes further and allows *any other party* (not just the party specially affected by the breach) to suspend the treaty, in whole or in part, not just in its relation with the defaulting party but against *all* parties:

if the treaty is of such a character that a material breach of its provisions by one party *radically changes the position of every party* with respect to the further performance of its obligations under the treaty (emphasis added).

This provision resembles what Fitzmaurice wished to see in respect of interdepen-

<sup>19</sup> Fitzmaurice, Second Report, Art. 19(iv).

<sup>20</sup> Fitzmaurice, Third Report, Art. 19.

<sup>21</sup> Fitzmaurice, Second Report, Art. 29.1(iii).

<sup>22</sup> *Ibid.*, Art. 19.1(ii)(b).

<sup>23</sup> Fitzmaurice, Third Report, Art. 19.

<sup>24</sup> In support: Dupuy, ‘A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility’, 13 *EJIL* (2002) 1053, at 1059.

<sup>25</sup> For a more complete overview, addressing generally the bilateralist *versus* multilateral conception of the law on treaties, see Spinedi, ‘From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility’, 13 *EJIL* (2002), at 1099.

dent treaties (e.g., disarmament treaties).<sup>26</sup> Under such interdependent treaties, performance of the treaty by each state is a necessary condition of performance by all other states. Breach by one party tends to undermine the whole regime of the treaty as it exists between all the parties. As a result, if one state ceases to perform, it makes no sense for the other parties to continue performance and all of them can then suspend the treaty. It can therefore be said that interdependent obligations are owed on an 'all or nothing' basis.<sup>27</sup>

As discussed below, interdependent obligations can be classified as a *particular type* or *sub-category* of what we termed collective obligations. The ILC Articles also reserve special treatment for interdependent obligations, more particularly in Article 42(b)(ii), which we shall come back to later. Suffice it to say that Article 42(b)(ii) copies the language of Article 60.2(c) of the Vienna Convention.

Secondly, and contrary to what is provided for in the event of breach of interdependent treaties (where all other parties can suspend the treaty), Article 60.5 categorically *outlaws* the termination or suspension of certain treaty provisions, even in response to breach by other contracting parties. Such provisions that cannot thereby be suspended or terminated in response to breach are those:

relating to the protection of the human person contained in treaties of a humanitarian character, in particular provisions prohibiting any form of reprisals against persons protected by such treaties.

These 'humanitarian treaties' are examples of integral treaties, for which Fitzmaurice precluded termination and suspension altogether. It would, indeed, be quite outrageous for the Vienna Convention to permit states to, for example, kill innocent civilians in response to an earlier unlawful killing of civilians by another state. Note, however, that the Vienna Convention only outlaws suspension and termination in response to breach for this rather narrow category of humanitarian treaty provisions. As pointed out earlier, Fitzmaurice, in contrast, would have expanded this ban so as to include *all* integral treaties.<sup>28</sup>

As we shall see below, much like interdependent obligations, integral obligations can also be classified as a *particular sub-set* of collective obligations. In the same vein as Article 60.5 of the Vienna Convention, Article 50.1 of the ILC Articles prohibits the adoption of countermeasures which suspend certain humanitarian, or other fundamental obligations.

Third and fourth, Articles 53 and 64 of the Vienna Convention state that if a treaty conflicts with a norm of *jus cogens*, that treaty is void or becomes invalid. These

<sup>26</sup> In contrast, for integral treaties, Fitzmaurice wanted to exclude any termination or suspension. Hence, it is incorrect for the ILC, in its commentary to Art. 40 (para. (19)) of the 1996 Draft Articles (Draft Articles on State Responsibility adopted by the ILC on First reading, ILC 48th session, 1996) and James Crawford in his Third Report (James Crawford, Special Rapporteur to the ILC, Third Report on State Responsibility, A/CN.4/507, 10 March 2000 (hereafter 'Crawford, Third Report'), at para. 91), to refer to Art. 60.2(c) as an expression of Fitzmaurice's theory on 'integral obligations'. The consequences in Art. 60.2(c) are rather those Fitzmaurice wanted to see in respect of 'interdependent' treaties.

<sup>27</sup> Commentaries to the ILC Articles, at 296, note 706.

<sup>28</sup> For a critique of Article 60.5 of the Vienna Convention and the corresponding Article 50.1 of the ILC Articles, in favour of Fitzmaurice's position in this respect, see *infra* note 72.

provisions recall Fitzmaurice's proposal to invalidate treaties conflicting with *any* treaty of an integral or interdependent nature. Note, however, that Articles 53 and 64 do not cover *all* conflicts with integral treaties, only conflicts with integral treaties of a particular type, namely those forming part of *jus cogens*.

Fifth — and perhaps most importantly — Article 41 of the Vienna Convention prohibits (but does not invalidate) *inter se* modifications to a multilateral treaty that:

- (1) are prohibited in the treaty itself;
- (2) 'affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations'; or
- (3) relate to 'a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as whole' (Art. 41.1(b)).

These are what we refer to below as the 'three grounds of illegality' under Article 41. Since Article 41 thus prohibits certain *inter se* modifications to an earlier multilateral treaty, it constitutes an exception to the general rule that a later treaty prevails over an earlier one. Article 30 of the Vienna Convention confirms this *lex posterior* principle and explicitly recognizes that Article 41 is an exception to the rule.<sup>29</sup> Sixth, Article 58 of the Vienna Convention provides for rules similar to those set out in Article 41, this time in respect of *inter se suspension* (as opposed to modification) of multilateral treaties.

Articles 41 and 58 of the Vienna Convention resemble Fitzmaurice's proposal to invalidate *inter se* agreements in conflict with earlier integral or interdependent treaties. However, Articles 41 and 58 do not go as far as Fitzmaurice did, and only *prohibit* — they do not *invalidate* — the *inter se* modification or suspension of multilateral treaty obligations that are, essentially, of a collective nature. As noted earlier, collective obligations are binding *erga omnes partes*. Hence, if some parties decide to modify or suspend those obligations between themselves, it will also affect the rights or obligations of *other* parties to the multilateral treaty that did *not* agree to the *inter se* agreement. As a result, modifications or suspensions of collective obligations are impermissible because they 'affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations' within the meaning of the second ground of illegality in Articles 41 and 58. These provisions closely follow the *pacta tertiis nec nocent nec prosunt* principle, which would classify the *inter se* modification or suspension as a non-opposable instrument (or *res inter alios acta*) insofar as it relates to third parties, i.e. parties to the multilateral treaty but not to the *inter se* agreement. This principle is confirmed in Article 34 of the Vienna Convention, which provides that '[a] treaty does not create either obligations or rights for a third state without its consent'.

Turning to the third ground of illegality set out in Articles 41 and 58, it may, at first sight, be a difficult and rather subjective exercise to decide whether an *inter se* agreement relates to a provision, which, if deviated from, renders such agreement

<sup>29</sup> Article 30.5 of the Vienna Convention states: 'Paragraph 4 [of Article 30] is without prejudice to article 41 ...'.



incompatible with the 'object and purpose' of the earlier multilateral treaty.<sup>30</sup> If the *inter se* agreement is prohibited by the treaty itself, with reference, *inter alia*, to the 'object and purpose' of the treaty (a reference required pursuant to rules on treaty interpretation),<sup>31</sup> then subjective assessment of whether the agreement goes against the 'object and purpose' in the sense of the 'spirit' of the treaty is not a problem. Indeed, an *inter se* agreement incompatible with the very object and purpose of the treaty is most likely to be also prohibited by the treaty itself (so that it is not permissible even under the first ground of illegality in Articles 41 and 58 as an *inter se* agreement prohibited in the multilateral treaty itself). As the ILC Commentary pointed out: 'an *inter se* agreement incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty'.<sup>32</sup>

Nonetheless, there may also be situations where the *inter se* agreement is not prohibited as such by the treaty, but still relates to a provision, for which a derogation is against the 'object and purpose' of the treaty. However, in my view, those cases would then fall under the second ground of illegality under Articles 41 and 58 (i.e., illegality based on the *pacta tertiis* principle). Indeed, the notion of 'object and purpose' of the treaty as a whole is closely related to the notion of collective obligations. Recall, for example, that the *Genocide Convention* case, which introduced the idea of collective or 'integral' obligations, did not refer to the term 'integral' as such, but to the 'objects' of the treaty. In respect of such *inter se* modifications incompatible with the object and purpose of the treaty, the ILC Commentary to Art. 41 notes that '[h]istory furnishes a number of instances of *inter se* agreements which substantially changed the régime of the treaty and which overrode the objections of interested states'. The one example provided is that of 'an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty'.<sup>33</sup> Such *inter se* agreements are incompatible with the 'object and purpose' of the treaty, but not because of a subjective evaluation of the 'spirit' of the treaty, but as a result of the fact that they not only affect the parties to the *inter se* agreement, but also the rights of third parties, since the obligations under the breached multilateral treaty are of a collective nature.<sup>34</sup> Hence, it can safely be said that the ground of illegality based on incompatibility with the object and purpose of the treaty as a whole (third ground) overlaps either with a prohibition in the treaty itself (first ground), or the ground of illegality based on the effect on third party rights (second ground).

## D The ILC Articles on State Responsibility (2001)

Unlike the Vienna Convention on the Law of Treaties, the ILC Articles on State Responsibility draw a general distinction between bilateral and collective obligations,

<sup>30</sup> As referred to in Arts. 41.1(b)(ii) and 58.1(b)(ii) of the Vienna Convention.

<sup>31</sup> See Art. 31.1 of the Vienna Convention.

<sup>32</sup> D. Rauschnig, *The Vienna Convention on the Law of Treaties, Travaux Préparatoires*, (1978), at 303.

<sup>33</sup> *Ibid.*

<sup>34</sup> Recall, indeed, that disarmament treaties are the standard example provided for what Fitzmaurice termed 'interdependent treaties'. In other words, such treaties are, what we called, of a collective nature.

and do so in explicit terms.<sup>35</sup> For the purpose of the ILC Articles, the legal consequence attached to such distinction relates to the right to invoke the responsibility of a state, i.e. the question of standing.

The ILC Articles distinguish between ‘injured states’ and ‘other’ states that are entitled to invoke responsibility.<sup>36</sup> Injured states are affected individually, in their own right, or at least ‘specially affected’ by the breach (Article 42). States *other* than injured states may also be entitled to invoke responsibility (albeit in a more limited way), ‘in some shared general interest’ (Article 48).<sup>37</sup>

Article 42(a) of the ILC Articles deals with bilateral obligations. It states that breach of a bilateral obligation — an ‘obligation . . . owed to [another] state *individually*’ — can only be invoked by the state(s) at the other end of the (bundle of) bilateral relationship(s). Article 48.1(a), in contrast, addresses collective obligations. It provides that if an ‘obligation . . . is owed to a group of states . . . and is established for the protection of a *collective interest* of the group’, then *all* states in that group can invoke responsibility for breach, not as injured states, but in the collective interest of the group.

The Commentary to the ILC Articles sheds more light on the question of standing within this distinction between bilateral and collective obligations. The Commentary to Article 42(a), dealing with bilateral obligations, notes that ‘[t]he expression “individually” indicates that in the circumstances, performance of the obligation was owed to that state’. The Commentary adds that a bilateral treaty necessarily sets out such bilateral obligations, but that this may also be the case for a rule of general international law,<sup>38</sup> or for an obligation in a multilateral treaty where ‘performance in a given situation involves a relationship of a bilateral character between two parties’.<sup>39</sup> Like Fitzmaurice, the Commentary refers to the Vienna Convention on Diplomatic Relations as an example of a multilateral treaty that gives rise to ‘bundles of bilateral relations’.<sup>40</sup>

The Commentary to Article 48.1(a), in contrast, defines collective or *erga omnes*

<sup>35</sup> For a more complete overview addressing generally the bilateralist *versus* multilateral conception of the law on state responsibility, see Simma, *supra* note 4; Spinedi, *supra* note 25; and Dupuy, *supra* note 24.

<sup>36</sup> The rules on standing in the ILC Articles are quite different from those in the 1996 ILC Draft. For a discussion of the 1996 Draft rules, see Crawford, ‘The Standing of States: A Critique of Article 40 of the ILC’s Draft Articles on State Responsibility’, in M. Andenas and D. Fairgrieve (eds), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000), Vol. II, at 23. For an earlier discussion on the topic of standing, see Frowein, ‘Reactions by Not Directly Affected states to Breaches of Public International Law’, 248 *RDC* (1994–IV), at 345.

<sup>37</sup> Commentary to the ILC Articles, Report on the work of its 53rd session, General Assembly, Official Records, 55th session, Supplement No. 10 (A/56/10), Chapter IV (hereafter ‘Commentary’), at 295.

<sup>38</sup> The example given is that of ‘rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian state and another’ (Commentary, *supra* note 37, at 298).

<sup>39</sup> *Ibid.* As noted by James Crawford, the term ‘individually’ in what is now Article 42(a), ‘should not obscure the possibility that state A may at the same time owe the same obligation bilaterally . . . to one or many third states’ (Crawford, Third Report, *supra* note 26, at 38).

<sup>40</sup> Commentary, *supra* note 37, at 297 (‘For example, the obligation of the receiving state under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending state’).

