

**THE LEGAL NATURE OF WTO OBLIGATIONS:**  
**BILATERAL OR COLLECTIVE?**



**A MINI THESIS SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENT FOR THE DEGREE OF MASTERS OF LAW (LLM) IN  
INTERNATIONAL TRADE, BUSINESS AND INVESTMENT LAW IN AFRICA.**

***SUBMITTED BY JELENA BAEUMLER***

***STUDENT NUMBER 3282311***

**PREPARED UNDER THE SUPERVISION OF PROF. WANDRAG AT THE  
UNIVERSITY OF THE WESTERN CAPE, SOUTH AFRICA.**

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## **DECLARATION**

I, Jelena Baeumler declare that this is an original work done by me and has never been submitted for any degree or examination in any university or higher institution of learning for publication as a whole or in part. All the sources used have been indicated and acknowledged as complete references.

SIGNED 14th May 2013 Jelena Baeumler.



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## Acronyms

AB	Appellate Body
ASR	International Law Commission Articles on the Responsibility of States Internationally Wrongful Acts
AGOA	African Growth and Opportunity Act
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICJ	International Court of Justice
ILC	International Law Commission
MFN	Most Favoured Nation
PCIJ	Permanent Court of Justice
SCM	Agreement on Subsidies and Countervailing Measures
UN	United Nations
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

## Key Words

Bilateral obligations

Collective obligations

Erga omnes obligations

Interdependent obligations

*Jus standi*/legal standing

Nature of obligations

Public International Law

State Responsibility

Vienna Convention on the Law of Treaties

World Trade Organisation



## **Chapter 1: Background to the Study**

### ***1.1. Background***

The World Trade Organisation (WTO) imposes a complex system of rights and obligations upon its members. With 159 parties at present and its ample coverage of almost all aspects of international trade its importance is manifest.<sup>1</sup> Although much academic writing has been undertaken with regard to a wide number of trade aspects arising from the WTO agreements, the understanding of the legal nature of its obligations is still far from being finally resolved.<sup>2</sup> Examining the legal nature of WTO obligations aims at answering the question whether these norms are bilateral or collective in nature.

### ***1.2. Problem Statement***

In public international law, a number of consequences follow from the distinction of bilateral and collective norms. This distinction is reflected in international treaties, first and foremost the Vienna Convention on the Law of Treaties (VCLT) and the International Law Commission Articles on the Responsibility of States Internationally Wrongful Acts (ASR)<sup>3</sup> concerning questions such as modification of treaties, legal standing and the right to countermeasures.<sup>4</sup>

Bilateral or reciprocal norms can be described as norms that are only determinative in the bilateral relationship between two parties, usually in a bilateral treaty.<sup>5</sup> Yet, it has been found that also in multilateral treaties norms can be of a bilateral nature. The multilateral treaty is then to be regarded as an agreement consisting of a bundle of bilateral relationships. The Vienna Convention on Diplomatic Relations, a treaty with 187 member states, is referred to as a prime example of a multilateral treaty with

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<sup>1</sup> Solanski GA 'Globalization and the Role of WTO in Promoting Free International Trade' (2012) 3 *JHSS11* 11-13.

<sup>2</sup> Carmody C 'WTO Obligations as Collective' (2006) 17 *EJIL* 419 419-420 (hereinafter Carmody WTO Obligations as Collective).

<sup>3</sup> Their codification of customary law is not accepted with regard to all articles but they were nevertheless adopted by the General Assembly in 2001, UN GA Res 56/83 (12 December 2001).

<sup>4</sup> Pauwelyn J 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 *EJIL* 907 908-909 (hereinafter Pauwelyn A Typology).

<sup>5</sup> Third Report on the Law of Treaties by Gerald Fitzmaurice UN Doc. A/CN.4/115 (1958) II *YILC* 20 27 (hereinafter Fitzmaurice Third Report).



bilateral obligations.<sup>6</sup> A violation of any of the rules only infringes the State directly affected by the breach, but not the interest of other member states.

Collective norms can be described as norms that express a common interest of the member states.<sup>7</sup> Two categories need to be distinguished. First, there are interdependent norms, in which case the performance of all member states are tied together in the sense that a violation leads to all member states of the treaty being injured in case of a violation. Generally, this is the case with regard to disarmament treaties, as all the parties solely want to perform their obligations under the treaty if all other member states also actually perform their obligations.<sup>8</sup>

Secondly, there are collective norms with an *erga omnes* character meaning that those obligations are owed towards the community as a whole<sup>9</sup> or with regard to *erga omnes partes* norms towards all parties to a certain treaty. The consequences that follow from considering an obligation as having *erga omnes* (*partes*) character are less clear. Yet, all other (member) states are seen as to having an interest in the adherence of the obligation. The concept was first developed by the International Court of Justice (ICJ) and *erga omnes* norms in public international law include *inter alia* the prohibition on genocide and slavery as well as basic human rights.<sup>10</sup>

The distinction is not only important to understand particular aspects of a treaty but also help in the overall understanding of a treaty. The WTO agreements, although in many aspects regarded as *lex specialis*,<sup>11</sup> were agreed among states on the international level making it reasonable and indeed essential to draw from categories found in general international public law in order to determine the legal nature of these obligations.<sup>12</sup>

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<sup>6</sup> Pauwelyn referring to Fitzmaurice A Typology (2003) 911; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Merits)* [1970] ICJ Rep 3 33 [hereinafter *Barcelona Traction*]; whether this holds true even today can be disputed see *infra* 3.3.1.

<sup>7</sup> Second Report on the Law of Treaties by Gerald Fitzmaurice UN Doc. A/CN.4/107(1957) II YILC 16 54 (hereinafter *Fitzmaurice Second Report*).

<sup>8</sup> *Fitzmaurice Second Report* (1957) 54.

<sup>9</sup> *Fitzmaurice Second Report* (1957) 54.

<sup>10</sup> *Barcelona Traction* (1970) 33.

<sup>11</sup> In the sense of Art. 5 and 55 ASR.

<sup>12</sup> See for the discussion of WTO as part of the wider framework of public international law instead of many Simma B & Pulkowski D 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483 483-484.

Thus, the question arises where to place the obligations of the WTO agreements? Are they bilateral because trade is generally between two states? Or is the international trading system expression of a common interest of the parties to create a rule based and fair common market place with the agreements reflecting the balance of interests of the parties? Does the latter thought justify regarding the norms as having an erga omnes character with the consequence that in case of a violation by one member state every member state should be in the position to enforce the rules?

Answering these questions will help to better understand the WTO system and will be crucial in several regards, especially with regard to enforcement, i.e. which member state or states have an interest in a dispute settlement procedure (legal standing)<sup>13</sup> and the right to countermeasures.<sup>14</sup> Furthermore, a theoretical understanding of the nature of obligations might enable a better understanding of the WTO in the wider framework of public international law. Hence, in case the WTO agreements are silent on certain aspects, Panels and the Appellate Body might and indeed already did so in the past refer to general international public law, such as the VCLT and the ASR making it necessary to determine which set of norms are applicable to the respective WTO norms.<sup>15</sup>

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### ***1.3. Research Question***

The aim of this research is to answer the question whether WTO obligations are bilateral or collective in nature. Not all WTO obligations feature the same characteristics. While some WTO norms tend to lead towards an understanding as norms erga omnes partes,<sup>16</sup> other norms can rather be seen as to define a bilateral

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<sup>13</sup> The lack of a doctrine of legal standing before the DSB was heavily criticised by Bustamante R ‘The Need for a GATT Doctrine of *Locus Standi*: Why the United States Cannot *Stand* the European Community’s Banana Import Regime’ (1997) 6 *MJGT* 532-584 (hereinafter GATT Doctrine of Locus Standi).

<sup>14</sup> In favor of multilateralising the enforcement of WTO obligations see Yen Kong NH ‘Collective Countermeasures and the WTO Dispute Settlement: ‘Solidarity Measures Revisited’ (2004) 2 *NJCL* 1-16.

<sup>15</sup> J & Gray KR ‘Principles of International Law in the WTO Dispute Settlement Body’ (2001) 50 *ICLQ* 248-298.

<sup>16</sup> This has been explicitly stated by the Arbitrator in the arbitration under Article 22(6) in United States – Tax Treatment for “Foreign Sales Corporations”: “Art. 3 SCM is 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, which is manifestly inconsistent with an erga omnes per se obligation.” (US v. EC) (2002) (Art. 22(6) Arbitration) WT/DS108/ARB para 6.10 [hereinafter US – FSC].

relationship. A consistent approach needs to be developed in order to be able to determine the legal nature of obligations in international law in general and a thorough norm-by-norm examination is necessary to determine the legal nature of WTO obligations in particular.

#### ***1.4. Objective and significance of the study***

The objective of the study is to gain a deeper and better understanding of the WTO agreements in their entirety. The significance lies in the fact that once the nature of obligations of WTO norms is better understood, this may answer a number of questions with regard to several aspects of Dispute Settlement Body (DSB) proceedings, especially legal standing and the right to countermeasures but also with regard to modification of obligations when a limited number of member states enter into Regional Trade Agreements thereby opting out from certain WTO rules. In a number of cases the Panel, AB or Arbitrators have referred to general international public law such as the ILC ARS, making it necessary to determine which norms are to be applied in case of lacunae.<sup>17</sup>

The potential impact could further be seen in the possibility that, if WTO norms were found to be of a collective nature, powerful states could take up the interest of less powerful states when being allowed to enforce norms that were breached but are otherwise not being brought to the attention of the DSB. If WTO norms are indeed not only of bilateral character but of a collective nature other states could enforce WTO norms without being directly affected by the violation.<sup>18</sup> This could be of particular importance for developing and least developed countries that often due to a number of reasons, i.e. lack of power or resources, do not approach the DSB. In fact, no African countries has as of now participated in a DSB proceeding as complainant.<sup>19</sup>

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<sup>17</sup> E.g. US – FSC (2002) (Art. 22.6), 5.58; *Brazil – Export Financing Programme for Aircraft (Brazil v. Canada)* (2000) (Article 22.6 — Brazil) WT/DS35/ARB para. 8.171.

<sup>18</sup> Posner EA ‘Erga Omnes Norms, Institutionalization, And Constitutionalism in International Law’ (2008) *Public Law and Legal Theory* Paper No. 224 8 arguing that erga omnes norms generally increase the level of enforcement (available at <http://www.law.uchicago.edu/Lawecon/index.html> last accessed 30.03.2013); contrary Stremnitzer A ‘Erga Omnes Norms and the Enforcement of International Law’ (2009) *Journal of Institutional and Theoretical Economics* 29 31-32.

<sup>19</sup> However, Benin and Chad argued that their interests should be taken into account in the proceedings between USA and Brazil due to the special role of developing countries in WTO which leads to the

### 1.5. Literature review

Hitherto, only a limited number of authors have substantially approached the question of the nature of WTO obligations. Notwithstanding, they arrived at quite opposing results. In a nutshell, Pauwelyn argues that trade is invariably between two states resulting in the WTO norms being of an exclusively bilateral character.<sup>20</sup> Carmody, on the other hand, proposed that WTO norms are in general of a collective nature as '[T]heir principal objective is the protection of collective expectations about the trade-related behaviour of governments'.<sup>21</sup> In his opinion, '[T]he rules serve the common interest over and above the interest of WTO Member States individually'.<sup>22</sup> Gazzini appears to agree with Pauwelyn with regard to the overall understating of the WTO obligations. However, he distinguishes between different norms and finds at least with regard to some rules that erga omnes effects have been extended to these norms, such as Art. 3 of the Agreement on Subsidies and Countervailing Measures (SCM) and Art. XXIII(1) General Agreement on Trade in Services (GATS).<sup>23</sup>

Yet, others have viewed this question from a slightly different angle, examining whether the WTO agreements are rather contractual or constitutional in nature.<sup>24</sup> The discussion overlaps with regard to the question what the underlying purpose of the WTO agreements is and whether the WTO and its agreement are of a higher hierarchical order superseding other agreements. The constitutional approach concludes that the WTO system of rights and obligations is collective and thus beyond the discretion of the individual member states establishing a legal order in which WTO obligations trump other legal obligations. From these obligations it cannot be derogated from by way of a

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question under what conditions Member States should be allowed to make claims on behalf of other Member States, *United States – Subsidies on Upland Cotton (US v. Brazil)* (2004) WT/DS267/R para. 7.1409 [hereinafter US – Upland Cotton].

<sup>20</sup> Pauwelyn A Typology (2003) 907-951.

<sup>21</sup> Carmody WTO Obligations as Collective (2006) 419.

<sup>22</sup> Carmody WTO Obligations as Collective (2006) 419.

<sup>23</sup> Gazzini T 'The Legal Nature of WTO Obligations and the Consequences of their Violation' (2006) 17 *EJIL* 723-742 [hereinafter Gazzini The Legal Nature of WTO Obligations].

<sup>24</sup> Cass DZ 'The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *EJIL* 39-75 [hereinafter Cass Constitutionalization of International Trade Law]; Dunoff JL 'Constitutional Concepts: The WTOs 'Constitution' and the Discipline of International Law' (2006) 17 *EJIL* 647-675 [hereinafter Dunoff The WTO's Constitution]; Petersmann E-U *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement System* (1997) [hereinafter Petersmann GATT/WTO].

separate agreement among a limited number of member states.<sup>25</sup> The contractual approach argues that the WTO lacks constitutional features and is thus a bundle of bilateral agreements that permits member states to derogate from it.<sup>26</sup>

This study will examine the different arguments and aims to uncover some of the shortcomings of the approaches brought forward so far. It will try to interlink the ‘contractual/constitutional’ as well as the ‘nature of obligation’ discussions in a comprehensive way. Although there tends to be a common understanding that a norm-by-norm approach might be most appropriate, the author finds that the answers presented so far did not develop a set of overall criteria that could help in determining the character of each and every specific norm. Therefore, the author will present a three step approach in order to determine legal obligations in international law in general and WTO obligations in particular. This test will be applied to a number of distinct and central WTO obligations.



### ***1.6. Methodology***

This is mainly a desktop study. It analyses the primary sources of WTO law, such as treaty texts, ministerial declarations and findings of the DSB as well as secondary sources, especially academic writing. It will draw on the rules that in general international law reflect the understanding of bilateral and collective obligations, namely the VCLT or the ASR. These two texts lay the ground for the distinction with regard to generally understanding the system of treaties in international law as well the responsibility of states in international law. The study will carefully analyze their meaning and the incorporation of this understanding with regard to the WTO.

### ***1.7. Limitations of the study***

Although it might turn out that different norms might have a different legal nature, this study will not be able to examine each and every provision of the many WTO

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<sup>25</sup> Langille J ‘Neither Constitution Nor Contract: Understanding the WTO by Examining the Legal Limits On Contracting Out Through Regional Trade Agreements’ (2011) 86 *NYULR* 1482 1493 [hereinafter Langille Neither Constitution Nor Contract].

<sup>26</sup> Langille Neither Constitution Nor Contract 1494-1497.

agreements. Rather, paradigmatic core norms will be looked at in greater detail in order to arrive at a proposal which can guide the characterisation of a WTO norm as bilateral or collective.

### ***1.8. Chapterization***

#### **Chapter Two**

The second Chapter will examine the differentiation between bilateral and collective obligations in general public international law. It will research on the historical development starting with the judgments of the Permanent Court of Justice (PCIJ) and the International Court of Justice (ICJ) in the Genocide Case, the Barcelona Traction Case and the East Timor Case. It will further study the different categories in the VCLT and the ASR. A better understanding of the concept of bilateral and collective obligations in international law will be necessary in order to being able to apply those categories to the WTO agreements.

#### **Chapter Three**

Chapter Three will analyse the right approach for the determination of the legal nature of WTO obligations. It will critically discuss the different existing approaches brought forward in legal academic writings so far, identify shortcomings and propose a distinct and pragmatic approach. It will present a catalogue of aspects that would generally enable categorizing the different norms of the WTO agreements.

#### **Chapter Four**

Chapter Four will apply the three step approach developed above to the WTO. It will examine the object and purpose of the WTO agreements, the procedural design and determine the legal nature of core obligations of the WTO agreements.

#### **4. Chapter Five**

Chapter Five will conclude the study.

## **Chapter 2: Distinction and consequences of the nature of obligations in public international law**

### **2.1. Introduction**

It is believed that international law as cooperation between states or state-like entities most probably started with simple trade agreements.<sup>27</sup> These agreements were usually concluded on a bilateral level and defined the relationship between two states. The idea of an international community only appeared much later and its first indications can be traced back to the 17<sup>th</sup> century with the famous peace treaties of Westphalia, when states strove for a balance of power.<sup>28</sup> However, only in the 19<sup>th</sup> century states began to develop international treaties in which general rules were laid out such as the Declaration of Paris regarding the freedom of the sea (1856) or the General Act of the Brussels Conference in 1890 that established an International Maritime Office.<sup>29</sup>

A new era of international law began after the First World War when states started cooperating by and large on an international level, first and foremost by establishing the League of Nations which would later develop into the United Nations (UN).<sup>30</sup> It is also after the Second World War that multilateral treaties were agreed among states on a large scale and most importantly the International Law Commission (ILC) began its work on the codification of international law. The shift in international law from a law reflecting the individual interest of states towards a community that protects certain communal interests goes hand in hand with the protection of communal goods and the deeper integration and globalisation encompassing almost all aspects of international cooperation.<sup>31</sup>

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<sup>27</sup> Neff CS *A Short History of International law* in Evans MD (ed.) *International Law* 2eds (2003) (available at: [http://www.oup.com/uk/orc/bin/9780199565665/evans3e\\_ch01.pdf](http://www.oup.com/uk/orc/bin/9780199565665/evans3e_ch01.pdf)) [hereinafter Neff A *Short History*].

