

**The Challenge of Enforcing the Rulings and Recommendations of the World  
Trade Organization (WTO) Dispute Settlement Body**

**An Interactional Legal Analysis of Compliance with WTO Law**

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### **Abstract**

Arguably, the rules-based international trading system is best represented by the work of the WTO Dispute Settlement Body (DSB). However, this view is inaccurate, because it reduces 'legality' to mean only formal adjudication under DSB authority, thereby overlooking the WTO's important role in administering 'interactional law'. Furthermore, due to the DSB's increasingly limited success to ensure effective compliance, the WTO is facing a compliance deficit. The result has been that settlements have been either delayed, or not reached, in a large number of consultations and high profile disputes. Developed member states have exhausted the resources of the DSB in prolonged litigations under the Dispute Settlement Understandings (DSU) Articles (21-23). Thus, scholars have raised concerns about the quality and timeliness of compliance actions, and the imbalance between the political and judicial branches of the WTO, which rely overly on the DSB.

This thesis argues that the WTO compliance regime needs to be reformed in accordance with interactional international law theory (interactionalism). It utilizes Brunnée and Toope's theory of interactionalism, and the interactional legal theory of Lon Fuller by applying them to the WTO rules and practice of compliance. Interactionalism combines the international relations theory of constructivism with Fuller's theory. It demands, under the element of *shared understandings*, an examination of the origins of the law, applying Fuller's *principles of legality* to norms to determine what is legal, and maintenance of a *practice of legality*.

This thesis first probes the legal obligations and adjudication of the WTO, and second, provides an evaluation of the legal character of DSU rules and procedures, based on interactional legal theory. Third, it investigates compliance as a part of the WTO's practice of legality. This is the first time interactionalism is applied to the world trade law, which shows this thesis' claim of originality. The conclusion asserts that WTO experts need to adopt a newer concept of legality, one akin to that developed in interactionalism, because, the efficacy of WTO law depends not only on its role in adjudication, but also on facilitating interactional legal practices.

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### List of Abbreviations

- AB.....The Appellate Body
- ACWL.....The Advisory Centre on WTO Law
- Anti-Dumping Agreement.....The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
- ARSIWA.....The 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts
- BIC Countries.....Brazil, India, and China
- BIT.....Bilateral Investment Treaty
- CRTA.....The Committee on Regional Trade Agreements
- DDR.....The 2001 Doha Development Round
- DSB.....The Dispute Settlement Body
- DSU.....The Understanding on Rules and Procedures Governing the Settlement of Disputes
- EC.....The European Community
- ELP.....The Six Steps of the WTO Extended Litigation Process
- EU.....The European Union
- GATS.....The General Agreement on Trade in Services
- GATT.....The 1994 General Agreement on Tariffs and Trade
- IAWC.....The Institute for Assessing WTO Commitments
- ICJ.....International Court of Justice
- ICSID.....International Centre for Settlement of Investment Disputes
- IGOs.....International Governmental Organizations
- ILC.....International Law Commission
- Interactionalism.....The Interactional International Law Theory
- IR.....International Relations
- ITLOS.....International Tribunal for the Law of the Sea
- MFN.....The Obligation of Most Favoured Nation
- NGOs.....The Non-governmental Organizations
- NoI.....Nullification or Impairment
- NT.....The Obligation of National Treatment on Internal Taxation and Regulation
- PTAs.....The Preferential Trade Agreements
- QUAD Countries.....The US, EU, Canada, and Japan
- RPT.....The Provision on Reasonable Period of Time
- SCM.....The Agreement on Subsidies and Countervailing Measures
- SDT.....The Principle of Special and Differentiated Treatment
- SPS.....The Agreement on the Application of Sanitary and Phytosanitary Measures
- TBT.....The Technical Barriers to Trade Agreement
- TPRB.....The Trade Policy Review Body
- TPRM.....The Trade Policy Review Mechanism
- TRIPs.....The Agreement on Trade-Related Aspects of Intellectual Property Rights
- UN.....The United Nations
- UNCLOS.....The United Nations Convention on the Law of the Sea
- US.....The United States of America
- VCLT.....The Vienna Convention on the Law of Treaties
- WTO Agreement.....The Marrakesh Agreement Establishing the World Trade Organization
- WTO.....The World Trade Organization