*partes* obligations as those that ‘apply between a group of states and have been established in some collective interest’,<sup>41</sup> or ‘situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized’.<sup>42</sup> Multilateral treaties setting out such collective obligations ‘must transcend the sphere of bilateral relations of the states parties’.<sup>43</sup> Their main purpose is ‘to foster a common interest, over and above any interests of the states concerned individually’.<sup>44</sup> The Commentary gives some examples of collective obligations: ‘They might concern, for example, the environment or security of a region (e.g. a regional nuclear free zone treaty or a regional system for the protection of human rights) . . . This would include situations in which states, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-state entities.’<sup>45</sup> Special Rapporteur James Crawford, who introduced this general distinction between bilateral and collective obligations in the ILC Articles, refers to obligations that arise ‘in the fields of the environment (for example, in relation to biodiversity or global warming) and disarmament (for example, a regional nuclear free zone treaty or a test ban treaty)’.<sup>46</sup> He points out that ‘human rights obligations are not the only class of international obligations whose performance cannot be considered as affecting any “particular state” considered alone. This is also true of some obligations in such fields as human development, world heritage and environmental protection’.<sup>47</sup> The Commentary makes it clear that the examples given are illustrative only, and that ‘[i]t will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes’.<sup>48</sup>

Four additional elements in the ILC Articles are of particular interest for present purposes: (1) the singling out of obligations *erga omnes*; (2) the prohibition to take countermeasures under certain obligations; (3) the difference in claims that ‘injured states’ can make, as opposed to states acting in the collective interest under Article 48; and (4) the fact that even breaches of collective obligations may give rise to genuinely ‘injured states’ either because some states are ‘specially affected’ by the breach or the obligation is of an ‘interdependent’ nature.

First, Article 48, which addresses collective obligations, singles out what can be regarded as a *particular type* of collective obligations, namely obligations *erga omnes* or

<sup>41</sup> *Ibid.*, at 320.

<sup>42</sup> *Ibid.*, at 297. An early author on the subject defined such collective obligation as a legal relationship ‘which cannot be simply split up into bilateral rights and obligations. This is, generally speaking, the case when the contents of the rule in question requires each party to adopt a course of conduct which is indivisible and is necessarily performed simultaneously towards all other states parties’; Sachariew, ‘State Responsibility for Multilateral Treaty Violations: Identifying the “Injured State” and its Legal Status’, 35 *NILR* (1988) 273, at 281.

<sup>43</sup> *Ibid.*, at 321.

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

<sup>45</sup> *Ibid.*, at 320–1.

<sup>46</sup> Crawford, Third Report, *supra* note 26, at 106 (b).

<sup>47</sup> *Ibid.*, at 88. On that basis, Crawford rightly criticizes the ILC Draft 1996 for singling out ‘human rights and fundamental freedoms’ in its Art. 40.2(e)(iii).

<sup>48</sup> Commentary, *supra* note 37, at 297.

those ‘owed to the international community as a whole’ (Article 48.1(b)). While *erga omnes partes* obligations can only be relied upon by states party to the multilateral treaty, for example, obligations *erga omnes* are binding on *all* states, and *all* states can invoke responsibility for their breach.<sup>49</sup> Such *erga omnes* obligations are, in Crawford’s view, ‘virtually coextensive with peremptory obligations (arising under norms of *jus cogens*)’.<sup>50</sup> Hence, in this respect, Article 48.1(b) overlaps with the *jus cogens* provisions in the Vienna Convention on the Law of Treaties (Articles 53 and 64).

Second, and partially related to obligations *erga omnes*, Article 50.1 of the ILC Articles prohibits countermeasures taking the form of non-compliance with the following obligations, all of which can be classified as what we referred to earlier as ‘integral obligations’:

- (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) Obligations for the protection of fundamental human rights;
- (c) Obligations of a humanitarian character prohibiting reprisals;
- (d) Other obligations under peremptory norms of general international law.

As the Commentary notes, in respect of these ‘integral’ obligations, ‘[a]n injured state is required to continue to respect these obligations in its relations with the responsible state, and may not rely on a breach by the responsible state of its obligations ... to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.’<sup>51</sup> In addition to the term ‘sacrosanct’, these obligations were also referred to as ‘intransgressible’.<sup>52</sup> As noted earlier, Article 50.1 of the ILC Articles (in particular, Article 50.1(c) referring to obligations of a humanitarian character) is modelled on Article 60.5 of the Vienna Convention.

Third, Article 48 of the ILC Articles makes it clear that responsibility for breach of collective obligations (including obligations *erga omnes*) can be invoked by the entire group of states involved (if not *all* states), because of the shared, collective interest that is at stake. The flip side of this flexible rule on standing is, however, that the categories of claims that states can make ‘in the collective interest’ under Article 48 are more limited than those of an ‘injured state’ as defined in Article 42. For example, a state acting under Article 48 cannot claim reparation for itself, but only ‘in the interest of the injured state or of the beneficiaries of the obligation breached’ (Article 48.2(b)). A

<sup>49</sup> See also *Barcelona Traction case (Second Phase)*, ICJ Reports (1970), at 32–33 (paras 33–34): ‘an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states.’ For other ICJ pronouncements in respect of *erga omnes* obligations, see *Namibia Opinion*, ICJ Reports (1971), at 16, 56 (para. 126); *Case concerning East Timor*, ICJ Reports (1995), at 90, 102 (para. 29); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v. Yugoslavia (Preliminary Objections)*, ICJ Reports (1996), at 625–626 (para. 4), 628 (para. 6).

<sup>50</sup> Crawford, Third Report, *supra* note 26, at 106 (a).

<sup>51</sup> Commentary, *supra* note 37, at 333.

<sup>52</sup> *Ibid.*, at 338, using the synonym adopted by the ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), at 226, 257, para. 79.

continuing bone of contention is whether states other than injured states can take countermeasures in response to breach of a collective obligation.<sup>53</sup>

Fourth, although many breaches of collective obligations will *not* affect any state in particular (just the collective interest of *all* states involved), the ILC Articles recognise that some breaches of collective obligations may specifically affect one or more states. Pursuant to Article 42.2, those states will then be considered as genuinely ‘injured states’, entitled to the full range of claims and remedies set out in the ILC Articles. In those cases, Articles 42 and 48 overlap, since the same breach can be invoked by some states under Article 42 and by others under Article 48. Article 42 envisages two different situations in this respect: (1) breach of collective obligations ‘specially affecting’ certain states; and (2) breach of so-called interdependent obligations (respectively, Articles 42(b)(i) and (ii)). We shall deal with them in turn.

### 1 Breach of Collective Obligations ‘Specially Affecting’ One or More Specific States

To begin with, Article 42(b)(i) addresses breach of a collective obligation (be it one of an *erga omnes* or *erga omnes partes* nature) that ‘specially affects’ one or more specific states, ‘even though it cannot be said that the obligation is owed to it individually’.<sup>54</sup> As the Commentary notes: ‘Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of states bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one state or on a small number of states.’<sup>55</sup> The following is an example: ‘a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several states whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the states parties to the 1982 Convention in the preservation of the marine environment, those coastal states parties should be considered as injured by the breach’.<sup>56</sup> Whether a state is ‘specially affected’ in the sense of Article 42(b)(i) must be decided on a case-by-case basis. However, ‘[f]or a state to be considered injured it must be affected by the breach in a

<sup>53</sup> See the rather ambiguous language in Article 54: ‘This chapter [on countermeasures] does not prejudice the right of any state, entitled under article 48, paragraph 1 to invoke the responsibility of another state, to take *lawful measures* against that state to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached’ (emphasis added). This language begs, of course, the question of whether countermeasures taken by a state other than the injured state in response to breach of a collective obligation qualifies as a ‘lawful measure’. After reviewing state practice in this regard, the ILC Commentary seems to answer this question *in the negative* but acknowledges that this may change with the further development of international law (Commentary, *supra* note 37, at 355: ‘the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of states. *At present there appears to be no clearly recognized entitlement of states referred to in article 48 to take countermeasures in the collective interest.* Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other states, identified in article 48, are permitted to take countermeasures ...’, emphasis added). For arguments that the ILC Articles do permit countermeasures by non-injured states, see Sicilianos, *supra* note 3, at 1141–44.

<sup>54</sup> Commentary, *supra* note 37, at 296.

<sup>55</sup> *Ibid.*, at 299.

<sup>56</sup> *Ibid.*, at 300.

way which distinguishes it from the generality of other states to which the obligation is owed'.<sup>57</sup>

Article 42(b)(i) of the ILC Articles reproduces Article 60.2(b) of the Vienna Convention on the Law of Treaties, which allows a party 'specially affected' by a *material* breach of a multilateral treaty to suspend the treaty in whole or in part, in relations between itself and the defaulting state.

The relationship between parties 'specially affected' by the breach (under Article 42(b)(i)) and parties that can act simply 'in the collective interest' (under Article 48.1(a)) is crucial. As the Commentary to Article 48 notes, '[a] state which is entitled to invoke responsibility under article 48 is acting *not in its individual capacity* by reason of having suffered injury, but in its capacity as a member of a group of states to which the obligation is owed'.<sup>58</sup> Moreover, 'in those cases where a state suffers individual injury from a breach of an obligation to which article 48 applies [that is, in case breach of a collective obligation "specially affects" certain states], ... [the] entitlement [of states acting in the collective interest under Article 48] will *coincide with that of any injured state* in relation to the same internationally wrongful act'.<sup>59</sup> Put differently, if the 'specially affected' state is not entitled to reparation, then other states acting under Article 48 cannot claim reparation for it either. Moreover, if the 'specially affected' state has, for example, accepted a certain amount of compensation as a form of reparation by the wrongdoing state, the reparation rights of other states acting under Article 48 are also extinguished (and such states, for example, can no longer insist on restitution).<sup>60</sup>

Taking this logic a step further, the crucial question then arises whether a state acting under Article 48 still has the right to complain about breach, if the state 'specially affected' by the breach has waived its underlying substantive rights (not its secondary rights to certain remedies), either in a prior agreement with the alleged wrongdoer or in a settlement that occurred after the wrongful act.<sup>61</sup> The answer ought to be in the affirmative — enabling specially affected states to, in effect, 'contract out' of collective obligations — in the case where the particular breach of the collective obligation affects a general legal interest or group interest of all the other states that *coincides exactly* with the *individual rights of specially affected parties*, and therefore extinguishes with the waiver of those rights (first interpretation). If, in contrast, the breach can also be said to affect the *individual rights* of states acting in the

<sup>57</sup> *Ibid.*

<sup>58</sup> Commentary, *supra* note 37, at 319 (emphasis added).

<sup>59</sup> *Ibid.*, at 320 (emphasis added).

<sup>60</sup> In support, see Crawford, Third Report, *supra* note 26, at 29: 'the particular beneficiary of a substantive obligation (e.g. the individual whose right has been violated contrary to a human rights obligation, the people whose right to self-determination has been denied, or even the state actually harmed by a breach of an obligation *erga omnes*) may validly prefer compensation to restitution. By what right could others, even with a recognized legal interest in compliance, countermand that preference?'

<sup>61</sup> In respect of bilateral obligations, in contrast, it is clear that the injured state or states at the other end of the bilateral relationship(s) 'can validly consent to conduct which would otherwise be a breach, or waive its consequences' and 'can elect to receive compensation rather than restitution', Crawford, Third Report, *supra* note 26, at 37(b) and (c). We return to this crucial consequence *infra* text after note 118 and sections 3 and 4 under the title on *The consequences of WTO obligations as bilateral obligations*.

collective interest under Article 48, then the mere waiver of the underlying substantive rights of 'specially affected' parties should *not* impair or extinguish the rights of the other parties. In that event, the other parties retain the right to invoke the responsibility of the wrongdoing state (in particular, the right to obtain cessation of the breach), notwithstanding the fact that the 'specially affected' state has waived *its* rights or *agreed* to the allegedly wrongful act. In those circumstances, a limited number of parties to the collective obligation could not 'contract out' of it (second interpretation).

If one takes the notion of collective obligations seriously — that is, as obligations which 'foster a common interest, over and above any interests of the states concerned individually'<sup>62</sup> and 'where the legal effects of an internationally wrongful act extend by implication to the whole group of states'<sup>63</sup> — then the second interpretation should prevail. Note, indeed, that under Article 48 of the ILC Articles, the claim of *reparation* pursued by other states is to be made 'in the interest of the injured state', and that state remains in control (Article 48.2(b)). In contrast, the claim of *cessation* under Article 48.2(a) is set up as a claim that can be pursued by all parties to the collective obligation *without* any reference to the rights of the injured state, i.e. as a claim that can be made irrespective of what the injured state does or has done to *its* rights. Is it acceptable for the government of a population whose human rights are violated by another state, not only to waive its right to compensation, but to actually agree with that other state that such human rights violations can continue? Would not such agreement affect the individual rights of other states party to the human rights treaty? If this interpretation were followed, Article 48 of the ILC Articles and Articles 41 and 58 of the Vienna Convention (on *inter se* modification and suspension of multilateral treaties) would converge in the sense that no multilateral treaty obligation of a collective nature (under Article 48 of the ILC Articles) could then be modified or suspended *inter se* (pursuant to Articles 41 or 58 of the Vienna Convention), on the ground that any such *inter se* agreement also affects the individual rights of all the other parties to the multilateral treaty. Or, as one early author on the subject of collective obligations noted, 'one has to presume that the breach of an integral obligation [and *a fortiori* of other collective obligations such as interdependent or *erga omnes* obligations] infringes the subjective rights of all parties other than the author state'.<sup>64</sup> This interpretation is reflected in the summarizing tables below. When examining the nature of WTO obligations (in particular some of the more recent ones that are of a regulatory type), however, we will return to the alternative interpretation that permits 'contracting out' of collective obligations as long as the consent of 'specially affected' states is obtained (first interpretation above).<sup>65</sup>

<sup>62</sup> Commentary, *supra* note 37, at 321.

<sup>63</sup> *Ibid.*, at 299.

<sup>64</sup> Sachariew, *supra* note 42, at 282.

<sup>65</sup> See *infra* text after note 118.