<sup>28</sup> Neff A *Short History* (2003) 12.

<sup>29</sup> Neff A *Short History* (2003) 20.

<sup>30</sup> Neff A *Short History* (2003) 25.

<sup>31</sup> Villalpando S *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law* (2010) 21 *EJIL* 387 390-394.



With the further development of international law came the distinction between bilateral and collective obligations. While the former category still reflects the bilateral relation between two states the latter category pays tribute to the development of an international community and the protection of collective interests in international law. This development was reflected in the jurisprudence of the ICJ, the work especially of Gerald Fitzmaurice as Special Rapporteur for the ILC,<sup>32</sup> as well as inter alia in the VCLT and the ASR. Both documents are mainly codifications of customary law with regard to a number of aspects of international treaties as well as the responsibilities of states. Although both texts foresee the possibility that treaties contain *lex specialis*,<sup>33</sup> they stipulate general rules in case no such *lex specialis* was created by parties to an international treaty. They can thus largely be seen to reflect customary law with regard to the understanding of bilateral and collective obligations in international law.

Although the WTO might indeed in many regards be of special nature, the world trade regime is still part of the wider framework of public international law.<sup>34</sup> Thus, general international public law is relevant also for understanding the WTO agreements, making it relevant to better understand the nature of obligations in general international public law.<sup>35</sup> It is well known that WTO agreements do not exist in 'clinical isolation' from the rest of international public law.<sup>36</sup> It was the work of Pauwelyn who again drew the attention on the distinction between bilateral and collective obligations in international public law and raised the question whether WTO obligations are rather bilateral or collective in nature.<sup>37</sup>

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<sup>32</sup> Especially Fitzmaurice Second Report (1957) and Third Report (1958).

<sup>33</sup> Art. 5 VCLT, Art. 55 ASR.

<sup>34</sup> Simma & Pulkowski *Of Planets and the Universe* (2006) 519-523.

<sup>35</sup> Cf. Van den Bosche P *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005) 60-65; Pauwelyn J 'Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law' (2003) 25-88; McRae D 'The WTO in International Law: Tradition Continued or New Frontier?' (2000) 3 *JIEL* 27-41; Petersmann E-U 'Dispute Settlement in International Economic Law – Lessons for the Strengthening International Dispute Settlement in Non-Economic Areas' (1999) 2 *JIEL* 189-248; Palmeter D & Mavroidis PC 'The WTO Legal System: Sources of Law' (1998) 92 *AJIL* 398-413; Shadikhodjaev S & Park N 'Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility' (2007) 41 *JWT* 1237 1238.

<sup>36</sup> *United States – Standards for Reformulated and Conventional Gasoline (US v. Bolivarian Republic of Venezuela)* (1996) WT/DS2/Ab/R 17 [hereinafter US – Gasoline]; Lamy P 'The Place of the WTO and Its Laws in the International Legal Order' (2007) 17 *EJIL* 969 972.

<sup>37</sup> Pauwelyn A *Typology* (2003) 907-951.

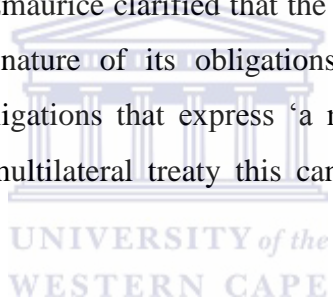


After a general introduction about the distinction between bilateral and collective obligations, the consequences of both categories can best be studied when examining different aspects regarding altering and enforcing treaty obligations as reflected in the VCLT, the ASR as well as the corresponding jurisprudence of the ICJ.

## ***2.2. The differentiation between bilateral and collective obligations***

The travaux préparatoires of the ILC to the VCLT was heavily influenced by the work of its first Special Rapporteur Sir Gerald Fitzmaurice who explicitly introduced the distinction between bilateral and collective obligations into public international law.<sup>38</sup>

Bilateral obligations define the relationship between two parties and obviously appear in a bilateral treaty. Yet, also a multilateral treaty may be comprised of bilateral obligations. In this regard, Fitzmaurice clarified that the number of parties to a contract is not determinative of the nature of its obligations.<sup>39</sup> He described bilateral or 'reciprocal' obligations as obligations that express 'a mutual interchange of benefits between the parties'.<sup>40</sup> In a multilateral treaty this can be described as a bundle of bilateral relations.<sup>41</sup>



The Vienna Convention on Diplomatic Relations is referred to as a multilateral treaty consisting of bilateral obligations.<sup>42</sup> Although the Convention today counts more than 186 ratifications,<sup>43</sup> the particular obligation only arises towards another member state individually in the respective bilateral relationship.<sup>44</sup> The violation of diplomatic rights, e.g. of a Zambian diplomat in Germany infringes the bilateral relation between the two states. Obviously Zambia may enforce its rights against Germany. However, this

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<sup>38</sup> Fitzmaurice Third Report (1958) 27.

<sup>39</sup> Fitzmaurice Second Report (1957) 20.

<sup>40</sup> Fitzmaurice Third Report (1958) 27.

<sup>41</sup> Ibid.

<sup>42</sup> Pauwelyn A Typology (2003) 911.

<sup>43</sup> Vienna Convention on Diplomatic Relations (1961) 500 UNTS 95; member states [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=III-3&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-3&chapter=3&lang=en) (last accessed 29.03.2013).

<sup>44</sup> At least traditionally the obligations were seen as bilateral Hilgruber C 'The Right of Third States to Take Countermeasures' in Tomuschat C & Thouvenin JM (eds) *The Fundamental Rules of The International Legal Order. Jus Cogens and Obligations Erga Omnes* (2006) 265 282 [hereinafter Hilgruber The Right of Third States].

violation would not give say France a right to enforce the rights of Zambia against Germany.

Alongside, there exists a second category in a multilateral treaty, namely obligations that are of a collective nature. These collective obligations create different consequences for the member states as they do not define a bilateral relationship but rather protect a common interest of the parties. Fitzmaurice described these obligations as “self-existent, absolute and inherent for each party”.<sup>45</sup> Two categories of collective obligations need to be distinguished.

The first subcategory of collective obligations is so called interdependent obligations. Fitzmaurice observed that collective obligations can be tied together in a sense that the compliance of all the parties is required in order to live up to the interest of all the parties. As an example it is usually referred to disarmament agreements that require all parties to demobilize their weapon arsenal.<sup>46</sup> It is the aim of the members that in the end really all parties are in the same way defenceless.<sup>47</sup> If only one party actually fails to reduce its armoury all the other parties may lose their interest in the contract as this upsets the object and purpose of the entire treaty.<sup>48</sup> In this regard, although a multilateral treaty, these treaties are more comparable to bilateral treaties in the sense that the obligations are owed to each and every other member state individually and failure to comply with an obligation thus upsets the interests of each and every state. Consequently, in case of violation every member is to be regarded an injured state in its individual capacity.

The other subcategory of collective obligations is so called *erga omnes* obligations. These obligations protect a collective interest of the parties. Although not every party

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<sup>45</sup> Fitzmaurice Third Report (1958) 28.

<sup>46</sup> Pauwelyn A Typology (2003) 912.

<sup>47</sup> Fitzmaurice Second Report (1957) 31.

<sup>48</sup> According to Article 60 VCLT a material breach of a multilateral treaty by one of the parties entitles (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself 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. A material breach may be found, for the purpose of this article, if the violation of a provision essential to the accomplishment of the object and purpose of the treaty (Art. 60, para 3(b)).

might be injured in case of their violation all parties – due to the fact that the obligation protects the collective interest and not only individual interest – have an interest that the obligations are adhered to and in case of violation can be enforced. It has been identified as a problem that ‘omnes’ – apart from it being a Latin phrase and thus by its very nature not clear at first sight – may “either refer to all others collectively, or to each of the others individually”.<sup>49</sup>

Erga omnes and erga omnes partes norms were very precisely defined by the Institute de Droit International as

“(a) An obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or

(b) An obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action”<sup>50</sup>

The definition reveals that erga omnes obligations may appear in general international law as well as subsections concerned with particular aspects of international relations. While the former are obligations owed to the community as a whole, the latter are obligations owed towards all members of a treaty, thus also referred to as erga omnes partes or erga omnes contractantes.<sup>51</sup> It should be noted already at this point that WTO obligations, as part of a treaty with a wide but still limited number of member states would – if at all – be erga omnes partes obligations.

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<sup>49</sup> Tams CJ *Enforcing Obligations Erga Omnes in International Law* (2005) 101 (hereinafter Tams *Erga Omnes*).

<sup>50</sup> Obligations and Rights Erga Omnes in International Law, Institut de Droit International, the Krakow Session, *Annuaire de l’Institut de Droit International* (2005) Article 1. See Gaetano Arangio-Ruiz (4<sup>th</sup> Report 1992) *Yearbook* vol. II Part one 34 para. 92 stating that “[t]his legal structure [obligations erga omnes] is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (erga omnes partes obligations)”.

<sup>51</sup> According to Tams this category was first expressly introduced by the ICTY in the *Blaskić* case, 110 ILR 699–700 (para. 26) *Erga Omnes* (2005) 119.

The consequences that follow from erga omnes (partes) obligations are much debated.<sup>52</sup> It is clear that the concept of erga omnes means more than the mere applicability of a norm between all member states to a treaty but rather refers to the secondary rules governing the effects in case of violation.<sup>53</sup> To put it differently, the main question is what rights follow for the other states in case of violation of an erga omnes obligation which will be discussed in conjunction with the VCLT and ASR.<sup>54</sup>

### **2.3. The VCLT: Admissibility of altering treaty obligations**

The VCLT is among other aspects concerned with the alteration of treaty obligations. When multilateral treaties are concluded member states often wish to adjust treaty obligations to their particular will, either by way of declaring reservations or by subsequently entering into other, differing agreements. In case of breach by another member state they may lose their interest in the contract, wishing to either suspend or terminate the treaty.<sup>55</sup>

#### **2.3.1. Reservation to a treaty**

The identification of a collective interest in international treaties was first expressly formulated by the ICJ in its Advisory opinion on Reservations<sup>56</sup> to the Convention on the prevention and punishment of the crime of genocide in 1951 (hereinafter Genocide Convention).<sup>57</sup> With regard to the question what kind of reservations can be declared to the Genocide Convention, the ICJ pointed out that the object and purpose of the treaty is the main aspect for its admissibility.

“In such a 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

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<sup>52</sup> See only the number of separate and dissenting opinions following ICJ *Belgium v. Senegal*.

<sup>53</sup> Tams *Erga Omnes* (2005) 102.

<sup>54</sup> See infra 2.3 and 2.4.

<sup>55</sup> See Art. 54-64 VCLT.

<sup>56</sup> Art. 2 (d) VCLT: “Reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State”.

<sup>57</sup> Reservations to the convention on the prevention and punishment of the crime of genocide (Advisory opinion) [1951] ICJ Reports 15 [hereinafter Genocide Convention Case].

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>58</sup>

Taking into consideration the underlying object and purpose of the convention, the ICJ argued that the parties are not free to choose which ever reservation it may please them. Rather, the Genocide Convention serves the collective interest of all states and cannot be divided into bilateral obligations owed to each and every member state individually. The parties agree on a certain behaviour, which is not to the discretion of the member state, restricting the possibility to declare reservations if they are not compatible with the object and purpose of the treaty. The rules regarding reservations in the VCLT stipulate that generally reservations may be allowed by the treaty or otherwise need to be in conformity with the object and purpose of the treaty thereby reflecting the ICJs jurisprudence.<sup>59</sup>

More problematic is the aspect of acceptance of the reservation by other member states; a point not yet resolved by the ICJ. According to Art. 20 (1) VCLT if the reservation is expressly authorized by a treaty such reservation does not require the acceptance of the other parties.<sup>60</sup> Yet, if this is not the case the question which state has to accept the reservation and what consequences follow if only some states accept the reservation while others do not is of much debate.<sup>61</sup> Article 20 (2) VCLT states that

‘when it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each and one to be bound by the treaty, a reservation requires acceptance of all the parties’.<sup>62</sup>

This rule mirrors Fitzmaurice’ understanding that collective interests may be dependent on each other in a way that all parties have to make a decision concerning reservation to

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<sup>58</sup> Genocide Convention Case (1951) 51.

<sup>59</sup> Art. 19 VCLT.

<sup>60</sup> Art. 20.1 VCLT.

<sup>61</sup> See instead of many Tomuschat C ‘Admissability and Legal Effects of Reservations to Multilateral Treaties’ (1967) 27 *ZaöRV* 463-482 and Hylton DN ‘Default Breakdown: The Vienna Convention on the Law of Treaties’ Inadequate Framework on Reservations (1994) 27 *Vand J Transnat’l L* 419-451.

<sup>62</sup> Art. 20.2 VCLT.

any treaty obligation. Only if the contract contains bilateral obligations may states by way of acceptance have differing obligations towards each other as it is the case with regard to the Vienna Convention on Diplomatic Relations. Different member states made different reservations that were accepted by some members and not accepted by others leading to differently defined relations between the respective pairs of states.<sup>63</sup> Contrary, in case of collective obligations the reservation needs to be accepted by all the parties.

### 2.3.2. Modification of treaties

The distinction of bilateral and collective obligations is also reflected in the rules governing the modification of treaties, part IV of the VCLT. Obviously a treaty may be amended by agreement of the parties, may it be with regard to a bilateral or a multilateral treaty.<sup>64</sup> However, the question is whether a multilateral treaty may also be amended by a limited number of member states only.

This is possible if the treaty expressly allows for it.<sup>65</sup> Yet, according to Article 41(b) VCLT, modification is also possible if it is not prohibited and does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations and does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.<sup>66</sup>

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<sup>63</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=III-3&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-3&chapter=3&lang=en).

<sup>64</sup> Article 39 and 40 VCLT.

<sup>65</sup> Article 41(a) VCLT.

<sup>66</sup> Article 41 VCLT reads: Article 41 Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

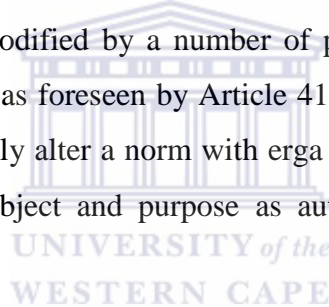
(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

From this provision it can be inferred that if obligations are purely bilateral, member states are allowed to bilaterally modify treaty obligations between them, as it may please them. This is due to the fact that other member states can, as a matter of fact, not be affected by the modification of the rights and obligations of the other two member states. This explains why e.g. the Vienna Convention on Consular Relations, which is understood as a treaty containing of bilateral obligations, provides in Art. 71(2) that “nothing shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provision thereof”.<sup>67</sup> The parties are thus free to modify their bilateral consular relations.

The second paragraph however indicates that collective obligations may only be modified if this does not impair with the object and purpose of the contract and/or does not upset the interest of other member states.<sup>68</sup> The consequence is that interdependent collective norms cannot be modified by a number of parties as this would affect the interests of the member states as foreseen by Article 41(b) (ii) VCLT. Even more, it is thus never possible to bilaterally alter a norm with erga omnes (partes) character if it is not in conformity with the object and purpose as automatically the interests of all member states are at stake.<sup>69</sup>



### **2.3.3. Suspension and termination**

Suspension and termination of treaty obligations are very similarly regulated. The VCLT distinguishes between suspension of treaty obligations by way of agreement or as reaction of a breach by another member state. Both provisions, Art. 58 and Art. 60 discern between bilateral and multilateral treaties.

Regarding multilateral treaties the suspension of treaty obligations by way of agreement by a limited number of member states is only possible if this does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations and is not incompatible with the object and purpose of the treaty. Regarding

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<sup>67</sup> Art. 71(2) Vienna Convention on Consular Relations (1967) 596 UNTS 261.

<sup>68</sup> Pauwelyn A Typology (2003) 914.

<sup>69</sup> Pauwelyn A Typology (2003) 914.



the possibility to react to the breach of another member state by way of terminating treaty obligations, according to Art. 60(2) (b) VCLT this is only possible for the party specifically affected by the breach. Any party not specifically affected by the breach may only invoke the responsibility as a ground for termination “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”, Art. 60 (2) (c) VCLT.

This provision again reflects Fitzmaurice’s distinction between bilateral obligations and interdependent obligations. Only with regard to interdependent obligations may a violation be of such severity as to bring all member states of a multilateral treaty into the position to terminate their treaty obligation.<sup>70</sup> However, there are no provisions on erga omnes obligations. Generally, the violation of an erga omnes obligation leaves the obligations of other states unaffected and does not entitle them to suspending their obligations in whole or in part because the collective interest shall be protected even if one state violates its obligation.<sup>71</sup>

To sum up, although the rules on reservation and modification do not expressly speak of bilateral and collective obligations, an obligation is of a collective nature if it is an expression of the collective interest of the member states, i.e. the object and purpose of the agreement and thus the possibility to alter erga omnes obligations is much more limited than with regard to bilateral obligations where only two states define the relationship between themselves, even in the context of a multilateral treaty.