## Chapter 1: Introduction

### 1.1 Enforcement of the World Trade Organization (WTO) Law:

This introduction is structured as follows: *The issue, the importance, the approach, and the structure*. To introduce *the issue*: The WTO law encompasses ‘the General Agreement on Tariffs and Trade (GATT), the results of past trade liberalization efforts, and all of the results of the Uruguay Round’.<sup>1</sup> The GATT/WTO rules do not seek to regulate the content of trade between member states (currently 163 states), but rather to supervise its restrictions.<sup>2</sup> The WTO *code of conduct* is implemented by two mechanisms, the Trade Policy Review Mechanism (TPRM), and the Dispute Settlement Body (DSB). The DSB is an important body for settling official disputes between member states. It operates on a consensual basis, governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The importance of the DSB is derived from the fact that it promotes fair trade, not only by generating decisions, but also through providing effective means of settling disputes, so that ‘self-serving interpretation be exposed and unilateralism discouraged’.<sup>3</sup>

However, the TPRM (including the governing body of Trade Policy Review Body), is not designed to enforce trade obligations per se, but rather to facilitate positive interactions between member states, in order to promote transparency, and to uphold members commitments to the multilateral trading agreements. Nevertheless, the TPRM has an ‘enforcement effect’, which manifests itself in the review process involving all member states who apply pressure on another member state by reviewing its trade policies and practices, in order to ensure they conform to WTO

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<sup>1</sup> Member states or member(s) refers to ‘any State or separate customs territory’ that signed the WTO agreement. ‘Contracting parties’ refers to the signatories of the 1947 General Agreement on Tariffs and Trade. The more encompassing term of *consenting states* generally refers to any state that accepted to be bound by an international agreement (i.e. GATT or WTO). World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (20th printing, Cambridge University Press 2013) (hereinafter The WTO Legal Texts) 4.

<sup>2</sup> Steve Charnovitz, ‘The World Trade Organization and Law Enforcement’ (2003) *Journal of World Trade* 817.

<sup>3</sup> J. G. Merrills, *International Dispute Settlement* (5th edn, Cambridge University Press 2011) 195.

law.<sup>4</sup> Nonetheless, in the literature, the DSB receives considerable attention and praise, primarily due to its wide mandate that enables it to uphold the trade rule of law. Compliance with the trade rule of law can only be guaranteed by adherence to the GATT/WTO rules, and the DSB's rulings and recommendations.<sup>5</sup> However, *the issue* is that the DSB's task of balancing the relationship between member states' sovereignty and the WTO's rules-based system has become onerous, due to the challenge of members entirely subjecting their trade policies and practices to the DSB, while the WTO function of negotiation is dysfunctional.<sup>6</sup> Member states have not been able to agree on fundamental institutional reforms that include revision of the DSU, and other legal texts such as the agreement on anti-dumping. In the meantime, the DSB is bearing the brunt of this institutional defect by trying to handle the large caseload of (508) disputes, some were settled out of court and many still have not been successfully concluded.

Settlements in cases like most of the consultation and high profile disputes, had been significantly delayed, or have not yet been reached. Although, (508) appears to be a large number for a tribunal of 20 years old, the WTO publicly available data about these disputes reveals neither evidence of effective or early settlements, thus, the ideal of compliance with trade rule of law is at risk.<sup>7</sup> The challenge is manifest in DSB proceedings, particularly in the disparity between the success rates of complainant and respondent, as well as in the members' lack of enthusiasm for implementing the DSB rulings and recommendations.<sup>8</sup> The increase usage of the dispute settlement mechanism indicates a growing trust in the rule of law, but it also suggests a stagnation in the WTO in terms of law-making, and law-enforcement broadly perceived as state and non-state actors' self-enforcement of their foreign trade rights. The WTO system has been legally misrepresented by the views that

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<sup>4</sup> Asif Qureshi and Andreas Ziegler, *International Economic Law* (3rd edn, Sweet & Maxwell 2011) 475-476.