## 2 *Breach of Collective Obligations that are ‘Interdependent’ in Nature*

Article 42(b)(ii) addresses a second special type of breach of collective obligations, namely breach of so-called interdependent obligations.<sup>66</sup> It states that the entire group of states concerned (and for *erga omnes* obligations, *all* states) must be viewed as ‘injured states’ if the breach of the obligation in question is ‘of such a character as radically to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation’. In those situations, all states concerned have a right to act in the collective interest under Article 48, but are also individually entitled to react to the breach as injured states under Article 42 (with the full privileges that come with it). As the Commentary notes, all states concerned will thus be ‘injured states’ ‘whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage’.<sup>67</sup> Examples of such interdependent, or ‘all or nothing’ treaties, are, as noted earlier: ‘a disarmament treaty, a nuclear free zone treaty, or any other treaty where each parties’ performance is effectively conditioned upon and requires the performance of each of the others’.<sup>68</sup> The Commentary also refers to the Antarctic Treaty and stresses that even under those treaties, ‘it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other states involved’.<sup>69</sup>

Article 42(b)(ii) of the ILC Articles copies the language in Article 60.2(c) of the Vienna Convention which, as noted earlier, allows any party to a multilateral treaty of the interdependent type to react to material breach of the treaty, by means of suspending the treaty in whole or in part, with respect to itself and *all other* parties (not just the defaulting party).

## E *A Typology of International Obligations*

Summarizing Section 2, the following typology of international obligations can now be provided, together with its related legal consequences both in the law of treaties and state responsibility:

<sup>66</sup> Sicilianos describes interdependent obligations as follows: they ‘can certainly not be brought under a bundle of bilateral relations; they are nonetheless dominated by a sort of global reciprocity in the sense that each state disarms because the others do likewise. One can, therefore, easily understand that breach of this sort of obligation might ‘radically change’ the situation of all the other states as to the further performance of, for example, their own disarmament obligation.’ Sicilianos, *supra* note 3, at 1135.

<sup>67</sup> Commentary, *supra* note 37, at 300.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, at 301.



TYPOLOGY OF INTERNATIONAL OBLIGATIONS

BILATERAL OBLIGATIONS	COLLECTIVE OBLIGATIONS
<ul style="list-style-type: none"> <li>◇ All bilateral treaties</li> <li>◇ Multilateral treaties that are ‘bundles of bilateral relationships’ (e.g., the Vienna Convention on Diplomatic Relations)</li> <li>◇ Certain rules of general international law and certain unilateral commitments<sup>70</sup></li> </ul>	<p><b>I. Obligations <i>erga omnes partes</i></b></p> <ul style="list-style-type: none"> <li>◇ Sub-set 1: ‘interdependent’ or ‘all or nothing’ obligations (e.g. disarmament or nuclear free zone treaties)</li> <li>◇ Sub-set 2: ‘integral’ obligations or sacrosanct/intransgressible obligations (e.g. human rights or humanitarian obligations and certain obligations relating to global warming or biodiversity)</li> </ul>
	<p><b>II. Obligations <i>erga omnes</i></b></p> <ul style="list-style-type: none"> <li>◇ Coincides with obligations of <i>jus cogens</i></li> <li>◇ All obligations <i>erga omnes</i> are also ‘integral’ obligations</li> </ul>

LEGAL CONSEQUENCES RELATED TO THE TYPOLOGY

TYPE OF OBLIGATION	LAW OF TREATIES (Vienna Convention)	STATE RESPONSIBILITY (ILC Articles)
BILATERAL OBLIGATIONS	In case of <b>material breach</b> , state(s) at the other end of the bilateral relationship(s) can <b>suspend</b> the treaty between itself and the defaulting state. Arts. 60.1 and 60.2(b)	<i>Only</i> the state(s) at the other end of the bilateral relationship(s) can <b>invoke responsibility</b> for breach. However, as ‘ <b>injured states</b> ’ they enjoy <b>full rights</b> . Art. 42(a)
COLLECTIVE OBLIGATIONS <i>All collective obligations</i>	<i>Inter se modification or suspension</i> of an earlier multilateral treaty obligation of the collective type is <b>not permitted</b> since it would affect third party rights or obligations. Art. 41.1(b)(i) and Art. 58.1(b)(i)	All states of the particular group of states bound by the collective obligation can <b>invoke responsibility</b> for breach in the <b>collective interest</b> . However, they can only make <b>limited claims</b> . Art. 48.1 (except for states ‘ <b>specially affected</b> ’ by the breach who, as injured states, enjoy full rights, Art. 42(b)(i))
Sub-set of <b>Interdependent obligations</b>	In case of <b>material breach</b> of an interdependent obligation by one state, <i>all</i> states can <b>suspend</b> the treaty as against <i>all</i> parties. Art. 60.2(c)	All states of the particular group of states bound by an interdependent obligation can <b>invoke responsibility</b> for breach as ‘ <b>injured states</b> ’ thus enjoying <b>full rights</b> . Art. 42(b)(ii)

<sup>70</sup> Commentary, *supra* note 37, at 298, *supra* note 38.

TYPE OF OBLIGATION	LAW OF TREATIES (Vienna Convention)	STATE RESPONSIBILITY (ILC Articles)
<b>COLLECTIVE OBLIGATIONS</b> Sub-set of <b>Integral obligations</b>	Even in the event of material breach, certain humanitarian treaty provisions <b>cannot be suspended</b> . Art. 60.5	<b>Countermeasures are prohibited</b> under obligations on threat or use of force, fundamental human rights, humanitarian obligations and <i>jus cogens</i> . Art. 50.1
Sub-set of <b>Obligations erga omnes/jus cogens</b> (all of which are both collective and integral obligations)	All treaties in conflict with <i>jus cogens</i> are <b>invalid/void</b> . Arts. 53 and 64	All states can <b>invoke responsibility</b> for breach. However, they can only make <b>limited claims</b> . Art. 48.1(b)

It is worth noting that when it comes to the sub-set of collective obligations that we termed integral obligations, both the Vienna Convention and the ILC Articles limit, respectively, the prohibition on suspending certain obligations in response to material breach (Article 60.5) or to non-compliance with certain obligations as a countermeasure (Article 50.1), to a very particular type of integral obligations, namely those of a fundamental human rights or humanitarian character. Yet, in effect, those two prohibitions ought to apply in respect of *all* integral obligations (including, for example, those of an environmental nature and non-fundamental human rights, as well as, *a fortiori*, all obligations of *jus cogens*).<sup>71</sup> Indeed, each time a state suspends an integral obligation (be it in response to material breach or as a countermeasure), the suspension of such integral obligation would not only affect the defaulting or wrongdoing party, but also *all other* parties that are bound by, and can invoke breach of, the integral obligation. This effect on the rights of third parties is prohibited by the *pacta tertiis* principle which, in the Vienna Convention, is reflected both in Article 34 and Articles 41 and 58. In the ILC Articles, this principle, as it relates to countermeasures, finds its expression in Article 49.1 which states that '[a]n injured state may *only* take countermeasures against a *state which is responsible* for an internationally wrongful act'; a countermeasure that also affects the rights of *third parties* remains unlawful as against those third parties.<sup>72</sup> Therefore, based on the *pacta tertiis* principle, the suspension of *any* integral obligation — not just those of a

<sup>71</sup> Based on the very definition of *jus cogens* norms, it is, indeed, safe to say that in addition to the humanitarian treaties referred to in Art. 60.5 of the Vienna Convention, norms of *jus cogens* cannot be suspended in response to a breach. Article 53 defines 'a peremptory norm of general international law' as 'a norm accepted and recognized by the international community of states as a whole as a norm *from which no derogation is permitted* . . .' (emphasis added).

<sup>72</sup> The Commentary to Article 49 explains this condition as follows (Commentary, *supra* note 37, at 330): 'A second essential element of countermeasures is that they 'must be directed against' a state which has committed an internationally wrongful act . . . The word 'only' in paragraph 1 [of Article 49] applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a state which is the author of the internationally wrongful act. Countermeasures may not be directed against states other than the responsible state.' The Commentary adds, crucially: 'In a situation where a third state is owed an international obligation by the state taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third state. In that sense the effect of countermeasures in

fundamental human right or humanitarian character summed up in Article 60.5 of the Vienna Convention or Article 50.1 of the ILC Articles — is prohibited. Although this result is already achieved, directly or indirectly, through other provisions in the Vienna Convention and the ILC Articles, it would have been more appropriate to expand the scope of Article 60.5 of the Vienna Convention explicitly (as it applies to multilateral treaties), and Article 50.1 of the ILC Articles, so as to include *all* integral obligations.

### 3 Are WTO Obligations Bilateral or Collective in Nature?

Based on the typology in Section 2, how should one classify WTO obligations? More specifically, are such multilateral treaty obligations ‘bundles of bilateral relationships’, or obligations concluded ‘in the collective interest’, transcending the interests of WTO Members individually? Before we enter this discussion, three preliminary remarks must be made.

#### A Preliminary Remarks

First, the question at issue is not whether the WTO *treaty* is, for example, of a bilateral or collective nature. Rather, one must examine the nature of WTO *obligations*, one by one, to determine whether they are bilateral or collective. As the ILC Commentary noted, ‘[i]t will be a matter for the interpretation and application of the primary rule [*in casu*, the WTO provision setting out the obligation] to determine into which of the categories an obligation comes’.<sup>73</sup> Hence, some WTO obligations may be bilateral, others collective. We shall have to make certain further generalizations, but it must be kept in mind that the distinction between bilateral and collective is to be determined obligation by obligation, not treaty by treaty.

Second, both the Vienna Convention and the ILC Articles provide *general* rules of international law, from which the WTO treaty may deviate by way of *lex specialis* (as long as it does not contradict *jus cogens*). This is explicitly recognized in Article 5 of the Vienna Convention<sup>74</sup> and Article 55 of the ILC Articles.<sup>75</sup> As a result, the legal consequences normally attached to the particular nature of WTO obligations may have been neutralized or altered in the WTO treaty itself, by way of *lex specialis*. This flexibility can make it particularly difficult to determine the inherent nature of obligations. For example, though a set of obligations may by their very nature be bilateral (so that normally only state(s) at the other end of the bilateral relationship(s) should have standing), the parties to the treaty in question can *explicitly deviate* from

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precluding wrongfulness is relative. It concerns the legal relations between the injured state and the responsible state.’

<sup>73</sup> Commentary, *supra* note 37, at 297.

<sup>74</sup> Article 5 states: ‘The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.’

<sup>75</sup> Article 55, entitled *Lex specialis*, reads: ‘These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law.’

the general rule and provide that *all parties* to the treaty will have a right to invoke responsibility, notwithstanding the bilateral nature of the obligations.<sup>76</sup> This means, in turn, that the mere presence of a legal consequence normally linked to a particular type of obligation (for example, the fact that *all parties* to the treaty have standing), may not be conclusive as to the inherent nature of the obligations concerned. Indeed, the legal consequence can be the result of *lex specialis* in the treaty, rather than of the inherent nature of the obligations themselves.

One may then question the relevance of determining the inherent nature of obligations if, in any event, the ensuing legal consequences can be de-activated or deviated from in each treaty. True, if there is one, the *lex specialis* will prevail; but the nature of an obligation remains crucial for those legal questions on which the treaty concerned *remains silent*. For example, although parties to a treaty that sets out bilateral obligations may provide for broader rules on standing, if they *do remain silent* on the question of standing, only the state(s) at the other end of the bilateral relationship(s) will have standing. They may provide for special rules on *inter se* modifications and suspensions. However, if they do *not*, the normal consequences attached to bilateral obligations apply. In sum, the legal consequences set out in the typology in Section 2 are of a residual nature only. However, in case the treaty concerned does not ‘contract out’ of them, they *must* apply.

Third, when it comes to distinguishing multilateral treaty obligations of a bilateral nature from those of a collective nature, the starting point, or presumption, is that treaty obligations are normally of the bilateral type.<sup>77</sup> In an earlier draft of the ILC Articles, for obligations to be deemed as collective in nature, it was even required that the treaty *explicitly said so*. Article 40.2(f) of the 1996 Draft Articles defined ‘injured states’, permitted to invoke responsibility for breach, *inter alia*, as follows:

if the right infringed by the act of a state arises from a multilateral treaty, any other state party to the multilateral treaty, if it is established that the right has been *expressly stipulated in that treaty* for the protection of the collective interests of the states parties thereto (emphasis added).<sup>78</sup>

Hence, in that draft, obligations could only be collective — giving standing to all parties for any breach — in case the treaty itself *expressly stipulated* that the obligation protects the ‘collective interests’ of all parties. Under the final ILC Articles, no such explicit statement is required. Still, as James Crawford himself stated, collective obligations are those ‘which are expressed (or *necessarily implied*) to relate to matters of

<sup>76</sup> In support: Dominicé, ‘The International Responsibility of States for Breach of Multilateral Obligations’, 10 *EJIL* (1999) 353, at 355.

<sup>77</sup> In support: Sicilianos, *supra* note 3, at 1133–4; Simma, *supra* note 4, at 822, stating that, traditionally, multilateral conventions ‘appeared, in their overwhelming majority, as bundles of bilateral rights and obligations merely tied together in a multilateral instrument’; and Perrin, ‘La Détermination de l’Etat Lésé. Les Régimes Dissociables et les Régimes Indissociables’, in *Theory of International Law At the Threshold of the 21st Century: Essays in Honour of K. Skubiszewski* (1996), at 243: ‘Les règles multilatérales dont découlent des régimes dissociables demeurent de loin les plus nombreuses.’