#### **2.4. The ASR: Enforcing treaty obligations**

The ASR are inter alia concerned with the question under what circumstances a state may invoke the responsibility of another state. Two important aspects that have also been dealt with by the ICJ in a number of cases, namely legal standing and countermeasures, shall be discussed.

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<sup>70</sup> YbILC 1966, Vol. II, 255, para. 8

<sup>71</sup> Tams *Erga Omnes* (2005) 61. This is not to be confused with the right to countermeasures which may also allow a state to pause certain treaty obligations towards the other member state, as the termination and suspension means that the whole treaty obligation is put out of force, see Art. 60(4) VCLT.



### 2.4.1. Legal Standing

Legal standing can be defined as ‘the right to make a claim’.<sup>72</sup> It has been circumscribed as the requirement for a State to establish a sufficient link between itself and the legal rule that forms the subject matter of the dispute.<sup>73</sup> In other words it is the question which state can be said to have an interest in the observance of a certain rule.<sup>74</sup> Yet, it must be distinguished between a general interest and a legal interest, the latter meaning an interest that is legally protected.<sup>75</sup> Even though there is no uniform understanding of legal standing in international law it entails aspects such as access to court, right to be party in a proceeding and procedural capacity.<sup>76</sup>

#### 2.4.1.1. The point of departure: Jurisprudence of the PCIJ and ICJ

Generally, a state has legal standing if it has suffered an injury due to the conduct of another state. Yet, already the Permanent Court of Justice (PCIJ) had to deal with the question whether states are permitted to bring a suit although they might not have suffered any damage or injury. Based on Art. 386 para. 1<sup>77</sup> of the Treaty of Peace of Versailles, the Court found in the *S.S. Wimbledon Case* that all four Governments had legal standing to bring a case against Germany, although passage had only been refused to a British Vessel by the German authorities. The Court found it sufficient that

“[...] each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags.”<sup>78</sup>

The court thus implicitly clarified that any party might have an interest in the enforcement of a treaty, although the three applicants were not as yet and could have only potentially been affected in the future. It relied on the wording of Article 386 of the

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<sup>72</sup> Blacks Law Dictionary (7<sup>th</sup> Edition) 1413

<sup>73</sup> Tams *Erga Omnes* (2005) 26.

<sup>74</sup> Tams *Erga Omnes* (2005) 28.

<sup>75</sup> Tams *Erga Omnes* (2005) 28.

<sup>76</sup> Del Vecchio A ‘International Courts and Tribunals, Standing’ in Max Planck Encyclopedia of Public International Law (2010).

<sup>77</sup> Article 386 para 1 reads: “In the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations”.

<sup>78</sup> *Case of the S. S. Wimbledon (France, Great Britain, Italy and Japan v. Germany)* (Merits) [1923] PCIJ (ser A) No 1 14 20.

Versailles Treaty which gave any interested Power “the right to appeal to the jurisdiction instituted for the purpose by the League of Nations”. Thus, especially the contractual design gave rise to the understanding that all parties had legal standing.

The ICJ discussed legal standing also in connection with the nature of the underlying obligation. The distinction between bilateral and erga omnes obligations was introduced in the famous case concerning the Barcelona Traction, Light and Power Company, Limited decided in 1970.<sup>79</sup> Not too long before, in their application in 1960 Ethiopia and Liberia alleged that the then Union of South Africa violated the Mandate given by the League of Nation in 1920 for South West Africa.<sup>80</sup> The Court after allowing the case at the first stage subsequently denied legal standing.<sup>81</sup> The court ruled that Ethiopia and Liberia had no jus standi, because none of their rights had been violated by South Africa’s conduct in South-West Africa. Yet, it could have been argued that the obligations allegedly violated by South Africa were those of an erga omnes character that gave rise to the concern of the international community.<sup>82</sup>

This line of argument was only developed in Barcelona Traction. Although the background of both cases is completely different, similarly, in Barcelona Traction the question arose with regard to legal standing, namely whether Belgium could bring a case against Spain, seeking reparation for certain damages allegedly caused by acts committed by organs of the Spanish State contrary to international law.<sup>83</sup> Spain argued that only Canada may bring a claim as the injured company was based in Canada.<sup>84</sup> Canada however had no interest in bringing a case, as Canadians had only suffered

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<sup>79</sup> *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Merits) [1970] ICJ Reports 3 [hereinafter Barcelona Traction].

<sup>80</sup> *South West Africa (Ethiopia v. South Africa, Liberia v. South Africa)* (First Phase) (Application of 4 November 1960) [1961] ICJ Reports 4.

<sup>81</sup> *South West Africa (Ethiopia v. South Africa, Liberia v. South Africa)* (Second Phase) [1966] ICJ Reports 1966 6.

<sup>82</sup> Ibid paras 49-51: “Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such interests do not in themselves amount to rules of law. All States are interested – have an interest – in such matters. But the existence of an ‘interest’ does not of itself entail that this interest is specifically juridical in character. [ . . . ] In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form”.

<sup>83</sup> Barcelona Traction (1970) 6.

<sup>84</sup> Barcelona Traction (1970) 15

minor damages. Belgium, on the other hand, had a major interest as the majority of the company's shareholders were Belgian nationals.<sup>85</sup>

The Court stressed that for a State to have a right to bring a case before the ICJ the State is required to firstly establish that the opponent state breached an international obligation and secondly that this obligation was owed to it.<sup>86</sup> With regard to the question whether an obligation is owed to a particular state, the ICJ ruled

“In particular, 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. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”<sup>87</sup>

The Court further specified that those obligations are for example the prohibition of aggression and genocide, basic human rights, protection from slavery or racial discrimination.<sup>88</sup> However, as such obligations were not at stake in the case at hand, although rights of Belgian shareholders were in fact violated, obligations only arose towards Canada, where the company was seated.<sup>89</sup> Thus, only Canada could have brought a claim on the background of diplomatic protection for its company. Belgium on the other hand was not considered to have *jus standi* to bring the claim against Spain.

The ruling in *Barcelona Traction* had a far reaching effect: with regard to those obligations owed to the community as a whole every state may have an interest in adherence of the obligation. This would enable any state to enforce obligations based on the fact that an obligation with an *erga omnes* character had been violated.

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<sup>85</sup> *Barcelona Traction* (1970) 15.

<sup>86</sup> *Barcelona Traction* (1970) 33, referring to *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 181-182.

<sup>87</sup> *Barcelona Traction* (1970) 33 [original emphasis].

<sup>88</sup> *Barcelona Traction* (1970) 33.

<sup>89</sup> *Barcelona Traction* (1970) 43.

However, the limits of the ruling were also soon to become apparent. In the Case Concerning East Timor although the court agreed that Portugal invoked an erga omnes obligation, namely the right to self-determination,<sup>90</sup> the court still declared the application impermissible. The Court made it clear that the question of legal standing has to be separated from the issue of jurisdiction.<sup>91</sup> Drawing on the Monetary Gold Rule that a Court may not exercise its jurisdiction if the State has not consented to it<sup>92</sup> the ICJ found that since Indonesia would be affected by a ruling in the case but had not given its consent to the jurisdiction of the ICJ the claim by Portugal against Australia was inadmissible. To put it with the words of the Court:

“Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where there is so, the Court cannot act, even if the right in question is a right *erga omnes*.”<sup>93</sup>

Hence, the importance of the determination of bilateral obligations and obligations with an erga omnes character is crucial although limits do apply with regard to the enforcement of such rights in light of the jurisdiction of a court.

Yet, it should be noticed that the restriction that a court may not have jurisdiction although an erga omnes partes obligation is invoked is an aspect of less relevance with regard to the WTO, as by agreeing to the WTO agreements parties generally accept jurisdiction of the Dispute Settlement System. Thus, WTO members may not be able to invoke a similar argumentation as Australia did with regard to Indonesia.<sup>94</sup> Regarding claims that are concerned with the rights and obligations of WTO members the DSB has jurisdiction for disputes arising among its member states.

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<sup>90</sup> *Case Concerning East Timor (Portugal v. Australia)* (Merits) [1995] ICJ Reports 90 102.

<sup>91</sup> *Case Concerning East Timor (Portugal v. Australia)* 102.

<sup>92</sup> *Case of the monetary gold from removed from Rome in 1943 (Italy v. France, United Kingdom and United States)* (Preliminary Question) [1954] ICJ Reports 19.

<sup>93</sup> *Case of the monetary gold from removed from Rome in 1943 (Italy v. France, United Kingdom and United States)* 19.

<sup>94</sup> See generally on legal standing in the WTO *infra* 4.3.2.1.

#### 2.4.1.2. Enforcement according to the ASR

The ASR are built on the distinction introduced by the ICJ. Within a bilateral agreement a breach of an obligation leads to responsibility of the respective state, Art. 42 (a) ASR. The other side may invoke responsibility in front of a competent court or arbitration forum having legal standing as the injured party.

The picture gets more complicated with regard to multilateral treaties. According to Article 42 (b) ASR

“A State is entitled as an *injured* State to invoke the responsibility of another State if the obligation breached is owed to:

(b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) 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”. [emphasis added]

It is important to notice that Article 42 ASR speaks of an “injured” state, i.e. a state that is itself adversely affected by the breach. This might either be the case in a multilateral treaty with collective obligations when the breach of the obligation affects that state particularly, alternative (i) or because of the nature of the obligation the violation injures *all* parties to the treaty, alternative (ii). It has been observed that the latter category refers to what Fitzmaurice had in mind on the effect of interdependent obligations.<sup>95</sup> Regarding interdependent norms the obligations of the parties are interlinked in a way that one state performs because the other parties do as well. Consequently, if one state fails to perform this also affects all other parties in their will to perform leaving all other parties injured. Article 46 only clarifies that in case of more than one party being injured, every party may invoke the responsibility of the state breaching its obligation.

On the other hand, Article 48 ASR also allows the invocation of the responsibility of another state *without* the state being injured. This right is not based on the complaining

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<sup>95</sup> Pauwelyn A Typology (2003) 922.

state being adversely affected but rather on the basis that the obligation was owed towards a group of states or the community as a whole. Article 48 ASR reads:

“Any State *other than an injured* State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

[emphasis added]

The first subsection refers to so called erga omnes partes obligations while the latter subsection refers to obligations that are owed to the international community as a whole independent of a treaty system (erga omnes partes). In both cases, the obligation needs to be established for the protection of a collective interest. In this case, any state other than the injured may claim the cessation of the internationally wrongful act and reparation in the interest of the injured state, Art. 48 para. 2 ASR.

In summary, according to the ASR an injured state may have legal standing. Additionally, any state (to a treaty) may invoke responsibility in case a collective obligation was breached either because of its interdependent or erga omnes nature.

#### **2.4.1.3. Exemplary treaty rules on legal standing**

As with regard to any other aspect discussed in this section, parties to a treaty are generally free to agree on differing rules. Yet, often treaty provision mirror the VCLT or ASR understanding. An example of a very clear broad legal standing provision is Article 26 of the ILO Constitution, adopted in 1919, which states that

“[a]ny of the [ILO] Members has the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified”.<sup>96</sup>

Similarly broad provisions can be found in the Genocide Convention (Art. IX), the European Convention on Human Rights (Art. 33) as well as in a number of other

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<sup>96</sup> Tams *Erga Omnes* (2005) 72.

treaties.<sup>97</sup> The same holds true for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Art. 30. It is particularly important that while no party ever successfully relied on legal standing on the basis of a violation of an erga omnes (partes) obligation, in the recent Case Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) of 2012 the court for the first time based the right to bring a claim on the violation of the erga omnes partes obligations of the Torture Convention, namely Art. 6 and 7.<sup>98</sup>

To sum up, bilateral obligations may only be invoked by the injured party while with regard to obligations erga omnes any state – in case of erga omnes obligations – or any state member to the treaty – in case of erga omnes partes obligations – may invoke the responsibility of the state being in breach of its obligations.

#### 2.4.2. Countermeasures

Regarding the right to countermeasures a number of aspects are much debated among scholars.<sup>99</sup> In its broadest sense countermeasures can be circumscribed as all possible reactions of states “in order to urge a violation state to end its breach of the law”.<sup>100</sup> The right to countermeasures might be more restrictive than to have legal standing as the former refers to the right of a state to directly apply certain measures against the defaulting member in its own capacity while the latter only means the possibility to invoke responsibility in front of a competent tribunal.<sup>101</sup> The ASR primarily refer to the injured State having the right to take countermeasures against the violating state, Art. 49. Regarding states other than the injured state, Article 54 ASR merely proclaims that

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<sup>97</sup> Other examples are Art. 8 Slavery Convention, Art. 22 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Art. 39 Refugee Convention, Article 9 Convention on Political Rights of Women, Art. 5 Convention on the Right of Correction, Art. 34 Convention on the Status of Stateless Persons, Article 10 Supplementary Slavery Convention, Article 10 Convention on the Nationality of Married Women, Article 14 Convention on the Reduction of Statelessness, Art. 22 Convention on the Elimination of All Forms of Racial Discrimination, Article 8 UNESCO Convention Against Discrimination in Education.

<sup>98</sup> *Question relating to the obligation to prosecute or extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Para 68 (Hereinafter *Belgium v. Senegal*). See also Uchkunova I ‘Belgium v. Senegal: Did the Court End the Dispute between the Parties?’ (2012) EJIL Talk (available at: <http://www.ejiltalk.org/belgium-v-senegal-did-the-court-end-the-dispute-between-the-parties/>, last visited 10.02.2013)

<sup>99</sup> See instead of many Tams *Erga Omnes* (2005).

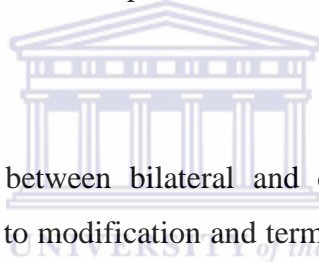
<sup>100</sup> Hilgruber *The Right of Third States* (2006) 265.

<sup>101</sup> Tams *Erga Omnes* (2005) 40.



“This chapter 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.”

By merely referring to lawful measures, it leaves open the question what kind of measures a state may undertake acting on behalf of the international community or a group of states within a treaty system. The admissibility is thus dependent on the respective treaty as customary law has not developed any clear results. Yet, there is a tendency that *erga omnes* (partes) obligations may also allow states other than the injured state to adopt countermeasures against the defaulting State.<sup>102</sup> Yet, it is clear that the object of the state’s measures is bound to those stated in Art. 48 para. 2 ASR, namely the cessation of the breach and reparation in the interest of the injured state.<sup>103</sup>



## **2.5. Conclusion**

To conclude, the distinction between bilateral and collective obligations becomes relevant especially with regard to modification and termination/suspension of treaties in the VCLT and with regard to legal standing and countermeasures in the ASR. Generally speaking, bilateral obligations leave more discretion to its member states and may only be enforced by the injured state, while collective obligation protect a collective interest and can thus less easily be altered but more easily enforced by any member state of the treaty system or the community as a whole.

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<sup>102</sup> Tams *Erga Omnes* (2005); Hilgruber *The Right of Third States* (2006).

<sup>103</sup> Art. 54 ASR.



## Chapter 3: Determining the Legal Nature of obligations

### 3.1. Introduction

After understanding the distinction between the different categories of obligations as laid down in the VCLT and ASR the next step is to clarify how to determine the legal nature of obligations in international treaties. No international treaty contains an explicit clause stating that its obligations are bilateral or collective. Thus it is required to determine the legal nature by reverting to other aspects such as the drafting history, preambles, ministerial declarations, wording and systematic context of the provision and its object and purpose.

This question how to determine the legal nature of erga omnes partes obligations contained in a treaty needs to be separated from determining erga omnes norms outside a treaty, i.e. in customary law. It is already difficult to determine the contents of customary law and even more difficult to establish that these norms have jus cogens or erga omnes character.<sup>104</sup> However, this work is concerned with determining the legal nature within in a treaty, and specifically within the WTO. Thus, it will only be dealt with the question how to determine erga omnes partes obligations.

### 3.2. The approach of the ICJ

As was already mentioned above in the Belgium v. Senegal proceedings the ICJ found the obligations of the Torture Convention, namely Art. 6 and 7, to have erga omnes partes nature. How did the Court arrive at that conclusion? The Court reasoned:

“The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. [...] All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties

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<sup>104</sup> The ICJ named a number of obligations such as prohibition of slavery and genocide in Barcelona Traction but did not reveal how it arrived at this conclusion, see also Tams *Erga Omnes* (2005) 117-157.

to the Convention. All the States parties “have a legal interest” in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case.”<sup>105</sup>

The Court connected the object and purpose of the treaty as expression of a common interest of the parties and the legal nature of its obligation and legal standing.<sup>106</sup> The Court, quick and easy, concluded that the common interest of the parties “in compliance with the obligations [...] implies that the obligations are owed by any State to all other States”.<sup>107</sup>

Yet, the number of separate and dissenting opinions – almost all of them commenting on this very aspect – indicates the uncertainty of how to determine the legal nature of an obligation in international law and the consequences that follow from an *erga omnes partes* norm.

Judge Donoghue intends to support the Court’s finding in his declaration by arguing that the duty of a State must correspond “to a right on the part of some or all of the other parties; this is inherent in the nature of treaty relations”.<sup>108</sup> He goes on to state that “it is difficult to see why the duty would be owed to some parties but not to others”.<sup>109</sup> After giving an example of unenforceability in case the obligations would be understood as bilateral he concludes that “the obligations at issue could be entirely hollow unless they are obligations *erga omnes partes*.”<sup>110</sup> However, it is hard to see how this would ever lead to a distinction between bilateral and collective obligations in multilateral treaties as always the danger of unenforceability exists if only the injured state is in a position to invoke the responsibility of the party in breach of its obligations. It is submitted that it is after all the obligation of the court to reveal the will and intent of the parties and not to

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<sup>105</sup> Belgium v. Senegal para. 68 [original emphasis].