<sup>5</sup> See Rachel Brewster and Adam Chilton, 'Supplying Compliance: Why and When the United States Complies with WTO Rulings' (2014) *Yale Journal of International Law* 201.

<sup>6</sup> See Joshua Meltzer, 'State Sovereignty and the Legitimacy of the WTO' (2005) *Journal of International Economic Law* 639.

<sup>7</sup> Disputes by Current Status  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm)> accessed 24 May 2016.

<sup>8</sup> See Karen Alter, 'Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System' (2003) *International Affairs* 783; William Davey, 'Compliance Problems in WTO Dispute Settlement' (2009) *Cornell International Law Journal* 119; Gregory Shaffer and others, 'The Law and Politics of WTO Dispute Settlement' (2016).

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2748883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748883)> accessed 22 March 2016.

reduce enforcement to the limited role of the DSB, and overlook the value of ‘legal interactions’.<sup>9</sup> These issues have undermined the authority of WTO in upholding the founding GATT principles, which are enshrined in the GATT economic purpose of the ‘reduction of tariffs and other trade barriers, and the elimination of preferences’, and include non-discrimination and prohibition of quotas and quantitative restrictions on trade.<sup>10</sup> This introduction will lay the groundwork for critically assessing the enforcement role of the DSB, first, by highlighting a number of DSB defects, both textual and structural. Although, throughout this thesis the focus will be primarily on the DSB rules and procedures, any WTO body or organ, committee, or working group and party, concerned with the optimal enforcement of trade norms, deserve to be briefly reviewed.

The DSB defects emanate from the WTO legislative impotence as epitomised by the lack of consensus on legal reforms concerning the WTO rules including the DSU. A critical legal analysis of the DSB adjudicative role ought to involve broad legislative issues to answer how the WTO law should be effectively enforced by the DSB and the TPRM. This thesis argues that the WTO law should be optimally enforced by member states in the DSB and through active participation in committee settings. Finally, on terminology, this thesis title mentions ‘enforcement’ and ‘compliance’ to highlight the interlinked relationship between these terms, since *enforcement* is ‘the action or process of enforcing’ compliance, whereas *compliance* is ‘the action, practice or fact of complying’.<sup>11</sup> In this sense, enforcement precedes compliance, and any analysis of compliance must consider the enforcement process, in this case the DSB’s role in forcing compliance. However, the WTO experts’ focus and member states’ overreliance on DSB is obstructing a complete understanding of compliance with WTO law. Thus, the second part of this introduction will discuss the benefits of adopting ‘the interactional international law theory’ (hereinafter *Interactionalism*) to analyse the WTO compliance regime.<sup>12</sup> The issue of overreliance on DSB relates to

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<sup>9</sup> See Robert Wolfe, ‘See You in Geneva? Legal (Mis)Representations of the Trading System’ (2005) *European Journal of International Relations* 339.

<sup>10</sup> Kenneth Reinert, *An Introduction to International Economics* (Cambridge University Press 2012) 96-97.

<sup>11</sup> See *Enforcement* and *Compliance* entries in Oxford English Dictionary <<http://www.oed.com/view/Entry/62166?redirectedFrom=enforcement#eid>> accessed 27 December 2016.

<sup>12</sup> See Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) (hereinafter, *An Interactional Account*); Lon L. Fuller, *The Morality of Law* (revised edn, Yale University Press 1969).

the problem of conceiving international law (including WTO law) along the lines of *classical legal positivism*, by claiming that the law is *only* effective as a result of the authority of the court that sanction non-compliance. As the ineffective work of the DSB will testify, this conventional view of law is misleading, as it conceals the defects of DSB, and neglects the question of how to achieve prompt and effective compliance with the constitutive elements of trade rule of law both within, and outside the DSB chambers.