<sup>78</sup> The Commentary to the 1996 Draft added: ‘in the present stage of development of the international community of states as a whole, the recognition or establishment of a collective interest of states is still limited in application’ (Commentary, *supra* note 37, at 24).

the common interest of the parties'.<sup>79</sup> It is, therefore, for those claiming that WTO obligations are collective or *erga omnes partes* obligations, to prove it. If they fail to do so, the consequences usually attached to bilateral obligations will follow, unless, of course, explicit WTO provisions were to change or neutralise these consequences.

## **B Narrowing Down the Possibilities: WTO Obligations are not Part of Jus Cogens or Interdependent Obligations**

With the above caveats in mind, we can now attempt to classify WTO obligations following the typology described in Section 2. To begin with, there can be little doubt as to certain classifications *not* fitting the profile of WTO obligations.

First, WTO obligations are *not* part of *jus cogens*. Only WTO Members are bound by the WTO treaty. Unlike *jus cogens* or obligations *erga omnes*, WTO obligations are *not* binding on *all* states. Moreover, pursuant to Article 22.6 of the WTO Dispute Settlement Understanding (DSU),<sup>80</sup> WTO obligations can be suspended in response to breach. Hence, they can hardly be viewed as norms 'from which no derogation is permitted', under the definition of *jus cogens* in Article 53 of the Vienna Convention. As obvious as it may sound, the fact that WTO norms are not part of *jus cogens* has an important consequence: it means that both earlier and later treaties in conflict with the WTO treaty are *not* invalid. On the contrary, in principle, later treaties will *prevail* over the WTO treaty between the parties to both treaties, pursuant to Article 30 of the Vienna Convention (subject to Article 41 discussed earlier).

Second, WTO obligations are *not* of the interdependent or 'all or nothing' type — such as a disarmament treaty, a nuclear free zone treaty or much of the Antarctic treaty — referred to in both Article 60.2(c) of the Vienna Convention and Article 42(b)(ii) of the ILC Articles. Material breach of a WTO obligation does *not* 'radically change the position of all the other' WTO Members 'with respect to the further performance of the obligation', at least not in the sense of the provisions just referred to. In the words of the Commentary to the ILC Articles, the WTO treaty is *not* a 'treaty where each of the parties' performance is effectively conditioned upon and requires the performance of each of the others'.<sup>81</sup> The fact that *one* WTO Member violates its obligations under the WTO treaty does surely *not* allow all other WTO Members to

<sup>79</sup> Crawford, Third Report, *supra* note 26, at 92 (emphasis added).

<sup>80</sup> Article 22.6 of the DSU provides: 'When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request.'

<sup>81</sup> Commentary, *supra* note 37, at 300.

violate theirs. The WTO's most-favoured nation (MFN) principle, for example, applies unconditionally, and not only when other WTO Members respect it. Nor does a violation by one WTO Member allow all other WTO Members to *suspend* the WTO treaty, in whole or in part, against *all* other WTO Members (the remedy provided for in Article 60.2(c)). Breach of WTO law may lead to the suspension of obligations or countermeasures by one or more complaining parties against the wrongdoer; it does not, however, permit *all* WTO Members to suspend the WTO treaty in whole or in part *vis-à-vis all other* WTO Members. As a result, WTO obligations are *not* interdependent, or of an 'all or nothing' type.

Since WTO obligations are not *jus cogens* obligations (or *erga omnes* obligations), or interdependent obligations, the remaining question is this: are they bilateral obligations (more specifically, those derived from a multilateral treaty that consists of bundles of bilateral relations) or collective obligations (the second sub-set of collective obligations, namely obligations of the integral type)? Before we tackle this question, let us first recall what is excluded from its scope.

### ***C What the Distinction between Bilateral and Collective/Integral Obligations is Not About***

To avoid all confusion, it is important to recall what the question of whether WTO obligations are bilateral or collective in nature does not entail.

First of all, the distinction is not linked to the source of the obligation concerned. In particular, the sole fact that an obligation derives from a *multilateral treaty* does not suffice for that obligation to be of the collective type. As we pointed out, and the ILC Commentary confirmed, multilateral treaties, in addition to bilateral treaties, may set out obligations of the bilateral type. As Christian Dominicé noted in this respect, '[o]ne must be wary of confusing the source — here the treaty — and the various obligations it stipulates'.<sup>82</sup>

Secondly, depicting obligations as bilateral instead of collective does not weaken the inherently binding nature of those obligations. Bilateral and collective obligations are equally binding. The difference resides in the matrix of relationships that make up the obligation: bilateral obligations are (bundles of) one to one relationships; collective obligations are equally binding on all parties so that any breach by one party affects the individual rights of all others.

### ***D The Benchmark: WTO Obligations are Bilateral in Nature***

Most public international lawyers will not be surprised by the argument that multilateral trade obligations are essentially bundles of bilateral relations. Although one can, of course, trade with many nations, the very definition of trade implies, after all, a bilateral state-to-state operation of export/import *between two countries*. Oscar Schachter, for example, did not mention the Vienna Convention on Diplomatic Relations as his standard example of multilateral treaty obligations of a bilateral nature. He stated, rather, that '[m]any trade treaties or agreements on foreign

<sup>82</sup> Dominicé, *supra* note 76, at 354.

investment (even if multilateral) fall into this category'.<sup>83</sup> The Commentary to the ILC Articles, or even James Crawford in his reports to the ILC, did not mention trade or WTO obligations as an example of collective obligations either. Although explicitly defined as an illustrative list only, reference was made to: environmental protection (especially biodiversity and global warming), collective security (such as test ban treaties) and the protection of human rights, as examples of collective obligations. Crawford added 'some obligations in such fields as human development [and] world heritage' to this list.<sup>84</sup>

Yet many WTO insiders will frown at the argument that WTO obligations are bilateral in nature, in an almost natural reflex to defend the stature of 'their' treaty and its 'systemic' importance: of course, they would say, WTO obligations are binding on all WTO Members and, of course, the WTO treaty was negotiated with a 'collective interest' in mind. However, as we noted earlier, classifying obligations as bilateral does not make them less important or less legally binding. It only changes their legal matrix. Nor does the fact that an obligation is equally binding on all parties to a treaty make that obligation a collective obligation; it may consist of bundles of (the same) bilateral relationships. Finally, the fact that WTO negotiators sought to achieve a 'collective interest' does not necessarily show that it is the type of interest required for the existence of collective obligations: Evidently, WTO negotiators aimed at pursuing the interest of all WTO Members when concluding the WTO treaty; if not, some WTO Members might not have signed on the dotted line. However, a genuine 'collective interest' requires more. As the Commentary to the ILC Articles states, a 'collective interest' is one that 'transcend[s] the sphere of bilateral relations of the states parties'<sup>85</sup> and goes 'over and above any interests of the states concerned individually'.<sup>86</sup>

Notwithstanding this natural tendency to argue that 'my' treaty must be 'collective in nature', the only author (to my knowledge) who carefully examined the nature of GATT/WTO obligations concluded that GATT obligations remain bilateral in nature. Michael Hahn, after considering the hypothesis that GATT obligations are to be fulfilled *erga omnes partes* (and could thus be qualified as collective obligations), reaches the conclusion that the basic structure of GATT obligations goes against such qualification. Hahn expressed the view that both GATT and the WTO treaty remain treaties establishing bilateral right-obligation relationships between WTO Members.<sup>87</sup> This view was recently confirmed by the United States in a statement before the Dispute Settlement Body: 'The concept *erga omnes* is squarely at odds with the fundamentally bilateral nature of WTO and GATT dispute settlement and with the notion that WTO disputes concern nullification and impairment of negotiated benefits to a particular Member. WTO adjudicators are tasked with resolving disputes between specific complaining and defending parties. Adjudicators may not, through improper

<sup>83</sup> Schachter, *supra* note 7, at 735.

<sup>84</sup> See *supra* notes 45–47. In the Commentary itself 'human development' and 'world heritage' is not mentioned.

<sup>85</sup> Commentary, *supra* note 37, at 321.

<sup>86</sup> *Ibid.*

<sup>87</sup> M. Hahn, *Die Einseitige Aussetzung Von Gatt-Verpflichtungen Als Repressalie* (1995) 396 and Section 3.

importation of the concept *erga omnes*, enforce WTO obligations on behalf of non-parties to a dispute.’<sup>88</sup>

The remainder of this section gives reasons why most WTO obligations should, indeed, be classified as bundles of bilateral obligations. We will, in turn, address the object matter, origin, objective, breach and enforcement of WTO obligations to illustrate their bilateral nature. We shall then analyse recent developments that may hint at a growing collectivization of WTO obligations.

### 1 *Object of WTO Obligations*

The object of WTO obligations is trade. Trade is and remains a bilateral occurrence. Goods or services from one country are being exported or transferred to one other country. The rights and obligations negotiated in the WTO are aimed at ensuring market access for a given product from member A into the market of member B. Several countries may, of course, have been involved in manufacturing a given product, but rules of origin do exist, precisely to determine the origin of each and every product. The fact that a product can, legally speaking, originate only in *one* country confirms the bilateral nature of trade. In that sense, the WTO treaty is not all that different from the Vienna Convention on Diplomatic Relations (the standard example, referred to earlier, of a multilateral treaty imposing obligations of a bilateral nature): in the Vienna Convention, rights and obligations relate to diplomats sent from one country to another; the WTO treaty is about market access for goods/services from one country into another.

Because of their trade-related object matter, WTO obligations *can* — unlike collective obligations — be ‘differentiated or individualized’.<sup>89</sup> Unlike breach of collective obligations, breach of a WTO obligation *can*, therefore, be ‘considered as affecting any “particular state” considered alone’.<sup>90</sup> Granted, not all WTO breaches affect the individual rights of just *one other* WTO Member (on the contrary, an increasing number of WTO violations breach rights of a number of WTO Members). Yet unlike breaches of, for example, human rights or environmental obligations of a true collective nature (relating, for example, to global warming), one *can* think of breaches of WTO law that affect the rights of *only one* other WTO Member taken alone: for example, an MFN discrimination against one other WTO Member or the

<sup>88</sup> US statement at the DSB meeting of 7 May 2003 (posted at <http://www.us-mission.ch/press2003/0507DSB.html>) reacting to the Decision by the Arbitrators in *United States — Tax Treatment for ‘Foreign Sales Corporations’ — Recourse to Arbitration by the United States under Article 22.6 of the DSU, WT/DS108/ARB*, 30 August 2002, para. 6.10, further discussed *infra* note 118.

<sup>89</sup> Commentary, *supra* note 37, at 297.

<sup>90</sup> Crawford, Third Report, *supra* note 26, at 88.



imposition of illegal anti-dumping duties on companies from only one WTO Member. Hence — unlike these other, collective obligations — not *all* breaches of WTO law *necessarily* affect the rights of *all other* WTO Members. In and of itself, this is one of the strongest reasons why WTO obligations are *not* of the collective type and ought to be classified as bilateral in nature.

## 2 Origin and Heterogeneity of WTO Obligations

The way WTO obligations are negotiated and re-negotiated confirms their bilateral nature. Most WTO obligations, especially those set out in country-specific schedules of concessions, are first negotiated on a state-to-state, bilateral level: state A gives and takes; state B does the same. This bilateral and mutual reduction in trade restrictions is then multilateralized and applied, respectively, by state A and state B in their bilateral relationships with all other WTO Members, pursuant to the MFN principle. As the Appellate Body remarked: ‘Tariff negotiations are a process of reciprocal demands and concessions, of “give and take”.’<sup>91</sup> The ultimate aim of this ‘give and take’ exercise is to achieve an appropriate balance of trade concessions. Or, as the third preamble to the Marrakesh Agreement puts it, the underlying objectives of the WTO are to be achieved by ‘entering into reciprocal and mutually advantageous arrangements’. As one commentator noted, collective obligations, in contrast, which ‘tend to promote extra-state interests, are not of a synallagmatic nature and fall outside the interplay of reciprocity’.<sup>92</sup>

Since WTO reciprocity is not required for each and every WTO commitment, but rather for the final package that is agreed upon (some speak of diffuse reciprocity as opposed to specific reciprocity),<sup>93</sup> the end result is that different WTO Members are subject to different types and degrees of WTO commitments, depending on the concessions they have made for a particular product or in a particular area. Consequently, WTO obligations are *not* the same for all WTO Members. Many WTO obligations are heterogeneous, depending on the schedules of concessions of each WTO Member or its developmental status (some obligations do not apply to, or offer flexibility for, developing countries or economies in transition).

As a result, the origin of a WTO obligation resting on a particular WTO Member — even those obligations that are the same for all WTO Members — lies primarily in a promise made by that member towards each and every other WTO Member *individually*. In this sense, a WTO obligation can be seen as a bundle of bilateral commitments. Collective obligations (such as human rights obligations), in contrast, do not imply a promise towards individual states, but towards the *collectivity* of all state parties *taken together*.

The MFN principle illustrates this idea of bundles of bilateral relations. The multiple MFN obligations set out in the WTO treaty, the cornerstone of the multilateral trading

<sup>91</sup> Appellate Body report on *European Communities — Customs Classification of Certain Computer Equipment*, complaint by the United States (WT/DS62/AB/R), adopted on 22 June 1998, para. 109.

<sup>92</sup> Sicilianos, *supra* note 3, at 1135. The notion of ‘extra-state interests’ was also referred to in Special Rapporteur Riphagen’s Fourth Report on State Responsibility, Yearbook of the ILC 1983, Vol. II (Part One), at 21, para. 114.