<sup>106</sup> This fact is however disputed in the dissenting opinion by Judge Xue 3-4, especially para. 16

<sup>107</sup> Belgium v. Senegal (2012) para. 68.

<sup>108</sup> Declaration of Judge Donoghue para 10.

<sup>109</sup> Declaration of Judge Donoghue para 11.

<sup>110</sup> Declaration of Judge Donoghue para 11.

become the legislature who adds extra meaning in order for a treaty regime to make sense and to be better enforceable.

Judge Trinidadé argues that both parties, Belgium and Senegal made statements revealing that both parties understanding these obligations as having an erga omnes character.<sup>111</sup> Yet, with all due respect, the question is not what Belgium and Senegal think but what the *common* understanding of the member states is. The nature of Art. 6 and 7 of the Torture Convention cannot be of erga omnes partes character in the bilateral relationship between Senegal and Belgium and of a collective nature in the relations of other member states. This would really undermine the idea of collective obligations.

Judge Xue goes as far as criticising the Court's conclusion as "abrupt and unpersuasive".<sup>112</sup> The arguments presented by the Court in her view do not demonstrate that the parties "intended to create obligations erga omnes".<sup>113</sup> The approach is also criticised by Judge Skotnikov who finds that merely quoting the Preamble may not lead to the conclusion that the obligations have an erga omnes partes character.<sup>114</sup>

Judge Sur argues in favour of a norm-by-norm approach because "to reason otherwise would be to adopt an approach to the question that is more ideological than legal".<sup>115</sup> Judge Sur presents a number of aspects that should be taken into account namely the nature of ordinary meaning of its terms, its context, subsequent practice, the intention of the parties and the treaty's object and purpose.<sup>116</sup> However, in his view the Court merely from the overall object and purpose of the treaty made a conclusion regarding all obligations of the treaty in general and only Art. 6 and 7 of the Torture Convention in particular.<sup>117</sup> He presents arguments that speak against this thesis, especially the fact that parties may opt out of the particular mechanism for the Committee against Torture

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<sup>111</sup> Separate Opinion Judge Trinidadé 31.

<sup>112</sup> Dissenting Opinion by Judge Xue 3.

<sup>113</sup> Dissenting Opinion by Judge Xue 5.

<sup>114</sup> Separate Opinion Judge Skotnikov 2.

<sup>115</sup> Dissenting Opinion Judge Sur 13.

<sup>116</sup> Dissenting Opinion Judge Sur 14.

<sup>117</sup> Dissenting Opinion Judge Sur 14-15.

(Art. 17-24).<sup>118</sup> The possibility to opt out indicates, in his opinion, that the obligations may not have an erga omnes partes character.<sup>119</sup>

The Court's reasoning as well as the differing opinions by the Judges reveal that not even the ICJ and its judges have as of yet developed a coherent and systematic approach to the question of determining the legal nature of treaty obligations.

### ***3.3. Existing approaches on the legal nature of WTO obligations***

Only a number of academics have commented on the question of the legal nature of WTO obligations after Pauwelyn initiated the discussion in 2003, especially Carmody and Gazzini. This justifies looking into their contribution to the question in greater detail. Pauwelyn<sup>120</sup> argues that WTO obligations are bilateral in nature. Carmody<sup>121</sup> takes the opposite view, while Gazzini<sup>122</sup> presents a middle ground position. Have they found a coherent approach how to determine the legal nature of WTO obligations? Although there appears to be accordance that a norm-by-norm determination is necessary, their approaches lack a coherent and systematic underlying basis.

#### **3.3.1. WTO norms as a bundle of bilateral obligations**

Pauwelyn begins his discussion by suggesting that generally speaking obligations in international public law rather have a bilateral character and thus it is upon those academics to argue and to prove to the contrary that an obligation has a collective character.<sup>123</sup> However, it might be true from a historic point of view that international public law was rather a bilateral matter between two states. However, as stated above,<sup>124</sup> this radically changed after World War II. Simma convincingly argues for international

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<sup>118</sup> Dissenting Opinion Judge Sur 15-16.

<sup>119</sup> Dissenting Opinion Judge Sur 16.

<sup>120</sup> Pauwelyn A Typology (2003).

<sup>121</sup> Carmody WTO Obligations as Collective (2006).

<sup>122</sup> Gazzini The Legal Nature of WTO Obligations (2006).

<sup>123</sup> Sicilianos S 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 *EJIL* 1127 1133-1134; Simma B 'Bilateralism and Community Interest in the Law of State Responsibility' in Dinstein Y & Tabory M (eds) *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* (1989) 822.

<sup>124</sup> See supra 2.1.

law to have developed from bilateralism to community interests.<sup>125</sup> The WTO and its agreements which only came into existence in 1994 can thus not so easily be accorded to a time where relations were rather bilateral. On the contrary, more recent international law regimes have been established to protect collective interests, such as human rights or the environment. Seen in light of that development, Pauwelyn's argument as such might not be valid anymore.

Although Pauwelyn is of the opinion that only a norm-by-norm approach can really determine the legal nature of an obligation, he approaches the question by arguing in general with the WTO agreements by and large, their object and purpose and the underlying reality of trade relations. Pauwelyn is of the opinion that the WTO agreements – although being a multilateral contract with more than 150 member states – consist mainly of a bundle of bilateral obligations.<sup>126</sup> He argues that the object and purpose of the WTO agreements is the regulation of trade. Trade in and of itself i.e. selling and buying goods or services takes place between two member states only. Even if more than one state contributes to the production process of the product the agreements provide to determine the origin of a certain product, making trade again a bilateral matter.<sup>127</sup>

It might be true that the actual movement of goods between State A and B is of a bilateral nature. However, this does not lead to irrevocably understanding the obligations concerning participation in the global marketplace as bilateral. In most cases a treaty also regulates the bilateral relation between two parties. Yet, over and above it might protect a collective interest which is independent of the bilateral reality of the treaty. For example a treaty on the protection of the environment may determine rights and obligations of neighbouring states, but it additionally protects the collective interest, namely to protect the environment. Pauwelyn compares the Agreement on Diplomatic Relations and the WTO Agreement.<sup>128</sup> Yet, this is not a strong support for Pauwelyn's

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<sup>125</sup> Simma B 'From Bilateralism to Community Interests in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217-349 [Simma From Bilateralism to Community Interests].

<sup>126</sup> Pauwelyn A *Typology* (2003) 908 et seqq.

<sup>127</sup> Pauwelyn A *Typology* (2003) 930.

<sup>128</sup> Pauwelyn A *Typology* (2003) 930.

argument. Even with regard to the Convention on Diplomatic Relations did the ICJ in the Teheran Hostages Case state that it

“[...]consider[s] it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously be respected.”<sup>129</sup>

Third states such as France and Germany also took measures against Iran, albeit these were lawful measures not requiring these countries of being entitled to countermeasures.<sup>130</sup> This indicates that even agreements that were found to be clear examples of treaties containing bilateral obligations are in an ever more globalised world more and more found to be collective in nature concerning all member states.<sup>131</sup>

The WTO agreements are to a much greater extent than the Convention on Diplomatic Relations the outcome of negotiations that reflect the balance of interest of all member states and the collective interest to create a common and fair international marketplace.<sup>132</sup> Thus, the rights and obligations are to a far greater degree interlinked and dependent on each other as this is the case with regard to e.g. diplomatic relations. This is supported by some WTO agreements and norms being concerned with the “world market” (e.g. Preamble third recital Agriculture Agreement (AA), Art. 6.3(d) SCM) and thus not only with the bilateral relation of two member states, but rather with the organization and protection of an undistorted global market on which all member states can fairly trade with each other.<sup>133</sup> This common market place also explains why the violation of an obligation towards one member state may also affect one or more

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<sup>129</sup> *Case Concerning United States Diplomatic and Consular Staff in Teheran (US v. Iran)* ICJ Reports 1980 3 para 92.

<sup>130</sup> Hilgruber Third States (2006) 282.

<sup>131</sup> In the same direction argues Hilgruber Third States (2006) 282-283.

<sup>132</sup> See e.g. the Marrakesh Declaration.

<sup>133</sup> This was the case in *US – Upland Cotton* where the parties did not have any trade relations with regard to cotton.

other states, as trade flows are interlinked and dependent on each other. A member state due to the subsidy policy of another member state in one sector may decide to invest into a completely different sector thereby affecting yet other states. Thus, almost any violation at least potentially may affect a great number if not all member states.

Pauwelyn's next argument is based on the fact that many trade concessions are negotiated on a bilateral level and subsequently extended to other member states via the Most-favoured Nation (MFN) treatment. This, in Pauwelyn's view also indicates that the obligations are of a rather bilateral nature.<sup>134</sup> Although the observation might be true with regard to the individual list of concessions, it does not hold true with regard to WTO agreements, such as the GATS, AA, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) or the Dispute Settlement Understanding (DSU) that were agreed by way of multilateral negotiations and are reflecting a balance of interest of the member states found in these negotiations.

The next argument leads into the same direction, namely that the preferential treatments for developing countries are based on bilateral concessions.<sup>135</sup> Yet, the basis and framework for special and differential treatment is to be found in the WTO agreements. Waivers have to be granted by all member states, thus on the multilateral level. The differential treatment of member states does not lead to an understanding that the obligations are bilateral but rather pays tribute to the *common* understanding that different member states require different treatment. If the US by way of the African Growth and Opportunity Act (AGOA) then allows for zero tariff imports from developing countries this is an expression of the common will of the parties to allow the US to better integrate developing countries into the world economy, a goal stipulated even in the Preamble of WTO agreements. This is further supported by rulings of the DSB that even though developing countries might be treated differently, among this group of least developed and developing countries states falling into this category shall

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<sup>134</sup> Pauwelyn A Typology (2003) 930.

<sup>135</sup> Pauwelyn A Typology (2003) 932.



be treated equally.<sup>136</sup> This understanding would not be inevitable if obligations were really as bilateral as Pauwelyn argues they are.

Pauwelyn especially distinguishes WTO obligations from obligations arising under human rights treaties.<sup>137</sup> Regarding treaties protecting human rights, generally no member state is injured in case of breach of an obligation, as usually a member state violates obligations towards the citizens living in its own territory. Due to the fact that no state would ever be injured but always the collective interest to protect certain human rights for all individuals, it is necessary that all states are enabled to invoke responsibility for obligations arising under such treaties.<sup>138</sup> Yet, human rights treaties are in this regard very special and a particularity within the whole system of international public law, as “[u]nlike international treaties of the classical kind’ [...] they go beyond reciprocal obligations”.<sup>139</sup> A number of other treaties, such as treaties on the law of the sea, protection of the environment and in the area of humanitarian law, simultaneously protect individual as well as common or collective interests.<sup>140</sup> With regard to the latter example they protect the collective interest of the member states to make the inhuman nature of war a little bit more human but also the individual interest of the member states to have their soldiers and civilians treated according to the minimum standard set forth in the Geneva Conventions and its Protocols.

Pauwelyn argues that quite to the contrary in case of a WTO obligation, generally speaking, one or more states will have suffered an injury but never all or no member state; this indicates that the obligations are bilateral and not collective.<sup>141</sup> However, this would mean that whenever a treaty protects individual interest responsibility could never be invoked by member states other than the one that had actually suffered an injury. Yet, already in the early Wimbledon case<sup>142</sup> the PCIJ clarified that next to

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<sup>136</sup> *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (India v. European Communities)* WT/DS246/R, WT/DS246/AB/R.

<sup>137</sup> Pauwelyn A Typology (2003) 933.

<sup>138</sup> Pauwelyn A Typology (2003) 933.

<sup>139</sup> *Ireland vs. UK* [1978] ECtHR (Ser A) Vol. 25 para. 239; Simma & Pulkowski *Of Planets and the Universe* (2006) 511.

<sup>140</sup> Simma B *From Bilateralism to Community Interests* (1994) 225.

<sup>141</sup> Pauwelyn A Typology (2003) 934.

<sup>142</sup> *Case of the S. S. Wimbledon (France, Great Britain, Italy and Japan v. Germany)* (Merits) [1923] PCIJ (ser A) No 1 14 20



England, which ships had been refused passage, other states had an interest in enforcing the obligations arising under the Versailles treaty. However, arguing with Pauwelyn, it would not have been necessary as England could have enforced the obligation alone.

The VCLT as well as the ASR acknowledge that treaties may protect individual as well as community interests and thus the fact that a treaty protects individual interest does not lead to the conclusion that it does not at the same time protect collective interests. The same is true with regard to the prohibition of aggressive war – an obligation generally accepted as *erga omnes* – that protects the individual interest of each and every state not to become the victim of an act of aggression. Yet, at the same time it protects the collective interest of the community as a whole to prohibit aggression against other states and peoples.

Finally, Pauwelyn refers to the fact that enforcement in the WTO actually takes place on a bilateral level.<sup>143</sup> He argues that Art. XXIII GATT 94 requires that a member state's interest is being nullified or impaired.<sup>144</sup> However, this totally disregards the second half of Art. XXIII GATT 94 which is in fact formulated much broader in that a member state may also refer to the DSB if the “attainment of any objective of the Agreement is being impeded”.<sup>145</sup>

To sum up, Pauwelyn's arguments lack a consistent approach and do not lead to the conclusion that all norms of the WTO are indeed bilateral. Even Pauwelyn admits that with the coming into existence of the objective order for world trade some of these ‘regulatory-type’ obligations might be collective.<sup>146</sup>

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<sup>143</sup> Pauwelyn A Typology (2003) 935.

<sup>144</sup> Vgl. Art. XXIII GATT 94.

<sup>145</sup> See for more detail on Art. XXIII GATT 94 supra 4.3.2.1.1.

<sup>146</sup> Pauwelyn A Typology (2003) 939-940.

### 3.3.2. WTO obligations as obligations erga omnes partes

Quite contrary to Pauwelyn, it is argued that WTO obligations are obligations erga omnes partes.<sup>147</sup> Carmody states that the WTO agreements protect the “collective expectations about the trade-related behaviour of governments”.<sup>148</sup> This makes the rules “unquantifiable and indivisible and therefore fundamentally unitary in nature”.<sup>149</sup>

Carmody argues that the very MFN is an obligation towards all member states.<sup>150</sup> He does not only understand the MFN as a legal obligation within the different agreements but as the underlying principle of the WTO. It is true that the MFN is one of the cornerstones of the WTO agreements. However, this does not prove that via the MFN all its obligations are to be understood as collective. Rather, it seems to support that due to its importance the MFN itself is a collective obligation.

Furthermore, Carmody points out that the DSU is not concerned with compensation but rather the wrongdoer has to bring its measures into conformity with WTO law.<sup>151</sup> This indicates that the violation is not resolved exclusively within the bilateral relation but the respective member is obliged to observe its obligations towards all member states by again behaving in conformity with the WTO agreements. Yet, the consequences of a DSB judgment are disputed. Some argue in favour of a general obligation to bring its laws into conformity.<sup>152</sup> Hitherto, the reality of the DSB draws another picture. Cases such as the US – Upland Cotton<sup>153</sup> brought to an end by an agreement between USA and Brazil without the US ever changing its subsidy policy but rather by it paying a certain amount to the Brazilian government – a result in complete contradiction to the WTO Agreements – speaks against Carmody’s argument. In this regard, the DSB rather functions like a bilateral system, one tends to think, like in a civil procedure, “where there is no claimant there is no case”.

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<sup>147</sup> Tams *Erga Omnes* (2005) 121; Günther *Klagebefugnis der Staaten in internationalen Streitbeilegungsverfahren* (1999), 142–144 and 242–247. Matsushita M & Schoenbaum T & Mavroidis P *The World Trade Organization. Law, Practice, and Policy* (2003) 26–27.

<sup>148</sup> Carmody *WTO Obligations as Collective* (2006) 419.

<sup>149</sup> Carmody *WTO Obligations as Collective* (2006) 421.

<sup>150</sup> Carmody *WTO Obligations as Collective* (2006) 425.

<sup>151</sup> Carmody *WTO Obligations as Collective* (2006) 441.

<sup>152</sup> Colares J F ‘The Limits of WTO Adjudication: Is Compliance the Problem’ (2001) 14 *JIEL* 403 422.

<sup>153</sup> Chan S ‘U.S. and Brazil reach Agreement on Cotton Dispute’, *New York Times* April 6, 2010; [http://www.nytimes.com/2010/04/07/business/07trade.html?\\_r=0](http://www.nytimes.com/2010/04/07/business/07trade.html?_r=0) (last accessed 09.05.2013).