## **1.2 An Evaluation of the WTO Dispute Settlement System:**

Since *the issue* has been briefly highlighted above, this part will briefly give an overview of the DSU, and then further elaborate on *the importance of the issue* under-investigation, namely the DSB lack of effectiveness. An adjudicative body requires an enforcement mechanism and a timetable for implementation in order to secure an early and effective settlement of disputes. DSU offers two options for dealing with non-compliance, firstly, there is compensation, generally undertaken in the form of an increase in tariff against the offending WTO member. Trade compensation has the advantage of choosing not to restrict trade between member states for two reasons: (i) it is prospective, in that the respondent state will compensate the complainant for its continuous breach of WTO obligations;<sup>13</sup> and (ii) Article (22:1) of the DSU acknowledges the voluntary nature of compensation, stating that it ‘shall be consistent with the covered agreements’.<sup>14</sup> This provision entails two requirements: (A) any agreement concerning compensation must be compliant with all WTO obligations, including the most favoured nation (MFN) under Article (I) of the GATT; and (B) *any benefits granted to the complainant must be equally granted to all WTO members*.<sup>15</sup>

Nonetheless, compensation has failed to produce compliance as it remains theoretical for requirement (B), which equalizes the complainant in terms of reaping the benefits of tariff reduction with all WTO members.<sup>16</sup> Secondly, should member states fail to agree on compensation within a period of twenty days following the

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<sup>13</sup> Simon Lester and others, *World Trade Law: Text, Materials and Commentary* (2nd edn, Hart Publishing, 2012) 160.

<sup>14</sup> The WTO legal Texts (n 1) 370.

<sup>15</sup> Lester and others, *World Trade Law* (n 13) 160-161.

<sup>16</sup> It is sparingly used as a remedy for non-compliance see (Turkey- Restriction on Imports of Textiles and Clothing Products, DS34).

expiry of the ‘reasonable period of time’, complainants are able to request permission from DSB to impose limited trade sanctions against the offending member (DSU Article 22:2). Such countermeasure is referred to as ‘retaliation’, authorized by DSB as a ‘suspension of concessions or other obligations under the covered agreement’ *unless* the ‘covered agreement prohibits such suspension’ (DSU Article 22:5). The WTO trade sanction is a significant departure from the traditional GATT doctrine, in which this trade remedy under GATT Article (XXIII:2) has been used *to rebalance concessions* (rather than sanction).<sup>17</sup> However, conventional economic retaliation in response to the lack of implementation appears to be of only limited effectiveness, primarily due to the imbalance between the retaliatory powers. Furthermore, it results in the complainant responding to one WTO-inconsistent trade barrier with another, contrary to the philosophy of free trade underlying the WTO.<sup>18</sup> The complaining member is required ‘to shoot itself in the foot by restricting imports and thus hurting its own industrial users, importers and consumers’.<sup>19</sup> Thus, this issue represents an inequality between member states, which affects its most vulnerable members, i.e. the developing and least-developed countries (LDCs), which lack the resources to self-enforce their trade rights.<sup>20</sup> In addition to the inadequacies of these remedies, there is no requirement for the respondent to identify the measure(s) it intends to use to achieve full compliance, despite the availability of compliance review under DSU Article (21:5), and the requirement for a respondent to submit a status report to the DSB under DSU Article (22:6). Hence, the means of achieving compliance is left at the discretion of respondents, who may fail to enact replacement legislation conforming to GATT/WTO rules, thus resulting in procedural delays and inadequate implementation.<sup>21</sup>

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<sup>17</sup> Steve Charnovitz, ‘Rethinking WTO Trading Sanctions’ (2001) *The American Journal of International Law* 792.

<sup>18</sup> Marco Bronckers and Naboth Van den Broek, ‘Financial Compensation in the WTO: Improving the Remedies of WTO’ (2005) *Journal of International Economic Law* 101.

<sup>19</sup> *ibid.*

<sup>20</sup> R. Rajesh Babu, *Remedies under the WTO Legal System* (Martinus Nijhoff Publishers 2012) 333-342.

<sup>21</sup> See (Canada-Measures Affecting the Export of Civilian Aircraft, DS70); (United States-Certain Country of Origin Labelling, DS384, DS386); (United States-Tax Treatment for ‘Foreign Sales Corporations’, DS108); (United States-Measures Affecting the Cross Border Supply of Gambling and Betting Services, DS285). See Carolyn Gleason and Pamela Walther, ‘The WTO Dispute Settlement Implementation Procedure: A System in Need of Reform’ (2000) *Law & Policy in International Business* 714; Robert Maclean, ‘The Urgent Need to Reform the WTO’s Dispute Settlement Process’ (2002) *International Trade Law & Regulation* 137.