<sup>93</sup> Keohane, ‘Reciprocity in International Relations’, 40 *International Organization* (1986), at 1–27.

system, ensure that any trade advantage a country gives to another — be it in its WTO schedule or completely outside the ambit of the WTO — must be ‘multilateralized’ and granted to *all* WTO Members. As a result, MFN surely makes bilateral concessions ‘collective’ in the sense that they must apply to all other WTO Members. But in substance, this ‘collectivization’ is nothing more than a duplication by the number of WTO Members of the original bilateral concession. The bilateral concession is thereby granted from state to state, to all other WTO Members. It does not, by means of MFN, transcend into some ‘global common’, more valuable than the sum total of the individual benefits it procures to each WTO Member. From a different angle, MFN is, of course, an obligation owed towards all WTO Members, but when member A discriminates only against member B — for example, by banning all imports coming from B or by imposing a higher tariff, above the set binding, only on imports from B — this MFN breach can hardly be said to affect the individual MFN rights of members C, D and E (who can continue to export to member A, arguably even more so than before given that the ban or tariff hike has stopped or reduced the supply coming from member B).

The bilateral nature of WTO obligations is also demonstrated by the fact that GATT and GATS concessions can be *re-negotiated* as between a limited number of WTO Members with a substantial trade interest in the product or sector concerned (pursuant to GATT Article XXVIII and GATS Article XXI). Article XXVIII of GATT, for example, allows WTO Members to modify their tariff concessions unilaterally, as long as they offer appropriate compensation, or accept to face equivalent modifications by certain other WTO Members. Moreover, WTO Members have a relatively wide scope to impose so-called safeguard measures (such as additional import quota restrictions otherwise prohibited by GATT Article XI) when faced with a sudden influx of imports that harms their domestic industry pursuant to the WTO Agreement on Safeguards.

In sum, WTO obligations are far from being homogeneous or intransgressible and, therefore, difficult to qualify as ‘integral obligations’: most originate in bilateral commitments; many are different between WTO Members; through the MFN principle, they change whenever additional concessions are made; and some can even be re-negotiated with the agreement of a limited number of interested parties or unilaterally disregarded in difficult times.

### 3 *Objective of WTO Obligations*

Crucially, the objective of trade liberalization driving the WTO is *not* a genuine ‘collective interest’ in the sense that it transcends the sum total of individual state interests. It is therefore difficult to construe WTO obligations as truly collective obligations. Surely, the WTO treaty was concluded in the interest of *all* WTO Members (although some are better off than others). One can, indeed, presume that all treaties are somehow in the interest of all those who sign them, otherwise states would not have signed in the first place. Yet the interest that all WTO Members have in keeping markets open, thereby achieving a more efficient allocation of resources, is one that

can be 'individualized'. Studies can calculate what a country has gained or lost by acceding to the WTO treaty or what a country gains or loses from the imposition or withdrawal of a trade restriction. As a result, the interest aimed at by WTO obligations is *not* one that, in the words of the ILC Commentary, 'transcend[s] the sphere of bilateral relations of the states parties';<sup>94</sup> it is *not* a 'collective interest' in the sense of 'a common interest, over and above any interests of the states concerned individually'.<sup>95</sup> Rather, performance of WTO obligations can be, and actually is (as noted earlier), 'differentiated or individualized'.<sup>96</sup> WTO obligations seeking to enhance trade differ, for example, from the Genocide Convention where, in the words of the ICJ:

the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages to states ...<sup>97</sup>

The same has been said of human rights treaties. As the Inter-American Court of Human Rights pointed out: 'human rights treaties . . . "are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states"; rather "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all other contracting states"'.<sup>98</sup> Or, as the European Court of Human Rights noted: 'the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order . . . [I]t follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.'<sup>99</sup>

This divergence in objective and fundamental structure is one of the main features that makes WTO obligations *bilateral*, and human rights obligations, *collective*. Unlike WTO obligations, human rights obligations do *not* constitute a promise to one or more other states *taken individually*, but a promise to the collectivity or common conscience of all states involved. The objective of human rights obligations is essentially to prevent states mistreating *their own nationals*. In the same way, breach of human rights obligations — that is, one government mistreating some of its own nationals — does not, in principle, affect one other state more than another (in this sense, breach of

<sup>94</sup> *Ibid.*, at 321.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, at 297.

<sup>97</sup> ICJ Report 1951, at 23.

<sup>98</sup> Inter-American Court of Human Rights, Advisory Opinion of 8 September 1983, quoted in Bernhardt, 'Thoughts on the Interpretation of Human-Rights Treaties', in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension, Studies in Honour of G. J. Wiarda* (1988), at 68–69.

<sup>99</sup> Case 788/60, 4 *Yearbook of the European Convention on Human Rights* (1961) 138, at 140.

human rights obligations *cannot* be ‘differentiated or individualized’,<sup>100</sup> nor can it be ‘considered as affecting any “particular state” considered alone’.<sup>101</sup> The breach is one towards the collective conscience of all states taken together. As a result, standing to invoke breach of human rights is given to all contracting states. Indeed, if this wide rule of standing were *not* provided for, then who could complain about human rights violations in the first place (since no one state is more affected than another in case, for example, a government tortures its own nationals)? The same can be said about other collective obligations, such as obligations to protect biodiversity, to prevent global warming, or not to pollute the high seas. Since breach in most of these cases does not affect one state specifically and individually, there is a genuine need to grant the right to invoke responsibility for breach to each and every party, not because it is specifically affected, but in the collective interest of all parties taken together, so that *someone* at least can enforce the collective obligation.

WTO obligations, in contrast, can be individualized and reduced to the relation between two states. Although a breach of WTO law may affect the rights of many WTO Members, all affected WTO Members will be able to point at specific and individual harm caused in their bilateral relationship with the defaulting states, be it the obstruction of actual trade flows or the prevention of trade that may potentially occur some time in the future. As a result, while breach of human rights violations *necessarily* violates the rights of *all* parties, breach of the WTO treaty *can* be limited to *one single party*. If, for example, Canada decides to increase its bound tariff of 5 per cent on computers to 10 per cent only for computers from Brazil, then only Brazil’s MFN-rights under the GATT are affected. The same is true where a WTO Member imposes anti-dumping or countervailing duties only on imports from one particular country. Since most WTO violations affect one or more other WTO Members specifically and individually, there is, in effect, no need to give standing to *all* WTO Members. The member(s) specifically affected can pursue the claim and it should, in principle, be for them to make a decision in this respect (if not, one risks what Bruno Simma termed ‘juridical “overkill” by turning loose a sort of international vigilantism’).<sup>102</sup> If Canada violates its MFN-obligation vis-à-vis Brazil, it is up to Brazil to complain or not complain. In theory, there is no need to also give standing to, for example, the United States or the EC, to challenge this violation, in the way that there is a need to give standing to all parties to a human rights treaty for the obligations in that treaty to be effectively enforced.

#### 4 *Breach and Enforcement of WTO Obligations*

The bilateral nature of WTO obligations is perhaps most apparent when examining their enforcement under the WTO Dispute Settlement Mechanism (DSU). Three particular features of the DSU are noteworthy in this respect. First, WTO dispute settlement does not tackle *breach*, but rather nullification of benefits *that accrue to a*

<sup>100</sup> Commentary, *supra* note 37, at 297.

<sup>101</sup> Crawford, Third Report, *supra* note 26, at 88.

<sup>102</sup> Simma, *supra* note 4, at 832.

*particular member*.<sup>103</sup> Second, Panel and Appellate Body proceedings only examine claims made by *one* WTO Member against *one other* WTO Member, i.e. in a purely bilateral fashion.<sup>104</sup> In this sense, the same measure may even constitute a violation only as it applies to some members and not to others (for example, when a claim of domestic protection depends on the 'likeness' of the imported products or a *de facto* disparate impact on imports as opposed to domestic production). Third, though a WTO violation will prompt a recommendation 'to bring the measure into conformity' as against all WTO Members (if not, the WTO's MFN principle would be violated), in case the defendant does *not* comply within a reasonable period of time, the complainant state(s) — and *only* the complainant state(s) — may be authorized to suspend some of its obligations *as they apply to the defaulting state* (DSU Art. 22.6).<sup>105</sup> This state-to-state, bilateral suspension usually takes the form of a 100 per cent tariff imposed *by the complaining party* on a list of imports *from the defaulting state*. The amount of trade thus suspended must be 'equivalent to the level of the nullification or impairment' suffered by the complainant state (DSU Art. 22.4), once again, a purely state-to-state calculation.

This bilateral enforcement of WTO rules is an important indication that most WTO obligations are, indeed, bilateral in nature. The fact that the WTO treaty allows *one* member to *suspend* its WTO obligations towards *one other* member provides a strong signal that WTO obligations are not collective in nature. Indeed, *if WTO obligations were of the collective type, their suspension as between two countries would necessarily affect also the rights of all other WTO Members* (the way a violation of human rights affects also the rights of all parties). In other words, the fact that the bilateral suspension of WTO obligations is permitted, implies that such suspension does *not* affect the *rights of all other* WTO Members (although it may, of course, affect them in purely *economic* terms, be it positively or negatively, due to global economic interdependence, discussed below).

Still, as noted earlier, the presence of legal *consequences* normally linked to bilateral obligations — in this case, the bilateral enforcement of WTO obligations and, in particular, the fact that it is permitted to suspend them *inter se* — may not be conclusive as to the inherent *nature* of the obligations themselves. The consequences may not stem from the inherent nature of the obligations, but may be rather a result of *lex specialis* in the specific treaty. Nonetheless, although it is conceivable for parties to a *bilateral* obligation to decide, for example, that *inter se* suspensions or modifications will *not* be allowed (thereby changing the normal consequences linked to bilateral

<sup>103</sup> See Article XXIII.1 of the GATT 1994, setting out the requirement that 'any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired'. The other avenue in Article XXIII.1 to start a WTO complaint, 'that the attainment of any objective of the Agreement is being impeded', one that is arguably of a less explicit bilateral nature, has not been used in practice. The same can be said about so-called 'situation complaints' in Article XXIII.1(c).

<sup>104</sup> This does not, however, prevent one panel from examining, and it often does, more than one of such bilateral relationships in the so-called procedure for multiple complainants (DSU Article 9).

<sup>105</sup> For an overview see Charnovitz, 'Rethinking WTO Trade Sanctions', 95 *AJIL* (2001), at 792–832, and Anderson, 'Peculiarities of Retaliation in WTO Dispute Settlement', 1 *World Trade Review* (2002), at 123–134.

obligations and making them more collective in nature), it seems very unlikely that parties to a *collective* obligation would provide for *lex specialis* to the effect that *inter se* suspensions will be permitted, thereby allowing two parties to affect the rights of third parties (given the collective nature of the obligations, any *inter se* suspension necessarily affects all parties). Put differently, it is easier and more likely that *lex specialis* in specific treaties makes bilateral obligations more collective (for example, in their enforcement), than it is for *lex specialis* to make collective obligations more bilateral. For example, notwithstanding the bilateral nature of WTO obligations, it may be a good idea to *enforce* them collectively so as to ensure, for example, stricter compliance with those obligations<sup>106</sup> (even if such would not, in itself, transform these obligations into collective obligations). In contrast, it is hard to imagine that countries first agreed on collective obligations — such as human rights or environmental standards for the protection of global commons — and then explicitly allowed deviations from those obligations *inter se* in the form of countermeasures (e.g. if state A tortures its nationals, in response state B may do the same).<sup>107</sup>

As a result, it is safe to say that the bilateral enforcement of WTO obligations and, in particular, the system of member-to-member suspensions of concessions in response to breach, is a very strong indication that WTO obligations are, indeed, bilateral in nature.

### ***E New Developments: Are Some WTO Obligations Collective in Nature?***

Notwithstanding the above arguments in support of the bilateral nature of WTO obligations, recent developments could serve to portray at least certain WTO obligations as collective obligations. We shall discuss, in turn, global economic inter-dependence; the importance of WTO obligations for individuals; and the regulatory nature of modern WTO obligations.

#### *1 Economic Inter-Dependence*

Given that (i) compliance with WTO rules normally leads to an increase in world-wide prosperity, and (ii) the economic inter-dependence between states is ever growing, a breach of WTO obligations by one member is likely to affect, directly or indirectly, the *economic interests* of many, sometimes all, other WTO Members. This may (in my view wrongly) be interpreted as a reason to construe WTO obligations as collective, all breaches of which can be invoked by all WTO Members. A distinction must, however, be made between affecting the economic *interests* or market figures of a country and affecting its individual legal *rights*. A breach of WTO law in the bilateral relationship between two WTO Members — for example, an MFN violation against one single country — may well have a spill-over economic effect beyond the market of the

<sup>106</sup> In support see Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules — Towards a More Collective Approach', 94 *AJIL* (2000), at 335–47.

<sup>107</sup> As Steve Charnovitz poignantly noted, 'the World Health Organization does not authorize spreading viruses to countries that do not cooperate in international health efforts', Charnovitz, *supra* note 103, at 810.

member discriminated against. World prices may change and diverted products may flood a third market. Yet, such MFN violations against one single country do not necessarily affect the *individual legal rights* of all other WTO Members. The same is true when a member suspends concessions against another member in response to continuing non-compliance. In terms of legal rights and obligations, this suspension operates only in the bilateral relationship between the complainant and the defaulting member: the standard 100 per cent tariff hike imposed by the complainant applies only to exports from the defaulting state. The fact that such suspension may have economic effects on third markets — such as a price reduction or increased imports — does not mean that third parties are thereby affected in their individual legal rights.

As a result, global economic inter-dependence as such does not alter the inherent bilateral nature of WTO obligations. Modern trade policies may apply to, and affect, many imports and exports from many WTO Members and may be breaches vis-à-vis many, and sometimes all, WTO Members. Yet, even in those cases, WTO breach remains a collection of bilateral breaches and does not *necessarily* and *in all cases* affect the individual rights of *all* WTO Members.