Carmody's main argument in understanding WTO obligations as collective is his integrated understanding of the WTO agreements as a treaty that predominantly serves "as a law of expectations, but also in selected instances as a law of realities and ultimately as a law of interdependence."<sup>154</sup>

With regard to the first aspect, the 'law of expectations' Carmody refers to the trade-related behaviour of member states. Although the concessions might be negotiated bilaterally they are applied in a collective way. Thus, the expectations of the trade-related behaviour are established among all member states. This is further supported by the fact that the interpretation of WTO treaties by the DSB takes place on the basis not only of the expectations of the two parties to the dispute but all parties.<sup>155</sup>

The 'law of realities' refers to the possibilities of member states to react to certain changes, namely by way of Anti-Dumping duties, Safeguard measures and Countervailing duties.<sup>156</sup> These measures are rather bilateral in that they are able to adjust a certain measure to the requirements between two parties.<sup>157</sup> Still the possibility to derogate from certain obligations is part of the WTO package and "work to reinforce the collectivity of the greater whole".<sup>158</sup> With the last aspect as a law of interdependence Carmody incorporates producers and consumers into the picture. He argues that thereby an "indissoluble web of economic relations" is created. He connects his thoughts with ideas about justice, considering the WTO agreements to be about distributive justice and not merely corrective justice.<sup>159</sup> His overall categorization is rather unclear as while earlier in his paper he defines WTO obligations as obligations *erga omnes partes* at the end it appears as if he finds those obligations to fall into the category of interdependent obligations. He compares the WTO agreements with a disarmament treaty just that the latter is military disarmament while the former is mercantile disarmament.

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<sup>154</sup> Carmody *WTO Obligations as Collective* (2006) 422.

<sup>155</sup> Similarly Neto G 'From Bilateral to Multilateral Law-Making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO' (to be published in *EJIL* autumn 2013).

<sup>156</sup> Carmody *WTO Obligations as Collective* (2006) 431.

<sup>157</sup> Carmody *WTO Obligations as Collective* (2006) 431.

<sup>158</sup> Carmody *WTO Obligations as Collective* (2006) 432.

<sup>159</sup> Carmody *WTO Obligations as Collective* (2006) 426.

Although there is some truth in that the WTO agreements aims at liberalizing trade and in reducing barriers to trade, may they be tariffs or non-tariff barriers and in this regard indeed comparable to disarmament, it can be agreed with Pauwelyn that the WTO does not contain interdependent obligations.<sup>160</sup> The obligations are not interlinked in a way that one member state only wants to perform when all other member states also perform their obligations. The interest of the member state does not stand and fall with only one member state not observing its obligations.

Furthermore, such generalized categorization does not lead towards understanding the individual character of a particular WTO obligation or clarifies how the legal nature of the different WTO obligations can be categorized. There is no link between the understanding of the WTO as a law of expectations, realities and interdependence and the design of the very different individual WTO norms. The MFN alone cannot serve to proof that because all member states are generally to be treated equally that every single obligation is - as different as not to provide subsidies or not to apply tariffs higher as provided in the schedule - a collective obligation. The MFN may not in and of itself serve as the basis for the argument that an obligation is collective, if the member state would merely violate any of the above mentioned obligations. Rather, the very obligation itself has to be of a collective nature in order for all member states to be able to enforce the obligation. The varied and colourful bunch of WTO obligations cannot be determined by making broad statements about the overall understanding of the WTO agreements or by trying to interlink all obligations via the MFN.

Concerning Carmody's argument about the interpretation of WTO norms, it is coherent that the WTO DSB does not interpret a norm only by referring to the expectations of the two member states of the conflict but all member states due to the fact there is only one rule to be interpreted. Accordingly and in line with international public law one interpretation will be given by the body responsible for the interpretation of the treaty text. Yet, does this lead to the norm being collective in nature? No. Interpretation rather attempts to finding the 'true meaning' of the norm.<sup>161</sup>

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<sup>160</sup> Pauwelyn A Typology (2003) 927-928.

<sup>161</sup> Van Damme I *Treaty Interpretation by the WTO Appellate Body* (2009) 33.

Furthermore, his argument that rules on dumping and subsidies are generally bilateral is not convincing as his argument is not based on the obligation itself but rather the possibility of a state to react towards a breach by another state. It can be asked: Because states may bilaterally charge countervailing duties is also the obligation not to provide subsidies bilateral? This is already not convincing as the bilateral enforcement track is additional to the multilateral enforcement track.

### 3.3.3. WTO as a ‘potpourri’ of obligations

Gazzini’s approach is more differentiated. As a starting point, he agrees with Pauwelyn that WTO obligations are “always legally divisible”.<sup>162</sup> Because it is possible to determine the origin of a product and because a violation may affect the right of one but not necessarily all member states the WTO agreements consist of a bundle of bilateral relationships.<sup>163</sup> This in Gazzini’s opinion is true for the MFN obligation as well as market access and national treatment but especially for anti-dumping measures or countervailing duties that are only applied towards the products of one member state.<sup>164</sup>

However, it needs to be responded: does the fact that the violation of an obligation specifically affects one or several member states really and irrevocably lead to the obligation being purely bilateral? In case of an agreement concerned with protection of the environment, only one or two states may directly be affected when waste is spilled on the one side of the ocean and arrives at the coast of a state on the other side of the ocean. But this does not mean that the obligation to protect the environment is only bilaterally enforceable. Rather, because the agreement protects the collective interest to protect the environment all member states may be able to enforce said obligation. Thus, there might be a collective obligation although one state is affected and not all states.

Gazzini observes that with regard to at least some obligations “contracting parties have decided to extend to certain WTO obligations the legal regime of *erga omnes*

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<sup>162</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 727; Gazzini C ‘A Theory of WTO Law’ (2008) 11 *JIEL* 1-31.

<sup>163</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 727.

<sup>164</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 727-728.

obligations".<sup>165</sup> For example Art. XXIII (1) GATS allows any party to bring a complaint in case of a violation of the services agreement. Also, Art. 3 SCM is seen as an obligation with an erga omnes character. Gazzini argues that obligations are bilateral but can be collectively enforced. He then observes whether his finding is in line with WTO's rules on legal standing and countermeasures. Especially with regard to the latter aspect Gazzini observes that countermeasures can be awarded even if the member state itself had not suffered an injury. As in the case of prohibited subsidies in US-FSC or Brazil-Aircraft the amount of subsidies was chosen on the background of effectively ensuring compliance and not on the adverse effect alone.<sup>166</sup>

Although Gazzini's results are not unconvincing, Gazzini does not provide us with criteria how to determine the legal nature of an obligation. The only criterion presented by Gazzini is the divisibility of the norm. Yet, other norms are divisible and still considered to have erga omnes character. Additionally, what does it mean that the legal regime of erga omnes is extended to certain norms of the WTO. Under what conditions could other norms than Art. XXIII and Art. 3 SCM be found to have erga omnes consequences? In comparison to Art. 5 and 6 SCM Art. 3 SCM does not require the claimant to have suffered an injury because it is assumed that the subsidy will have caused adverse effect. Yet, other norms of the WTO agreements also do not require all states to have suffered adverse effect. Does this lead to the assumption that all these obligations have an erga omnes partes nature? Again, approach and criteria are lacking.

### ***3.4. Three step approach***

The analysis of the existing approaches by the ICJ as well as academics commenting on the WTO do not provide a general answer for the determination of the legal nature of obligations in international law in general. With regard to the WTO it even appeared as if arguments speak for one view while others speak for the other. Sometimes even the same aspect, e.g. the MFN is used in favour of both views.

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<sup>165</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 729-731.

<sup>166</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 742.

There seems to be agreement that the legal nature of obligations can only be determined on a norm-by-norm basis. Notwithstanding, rather broad assessments are made about the WTO agreements as such. At the same time, rather randomly certain norms are picked out in order to prove that obligations in general are rather bilateral or collective, because *one* norm seems to be rather bilateral or collective. Also, the role of the VCLT and ASR seems to be quite unclear. Is the determination of the legal nature crucial for the question which consequences are in conformity with the VCLT and the ASR or is it not the other way around? Are the consequences attached to a breach in the WTO agreements not rather indicative for the determination of WTO obligations? Would e.g. the fact that the legal standing in the WTO rather fits into the picture of collective obligation not lead to the assumption that at least some obligations might have this characterization and that a lacunae must be filled with applying rules belonging to collective obligations? Even Gazzini's more distinct approach mixes different levels of argumentation for example the material rule of Art. 3 SCM with the rather procedural rule of Art. XXIII GATS.

These shortcomings require one to rethink the approach to the question of the determination of the legal nature of obligations in international law in general and of the WTO in particular. With regard to a treaty the will of the parties becomes apparent in a number of aspects, not just the stipulation of the individual obligation but rather the way the parties designed the entire treaty.

A three-step approach is suggested. Firstly, collective norms are collective because they protect collective interest.<sup>167</sup> This overall will of the parties needs to be understood in order to consider the individual obligations laid out in a treaty. In a first step it is thus important to consider whether and what collective interests the WTO agreements protect. It will be helpful to take into consideration preambles, ministerial declaration or general statements by Panels and the Appellate Body. Only if it can be found that collective interests are in fact protected by the WTO agreements is it at all possible that a particular obligation serves a collective interest.

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<sup>167</sup> Belgium v. Senegal para 68.



Secondly, before examining an individual obligation it is important to understand the procedural design of a certain treaty. The VCLT and the ASR show which consequences are aligned with bilateral and which with collective obligations. In its separate opinion Judge Skotnikov criticised that in the judgment only from the object and purpose of the Preamble it is drawn on the legal nature of all obligations in the treaty.<sup>168</sup> He examines the legal standing of the European Convention in comparison to the provision in the Torture Convention, the former being much broader than the latter.<sup>169</sup> It is submitted that this argument convincingly reveals the importance of taking into account the design of a treaty in order to understand the parties will to give power to their common interest, i.e. with regard to legal standing provisions or the right to modification etc. In international law nothing can be conferred on states, they are the origin of the laws. Thus, any interpretation is to be based on the attempt to clarify the will of the parties.

This means, if the WTO agreements entail rules on some or all of these aspects this might be indicative on how its obligations are to be understood. If the procedural design of the DSB mirrors that of treaties with bilateral obligations it is much more realistic that the WTO agreements obligations are also of a bilateral nature. Yet, if the result is vice versa this may speak in favour of the argument that at least some obligations do have erga omnes character. To say it differently, it is a lot less convincing to argue that obligations are collective if they are only bilaterally enforceable. And it does not quite fit to argue that the parties in deviation from general international public law – without any express clarifications in this regard – intended to create bilateral obligations that are however collectively enforceable.

Step one and two may not clarify how individual obligations are to be categorized; yet, they lay the ground for the interpretation on the third step. At the last level, individual obligations need to be looked at in detail. Some might be quite clearly collective due to their wording and the protection of collective interests. Others, due to certain material

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<sup>168</sup> Separate Opinion Judge Skotnikov 2, para. 13: "One would have expected the Court to have recourse to the interpretation of the Convention in order to support its conclusion. Instead, it confines itself to quoting from its Preamble and classifying this instrument as being similar to the Genocide Convention. This is hardly sufficient"

<sup>169</sup> Separate Opinion Judge Skotnikov 3 para. 18-19.



prerequisites might not allow an interpretation as collective. Other norms might be more ambiguous. Especially in the latter case a careful analysis is necessary of what collective interest the individual norm protects. The clearer it mirrors one of the collective interests found at the first level will it be justified to characterize the norm as collective. Hence, the well-known interpretation methods such as wording, drafting history and the object and purpose laid down in the VCLT have to be taken into account in order to evaluate WTO obligations in conformity with the understanding of international law as a system of legal norms.

### ***3.5. Conclusion***

Due to the different arguments brought forward so far, stretching from arguing that all or most obligations are bilateral to the appraisal that all or most are collective it could be seen that a coherent approach on how to determine the legal nature of an obligation is missing. Thus, a three-step approach has been developed which will firstly analyze the collective interest protected by the WTO agreements, secondly analyse how the WTO approaches aspects that in general international law reflect the understanding of bilateral and collective obligations and will thirdly determine the legal nature of certain core WTO obligations with regard to whether they protect a collective interest and by way of interpretation are to be understood as bilateral or collective.

## **4. Chapter: Determination of the legal nature of WTO obligations**

### ***4.1. Introduction***

In order to determine the legal nature of WTO obligations the three step approach presented above will be applied.<sup>170</sup> Firstly, it will be examined whether the WTO agreements protect collective interests. Secondly, it will be scrutinized how the WTO resolves aspects that in general international law reflect bilateral and collective interests, namely altering and enforcing treaty obligations. Thirdly, individual obligations of the WTO shall be looked at in greater detail.

### ***4.2. Step one: Do the WTO agreements protect collective interests?***

In a first step it needs to be determined whether the WTO agreements protect collective interests. The purpose of the Preamble has been acknowledged by the Appellate Body when it stated that the “language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement”.<sup>171</sup> Yet, the WTO with its many agreements regulating almost all aspects of international trade is much more complex in its goals than say the Genocide or the Torture Convention, aiming at eliminating these particular kinds of atrocities. The WTO’s object and purpose might not be singular but manifold.

#### **4.2.1. The GATT 47**

The GATT of 1947 (GATT 47) was drafted against the background of half a century of economic crisis and World War II. Leaders of key states believed that further economic integration and interdependence would contribute to cooperative behaviour among states and economic growth worldwide.<sup>172</sup> In comparison to e.g. the Convention on Diplomatic Relations which was codified on the basis of customary international law,

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<sup>170</sup> See supra 3.4.

<sup>171</sup> *United States – Import Prohibition on Certain Shrimp and Shrimp Products (US v. India, Malaysia, Pakistan, Thailand)* (1998) WT/DS58/AB/R para 153 [hereinafter US – Shrimp].

<sup>172</sup> Bagwell K & Staiger AW *The Economics of the World Trading System* (2002) 44-45.

i.e. a long standing international practice and *opinio juris*, the GATT 47 is to much greater extent the result of the will of the parties to design an international trade order with certain characteristics. The GATT 47, incorporated by the GATT 94,<sup>173</sup> is first and foremost concerned with trade. The Preamble clearly states that it aims at the “substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce”.<sup>174</sup> Thus, the admissibility of a measure must always be considered against the background of the restrictive effect this measure might produce for the goal of further liberalising trade and the objects and purpose stated above.<sup>175</sup>

Yet, already with coming into existence of the GATT 94 the parties agreed not only to adhere to certain rules when trading with each other but rather stipulated the goal

“to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.”<sup>176</sup>

It can be inferred from this part of the preamble that the member states did not only want to regulate their trade relations but that they created the GATT 94 with a number of ideas in mind, namely raising the standard of living, full employment, growing volume of real income and the full use of resources of the world. The general objective was the expanding of trade in goods and services and the reduction of barriers to trade.<sup>177</sup> The objects were to be gained by the further liberalization of trade and are thus also important when interpreting WTO norms.

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<sup>173</sup> Thus, in the following it will be referred to as GATT 94.

<sup>174</sup> GATT 94 Preamble Third recital.

<sup>175</sup> For example when considering whether a measure is “necessary”, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Meat (Republic of Korea v. US)* (2000) WT/DS161/AB/R para. 163; see also *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China v. United States)* (2009) WT/DS363/AB/R para. 304, citing and analogizing to this example.

<sup>176</sup> GATT 94 Preamble Second Recital.

<sup>177</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC v. Ecuador et. al)* (1997) WT/DS27/AB/R para. 433 [hereinafter EC – Bananas III].

#### 4.2.2. Marrakesh Agreement establishing the WTO

The protection of collective interests is even more apparent with regard to the WTO agreements that institutionalized international trade relations and further integrated almost all aspects of international trade in the WTO framework. The establishment of the WTO in 1994 reflects the idea that the WTO is not a mere collection of rules on international trade, but rather in the Marrakesh Declaration

“Ministers affirm that the establishment of the World Trade Organization (WTO) ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples.”<sup>178</sup>

The passage reflects the comprehensive approach when establishing the World Trade Organisation. The mention of terms such as “fairer” and “more open multilateral trading system” for the “benefit and welfare of their peoples” proofs the collective interest of the parties. Especially the role of developing countries and their better integration is stressed when the declaration formulates, that “[t]his has marked a historic step towards a more balanced and integrated global trade partnership.”<sup>179</sup>

The WTO Agreement aimed at ending the “fragmentation that had characterized the previous system” and to “develop, more viable and durable multilateral trading system encompassing the GATT, the result of past trading liberalization efforts and all of the results of the Uruguay Round of Multilateral Trade Negotiations”.<sup>180</sup> Hence, the WTO Agreement largely confirms the aims of the GATT 94 but expressly includes other objects such as the

“objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”<sup>181</sup>

And especially

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<sup>178</sup> Uruguay Round Agreement Marrakesh Declaration of 15 April 1994 para. 2.

<sup>179</sup> Uruguay Round Agreement Marrakesh Declaration of 15 April 1994 Para. 4.

<sup>180</sup> *Brazil – Measures Affecting Desiccated Coconut (Brazil v. Philippines)* (1997) WT/DS22/AB/R p. 17.

<sup>181</sup> WTO Agreement Preamble First Recital.

“to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”<sup>182</sup>

It has expressly been confirmed that the WTO Preamble recognizes the “importance of coordinating policies on trade and environment”,<sup>183</sup> the objective of sustainable development<sup>184</sup> and the common goal of better integrating developing countries.<sup>185</sup> These examples lead to the conclusion that the WTO indeed protects collective interests.