Overall, both WTO remedies for noncompliance have resulted in confusion for WTO lawyers concerning their negative effects on developing countries and LDCs, due to the focus of these remedies being ‘on providing some form of redress for the complainant, not on punishing the respondent’.<sup>22</sup> When it comes to the second component of enforcement, namely a timeframe, a major cause for delayed compliance concerns the timetable for implementation, along with the non-implementation of the DSB’s recommendations and rulings *within* a reasonable period of time (RPT). In situations in which immediate compliance is *impracticable*, the RPT is determined by the failing party, i.e. member, or by the disputing parties’ mutual agreement, or (should neither of these solutions prove possible) by the appointed arbitrator(s) (DSU Article (21:3)).

Three major problems have been identified with respect to the members’ use of this procedure. First, it is highly possible that RPT will be misused leading to more negotiated extensions or disagreements between the members that arbitration cannot resolve.<sup>23</sup> DSU Article (21:3) stipulates that in case of members’ disagreement, the RPT shall be determined by ‘binding arbitration within 90 days’, however, this Article provides a lenient timeframe which can be easily violated with impunity.<sup>24</sup> Because, DSU Article (21:3(c)) maintains that ‘the reasonable period of time shall not exceed 15 months from the date of adoption of a Panel or Appellate Body report’. DSU Article (21:4), however, maintains that ‘the period from the date of establishment of the Panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months *unless the parties to the disputes agree otherwise*’.<sup>25</sup> In almost all of the high profile disputes, these two DSU Articles are often misused by the offending members which use the strategy of inciting disagreement leading to an appeal under DSU Article (21:5) for a compliance review, to prolong the dispute.

Second, a number of criticisms have been made of the arbitrator’s mandate of being narrow in scope when it comes to determining only RPT for implementation under DSU Article (21:3(c)). For instance, the arbitrator in *Korea-Alcoholic Beverages*

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<sup>22</sup> Donald McRae, ‘Measuring the Effectiveness of the WTO Dispute Settlement System’ (2008) *Asian Journal of WTO & International Health Law and Policy* 1.

<sup>23</sup> This is characteristic of most of the high profile disputes discussed below where the RPT have been misused. See M. A. Qian, ‘Reasonable Period of Time’ in the WTO Dispute Settlement Systems’ (2012) *Journal of International Economic Law* 257.

<sup>24</sup> *The WTO Legal Texts* (n 1) 369.

<sup>25</sup> *ibid* (emphasis added).



maintains that, ‘it is not within my mandate to suggest ways and means to implement the recommendations and rulings of the DSB’.<sup>26</sup> Third, the occurrence of ‘bad-faith implementation’ of member states is inevitable under DSU Article (21:6), due to a lack of supervision over implementation. This DSU Article prescribes ‘the surveillance of implementation of recommendation and rulings’ and that the issue of delayed implementation ‘shall be placed on the agenda of the DSB meeting’ which can only be held until six months after the establishment of the RPT.<sup>27</sup> Overall, the determination of RPT cannot sufficiently constitute an effort to ‘prompt compliance’ pursuant to DSU Article (21:1) for the ‘effective resolution of disputes to the benefit of all Members’.

Nonetheless, concerns about the performance of the DSB are increasing, for instance, it has become questionable whether the DSB is a powerful tool when issuing binding decisions in providing a stable and predictable multilateral trading system. For instance, a debate is concerning the ways in which to measure the success of the dispute settlement system, as a result of new data containing an increased number of high profile disputes of non-compliance, which has gradually diminished member states’ expectations of the effectiveness of DSB. Reisman, for example, warns that any degeneration of expectations concerning the effectiveness and stability of the DSB system will have a negative influence on transnational commerce.<sup>28</sup> This has led him to reason that, ‘the effect of non-compliance may be an instinctive commercial and economic withdrawal, which imposes a serious deprivation upon the impugning state’.<sup>29</sup>

Horlick and Coleman, who despite their data demonstrating a positive record of compliance in WTO, raise the point that a small percentage of non-compliance (i.e. as small as 6.1%) can be problematic.<sup>30</sup> This perception has been formulated

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<sup>26</sup> Qian (n 23).