## 2 The Importance of WTO Obligations for Individuals

Another development that may, according to some critics, prompt a re-classification of WTO obligations, is the recognition that WTO obligations affect not only the state authorities or governments that agreed to them, but also (if not mainly) individual economic operators who are actually engaged in trade, whether they are producers, exporters, importers, retailers or consumers. The idea that GATT rules affect economic operators, and not just states, was already acknowledged in GATT case law.<sup>108</sup> But with the advent of new WTO agreements (such as the SPS, TBT and TRIPS agreements),<sup>109</sup> it has been accentuated and expanded so as to include private traders, as well as consumers and private right holders.<sup>110</sup>

To ensure a greater degree of predictability for those private operators, should one strive for a more 'integral' or 'intransgressible' nature of WTO obligations and, therefore, redefine WTO obligations as collective in nature? From the perspective of certain individual operators, such development would most certainly have benefits: since they would no longer be subject to bilateral suspension or modification, in the form of safeguards, re-negotiations, countermeasures or subsequent treaties contracting out of WTO obligations, WTO rights could then become more predictable, almost 'constitutional' in nature. However, the WTO treaty is not drafted this way.

<sup>108</sup> See, for example, the Panel report on *US — Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2.

<sup>109</sup> Respectively, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Trade-related Intellectual Property Rights (TRIPS).

<sup>110</sup> See Panel Report, *United States — Sections 301–310 of the Trade Act of 1974* ('*US — Section 301 Trade Act*'), WT/DS152/R, adopted 27 January 2000. However, as that panel acknowledged, WTO obligations have *not* so far been interpreted by GATT/WTO institutions as 'creating legally enforceable rights and obligations for individuals' or 'a legal order producing direct effect'. Consequently, the WTO 'did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals' (*ibid.*, para. 7.72).

WTO rights and obligations *are* subject to a long series of exceptions and safeguards and can be re-negotiated or suspended. And there are very good reasons for this. Without such safety nets, governments may not have agreed to WTO obligations in the first place. In addition, when WTO Members decide to contract out of WTO obligations in a subsequent treaty (and as between the parties to that treaty only), they are likely to do so because their populations asked for, and support, for example, trade restrictions in order to protect the environment, human rights, biodiversity or public health. In addition, allowing suspension of equivalent obligations in response to, for example, a WTO illegal ban on hormone treated beef — a ban that seems democratically supported among consumers mainly for reasons other than trade protectionism — could provide an important safeguard that may, in the long run, legitimize WTO obligations, rather than undermine them.

Put differently, the values, aspirations and priorities of close to 150 WTO Members remain far too diverse for WTO norms to be streamlined into constitutional-type obligations that would preclude exceptions, contracting out or suspensions.<sup>111</sup> This should comfort consumers and citizens at large, but may frustrate traders. However, the latter ought to realize that, for example, 90 per cent legal certainty combined with certain democratic and other safety-nets (at times working also to *their* advantage) is still better than the risk of having less, or even no, legally enforceable WTO obligations at all. Moreover, this limited loss of predictability for traders pales in comparison to other uncertainties faced in international business, be it currency fluctuations or variations in interest rates, consumer demand or input prices. Similar risks of non-compliance arise under *private* contracts for which specific performance in all cases is not guaranteed either (instead monetary compensation may permit a party to walk away from a contract). This risk is a limited cost that seems far outweighed by its wider societal benefits.

### 3 *The Regulatory Nature of Modern WTO Obligations*

In the discussion so far, we have focused on traditional GATT obligations (such as MFN, non-discrimination and the prohibition on quantitative restrictions), as well as country-specific concessions made in schedules (such as Member-specific tariff bindings). But what of the nature of some of the more recently concluded obligations set out in, for example, the TRIPS agreement or the SPS and TBT agreements? Some of these new obligations are not about tariffs or quotas on (bilateral) trade, nor about non-discrimination in (bilateral) trade relationships. Rather, they set out minimum standards that WTO Members must meet, irrespective of their actual or potential trade impact in (bilateral) relations with other WTO Members. They are obligations for which the content in terms of domestic regulation is largely the same for all WTO Members (developing countries or economies in transition may have certain benefits). These new obligations could, therefore, be regarded more as ‘statutes’ with general

<sup>111</sup> See the Petersmann–Alston debate in 13 *EJIL* (2002), at 815, and the cautionary notes in Howse and Nicolaidis, ‘Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far’, in R. Porter *et al.* (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001).



application, than bundles of bilateral ‘contracts’.<sup>112</sup> SPS article 2.2 requires, for example, that all sanitary measures be ‘based on scientific principles’. If they are not (and do not meet limited exceptions), they violate WTO law, irrespective of whether they discriminate against the complainant or protect domestic production. TRIPS Article 26, in turn, sets out an overall minimum requirement of 20 years for the protection of patents, irrespective of bilateral trade.

Does the general, and more or less homogeneous, scope of these obligations make them collective in nature?<sup>113</sup> In my view they do not, at least under the definition of collective obligations set out in Article 48 of the ILC Articles (a definition we adopted here). Trade remains the object of those new WTO obligations. More importantly, unlike breach of collective obligations, even breach of more recent WTO obligations does not *necessarily* affect the *individual rights* of *all other* WTO Members. Unlike breaches of, for example, human rights obligations, a breach of TRIPS, SPS, TBT or GATS obligations *may* (and can) still single out one or more WTO Members without affecting the individual rights of all other WTO Members. Countries could, for example, refuse to recognise patents of nationals from only one other country;<sup>114</sup> sanitary restrictions, as well as domestic regulations in the services area, may well affect trade (including potential trade) between a limited number of countries only. In economic terms, the advantages and drawbacks linked to adopting or withdrawing intellectual property protection or sanitary and other regulatory measures restricting trade, can also be calculated on a bilateral state-to-state basis,<sup>115</sup> i.e. these WTO obligations can also be ‘differentiated or individualized’<sup>116</sup> and their breach *can* be ‘considered as affecting any “particular state” considered alone’.<sup>117</sup> Their underlying objective is no different from other WTO obligations (the promotion of trade) and since this is the crucial criterion to decide on the collective nature of obligations (are they in the collective interest, over and above the sum total of individual state interests?), those regulatory-type obligations remain essentially bundles of bilateral obligations. The mere fact that they are regulatory in nature — and thus *substantially the same bundles for all WTO Members* — does not suddenly transform them into constitutional-

<sup>112</sup> See *supra* note 6.

<sup>113</sup> Sachariew, for example, includes, in his notion of ‘multilateral/integral structures’, ‘[m]ultilateral conventions ... on uniform law’ (Sachariew, *supra* note 42, at 281). Similarly, Simma includes ‘multilateral treaty obligations [that] do not run between the states parties at all but rather oblige the contracting states to adopt a certain “parallel” conduct within their jurisdiction which does not manifest itself as any tangible exchange or interaction between the parties ... Treaties ... to implement uniform law figure among agreements of this kind’ (Simma, *supra* note 4, at 823–4).

<sup>114</sup> Decision by the Arbitrators, *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000.

<sup>115</sup> For a bilateral analysis of, for example, the TRIPS agreement see E. Bond, ‘The Economics of International Agreements and Dispute Settlement with IPRs’, *paper presented at the Duke Conference on International Public Goods and Transfer of Technology*, 4–6 April 2003.

<sup>116</sup> Commentary, *supra* note 37, at 297.

<sup>117</sup> Crawford, Third Report, *supra* note 26, at 88.

type norms in the interest of some ‘global common’, transcending the sum total of individual interests of states concerned.<sup>118</sup>

Although such obligations are, therefore, not genuinely collective in nature — yet the author recognizes that this position, in particular, is subject to debate and may need to be adapted in light of future developments — it remains that *most* (though not necessarily *all*) breaches of these regulatory-type obligations will, indeed, affect the individual rights of most and often all WTO Members and, therefore, in most cases a large number of WTO Members will have standing to challenge breach. One could even go as far as saying that these more recent WTO obligations are collective in nature *when it comes to rules on standing*, so that all parties will be permitted to sue for any breach *in the general interest*. However, when assessing whether all parties are *necessarily* affected *in their individual rights*, the answer remains in the negative. As a result, a bilateral suspension of these obligations (be it as a multilaterally authorized sanction, say, the suspension of patents of nationals from one particular country, or based on a subsequent treaty) may be permissible since it could still be tailored so as to affect only the *individual rights* of the specific parties concerned (although this will be far more difficult to achieve for such regulatory-type obligations as opposed to, for example, tariff or non-discrimination obligations). Even if, following this argument, all parties may be allowed to sue for breach in the general interest, some parties may be specifically affected and those parties will control the legality or permissibility of the breach. Once they have agreed to it, or otherwise waived their rights, the general interest that allowed other parties to sue for breach then evaporates. Put differently, states may be allowed to sue in the general interest, essentially exercising the *rights of other parties*; however, once these other, individually affected parties waive those rights or have otherwise agreed to suspend or overrule them, such rights extinguish and the other parties, which are not individually affected, can no longer sue in the general interest, on behalf of someone else.

This line of thinking goes back to our earlier discussion on the relationship between ILC Article 48 giving limited standing to *all parties* to collective obligations and ILC Article 42(b)(i) defining states ‘specially affected’ by breach of collective obligations as genuinely ‘injured states’. In particular, it was argued in the alternative that with the

<sup>118</sup> It is in this light that the following statement by a recent arbitration report should be read. The arbitrator characterized the WTO prohibition to provide export subsidies as ‘an *erga omnes* obligation owed in its entirety to each and every Member. It cannot be considered to be “allocatable” across the Membership. Otherwise, the Member concerned would be only partially obliged in respect of each and every Member, which is manifestly inconsistent with an *erga omnes per se* obligation’ (Decision by the Arbitrators, *United States — Tax Treatment for ‘Foreign Sales Corporations’ — Recourse to Arbitration by the United States under Article 22.6 of the DSU, WT/DS108/ARB*, 30 August 2002, para. 6.10). The specific obligation breached in this case is, indeed, the same for all WTO Members. Moreover, the specific breach in that dispute — the provision of export subsidies for an almost unlimited range of products, no matter where the export goes to — could, indeed, be said to affect the individual rights of all WTO members. Yet the existence of identical bundles of bilateral breaches in this particular case does not mean that the very nature of the obligation in question becomes collective, i.e., in the collective interest, over and above the sum total of individual state interests (the way, for example, a human rights obligation can be construed). In any event, the reference to *erga omnes* is misplaced; at best it should have been *erga omnes partes*. See the US reaction to this report, *supra* note 88.

consent of ‘specially affected’ states, even collective obligations can be waived or ‘contracted out’ from (not just the remedies of restitution or compensation, but also the underlying substantive obligation, i.e., the remedy of cessation).<sup>119</sup> If this position were to be adopted, it would add an altogether separate category of collective obligations, in addition to interdependent and integral obligations, namely obligations that *are* collective under Article 48.1(a) of the ILC Articles (so that all parties have standing for all breaches *in the general interest*), but that are *not* collective in the sense of Articles 41.1(b)(i) and 58.1(b)(i) of the Vienna Convention because certain *inter se* modifications or suspensions from those obligations (by way of countermeasures or subsequent treaties) can be permitted since they could be tailored in a way that does *not* affect the *individual rights* of third parties.

## 4 The Consequence of WTO Obligations as Bilateral Obligations

If the above evaluation is correct and most, if not all, WTO obligations are bilateral in nature, the following crucial consequences ensue. In this section we shall attempt to combine the consequences under general international law set out in the typology in Section 2 and the *lex specialis* provided for in the WTO treaty itself. We shall address, in turn, questions of (i) standing; (ii) subsequent treaties contradicting the WTO treaty; (iii) countermeasures in response to breach of non-WTO law; and (iv) remedies. Another consequence we do not further pursue here is that the bilateral nature of WTO obligations may explain why WTO obligations cannot evolve into customary international law: as Oscar Schachter pointed out, bilateral obligations are intra-dependent and cannot be abstracted from the treaty as independent rules.<sup>120</sup>

### A Standing under the WTO Treaty

If WTO obligations are, indeed, bilateral obligations then, as a starting point, only the WTO Member(s) at the other end of the (bundle of) bilateral relationship(s) should have standing for breach (pursuant to Art. 42(a) of the ILC Articles). This starting point is confirmed in GATT Art. XXIII, providing that any WTO Member may start proceedings if it considers that ‘any benefit *accruing to it* directly or indirectly under [the GATT] is being nullified or impaired’.

However, as pointed out earlier, given the current global economic interdependency, an increasing number of WTO breaches will affect the rights of many, sometimes all, WTO Members. For example, in *EC — Bananas* the Appellate Body decided that the United States could bring a case under GATT even though it hardly produces bananas and has not yet exported any.<sup>121</sup> In that case, the Appellate Body report went as far as stating that in order to bring a case under the DSU, *no* ‘legal

<sup>119</sup> See *supra* text after note 60.

<sup>120</sup> Schachter, *supra* note 7, at 735.

<sup>121</sup> Appellate Body Report on *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted on 25 September 1997.

interest' is required<sup>122</sup> (although surely it must have meant that no actual trade diversion is required since under international law *at the very least* a legal interest, in the sense of an interest to see the law abided by, is *always* required even to invoke responsibility for breach of *jus cogens*).