Opponents of the thesis that the WTO contains collective obligations argue with the third recital of the preamble which refers to “reciprocal and mutually advantageous arrangements.”<sup>186</sup> But, the reference to “reciprocal and mutually advantageous arrangements” does not necessarily speak in favour of understanding the WTO obligations as bilateral. It is rather an expression of the fact that the GATT 94 negotiation and the agreement are based on a “give and take” of the member states. The Appellate Body stated in *EC – Tariff Preferences* that “this objective [to raise the standards of living] was to be achieved in countries at all stages of economic development through the *universally-applied* commitments embodied in the GATT provisions.”<sup>187</sup> Similarly, the Panel in *EC – Chicken Cuts* stressed that any interpretation should not “disrupt the balance of concessions negotiated by the parties”.<sup>188</sup> These statements emphasize that the arrangements are negotiated taking into consideration what the other member states gained and had to give up and thus reflect the balance of interest found thereby interlinking all rights and obligations with each other. This understanding is further supported by the single undertaking approach,

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<sup>182</sup> WTO Agreement Preamble Second Recital.

<sup>183</sup> WTO Agreement Preamble First Recital; *US – Gasoline* (1996) WT/DS2/AB/R p. 30.

<sup>184</sup> *US – Shrimp* (1998) paras. 129–131.

<sup>185</sup> WTO Agreement Preamble Second Recital; *Brazil – Aircraft* (2000) WT/DS46/RW (Article 21.5 — Canada) para. 6.47 fn 49 [hereinafter *Brazil – Aircraft*].

<sup>186</sup> Especially Pauwelyn A *Typology* (2003) 931.

<sup>187</sup> *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC v. India)* (2004) WT/DS246/AB/R para 107 [original emphasis].

<sup>188</sup> *European Communities – Customs Classifications of Frozen Boneless Chicken Cuts (EC v. Brazil)* (2005) WT/DS269/R para. 7.320.

meaning that “virtually every item of the negotiation is part of a whole and indivisible package.”<sup>189</sup>

The WTO agreements were concluded in the collective interest to create a common, global marketplace on which the participants follow the same rules and regulations. Generally the WTO is understood to have three purposes, namely the liberalisation of trade, to cover all trade aspects and to provide clear rules that make trade more predictable and lastly to provide a forum for further trade negotiations among the member states.<sup>190</sup> It has been confirmed on several occasions that one of the main objectives is the security and predictability of the international trading system.<sup>191</sup> The whole trading system is largely based on the principle of non-discrimination. Thus, the rules are not a mere codification of more or less random, yet constant practice of states but were created with a purpose and a collective interest in mind.

This understanding is supported by the fact that the system is also created in order for individuals and companies to be able to trade on this international market.<sup>192</sup> In the US – Section 301-310 the Panel stressed the importance of the “creation of market conditions conducive to individual economic activity in national and global market places”.<sup>193</sup>

These considerations go hand in hand with yet another discussion namely the one discussion dubbed ‘Constitutionalization of Trade Law’.<sup>194</sup> Reference to the WTO agreement as a constitution should not be equalized with domestic understanding of a constitution that regulates the basic relationship between the government and its peoples. Rather, it is used as an analogy: regarding aspects such as the institutional and

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<sup>189</sup> Doha Declaration para. 47-52

<sup>190</sup> Langille Neither Constitution Nor Contract (2011) 1486-1487.

<sup>191</sup> E.g. *European Communities – Customs Clarifications of Certain Computer Equipment ( EC v. US )* (1998) WT/DS62/AB/R para. 82.

<sup>192</sup> Yenkon NH & Rios-Herran R ‘WTO dispute settlement system and the issue of compliance: Multilateralizing the enforcement mechanism’ (2004) 1 *MJIEL* 17 25; Petersmann GATT/WTO (1997) 130 [Yenkon Multilateralizing].

<sup>193</sup> *United States – Sections 301-310 of the Trade Act of 1974 ( EC v. US )* (1999) WT/DS152/R para. 7.73 [hereinafter US – Sections 301-310].

<sup>194</sup> See e.g. Langille Neither Constitution Nor Contract (2011); Dunoff The WTO’s Constitution (2006) 656-661; Cass Constitutionalization of International Trade Law (2001) 39-75; DeWet E ‘The International Constitutional Order’ (2009) 55 *ICQL* 51 53.

structural outline, judicial review and the binding commitments outlined by the WTO agreements. Most important is the aspect of hierarchy. Understanding the WTO agreements as constitutional means that they are categorised as a higher form of law superseding other agreements in the area of trade.<sup>195</sup> They aim to secure the freedom of trade and are thus owed to the collective.<sup>196</sup> This approach is mainly based on the fact that any trade agreement between a limited number of states has to be in conformity with the WTO rules. This proves that the WTO is the generally higher rule, ignoring especially the rule of *lex posterior* and *lex specialis* that generally governs the relationship of agreements in international law. Similarly to Art. 103 UNC, with regard to trade, the WTO is of a higher hierarchical order comparable to a constitution.

#### 4.2.3. Other Agreements

A number of agreements are preceded by a preamble that may express the common interest of the parties with regard to that particular agreement. E.g. the AA, the Agreement on Sanitary and Phytosanitary Measures and the Agreement on Rules of Origin confirm the collective interest of the member states either with regard to the goals established by the GATT 94 or the WTO Agreement or additionally formulate certain aspects important with regard to that very agreement.

Even when the agreement does not contain a preamble Panels and the Appellate Body made statements on the object and purpose of the agreement. For example with regard to the SCM Agreement it was stressed that the object and purpose of the Agreement was “to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures”<sup>197</sup> and “to impose multilateral disciplines on subsidies which distort international trade”.<sup>198</sup> This expresses the common interest of the parties of not being adversely affected by subsidies and to eliminate practices that distort the market in general.<sup>199</sup>

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<sup>195</sup> Petersmann GATT/WTO (1997) 47.

<sup>196</sup> Petersmann GATT/WTO (1997) 47 referring to Article XVI(3) WTO Agreement.

<sup>197</sup> *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada (Softwood Lumber IV) (US v. Canada)* (2004) WT/DS257/AB/R para. 64.

<sup>198</sup> *Brazil – Aircraft* (1999) WT/DS46/R para. 7.26.

<sup>199</sup> *Canada – Measures Affecting the Export of Civilian Aircraft (Canada v. Brazil)* (1999) WT/DS70/R para. 9.119.



Especially with regard to the security and predictability did Panels and the Appellate Body confirm that the Dispute Settlement System was one of the most important instruments to protect and further this very objective of the WTO agreements.<sup>200</sup> Hence, the DSU has to be interpreted in light of this very object and purpose and in a manner that enhances this goal effectively. This is also one of the reasons why the DSU allows “as such” and not only “as applied” complaints as GATT and WTO “are intended to protect not only existing trade but also the security and predictability needed to conduct future trade”.<sup>201</sup> The Appellate Body clarified that with a view to private economic activities the WTO in general and the DSB have certain objectives

“[t]he most relevant in our view are those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system.”<sup>202</sup>

To sum up, already the GATT 94 but especially the WTO Agreement as well as more particular agreements in their respective preamble lead to the conclusion that these agreements not merely regulate trade between two members bilaterally but that they protect the collective interest of establishing a common marketplace. This common marketplace serves collective interests such as inter alia the growth of the economy of member states, reduction of poverty, protection of health or the integration of developing countries. This is confirmed by ministerial statements as well as jurisprudence.

#### **4.3. Step 2: Procedural design**

After finding that the WTO protects collective interest, the procedural design shall be looked at in greater detail. This step does not allow the determination of the individual nature of WTO obligations but it enables reconstructing the overall understanding of the WTO agreements and to a greater extend the underlying will of the parties. It will lead to a better overall understanding of the WTO regarding aspects that in general

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<sup>200</sup> *US – Sections 301-310* (1999) para. 7.75.

<sup>201</sup> *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan ( US v. Japan )* (2003) WT/DS244/AB/R para. 82

<sup>202</sup> See *US – Sections 301-310* (1999) para. 7.71.



international public law are expressions of bilateral or collective obligations and can guide the individual determination of the legal nature of WTO obligations.

#### **4.3.1. Alteration**

First, the question whether treaty obligations can be altered by a member State by way of reservations or inter se modifications is discussed. Secondly, the consequence of bilateral and collective obligations with regard to Suspension and termination in the WTO agreements shall be examined.

##### **4.3.1.1. Reservations**

The WTO Agreement provides in Art. XVI:5 that no reservations may be made in respect of any provision of the WTO Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

A number of agreements, namely Art. 18.2 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 32.2 SCM, Art. 15 Agreement on Technical Barriers to Trade, Art. 72 Trade-Related Aspects of Intellectual Properties, contain the following provision: “Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members”. This demonstrates that it is upon *all* member states to agree to any reservation made by a member State. It is thus not within the bilateral relationship of two member states to accept a reservation but by the consent of all other members collectively. If the WTO obligations were purely bilateral it would be the business of the individual pairs of states to either accept or refuse a reservation. However, the rule on reservation rather reflects the approach of multilateral treaties containing collective obligations.

Yet, GATT 94 and GATS as well as the Agreement on Trade-Related Investment Measures, Agreement on the Application of Sanitary and Phytosanitary Measures,

Agreement on Rules of Origin, Agreement on Agriculture, Dispute Settlement Understanding and Trade Policy Review mechanism are silent as to the question which reservation is admissible. This requires applying the VCLT proofing against the requirement to determine the legal nature of the WTO obligations.<sup>203</sup>

#### **4.3.1.2. Modification**

Inter se modifications are modifications by only a limited number of member states to a multilateral treaty by way of a subsequent agreement altering the obligations among them.<sup>204</sup> From the general section above it could be seen that inter se modification according to Art. 41 VCLT is legitimate if this possibility is provided in the treaty *or* the modification is not prohibited *and* does not affect third party rights *and* is not in contradiction with the object and purpose of the treaty.

With regard to the WTO two different kinds of modifications need to be distinguished: agreements that further liberalise trade and those that restrict trade among a limited number of member states. They can be circumscribed as ‘WTO plus’ and ‘WTO minus’ agreements.<sup>205</sup> The WTO agreements only contain rules regarding further liberalization but it is however silent with respect to restricting trade among a limited number of member states.<sup>206</sup>

Regarding ‘WTO plus’ agreements, Art. XXIV GATT 94 and Art. V GATS enable the member states to modify certain treaty obligations in order to gain deeper integration among a limited number of member states departing from the MFN. Thus, the possibility of a Free Trade Agreement is provided for by the treaty in the sense of Art. 41 (1) (a) VCLT; Art. 41 (1) (b) VCLT is not applicable.<sup>207</sup>

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<sup>203</sup> Rolland SE *Development at the WTO* (2012) 296.

<sup>204</sup> Pauwelyn J *The Role of Public International Law in The WTO: How Far Can We Go?* (2001) AJIL 535 547 [hereinafter Pauwelyn *The Role*].

<sup>205</sup> Adlung R & Miroudot S ‘Poison in the Wine: Tracing GATS-Minus Commitments in Regional Trade Agreements’ (2012) JWT 1045 1056.

<sup>206</sup> Pauwelyn *The Role* (2001) 548.

<sup>207</sup> Pauwelyn *The Role* (2001) 548.

Yet, regarding ‘WTO minus’ agreements the WTO does not provide rules making it necessary to fall back on general international public law. If the WTO obligations were purely bilateral, inter se modification could as a matter of fact not affect third party rights. Yet, apart from the fact that ‘WTO minus’ provisions might be incompatible with the object and purpose of the WTO with regard to the goal to further liberalizing trade,<sup>208</sup> ‘WTO minus’ agreements may also affect third party rights. Art. 41(1) (b) VCLT is not only concerned with the formal status of rights and obligations but rather refers to “the enjoyment by other parties of their rights under the treaty or the performance of their obligations”. Thus, it also matters whether the inter se modification directly or indirectly affects third party rights.<sup>209</sup> Parties concluding a treaty may also be protected in their expectations what to gain under the treaty not with regard to particular trade flows but regarding trade related behaviour of other member states.

Concerning so called ‘GATS-minus’ agreements, Adlung and Morrison argue that due to the different modes of supply in trade in services the effects are much more interlinked and thus “GATS obligations are much less bilateral in nature than trade obligations for goods”.<sup>210</sup> Hence, GATS minus agreements potentially affect the enjoyment of third party rights.<sup>211</sup> While agreeing with their findings made under GATS, the same holds also true with regard to trade in goods. The change in trade flows due to WTO minus agreements may affect the enjoyment of the rights of third parties, positively – if other parties may gain a bigger trade share – but also negatively – if e.g. suppliers may have worse access to certain products at their production plant in the respective country.

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<sup>208</sup> Pauwelyn wonders which obligations might be so important as to giving them away would threaten the effective executing of the object and purpose of the treaty, the Role 449; in my opinion, it is quite clear that at least the liberalization of trade is one of the main objects and purpose of the WTO that is threatened if parties bilaterally step back from the commitments they have already undertaken under the multilateral WTO agreements.

<sup>209</sup> Rigaux A & Simon D in Corten O & Klein P (eds.) *Vienna Convention on the Law of Treaties – A Commentary* (2001) Art. 41 para 31.

<sup>210</sup> Adlung R & Morrison P ‘Less Than The GATS: ‘Negative Preferences’ in Regional Services Agreements (2010) *JIEL* 1103 1125 (hereinafter Adlung & Morrison Less Than The GATS).

<sup>211</sup> Adlung & Morrison Less Than The GATS (2010) 1125.

Thus, parties are not free to modify their bilateral trade relations under the WTO agreements neither by bilaterally agreeing to more or less integration apart from what is allowed by the WTO agreements themselves in Art. XXIV GATT 94 and Art. V GATS. The understanding that parties may not by way of bilateral or multilateral agreements to which not all member states are party alter the obligations set forth in the multilateral WTO agreements has also been confirmed by case law. In EC-Poultry the Appellate Body stressed that Schedule LXXX was annexed to the Marrakesh Protocol and therefore an integral part of the ‘multilateral obligations under the WTO Agreement’.<sup>212</sup> The Oilseeds Agreement on the other hand, between Brazil and the European Communities, was a bilateral agreement and not part of the multilateral obligations accepted by the parties.<sup>213</sup> Thus it could not alter Schedule LXXX.

This is a sign that WTO obligations are not understood as consisting only of bilateral obligations if one takes into consideration how treaties usually regulate the right to modification in treaties with bilateral obligations.<sup>214</sup> However, this alone would not proof the collective character of WTO obligations, at least not with regard to the question which individual WTO obligation might be understood as bilateral and which one as collective. Yet, it is an indication for the fact that GATS obligations but also GATT 94 obligations are not purely bilateral.

#### **4.3.1.3. Suspension/termination of treaties**

Suspension or termination is the permanent interruption of relations in case of breach of a member state. This mechanism has to be distinguished from the right to countermeasure, which is also a possible reaction to a breach of another member state. Yet, the difference lies in its purpose: while the suspension or termination aims at ending temporarily or permanently the agreement, countermeasures aim at enforcing treaty obligations.

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<sup>212</sup> *European Communities – Measures Affecting Importation of Certain Poultry Products (EC v. Brazil)* (1998) WT/DS69/AB/R para. 79 [hereinafter EC – Poultry].

<sup>213</sup> *EC – Poultry* (1998) para 79.

<sup>214</sup> See further infra 4.3.1.2.

The WTO does not give parties the right to suspend or terminate treaty obligations in case of violation by another member states. The silence would require considering the VCLT in case the question would ever arise between member states. As shown above the VCLT provides no right for suspension or termination in case of obligation erga omnes partes. This is yet another indication that obligations in WTO agreements are of a collective and not of a bilateral nature.

#### **4.3.2. Enforcement**

When discussing enforcement the question arises, whether a state is entitled to respond to a breach by another state, either by way of legal proceeding or by way of countermeasures.<sup>215</sup>

##### **4.3.2.1. Legal standing**

Legal standing concerns the question which state may bring a claim, i.e. which state may be complainant in a WTO proceeding before the DSB.<sup>216</sup> Art. XXIII GATT 94 is the central norm for the question under what conditions a state may invoke a Panel proceeding. A number of WTO agreements refer to this provision; only a few agreements, especially Art. XXIII GATS are formulated differently.

##### **4.3.2.1.1. Art. XXIII GATT 94**

Art. XXIII GATT 94 is formulated rather broadly.<sup>217</sup> Not only can a member state commence a proceeding when any benefit accruing to it is being nullified or impaired, but also when the attainment of any objective of the Agreement is being impeded as the result of certain conduct by another state. Thus, by its wording the Art. XXIII GATT 94 is not restricted to the injured state but any party can ensure that other member states

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<sup>215</sup> Tams *Erga Omnes* (2005) 25.

<sup>216</sup> The aspect of third parties required to having substantial interest is regulated separately, Art. 4.11 and 10.2 DSU.

<sup>217</sup> The provision reads: "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or  
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or  
(c) the existence of any other situation  
the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned"

adhere to the agreement and do not impede the common objective of the parties stipulated in the agreements.

Behind the question which state may access the dispute settlement apparatus stand two opposing positions. On the one side it could be argued that the DSB serves to uphold the balance of interests of the member states as a reciprocal ideal. A member state may restore this balance of interest when another member state upsets the equilibrium found in the agreements.<sup>218</sup> Thus, the purpose of the DSB is resolving a particular bilateral dispute. Contrary to this legalistic approach, the other side rather relies on the collective commitment that the parties have entered into.<sup>219</sup> The main aspect is the “good faith” of the parties to make the agreements work the way they were agreed upon.<sup>220</sup> While the former approach would rather reflect a bilateral understanding the latter could be understood as indicating that at least some WTO obligations were meant to be collective.