<sup>27</sup> *ibid.*

<sup>28</sup> W. Michael Reisman, ‘The Enforcement of International Judgments and Awards’ (1969) 63 *American Journal of International Law* 1.

<sup>29</sup> *ibid.*

<sup>30</sup> Of the (78) final decisions reached from 1996-2007, (53) cases (68.8%) ended up in full compliance, (19) (24.6%) in partial compliance, and only (6) (6.1%) resulted in unabashed non-compliance, e.g. EC-Hormones. See Gary Horlick and Judith Coleman, ‘The Compliance Problems of the WTO’ (2007) *Arizona Journal of International and Comparative Law* 141. Wilson highlights that the positive record of compliance is reflected in the fact that there were few cases in which Members received authorization to impose retaliatory measures. However, he acknowledges that the EC and US did not comply promptly with the DSB’s rulings and recommendations, despite the sanction in four cases (EC-Banana, EC-Hormones, US-FSC, and US-Byrd Amendment; and in

following Hudec's calculation that 'the GATT dispute settlement system 'worked' 88% of the time, *but it was the 12% of cases where GATT did not 'work' that reduced the system's credibility enough to require the major changes in the Uruguay Round*'.<sup>31</sup> Opponents of the use of the 'compliance rate' as a measurement of success point out a need to 'consider the quality and timeliness of compliance actions' and that 'timeliness' does not only encompass the RPT set for implementation, but also the time taken by the Panel and Appellate Body (AB) to settle the dispute in accordance with the standards specified in the DSU.<sup>32</sup> Davey contends in 2009 that the high rate of usage of the WTO's dispute settlement system is not a significant measurement of success, highlighting reasons for concern being, 'the recent sharp decline in new consultation requests and the continuing problem of non-implementation, or delayed implementation, of adopted panel/AB reports'.<sup>33</sup> Such a decline is evident in the recent 'statistical analysis' of the system between 1995 and 2015, which reveals that the average number of complaints per year has decreased from (37) during the period 1995-1999, to (17.2) between 2010 and 2014.<sup>34</sup> Additionally, the available data on consultation disputes (currently 151) that have not been settled in a timely and effective manner is a clear indication of the weakness of the pre-panel procedure under DSU Articles (4-5).<sup>35</sup>

Statistics related to the provisions of DSU Article (21), and in particular (21:3) (i.e. RPT arbitration), and the deadlock provision of DSU Article (21:5) (which refers to the 'recourse to the dispute settlement procedures, including wherever possible resort to the original panel' in case of non-compliance), reveals fluctuating numbers

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Canada-Aircraft where the authorization was received but retaliatory measures were not imposed) see Bruce Wilson, 'Compliance by Members with Adverse WTO Dispute Settlement Rulings: The Record to Date' (2007) *Journal of International Economic Law* 397.

<sup>31</sup> See Horlick and Coleman, 'The Compliance Problems of the WTO' (n 30) (emphasis added).

<sup>32</sup> Davey identified three problematic areas where compliance is often not timely, and has no practical effect, these being: agriculture, subsidies, and Sanitary and Phytosanitary Measures (SPS) cases, see Davey, 'Compliance Problems in WTO Dispute Settlement' (n 8).

<sup>33</sup> William Davey, 'The WTO Looking forward' (2006) *Journal of International Economic Law* 9.

<sup>34</sup> Leitner and Lester noted that some complaints are 'very similar in terms of the measures and legal claims at issue (...) For example, of the 37 complaints brought in 2002, eight of these related to the *U.S.-Steel Safeguards* dispute' see Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2015 – A Statistical Analysis' (2016) *Journal of International Economic Law* 289 citing *United States –Definitive Safeguards Measures on Imports of Certain Steel Products*, DS248, DS249, DS251, DS252, DS253, DS254, DS258, DS259.