It is as important to underline what the Appellate Body did *not* state in *EC — Bananas*. It did not say that a purely 'legal interest' in ensuring respect of WTO rules is sufficient for any WTO Member to have standing in respect of all possible breaches of WTO law. On the contrary, it stated (in my view, misleadingly) that there is *no* requirement of 'legal interest'. Of course, as any WTO Member (and arguably even non-WTO Members) the United States did have a 'legal interest' in making sure GATT rules were abided by. In addition, however, the Appellate Body was careful enough to base its finding that the United States did have standing under GATT on other factors as well (not related to purely 'legal interest'): the United States was an (albeit small) producer of bananas and hence a potential exporter, the US market for bananas was potentially affected by the EC regime in terms of world supplies and prices and the GATT claims were inextricably interwoven with those under GATS for which the United States did unmistakably have standing.<sup>123</sup> The Appellate Body stressed that:

taken together, these reasons are sufficient justification . . . This does not mean, though, that one or more of the factors . . . would necessarily be dispositive in another case.<sup>124</sup>

The Appellate Body forgot, however, to mention one other obvious but crucially important factor for standing to be granted, namely the fact that the EC import regime for bananas, if found to be discriminatory the way the United States claimed it to be, was favouring *certain specific countries* (the so-called African, Caribbean and Pacific or ACP countries) and hence, at least in theory, discriminating against *all other WTO Members, including the United States*. The measure at issue was not a measure discriminating against only one other WTO Member (say, Ecuador); or a trade restriction that, on the books, did not apply to US exports (the way, for example, an allegedly WTO inconsistent anti-dumping duty imposed by the EC on cement from Mexico would have nothing to do with individual US rights under the WTO).

In sum, based on a close reading of the Appellate Body decision in *EC — Bananas*, the mere fact that a WTO Member breaches GATT rules does not suffice for all other WTO Members to have standing to seek redress for this breach. A purely 'legal interest' is not enough.<sup>125</sup> For a member to have standing, the inconsistent measure must at least *apply to the trade of that member*, albeit potential trade only (first condition of standing). An anti-dumping duty imposed by the United States on steel from Japan only, cannot be challenged by the EC; nor can the United States complain about

<sup>122</sup> *Ibid.*, para. 133.

<sup>123</sup> Appellate Body Report on *EC — Bananas*, paras 136–137.

<sup>124</sup> *Ibid.*, para. 138.

<sup>125</sup> In support of the need for a *locus standi* doctrine in WTO dispute settlement see: Bustamante, 'The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime', 6 *Minnesota Journal of Global Trade*, at 533–583; Davey, 'Has the WTO Dispute Settlement System Exceeded its Authority?', *JIEL* (2001) 95, at 97–99; and Martha, 'The Duty to Exercise Judgment on the Fruitfulness of Actions in World Trade Law', *JWT* (2001), at 1035–1059.

Zambia discriminating exports from Nigeria only. In addition, even if the measure does apply *de jure* to trade from that other member, some proof must be shown that either actual or *potential* trade flows may be restricted and/or that the member is otherwise economically affected (e.g., by an increase in world prices, as referred to in *EC — Bananas*), the second condition of standing. This second condition for a member to have standing is directly related to the conditions for a *breach* of WTO obligations to be established. Since standing essentially depends on the existence of a legal right, proof of a legal right will be inextricably linked to proof of breach. For a breach of WTO rules to be established, it is generally accepted in GATT/WTO case law that a complainant is not required to prove that actual trade flows have been diverted.<sup>126</sup> Proof of trade opportunities being affected will be enough. This explains, at the same time, why proof of actual trade effects is not a requirement in terms of standing.<sup>127</sup>

Nonetheless, two recent Appellate Body decisions could be regarded as giving even broader standing rights to WTO Members. In *US — Section 211 Appropriations Act*, the Appellate Body upheld a claim made by the European Communities against the United States, based on discrimination between original owners of intellectual property rights who are nationals of, on one hand, Cuba and, on the other, the United States.<sup>128</sup> Although less favourable treatment was given only to *Cuban* nationals, not to *EC* nationals, the European Communities succeeded in its claim under Article 3.1 of the TRIPS agreement. In *US — Line Pipe*, as well, Korea was allowed to make a claim under Article 9.1 of the Safeguards Agreement on the ground that the United States treated *developing countries* in the same way as all other suppliers, even though Article 9.1 requires that safeguard measures ‘not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent’.<sup>129</sup> Even though Korea is generally *not* regarded as a developing country, it succeeded under this claim. Crucially, however, the defendant, *in casu* the United States, did not object, in either case, to the EC and Korea, respectively, making such claims essentially on behalf of *other* WTO

<sup>126</sup> See, for example, the Panel Report on *US — Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2 referring to GATT Art. III as a provision ‘not only to protect current trade but also to create the predictability needed to plan future trade’.

<sup>127</sup> In addition, DSU Art. 3.8 provides for a presumption to the effect that breach ‘is considered *prima facie* to constitute a case of nullification and impairment’. This is further explained to mean that ‘there is normally a presumption that a breach of the rules has an adverse impact on other Members’. However, as the Appellate Body noted, Art. 3.8 is about ‘what happens *after* a violation is established’ (Appellate Body Report, *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, emphasis in the original). Art. 3.8 does *not* relate to the issue of standing required in order to be allowed to *invoke breach*. In other words, to say that nullification of benefits is presumed once breach is established (as Art. 3.8 does) is not the same as saying that all WTO Members have a right to complain about any WTO breach. Moreover, Art. 3.8 states that there is ‘normally a presumption’, implying (i) that there may be cases where the presumption is not activated; and (2) that it may be possible to rebut the presumption.

<sup>128</sup> Appellate Body Report, *United States — Section 211 Omnibus Appropriations Act of 1998* (‘*US — Section 211 Appropriations Act*’), WT/DS176/AB/R, adopted 1 February 2002, paras 273–296.

<sup>129</sup> Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (‘*US — Line Pipe*’), WT/DS202/AB/R, adopted 8 March 2002, paras 120–133.

Members.<sup>130</sup> Hence, it is fair to say that the Appellate Body — not faced with a challenge to standing, and presuming, arguably, that the United States accepted jurisdiction in this respect<sup>131</sup> — has not yet expressed judgment on whether one WTO Member can bring a claim on behalf of another. In any event, even if this form of *actio popularis* were accepted — with the ensuing risk of a limited number of WTO Members becoming policemen for WTO enforcement and carefully selecting the obligations *they* want to see enforced<sup>132</sup> — it must be recalled that it would only mean that WTO Members can, in certain circumstances, exercise the *rights of other Members*,<sup>133</sup> not that breach of any WTO rule by any WTO Member necessarily violates the *individual rights of each and every other WTO Member*. In other words, it would amount to granting wider standing to WTO Members, without necessarily declaring that WTO obligations are genuine collective obligations that cannot, for example, be suspended or modified *inter se* without affecting the individual rights of all other WTO Members.

As noted earlier, however, nothing prevented the WTO treaty drafters from *changing* the rule of general international law — set out in Article 42(a) of the ILC Articles — that responsibility for breach of bilateral WTO obligations can only be invoked by members at the other end of the (bundle of) bilateral relation(s). This is arguably what happened in the GATS agreement where GATS seems to give standing to all WTO Members for any GATS breach by any WTO Member.<sup>134</sup>

However, as pointed out earlier, the fact that all WTO Members may have standing under a general GATS interest for all GATS breaches, does not automatically mean that all GATS breaches affect the *individual rights* of all WTO Members and that all *inter se* suspensions of GATS obligations are prohibited, be it in the form of coun-

<sup>130</sup> In support of the fact that the United States actually takes the view that WTO obligations are bilateral in nature and that WTO adjudicators cannot 'enforce WTO obligations on behalf of non-parties to a dispute', see the US statement *supra* note 88.

<sup>131</sup> At the same time, it could be argued that the Appellate Body *should have* examined this question of standing *at its own initiative* since it goes to the heart of its jurisdiction over this particular claim. As the Appellate Body pointed out elsewhere, in respect of panel jurisdiction, 'some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time' since 'it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative' (Appellate Body Report, *United States — Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 54 and note 30).

<sup>132</sup> Bruno Simma termed this, the risk of 'juridical "overkill" by turning loose a sort of international vigilantism' (Simma, *supra* note 4, at 832).

<sup>133</sup> Allowing a WTO Member to exercise the rights of another, without the involvement of this other member, would, of course, raise problems. In those cases, the final judgment would necessarily affect the rights and obligations of third parties that were not even involved in the dispute. ICJ case law, for example, would seem to reject making a judgment in those circumstances. *Monetary Gold case*, ICJ Reports 1954, 32 ('Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania'). More recently confirmed in the *East Timor case*, ICJ Reports 1995, 102, para. 28. See also Panel Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363, paras. 9.4–13.

<sup>134</sup> GATS Art. XXIII.1 provides as follows: 'If *any Member* should consider that *any other WTO Member* fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU' (emphasis added).

termeasures under GATS (DSU Art. 22.6) or in the form of a subsequent treaty in which GATS obligations could be deviated from without affecting third parties (in line with Articles 41.1(b)(i) and 58.1(b)(i) of the Vienna Convention). In this sense, the *lex specialis* in GATS Art. XXIII.1 may alter rules on standing, but it does not alter the inherent bilateral nature of GATS obligations.

Interestingly enough, the TRIPS Agreement — which, of all WTO obligations, is the most regulatory in type — does *not* include a provision similar to GATS Art. XXIII.1 and refers instead to the general rule in GATS Art. XXIII, discussed earlier.

### **B Countermeasures in the Form of Suspension of WTO Obligations**

Given the bilateral nature of WTO obligations, suspension by one member of its obligations vis-à-vis another defaulting member is tolerated (DSU Art. 22.6). Since WTO obligations are not collective (like human rights), the suspension can be tailored in such a way that it does *not* affect the rights of third members. It is, therefore, also permitted under Article 58.1(b)(i) of the Vienna Convention as a suspension that ‘does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations’.

If the suspension of WTO obligations is explicitly allowed in response to breach of WTO obligations, is it also permitted in response to breach of international law obligations lying *outside the WTO treaty*? For example, if two WTO Members are bound by a human rights or environmental treaty and this treaty provides for sanctions in case of non-compliance, could such sanctions take the form of a suspension of WTO obligations? If WTO obligations are bilateral in nature, the answer must be yes. In that event, WTO obligations could be lawfully suspended between two parties, as long as both parties have agreed to this method of sanction (here, by agreeing to the sanctions mechanism in the non-WTO treaty). Given the bilateral nature of WTO obligations, suspension could then be framed in such a way that it does not affect the WTO rights of third parties (i.e., a tariff hike on imports only from the state violating human rights). It could even be argued that countermeasures in general international law — under Articles 49–54 of the ILC Articles — can take the form of a suspension of WTO obligations even if such sanction is not explicitly provided for in the non-WTO treaty or the rule of general international law that is breached. Indeed, Article 22 of the ILC Articles seems to preclude the wrongfulness of such WTO violation if and to the extent it is a countermeasure against breach elsewhere.<sup>135</sup>

### **C Subsequent Treaties Contracting out of WTO Obligations**

That WTO obligations may be qualified as bilateral in nature bears crucially important consequences for the relationship between the WTO treaty and other, prior

<sup>135</sup> The counter-argument, that the WTO rule violated by the countermeasure is *lex specialis* contracting out of Article 22 of the ILC Articles, is not convincing. Indeed, if this were accepted then Article 22 could essentially not justify *any* countermeasure since a countermeasure is *by definition* an act that is otherwise explicitly prohibited under some specific rule or *lex specialis*. Yet most authors consider the taking of countermeasures under the WTO treaty for breach of non-WTO norms to be unlawful. See L. Boisson de Chazournes, *Les Contre-Mesures en Droit International Economique* (1992), at 184; Pons, ‘Self-Help and the

or subsequent, treaties that contradict the WTO treaty. Although in most cases WTO law and other international norms will provide sufficient exceptions and ambiguity so that the two sets of norms can be *interpreted* in a harmonious manner (relying, for example, on GATT Article XX exceptions when it comes to environmental agreements), such leeway may not exist in other, exceptional circumstances and the two norms may conflict, raising the need for a decision on which norm prevails.<sup>136</sup>

As noted earlier, since WTO obligations are not part of *jus cogens*, other treaties contradicting the WTO treaty are *not* invalid. What is more, unless the WTO treaty provides otherwise, the usual rules of conflict in public international law must apply, to decide on the relationship between the WTO treaty and other treaties. The most important of these rules of conflict is reflected in Article 30 of the Vienna Convention stating that as between two states bound by two treaties, in the event of conflict, *the latest treaty prevails*.<sup>137</sup> The pre-eminence of a later environmental treaty, for example, over the earlier WTO treaty between parties bound by both treaties, is only subject to two limitations.

First, the later non-WTO treaty may not affect the rights of other WTO Members that are not party to this later treaty. As Article 34 of the Vienna Convention points out: ‘A treaty does not create either obligations or rights for a third state without its consent.’ Moreover, if the later treaty may be construed as a form of *inter se* modification or suspension of particular WTO obligations as between the parties to the later environmental agreement only, Articles 41.1(b) and 58.1(b) of the Vienna Convention prohibit such modification or suspension whenever it affects the rights of third parties.<sup>138</sup> Crucially, as pointed out earlier, if WTO obligations are, indeed, bilateral in nature such *inter se* suspension or modification must then be permitted because it is possible to contract out of WTO obligations without affecting the individual rights of all other WTO Members.

Second, the particular ‘contracting out’ or conflict that the later environmental treaty creates with an earlier WTO norm, may not be explicitly prohibited or otherwise regulated in either of the two treaties. For example, the *lex posterior* rule in

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World Trade Organization’, in Paolo Mengozzi (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trading System* (1999), at 55; and Hahn, *supra* note 87, at 284.

<sup>136</sup> On the wide (yet inherently limited) scope for interpreting WTO norms in line with other norms, see Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, 95 *AJIL* (2001), at 535; Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties’, 35 *JWT* (2001), at 1081–1131; and Marceau, ‘WTO Dispute Settlement and Human Rights’, 13 *EJIL* (2002), at 753.

<sup>137</sup> On this and other conflict rules, see J. Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Related to Other Rules of International Law*, (2003).