The parties did not resolve this question clearly in one way or the other. Article XXIII GATT 94 contains two options, namely that benefits are nullified or impaired but also that the objectives of the agreement are impeded. This second option is much more objective and speaks in favour of giving the right to bring a case to any member state. It might require that a measure by its gravity is able to impede the objectives of the agreement. But if this is the case nothing refers to the prerequisite of an adverse effect in order to bring a claim. It was thus stated that “a Member’s potential interest in trade in goods or services and its interest in a determination of rights and obligations are each sufficient to establish a right to pursue a WTO dispute settlement proceeding.”<sup>221</sup>

Unlike other areas of public international law, it is much less to the discretion of the defaulting member state to negotiate or agree to a solution but rather upon other member states to commence a compulsory DSB proceeding and to enforce it in case of

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<sup>218</sup> Bustamante GATT Doctrine of Legal Standing (1996) 555.

<sup>219</sup> Bustamante GATT Doctrine of Legal Standing (1996) 555.

<sup>220</sup> Bustamante GATT Doctrine of Legal Standing (1996) 555.

<sup>221</sup> *EC – Bananas III* (1997) WT/DS27/R para. 7.50.

failure to comply. In comparison to the pre-WTO times the parties cannot veto a panel report.<sup>222</sup>

#### 4.3.2.1.2. DSU

The GATT 94 which was drafted before existence of the DSB are supplemented by the rules of the DSU. Art. 3 DSU stipulates general provisions for a panel proceeding.

The question under what conditions a state may bring a claim before the DSB has been discussed a number of times. Especially in the EC – Bananas saga did the EC question the *jus standi* of the US as they hardly produce any Bananas but rather acted in the interest of American companies producing Bananas in Latin America. Yet, the GATT 94 standing is based on the origin of the respective product.<sup>223</sup>

The court allowed the US to be a complainant in the case. The AB ruled that

“we agree with the panel report that ‘neither Article 3(3) nor 3(7) DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a ‘legal interest’ as prerequisite for requesting a panel’. We do not accept the need for a legal interest is implied in the DSU or in any other WTO Agreement.”<sup>224</sup>

The passage has been widely criticized for it appearing as no legal interest requirement exists with regard to a DSB proceeding. However, more in line with international public law it can be understood that no special interest is required but that a general interest of any member State is sufficient. To put it differently, a member state may not need to show a special legal interest over and above the general interest to ensure adherence of the agreements in order to have legal standing to bring a claim before the DSB.<sup>225</sup> The WTO has thus been described as a system of “Judicial Supervision”.<sup>226</sup>

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<sup>222</sup> Bustamante GATT Doctrine of Legal Standing (1996) 556.

<sup>223</sup> e.g. Art. I GATT requires countries to treat the products of all member states alike, see Bustamante GATT Doctrine of Legal Standing (1996) 551; Neugaertner I *Die actio popularis in der WTO – Überlegungen zur Zulässigkeit einer actio popularis, der Kollektivierung des Durchsetzungsmechanismus und der Einführung der Aufsichtsklage* (2002) 87-88.

<sup>224</sup> *EC – Bananas III* (1997) WT/DS27/AB/R para. 132.

<sup>225</sup> Benzing M ‘Community Interests in the Procedure of International Courts and Tribunals (2005) 5 *The Law and Practice of International Courts and Tribunals* 369 397-398.

<sup>226</sup> Iwasawa Y ‘WTO Dispute Settlement as Supervision’ (2002) 5 *JIEL* 287.



Legal standing is closely connected with the notion of nullification and impairment set forth in Art. 3 (8) DSU as well Art. 22 DSU. If a member state resumes to the DSB, nullification and impairment is presumed<sup>227</sup> and if at all rebuttable in fact no state was so far able to refute said assumption.<sup>228</sup> The Appellate Body argued that not the expectation on export volumes but the expectations on the competitive relationships between imported and domestic products are most important. It thus stated that “[a] change in the competitive relationship contrary to that provision must consequently be regarded ipso facto as a nullification or impairment of benefits accruing under the General Agreement”.<sup>229</sup> Even the fact that a measure “has no or insignificant effects would [...] not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired [...]”.<sup>230</sup>

Yet, the concept of legal standing is broader than the notion of nullification and impairment.<sup>231</sup> The Appellate Body made clear that whenever there is nullification or impairment the respective state also has legal standing.<sup>232</sup> However, the fact that a state cannot claim either of the two options does not mean that there is no legal standing.<sup>233</sup> Rather, it is upon the members to decide whether to bring a claim or not in order to resolve the dispute, in other words whether it is fruitful to access the DSB.

It has been confirmed by the DSB that the parties have a “broad discretion in deciding to bring a case against another Member under the DSU.”<sup>234</sup> The US could be a claimant in the Bananas case although they hardly produce Bananas because it was not necessary that US products were affected in order to have legal standing, as confirmed by the Panel and the Appellate Body. The Appellate Body agreed that the potential interest and internal market of the US would be sufficient reasons extending legal standing to

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<sup>227</sup> *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products (Republic of Korea v. EC)* (1999) WT/DS98/R para. 7.13 [hereinafter *Korea – Dairy*].

<sup>228</sup> *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey v. India)* (1999) WT/DS34/R para. 9.204; *Korea – Dairy* (1999) WT/DS98/AB/R paras. 114-131.

<sup>229</sup> *EC – Bananas III* (1997) WT/DS/AB/R para. 252 (referring to GATT Panel Report, US — Superfund, para. 5.1.9).

<sup>230</sup> *EC – Bananas III* (1997) WT/DS/AB/R paras. 251-253.

<sup>231</sup> *EC – Bananas III* (1997) WT/DS/AB/R, paras. 251.

<sup>232</sup> *EC – Bananas III* (1997) WT/DS/AB/R para. 135.

<sup>233</sup> *EC – Bananas III* (1997) WT/DS/AB/R para 135.

<sup>234</sup> *EC – Bananas III* (1997) WT/DS/AB/R para 135.



virtually any party with regard to any question as indirect effects, especially on the internal market can almost never be excluded. The AB pointed out that

“[...]with the increased interdependence of the global economy [...] any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly”.<sup>235</sup>

The same holds true with regard to the Havana-Club case.<sup>236</sup> The EU initiated a Panel proceeding although the US measure was not directed against EU but against Cuban products. The EU still had an interest, as Havana Club had become a joint venture with a French company. However, this fact would not suffice, if viewed in light of the ruling by the ICJ in the Barcelona traction case referred to above. In that case, the Court had not allowed Belgium to bring a claim against Spain based on the mere fact that Belgium nationals were the majority of shareholders of the company, which rights were allegedly violated by Spain. The ICJ argued that Belgium would have had *jus standi*, if obligations *erga omnes* had been involved. If one assumes that the same considerations apply with regard to the WTO, it must be concluded that at least some obligations do have an *erga omnes* character. Otherwise it is not explainable, from a general international law point of view, that the EU had legal standing in the Havana Club Case. Another case were a member state argued with negative trade effects of third countries is the US – Line Pipe case in which South Korea argued that a measure violated the rights of developing countries without itself being a developing country.<sup>237</sup>

The very fact, that the legal standing in the WTO is not restricted to the injured state, leads to the careful assumption that at least some obligations of the WTO agreements might not be bilateral but rather have an *erga omnes* character that allow any state to bring a claim in case of their violation if the attainment of the objectives of the agreements is impeded.

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<sup>235</sup> *EC — Bananas III* (1997) WT/DS/AB/R paras. 137.

<sup>236</sup> *United States – Section 211 Omnibus Appropriations Act of 1998 (US v. EC)* (2001) WT/DS176/R, (2002) WT/DS176/AB/R,

<sup>237</sup> *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US v. Republic of Korea)* (2002) WT/DS202/AB/R para 121.

#### **4.3.2.1.3. Art. XXIII GATS**

The General Agreement on Trade in Services (GATS) formulates its own provision on access to the DSB. Art. XXIII GATS states

“If any Member should consider that any other 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”.

This provision has been understood as to prove that all GATS provisions are collective in nature or at least that the consequences of collective obligations are attached to the services obligations as any state may bring a claim in case of a violation.<sup>238</sup> It is submitted that it is difficult to argue that the nature of GATS obligation is bilateral but that the consequences attached to it are those of erga omnes partes obligations. Rather, the notion of legal standing is indicative for the legal nature of an obligation of a treaty.

The legal standing regarding the violation of a GATS obligation is even broader than Art. XXIII GATT 94. It was noticed that the legal standing of the US in the Bananas case with regard to GATS was not even questioned.<sup>239</sup> Adlung and Morrison stress the higher degree of linkage of GATS obligations due to the different modes of services explaining why any member has legal standing with regard to GATS obligations. The legal standing of the GATS is thus a strong indication that all GATS obligations are indeed erga omnes partes obligations. Yet, the individual determination of its obligations will have to take place on the third level.<sup>240</sup>

#### **4.3.2.2. Countermeasures**

Firstly, it should be stressed that even in general international public law regarding well accepted erga omnes obligations it is highly contested whether these obligations allow the recourse to collective sanctions.<sup>241</sup> Although Tams after considering a number of

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<sup>238</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 729-731.

<sup>239</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 729-731.

<sup>240</sup> See *infra* Chapter 4.

<sup>241</sup> See *supra* 2.4.2.

cases concludes that collective sanctions are permitted in case of *erga omnes* violations a number of authors are of the opinion that in general only an injured state may have the right to impose countermeasures.<sup>242</sup>

The WTO allows two different kinds of countermeasures that should be distinguished, namely in the bilateral and in the multilateral track. Either a member state may impose countermeasures in the form of anti-dumping or countervailing duties due to an injury that incurred to him or it may impose countermeasures in case of non-compliance with the recommendations and rulings of the DSB. The difference of the basis is important: in the first scenario the state acts in its individual capacity while in the second scenario the state enforces a ruling after objectively a violation of an obligation was confirmed by the DSB. While in the first case the state acts on its own behalf in the latter case the DSB had already determined that the conduct of the state was not in conformity with the member states' WTO obligations.

In the bilateral track not every state may impose countermeasures. Rather, countervailing as well as Anti-Dumping duties require the state wanting to impose countermeasures to have suffered an injury.<sup>243</sup> It is in this regard irrelevant whether a duty is imposed as response to prohibited or actionable subsidies or dumped products. However, it is limited to the amount suffered by the unlawful measure of the other member state.

At first, the same understanding might be underlying the multilateral track as Art. 22 (6) DSU requires "that the level of such suspension is equivalent to the level of nullification or impairment". This could lead to the assumption that the suspension must be equivalent to the injury suffered by the member state intending to impose the countermeasure. In other words, a member state may only suspend concession if it has suffered an injury as otherwise it could never suspend concession that are equivalent to the nullification or impairment. The system has been described by the Arbitrator in

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<sup>242</sup> Tams *Erga Omnes* (2005) 311.

<sup>243</sup> Art. VI GATT and ADA; Art. 4 and 7 SCM.

Brazil – Aircraft that “these countermeasures aim at eliminating the adverse effects of measures on trade of a given Member”.<sup>244</sup>

However, this statement is not unproblematic as it has been stressed several times that object and purpose of the right to countermeasures is to *induce compliance*.<sup>245</sup> It aims at restoring the balance of rights and obligations among the member states.<sup>246</sup> Most importantly, the right to countermeasures is not meant to be understood in a punitive manner.<sup>247</sup> Thus, the restriction to the equivalent amount is first and foremost the prohibition on punitive countermeasures or compensation. It shall only serve the purpose to induce future compliance with the rulings and recommendations of the DSB. It is directed at bringing into conformity measures that violated the WTO agreements. This understanding opens the door towards not restricting the right to countermeasures solely to an injured state. Indeed, different constellations need to be distinguished.

For example, Art. 4 and 7 SCM are *lex specialis* in relation to the DSU with regard to prohibited and actionable subsidies.<sup>248</sup> Remarkably, while Art. 7.9 SCM similarly to Art. 22(6) DSU, provides for countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, such connection to the injury cannot be found in Art. 4 SCM. Rather, Art. 4.10 SCM reads that

“the DSB shall grant authorization to the complaining Member to take *appropriate*<sup>9</sup> countermeasures, unless the DSB decides by consensus to reject the request.” [emphasis added]

(footnote original)<sup>9</sup> This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

This provision does not require the equivalence of nullification and impairment or an injury but allows *appropriate* countermeasures. In the US – FSC proceeding the

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<sup>244</sup> Brazil – Aircraft (2000) WT/DS45/ABR para 3.57(b).

<sup>245</sup> EC – Bananas III (1999) (Article 22.6 — US), para. 6.3; Canada — Aircraft (2003) (Article 22.6 — Canada, para. 3.105; United States – Anti-Dumping Act of 1916 (US v. EC) (Article 22.6 — US) WT/DS136/ARB para. 5.7; US – FSC (2002) (Article 22.6), para. 5.52.

<sup>246</sup> US – FSC (Article 22.6), para. 5.57.

<sup>247</sup> EC – Bananas III (1999) (Article 22.6), para. 6.3.

<sup>248</sup> In the meaning of Art. 1.2. DSU; Australia – Subsidies Provided to Producers and Exporters of Automotive Leather (Automotive Leather II) (Australia v. US) (2000) (Article 21.5) WT/DS126/RW para. 6.41.

arbitrator granted the EC the right to countermeasures as a response to prohibited subsidies not in the amount equal to their share of the market but in the amount roughly equivalent to the total value of the subsidies unlawfully granted by the US.<sup>249</sup>

Beyond the case of prohibited subsidies, member states were allowed to impose countermeasures although the nullification and impairment of their rights was difficult to determine. In *EC-Bananas III* – in which case already the legal standing of the US was questioned since they hardly produce any Bananas – it could have been expected that the US would at least not have been allowed to suspend concessions as not the US but only American companies had suffered any injuries. Yet, the arbitrator did allow the suspension of concessions in the – rather randomly determined – amount of 191 million US dollars. The arbitrator based its argument on a potential trade share and import licences, totally ignoring the fact that the US did not in reality produce any Bananas and that other producers would also gain a bigger world share in case of opening of the EC market. The arbitrator argued

“Rather, the task is reduced to working out the differences between the two scenarios in (a) the US share of wholesale trade services in bananas sold in the European Communities and (b) the US share of allocated banana import licences from which quota rents accrue. Using the various data provided on US market shares, and our knowledge of the current quota allocation and what we estimate it would be under the WTO-consistent counterfactual chosen by us, we determine that the level of nullification and impairment is US\$191.4 million per year”<sup>250</sup>.

This ruling is in line with the object and purpose of the DSU, namely to induce compliance. It may be less relevant to what extent the individual member was injured if it is assumed that the inconsistency of a measure has caused nullification and impairment to any member state and thus to the WTO system as whole. It can be assumed that there was a WTO inconsistency and that this has presumably caused nullification or impairment to member states. The member state does not act on behalf

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<sup>249</sup> Gazzini with reference to *US – FSC* (2002) (Article 22.6 Arbitration) *The Legal Nature of WTO Obligations* (2006) 739.

<sup>250</sup> *EC – Bananas III* (Art. 22(6) Arbitration) para. 7.8.

of other member states but on the fact that a panel found an inconsistency that the complaining member state now has the right to enforce. Of course not any member could impose countermeasures but only a complaining member holding the DSB ruling in its favour in its hands.

However, often the problem of multiparty proceedings is expounded.<sup>251</sup> It is argued that only if the right to suspend concession is strictly mirrored by the nullification and impairment criteria may this guarantee that several complainants will not overstretch the overall right to countermeasures.

Yet, Gazzini rightly points out that

“the crux of the matter is the total of the authorized counter-measures the sum of which must be appropriate in the sense that they are expected effectively to induce compliance”.<sup>252</sup>

It is important to determine what the overall allowance should be for all complainants and then appoint an appropriate share to that complainant invoking a proceeding under Art. 22(6) DSU. It would not even be against the spirit of Art. 22 DSU to allow this member State to suspend concession in the overall amount and require all other complaining parties to request their right from the first complaining member state approaching Art. 22(6) DSU. In fact, Art. 22(4) DSU which refers to the equivalence of suspension and nullification and impairment does not state that the authorization is restricted to the nullification and impairment of the state requesting the authorization. It could also be understood as to prohibit suspension more than the overall nullification and impairment. This would suffice to guarantee that countermeasures are not abused for compensation or in a punitive manner.

If the main reason for the right to countermeasures is the insurance of compliance and the enforcement of WTO conform behaviour of a certain member state it is less relevant which member state exactly suspends the concession as long as the violating member state is instigated to bringing its measures into conformity. This is also not an unjust or dangerous suggestion as it is totally up to the member state in breach of its obligations to immediately end the suspension of concession by complying with the ruling. Due to

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<sup>251</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 740-741.

<sup>252</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 741.

the fact that the Appellate Body allowed legal standing to virtually any member State it is only consequent if any complainant may also be able to enforce the ruling. Otherwise, it would be risked that the dispute settlement mechanism evolved into a two class system in which better complainants could enforce a ruling while other, although winning the case, could only sit and watch the unduly behaviour of the responding state.

This finding is in line with Art. 54 ASR. According to this provision a state other than the injured state may take lawful countermeasures. The WTO itself states that “the complainant is thus allowed to impose countermeasures that would otherwise be inconsistent with the WTO Agreements, in response to a violation or to non-violation nullification or impairment.”<sup>253</sup> The DSB thus allows the measures by a state that is not injured, enabling this state to take up lawful countermeasures in the sense of Art. 54 ASR. There exists even an expressive reference in the DSU that indicates that the member states thought about collectively enforcement of rulings of the DSB.<sup>254</sup> According to Art. 21(6) DSU

“[T]he issue of implementation of recommendations or rulings may be raised at the DSB by any Member at any time following their adoption.”