<sup>35</sup> Disputes by Current Status

<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm)> accessed 7 March 2016.

indicating neither prompt compliance, nor timely implementation of decisions.<sup>36</sup> Hence, Davey's questioning of whether 'The WTO's Dispute Settlement System is ultimately doomed to fail?' has predicted that, 'there is the fear that the system, because of its so-called automaticity, will be forced to pronounce results in controversial cases that will not be implemented, thereby putting the effectiveness of the system in doubt.'<sup>37</sup> This fear is reflected in DSB's handling of high profile cases conforming to Hudec's reference to 'wrong cases', when speaking of the future of the WTO.<sup>38</sup> These include cases touching on: public health (*EC-Asbestos*); environmental protection (*US-Shrimp-Turtle*); cultural identity (*Canada-Periodicals*); industrial policy (*EC and Certain Member States-Large Civil Aircraft*); taxation (*US-Foreign Sales Corporations (FSC)*); public morals and public order (*US-Gambling*); foreign and development policy (*EC-Bananas*): and recent disputes concerning discriminatory health measures and technical trade barriers involving the US (*Clove Cigarettes, Tuna, Cool*), as well as the (*Seal products*) dispute involving Canada. These disputes (along with the controversy surrounding the *EC-Hormone*) have been found challenging, due to both DSB, and member states, dealing with different regulatory regimes and attitudes with divergent views regarding risk, when adhering to their international trade commitments.<sup>39</sup>

Moreover, the reasoning in the judgments of a number of these cases (e.g. *US-FSC, EC-Asbestos, and US-Gambling*) have been criticized for lacking the characteristics of good judgment, including, an explanation of the relationship between facts,

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<sup>36</sup> Leitner and Lester said, 'To date, the percentage of Article 21.5 panel reports appealed is 68.75%', see Leitner and Lester, 'WTO Dispute Settlement 1995-2015 – A Statistical Analysis' (n 34).

<sup>37</sup> Davey, 'Compliance Problems in WTO Dispute Settlement' (n 8).

<sup>38</sup> *ibid.* The term 'wrong cases' refers to cases where the respondents fail to comply because of "domestic political considerations". See Robert Hudec, 'GATT Dispute Settlement After the Tokyo Round: An Unfinished Business' (1980) *Cornell International Law Journal* 159; Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (American Enterprise Institute Press 2001) 17-18. However, after reviewing a number of disputes with highly political, economic, and social implications that have risen in the first decade of the WTO, or continued to be litigated, Taylor prefers to use the term *impossible cases*. She means that these cases contain 'factors that lead to greatly increased chances for non-compliance such as disputes that have great symbolic importance in the culture of the country (*EC-Hormones*), or produces stronger disagreement over the legal norms; for example, cases where there are links between trade and the environment (*US-Shrimp-Turtles*), or where cases create great stress on the DSU procedures; for instance, about whether amicus briefs should be allowed', see C. O'Neal Taylor, 'Impossible Cases: Lessons From the First Decade of WTO Dispute Settlement' (2007) *University of Pennsylvania, Journal of International Economic Law* 309 (emphasis added).

<sup>39</sup> Bernard Hoekman and Michel Kostechi, *The Political Economy of the World Trading System* (Oxford University Press 2009) 106.

evidence and law, and the judgment contribution to the role of the legislation.<sup>40</sup> Therefore, a number of scholars have expressed concerns that the WTO dispute settlement system could be rendered ‘substantively’ and ‘politically’ unsustainable, due to the rise of sovereignty tensions within the WTO, as a result of the inability of member states to agree on clearer rules governing highly sensitive economic, social or political issues.<sup>41</sup> The above claim is frequently substantiated by the further claim that GATT/WTO rules ‘have not been paired with a strong enough enforcement mechanism’.<sup>42</sup> Furthermore, the DSB’s AB has been criticized for overstepping the boundaries of its authority, undermining the balance of rights and obligations of member states, by denying them the pursuit of domestic policy goals.<sup>43</sup> This issue of overstepping comes as a result of the judicialization of politics, which has extended the WTO’s mandate to areas of domestic regulations under the control of the state, thus the rulings in some of the high profile cases noted above (e.g. *US-Shrimp-Turtles*) have been considered an ‘intrusion into the cultural traditions and basic habits of Member States’ citizens’.<sup>44</sup> Finally, when commenting on the ruling of *US-FSC*, Barfield argues for a major change in the mindset and intellectual isolation of the DSB, as the case shows that the adjudicators, ‘demonstrated a stunning technocratic determination to barrel forward with their own pet legal theories and ignore the political history and context of the issues at hand’.<sup>45</sup> Overall, a number of issues remain largely unresolved concerning the efficacy of DSB, and further