<sup>138</sup> That the three grounds of illegality in Articles 41.1(b) and 58.1(b) of the Vienna Convention can essentially be reduced to either (i) affecting third party rights or (ii) prohibitions in the prior multilateral treaty itself, see *supra* note 34.



Article 30 of the Vienna Convention would be deactivated in case the later environmental treaty ‘specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty’ (Article 30.2). In that event, contrary to the general rule, the earlier WTO treaty will prevail. Moreover, as Articles 41.1(b) and 58.1(b) provide, an *inter se* suspension or modification can only be permitted if ‘the modification [suspension] in question is not prohibited by the [earlier multilateral] treaty’, *in casu*, the earlier WTO treaty. This would be the case, for example, if two WTO Members were to conclude a bilateral agreement in which they exchange trade concessions only between themselves. The MFN principle would not strictly *prohibit* such bilateral agreement. Rather, the bilateral exchange of concessions would be automatically ‘multilateralized’ and granted to *all* WTO Members. The main exception to this ‘multilateral’ effect of the MFN principle is GATT Art. XXIV and GATS Art. V, which state that GATT/GATS obligations (in particular, the MFN-principle) will *not* prevent WTO Members from concluding free trade areas or customs unions that meet the specific conditions set out in these articles. Although these provisions *explicitly enable* WTO Members to deviate from WTO obligations, conditions related to such deviations mean that regional liberalization arrangements *not* meeting these conditions (though not as such *prohibited* under WTO rules) will continue to be subject to the MFN principle. Crucially, however, this *lex specialis* in the WTO treaty (the MFN principle, GATT Article XXIV and GATS Art. V) relates only to *inter se* agreements that *further liberalize trade*. The WTO treaty is silent on *inter se* agreements that *limit trade* between some WTO Members only, for example, in order to protect cultural diversity, human rights or ethical standards in a way not permitted under normal WTO exceptions such as GATT Art. XX. Given the WTO treaty’s silence on such *trade restricting* agreements, the rules of conflict under general international law continue to apply.<sup>139</sup> This means that if WTO obligations are, indeed, bilateral in nature, other non-WTO treaties that restrict trade *inter se* must be permitted and stand as between the WTO Members that concluded them, as long as they are tailored in such a way that they do not affect the rights of other WTO Members. For example, in a

<sup>139</sup> The fact that the WTO treaty sets out explicit rules on how to *amend* the treaty or how to excuse members from particular obligations by a so-called *waiver* decision, does not amount to a ‘contracting out’ of general international law rules on *inter se* modification or suspension; nor does it dis-apply the *lex posterior* principle in Article 30. The Vienna Convention itself clearly distinguishes treaty amendment (dealt with in Article 40) from treaty modification and suspension (covered in Articles 41 and 58). Providing for specific rules on treaty amendment, as the WTO treaty does, may contract out or deviate from general rules on treaty *amendment*. It cannot, however, change the general rules on treaty *modification* or *suspension*. The same applies in respect of WTO waiver provisions where one WTO member may be excused from certain WTO obligations as they apply to *all other* WTO Members, a matter that is quite different from treaty modification or suspension (where two or more WTO Members effectively agree to overrule certain provisions of WTO law *between themselves only*, without affecting all other WTO members).

bilateral agreement two WTO Members could agree that in the event either one breaches certain human rights or labour standards, the other can impose an import restriction that is limited to certain goods originating in the first state (and this is the case even if such restriction is otherwise inconsistent with WTO rules).

### **D Remedies for Breach of WTO Obligations**

Finally, the bilateral nature of WTO obligations also has major consequences when considering the remedies that could be provided for breach of WTO law. If WTO obligations are, indeed, bilateral, one could drive the analogy of WTO obligations as bundles of bilateral ‘contracts’ to its extreme and permit the disputing parties to settle or renegotiate the contract, as long as they do not affect the individual rights of third parties in doing so. Put differently, one could then allow a defaulting member to opt for a so-called ‘efficient breach’, that is, for the DSU to tolerate ‘a situation where the benefit to the promisor of the breach exceeds the harm to the promisee resulting from the breach’.<sup>140</sup> Such contract re-negotiations, efficient breaches or situations where, effectively, reparation instead of specific performance ends the dispute, could take the form of excusing a breach as long as sufficient compensation is paid (be it in terms of trade concessions or money) or as long as the defaulting state tolerates the withdrawal of equivalent trade concessions by those WTO Members individually affected by the breach. Although some authors are of the view that these alternatives to specific performance or full compliance are already lawful under the current DSU, this author believes that pursuant to DSU Article 22.1 both compensation and suspension of concessions can only be a temporary solution so that, at least in principle (though not perhaps in practice), neither compensation nor suspension can currently close or settle a case.<sup>141</sup> In addition, another remedy that could close the case, if WTO obligations are indeed bilateral, is a bilateral compromise or settlement in which the rights and obligations of the specific parties in dispute are re-arranged, but in such a way that does not affect the rights of third parties.<sup>142</sup> This is already occurring in effect, in cases such as *EC — Hormones* where non-compliance has continued for years in combination with a suspension of equivalent concessions by the members that won the dispute (although under the current DSU, ‘equivalent’ suspension or compen-

<sup>140</sup> For a view of the WTO treaty as already permitting such ‘efficient breaches’, see Schwartz and Sykes, ‘The Economic Structure of Renegotiation and Dispute Resolution in the WTO’, 31 *Journal of Legal Studies* (2002), at 179–204, and Lawrence, *supra* note 6.

<sup>141</sup> In support of the latter view: Jackson, ‘The WTO Dispute Settlement Understanding — Misunderstandings on the Nature of Legal Obligation’, 91 *AJIL* (1997), at 60–64.

<sup>142</sup> Even the current DSU provides that ‘[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred’, even above withdrawal of the inconsistent measure. It adds, however, that such solution must be ‘consistent with the covered agreements’. It is unclear whether this requirement of consistency also applies between the parties to the settlement or only against third parties. However, if a solution mutually acceptable between the parties is to be at all different from withdrawing the inconsistency (both actions are clearly set up as different in the DSU), then it seems that even under the current DSU a bilateral settlement that only affects the rights of the parties to it, not those of other WTO members, could lawfully close a case.

sation may be *too low* for the victim(s) of the breach to be fully compensated, especially if it works prospectively only, so that the breach is not truly 'efficient'.<sup>143</sup>

If WTO obligations are, indeed, bilateral in nature — or, more like a contract between two parties (though multilateralized in bundles of bilateral relations) — such alternatives to specific performance could, in principle (though with the required DSU amendments), be tolerated, if tailored in such a way that they do not affect the rights of third parties.<sup>144</sup> In contrast, if WTO obligations were collective in nature — comparable to a penal statute or constitution — then all situations of continuing breach would necessarily affect the rights also of all other WTO Members and *only* full compliance with WTO obligations in all situations can end a dispute. The same way that perpetrator and victim cannot settle a crime (on the ground that crimes affect society at large), two WTO Members would then be precluded from settling a WTO violation which — as a breach of collective obligations — affects the rights of *all other* WTO Members.

As noted earlier, permitting these alternatives to full compliance or specific performance would not be to the advantage of private economic operators concerning predictability, in particular traders (although in economic terms they would be equally well off if the breach is truly 'efficient'). But this may be the price to pay for having legally enforceable WTO obligations in the first place, as well as a welcome democratic safety-net that may actually render WTO obligations more, rather than less, legitimate. Even from a systemic point of view, compensation or other forms of bilateral settlement — as opposed to insisting on full and immediate compliance under all circumstances — may actually save the system from collapse, rather than question the integrity of the WTO legal regime. As Joseph Nye pointed out, 'the procedure [of compensation or suspension of concessions as a back up to compliance] is like having a fuse in the electrical system of a house — better the fuse blows, than the house burns down'.<sup>145</sup>

## 5 Conclusion

This essay elaborates a typology of international obligations based, in particular, on the Vienna Convention on the Law of Treaties and the Articles on State Responsibility of the International Law Commission. Its focus is on the distinction between multilateral treaty obligations that are bilateral in nature (or bundles of bilateral relations) and those that are collective in nature or of the *erga omnes partes* type. This typology is then applied to the obligations set out in the Marrakesh Agreement Establishing the WTO, examining in particular whether WTO obligations are bilateral

<sup>143</sup> See Decision by the Arbitrators, *European Communities — Measures Concerning Meat and Meat Products (Hormones) — Original Complaint by the United States — Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105.

<sup>144</sup> In support, see the statement by James Crawford, *supra* note 61.

<sup>145</sup> J. Nye, *The Paradox of American Power* (2002), quoted with approval by the former Director-General of the WTO himself, in M. Moore, *A World Without Walls, Freedom, Development, Free Trade and Global Governance* (2003), at 109.

or collective/integral in nature. The conclusion reached is that WTO obligations are bilateral obligations, even if some of the more recent WTO obligations, especially those of a regulatory type, may have certain collective features.

Regardless of its conclusions on these important questions, the main objective of this paper is to point at the difference between bilateral and collective treaty obligations and the crucial consequences that come with it under the general international law of treaties and state responsibility.

These consequences relate, first, to the *potential response to breach of WTO obligations*. When a WTO obligation is breached, does this breach occur as against one or more other WTO Members in a series of bilateral relationships (WTO obligations as bilateral obligations) or as against the collectivity of WTO Members as a whole (WTO obligations as collective obligations)? As a matter of general international law (subject, of course, to *lex specialis* in the WTO treaty itself), if the former is true (bilateral obligations), only the WTO Member(s) at the other end of the bilateral relationship(s) have standing to invoke responsibility<sup>146</sup> and only those WTO Members may be permitted to suspend their own WTO obligations in response to the breach.<sup>147</sup> If the latter is true (collective obligations), all WTO Members have standing<sup>148</sup> and all of them may have a right to suspend<sup>149</sup> their own WTO obligations vis-à-vis the wrongdoer.<sup>149</sup>

A second set of consequences relates to the contractual freedom of WTO Members to change or modify WTO obligations as between a sub-set of WTO Members only, or to suspend WTO obligations as a countermeasure in response to breach of other, non-WTO obligations. Unlike the first set of consequences relating to the potential response to breach of WTO obligations *within the WTO* (who has standing; what can be done in response to breach?), this second set of consequences has to do with the freedom of WTO Members acting *outside the WTO* (to what extent can WTO Members change/suspend their WTO obligations for reasons unrelated to WTO breach?). As a matter of general international law (subject, again, to *lex specialis* in the WTO treaty itself), if WTO obligations are bilateral obligations, subsequent treaties as between a sub-set of WTO Members may validly *prevail* over the WTO treaty<sup>150</sup> and countermeasures under the WTO treaty to induce compliance with other, non-WTO obligations, *can* be tolerated.<sup>151</sup> In that event, the later treaty or the countermeasure can be tailored in such a way that it affects only the bilateral relation(s) of the specific WTO Members involved, leaving untouched the rights and obligations of other WTO Members. If, in contrast, WTO obligations are collective obligations, any subsequent treaty modifying rights or obligations as between some WTO Members only, and any countermeasure under the WTO treaty for breach of other, non-WTO obligations,

<sup>146</sup> Article 42(a) of the ILC Articles.

<sup>147</sup> Article 60.2(b) of the Vienna Convention.

<sup>148</sup> Article 48.1(a) of the ILC Articles.

<sup>149</sup> Article 60.2(b) and (c) of the Vienna Convention (subject to Article 60.5 thereof).

<sup>150</sup> Articles 30 and 41 of the Vienna Convention.

<sup>151</sup> Articles 49.2 and 50 of the ILC Articles.

cannot be tolerated.<sup>152</sup> In that event, the later treaty or the countermeasure will necessarily affect also *all other* WTO Members and can, therefore, not be permitted pursuant to the principle that treaties cannot affect the rights or obligations of third parties without their consent (*pacta tertiis nec nocent nec prosunt*).<sup>153</sup>

In terms of potential response to breach, characterizing WTO obligations as collective obligations is, therefore, seriously ‘empowering’ for WTO Members: *all* WTO Members could then challenge and respond to *all* breaches of WTO law (even if only ‘specially affected’ members would then be genuinely ‘injured states’ and have the right to rely on, and control, the full panoply of remedies for breach).<sup>154</sup>

At the same time, when it comes to the permissibility of *inter se* changes or suspension of WTO rights and obligations, classifying WTO obligations as collective obligations is forcefully ‘inhibiting’ for WTO Members: since all *inter se* changes or suspensions then also affect *all other* WTO Members, no such changes or suspensions can be tolerated. As a result, WTO rights and obligations would then be transformed into constitutional-type rules, written in stone, to be altered or affected only by the consensus of all WTO Members *even when it comes to the bilateral relationship between just two WTO Members*. In contrast, if WTO obligations were of a bilateral nature, such *inter se* modifications or suspensions — much needed, in my view, to cater to the wide diversity between WTO Members — would be permitted as long as the individual rights of third parties are left untouched. This, in turn, could open the door for alternatives to specific performance of WTO obligations — be it through a bilateral settlement, compensation or suspension of concessions — on the condition that victims of the breach are fully compensated and third party rights are left unaffected. Permitting such *inter se* changes and alternatives to full compliance may, at first, be looked at as a defeat for the rule of law. Upon reflection, however, they are likely to strengthen and further legitimize the WTO as a system with an increasing number of common rules, but flexible enough to allow for the diverse interests, aspirations and priorities that thrive among the peoples of almost 150 WTO Members.

<sup>152</sup> Respectively, Article 41.1(b)(i) of the Vienna Convention and Articles 49.2 and 50 of the ILC Articles.

<sup>153</sup> Article 34 of the Vienna Convention.

<sup>154</sup> Article 42(b)(i) of the ILC Articles.