This part of the provision that has hardly been noticed and did not play any relevance in practice as of yet lifts implementation out of the purely bilateral relation and makes it an issue of all member states.

While in the bilateral track the right to countermeasures is restricted to the injured state this does not hold true with regard to the multilateral track. Rather, the right to countermeasures mirrors the fact that a member state was complainant in a proceeding. In this case, a member state may suspend concessions and other obligations. Yet, no member state shall be authorized to impose countermeasures over the total amount of possible nullifications and impairment of all member states taken together.<sup>255</sup>

To sum up the second stage, the procedural design of the WTO, regarding reservations and modifications as well as legal standing and the right to countermeasures rather

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<sup>253</sup> Available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s10p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm).

<sup>254</sup> Yen Kong Multilateralizing (1997) 26.

<sup>255</sup> Yen Kong Multilateralising (1997) 30.



mirror those rules that in general international are attached to collective obligations. That implies that some if not all WTO obligations were meant to be collective.

#### ***4.4. Step 3: Exemplary core norms of different legal nature in WTO***

On the third level the legal nature of individual obligations can be determined. It has been observed that the WTO protects collective interests and that the procedural design leads towards finding that at least some obligations have an erga omnes character. But which norms are bilateral and which collective? When determining the legal nature of WTO obligations on the third level, it will be revealed that not all obligations share the same features. While some norms clearly reveal an erga omnes character, other norms due to their material prerequisites have a bilateral character while other important norms might be more ambiguous.

##### **4.4.1. Erga omnes partes obligations**

On the one side of the spectrum are erga omnes partes obligations in the WTO agreements. These norms indeed feature the characteristic of erga omnes obligations, namely they protect a collective interest, they do not require a member state to be adversely affected in order to invoke their violation and they may thus be enforced by any member state.

##### **4.4.1.1. Prohibited subsidies**

Art. 3 SCM can be named as a clear example of a WTO norm with an erga omnes character. It sets forth that export and import substitution subsidies shall be prohibited. The drafters of the SCM agreed that these two types of subsidies generally cause adverse effect and disturb the market. They thus did not make the invocation of this norm dependent on an adverse effect of the member state claiming a violation. Rather, there is an assumption that such subsidy has caused adverse effects and that the balance of interest of the member states was upset.<sup>256</sup> Hence, the wording prohibits these kinds of subsidies as a matter of principle. This objective wording without any reference to an adverse effect of a member State led the Arbitrators in the US-FSC case to argue that

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<sup>256</sup> *US – FSC* (2002) (Art. 22.6 Arbitration) Rn.5.23- 5.24.



“Other Members are not obliged to make a case regarding the adverse effects to successfully challenge such measures. They are required simply to establish the existence of a measure that is, as a matter of principle, expressly prohibited. As an empirical matter they undoubtedly do have adverse effects. But that is not the legal basis upon which action may be taken to challenge them under the SCM Agreement.”<sup>257</sup>

That is to say that in the next paragraph the arbitrator, with regard to the legal nature of Art. 3 SCM argues

“It is 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. Thus, the US has breached its obligation to the EC in respect of all the money that it has expended, because such expenditure in breach – the expense incurred – is the very essence of the wrongful act.”<sup>258</sup>

Yet, regarding the right to countermeasures it should be noticed that the Arbitrator in this proceeding referred to Article 49 ASR and the right to countermeasures of an injured state.<sup>259</sup> However, the EU was in fact injured by the subsidies. This confirms the view that an erga omnes obligation may also be found where a violation may at the same time injure one or a number of states particularly.

Horn and Mavroidis do not share this view.<sup>260</sup> They argue that also Art. 3 SCM is based on the consideration that the subsidy confers competitive advantage. Thus, this provision protects the individual interests of certain member states, only – in comparison to Art. 5 and 6 SCM – the adverse effect is assumed. Yet, that the provision at the same time protects individual interests does not prove that it does not also protect the common interest of the member states, to in this regard trade on a market that is not

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<sup>257</sup> *US – FSC* (2002) (Article 22.6 Arbitration) Rn. 5.39; similarly in *Canada – Aircraft* (2000) WT/DS222/ARB Rn. 3.29.

<sup>258</sup> *US – FSC* (2002) (Art. 22.6 Arbitration) para. 6.10; Horn & Mavroidis (eds) rightly point out that it is flawed if the Arbitrator refers to erga omnes obligations as the obligation not to provide prohibited to the community as a whole but to all WTO member states; it should correctly be referred to erga omnes *partes* norms *The American Law Institute Reporters' Studies on WTO Case Law* (2007) 356 [hereinafter Horn & Mavroidis *WTO Case Law*]

<sup>259</sup> *US – FSC* (2002) (Art. 22.6 Arbitration) para. 5.60.

<sup>260</sup> Horn & Mavroidis *WTO Case Law* (2007) 356

distorted by export and import substitution subsidies that “are specifically designed to affect trade”.<sup>261</sup> It has been found that – even absent a Preamble – the very object and purpose of the SCM is prohibiting the distortion of international trade.<sup>262</sup> The US-FSC Arbitrator rightly pointed out that the member states have “have a ‘right’ to expect that there will be no export subsidies applied to those goods covered by the SCM Agreement” corresponding with the obligation of the other member states to refraining from applying such kind of subsidies.<sup>263</sup> The common interest of the member states is the establishment of a fair and undistorted market. This finding is supported by the right to appropriate countermeasures provided in Art. 4.10 SCM.

#### **4.4.1.2. Trade in services obligations**

It has been opined that the same consideration can be applied to all obligations under GATS, because Art. XXIII GATS does not require the member state to have suffered any injury, but only that objectively “a Member has failed to carry out its obligation”. Adlung argues that “the purely bilateral nature of trade in services is much less evident” because in trade in services the different modes of supply tend to feature a higher degree of linkage among the member states than in case of goods.<sup>264</sup>

Yet, obligations are not more or less evidently bilateral but either bilateral or collective in nature. The preamble of the GATS Agreements formulates the collective interest of the member states:

*“Recognizing* the growing importance of trade in services for the growth and development of the world economy;

*“Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries”<sup>265</sup>

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<sup>261</sup> *Brazil — Aircraft* (1999) WT/DS46/R para. 7.26.

<sup>262</sup> *Brazil — Aircraft* (1999) WT/DS46/R para. 7.26; *Canada — Aircraft* (1999) WT/DS70/R para. 9.119.

<sup>263</sup> *US – FSC* (2002) (Article 22.6 Arbitration) para. 6.7.

<sup>264</sup> Adlung & Morrison *Less Than The GATS* (2010) 1124.

<sup>265</sup> GATS Preamble first and second recital.

The preamble is focused on the expansion of trade in services and the establishment of principles and rules. In comparison to the GATT 94 it does not speak of reciprocal agreements but rather of the increase in trade in services, transparency and progressive liberalisation aiming at promoting economic growth of all trading partners. Special attention is given to developing countries.<sup>266</sup> Also, the legal standing is a strong indication that indeed the drafters wanted the obligations in services to be understood as *erga omnes partes* obligations.<sup>267</sup> But what does that mean with regard to the individual obligations? Step 1 and 2 can only guide but never entirely anticipate the result of the third step, namely the analysis of the individual obligations in the WTO agreements.

The GATS obligations run parallel with a number of GATT 94 obligations, most importantly MFN and National Treatment (NT). It is unique for example with regard to requiring transparency, Art. III GATS. Yet, most obligations are determined by the individual schedules committed by the member states. Especially those core norms such as MFN and NT may be found to have an *erga omnes* character, as will be shown for the GATT Agreement further below. They reflect the common interest of the member states to treat all member states equally and to build an international trading system without discrimination among the market participants, especially in the services sector. This obligation is not only owed towards each member state individually but rather – as it is stated in Art. I GATS – towards all member states of the GATS treaty. This is exactly confirmed by Art. XXIII GATS that gives every member state the possibility to challenge behaviour that is not in conformity with the services agreement.

Thus, it can be concluded that at least those core obligations under GATS that reflect the collective interest of the member states are obligations *erga omnes partes*.

#### **4.4.2. Bilateral obligations**

On the other side of the spectrum are norms that have a clear bilateral character. What makes these obligations bilateral is the fact that they require the claiming party to have been adversely effected. Yet, an obligation can never be regarded as to have an *erga*

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<sup>266</sup> Especially in recital 5 and 6 of the Preamble.

<sup>267</sup> Gazzini *The Legal Nature of WTO Obligations* (2006) 731.

omnes character if – in its material prerequisites – the norm requires the claimant state to have suffered an injury. This is due to the fact that the complaining member cannot rely on another member states injury leading to the conclusion that the obligation is owed towards each and every member state individually.

#### **4.4.2.1. Actionable subsidies**

For example, Art. 5 and 6 SCM require a state to prove before the DSB that an adverse effect was caused by the subsidy. In *US-Upland Cotton Benin and Chad* – although not a claimant in the proceeding between Brazil and USA – argued that their adverse effect of the subsidization of the Cotton industry by the US should also be taken into consideration. They argued that Art. 5 SCM is “an obligation on behalf of the subsidizing Member not to cause adverse effects to the interests of *all* WTO Members – not just the complaining Member. [emphasis added]”<sup>268</sup> The Panel did not accept this line of argumentation. Although Art. 5 SCM refers to “Members”, i.e. the plural, the Panel in *US-Upland Cotton* stressed that the more precise text of Art. 6.3. SCM refers to “another member”.<sup>269</sup> The Panel argued that taking into consideration Benin’s and Chad’s adverse effect would alter the terms of the provision.

Especially, Art. 7 SCM supports this line of argumentation. In comparison to prohibited subsidies that are per se prohibited and thus must be withdrawn, Art. 7 suggest the removal of the adverse effect *or* the withdrawal of the measure. Thus the lawfulness of the subsidy depends exclusively on the member state claiming to have suffered adverse effect. Similarly, Art. 7.9 SCM does not allow appropriate countermeasures such as Art. 4.10 SCM but countermeasures “commensurate with the degree and nature of the adverse effect determined to exist”.

It is thus a bilateral obligation not to cause adverse effect to another member state individually by actionable subsidies.

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<sup>268</sup> *US - Upland Cotton* (2004) para. 7.1400.

<sup>269</sup> *US - Upland Cotton* (2004) para. 7.1400.

#### 4.4.2.2. Dumping

The same holds true with regard to Anti-Dumping measures, where the member State wishing to impose an anti-dumping duty has to have suffered an injury itself. It would not suffice that any member state has suffered an injury because Art. VI GATT 94 in its wording refers to the member state that is imposing the anti-dumping duty. In this regard Art. VI GATT 94 states that

“The contracting parties recognize that dumping, by which products of one country *are introduced into the commerce of another country* at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry”.

The Anti-Dumping Agreement (AD) lacks a preamble. Neither the Panel nor the Appellate Body have made statements regarding a general object and purpose of the AD except that one of the ‘objectives’ of the agreement is “providing a multilaterally agreed framework of rules governing actions against injurious dumping”.<sup>270</sup> This supports the assumption that the Anti-Dumping does protect a common interest of the member states, but to a lesser extent than the SCM with regard to export and import substitution subsidies. It rather protects the individual interest of the member states not to be injured by way of dumped products imported into their respective markets, which is in this sense a common interest but not over and above what the agreement is supposed to protect in the interest of the individual member.

To sum up, where a norm includes as a prerequisite that an adverse effect has been suffered by that member state, the norm is of a bilateral character.

#### 4.4.3. Ambiguous Norms

There are a number of clauses that are interpreted as bilateral or collective by different authors and can thus be considered to be ‘ambiguous’ norms. As not all WTO norms can be observed here, the focus is on core obligations of the WTO agreements,

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<sup>270</sup> *United States – Measures Relating to Zeroing and Sunset Review (Zeroing – Japan) (US v. Japan) (1999) WT/DS46/AB/R para. 108.*

especially MFN and NT. This section shall also briefly touch upon obligations in other agreements that have not yet been examined by other authors.

#### **4.4.3.1. MFN**

The clearest indication for a bilateral obligation, in Pauwelyn's view, is the MFN clause itself, Art. I GATT 94. The MFN function on the basis that

“With respect to customs duties and charges [...] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”<sup>271</sup>

Pauwelyn emphasizes that commitments that are often negotiated bilaterally have to be extended to other member states. Thus, there are no common commitments but only commitments extended to every member state.<sup>272</sup> It is true that the mechanism of the MFN clause works via a bilateral relation. Through concessions provided to one member state other member states gain the right to require the member state to treat them equally. Yet, this mechanism does not prove that the obligation is not collective.

An *erga omnes partes* obligation is an obligation owed to the members of a treaty as a whole due to the fact that the obligation protects the collective interest of its member states. What collective interest does the MFN protect? Basically, that all member states treat and are in fact treated alike. The preamble of the GATT 94 clearly states that it aims at “the elimination of discriminatory treatment in international commerce”. The MFN is an expression of this very goal that – although referring to the product – all member states are treated equally and it is in fact a cornerstone of the multilateral trading system.

Of course, one could argue that if state X has to grant any advantage to state A and subsequently to state B and C, it is a subsequent and individual obligation towards states B and C. However, this view does not appropriately take into consideration that the

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<sup>271</sup> Art. I GATT 94.

<sup>272</sup> Pauwelyn A Typology (2003) 931-932.

MFN is formulated as an obligation towards all member states. The norm was not formulated in a bilateral way, namely that the respective treatment shall be accorded to each and every member state. Rather, the wording refers to *all* contracting parties thereby giving it a rather collective character.

Thus, every member state owes to all the parties of the WTO the obligation to in fact apply the privileges it grants to one member State to all products from any State, not even restricted to the point in time when the agreement came into force, but any time when a member state starts trading in the respective product. This general obligation towards the WTO community is violated if a state for example would pass a law in which it would carve out a number of states from the MFN treatment, granting privileges to products from only 89% of the member states. The member state would not only violate the MFN 'as applied' but implicitly declare that it does not respect the MFN 'as such'. This would in fact be a breach that would enable any state to start a proceeding against this state, as it would – in line with Art. XXIII GATT 94 – impede the attainment of the goal of the WTO, namely that all member states treat all other member states alike. It would violate the collective interest of the member state and would jeopardize the balance of interest of the member states found in the agreements. Thus, it can be concluded that the MFN is an *erga omnes partes* obligation.

#### **4.4.3.2. NT**

Similar considerations apply to NT. The wording of Art. III.2 GATT 94 might appear more bilateral than the MFN provision. It reads

“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.”

Although, the wording of the provision on NT is thus rather bilateral the obligation is similarly an expression of the parties will to eliminate discrimination between imported and domestic products. If NT is not granted a member may be able to seal off its market if it were to apply taxes or other charges that would disadvantage foreign products to be established on the market. Due to the fact that non-discrimination is one of the major



objects and purposes of the WTO, a member state would impede the attainment of the objective of the agreements. Thus, any member state would be able to rely on Art. XXIII GATT 94 and invoke a violation of Art. III GATT 94 even without being affected by an “as such” measure of another member. Thus, the NT obligation is also enforceable by any member state. These arguments speak in favour of considering NT to have erga omnes partes character.

#### **4.4.3.3. Obligations in other Agreements**

Another example is the Agriculture Agreement. The strong language of the Preamble reveals the interest in the parties to commonly regulate the Agriculture Sector. However, from the drafting history we know that the interests are not very common and that hardly any agreement was as disputed as the Agriculture Agreement. The obligations that reflect the SCM regarding subsidies might be resolved in the same way as with regard to the AA, namely when the material prerequisites require to be adversely affected the obligations are bilateral. The procedural design does not feature any particularities, apart from the standstill clause in Art. 13 AA which has however elapsed in 2003. Otherwise the obligations, due to the interests of protecting developing countries and food security in the world indicate their rather collective nature and thus have an erga omnes partes character.

Another agreement that might appear ambiguous is the TBT. The preamble stresses the importance of international accepted standards for the international trade.<sup>273</sup> The core obligation, Art. 2.2 TBT states that it

“[S]hall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.”

This provision does not require a state to be adversely affected but rather is an objective regulation that technical barriers may not lead to obstacles to trade. It is very convincing if a party would argue that legislation adopted by a member state violates this principal

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<sup>273</sup> TBT Preamble Third Recital.

obligation even without it facing any obstacles to its trade at present. Thus, Art. 2.2. TBT is also an erga omnes partes obligation.

#### ***4.5. Conclusion***

To sum up, when applying the three step approach in order to determine the nature of WTO obligations it needs to be referred to aspects such as the object and purpose of the agreement and the procedural design in order to understand the overall will of the parties. It was shown that the WTO agreements protect collective interests and that the procedural design mirrors that of obligations erga omnes partes, making it reasonable to assume that at least some obligations are in fact of an erga omnes partes nature.

When considering particular obligations especially the question whether the obligation protects one of the objects and purposes of the agreement and the wording needs to be taken into consideration. It has been found that some obligations in the WTO are of an erga omnes partes nature, e.g. Art. 3 SCM and obligations in trade in services. Other obligations, especially due to the fact that the norm in its material prerequisites requires the member state to be adversely affected indicates that these obligations are of a bilateral nature. Further, it has been argued that other core norms, such as MFN and NT are also of an erga omnes partes nature as these norms protect the very object and purpose of the WTO agreements, namely non-discrimination and equal treatment among member states.





