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<sup>40</sup> James Flett, ‘Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence’ (2010) *Journal of International Economic Law* 287.

<sup>41</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of World Trade Organization: Text, Cases and Materials* (3rd edn, Cambridge University Press 2013) 304 citing Barfield (n 38) 1-68.

<sup>42</sup> Joost Pauwelyn, ‘Enforcement and Countermeasures in the WTO: Rules-Toward a More Collective Approach’ (2000) *The American Journal of International Law* 335; James Cameron and Kevin Gray, ‘Principles of International Law in the WTO Dispute Settlement Body’ (2001) *International and Comparative Law Quarterly* 248.

<sup>43</sup> Gary Sampson, ‘The Future of the WTO in World Economic Affairs’ (2005), *World Trade Review* 419. See the DSB recent debate on the appointment and reappointment of two members of the AB, where the US objected to the reappointment of Mr. Chang because of his judicial activism, see WTO Members Debate Appointment/reappointment of Appellate Body Members <[https://www.wto.org/english/news\\_e/news16\\_e/dsb\\_23may16\\_e.htm](https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm)> accessed 24 May 2016; FT View, ‘Washington Threatens to Undermine the WTO’ *Financial Times* (London, 1 June 2016); US Ambassador to the WTO and trade Counsel reply to FT: Michael Punke and Tim Reif, ‘Problem of Over-reach by Appellate Body has Become More Serious’ *Financial Times* (London, 6 June 2016).

<sup>44</sup> Amrita Narlikar, *The World Trade Organization: A Very Short Introduction* (Oxford University Press, 2005) 92-94 (emphasis added).

<sup>45</sup> Claude Barfield, ‘Should the WTO Determine US Tax Policy?’ (7 July 2004) <<https://www.aei.org/publication/should-the-wto-determine-u-s-tax-policy/>> accessed 18 December 2012.

analysis is therefore required to determine whether DSB is performing a successful enforcement role.

Chapter One focuses on the concept of compliance in public international law, with special reference to the WTO, and will further deconstruct DSB to evaluate its compliance record, along with its rules and procedures. Chapter Four will also revisit the DSB efficacy claim with more revealing statistics about the recorded disputes, followed by a comparative analysis between the DSB and three international law compliance regimes. However, the defects of DSB compliance procedures begs the question, that *if compliance was not intended to be effectively achieved, how can the WTO as an institution, endowed with legislative and administrative powers, improve compliance with WTO law*. The above analysis highlights the need to incorporate an encompassing concept of international law to examine compliance with WTO law. This thesis employs Brunnée and Toope's theory of interactionalism, and the interactional legal theory of Lon Fuller by applying them to the WTO rules and practice of compliance. Merely highlighting the defects of DSB, without providing further analyses of how, and where, compliance within the WTO apparatuses can be improved, would lead to an incomplete unoriginal thesis. The following part will discuss a number of reasons for the choice of interactionalism as the apt international compliance theory.

### **1.3 Why is Interactionalism Apt for Analysing Compliance with WTO Law?**

The analytical *approach* of this thesis can be introduced as follows: An examination of the internal and external influences on the law-making and enforcement under the GATT and the WTO can only be done by using an analytical-framework or an authoritative mechanism. This is because the application of a framework that is based on a complete theory of law will provide an original and comprehensive assessment of the concept of compliance with the international trade rule of law. There are generally accepted economic and political theories of the WTO Agreement, but not a legal theory of 'what the WTO law *is* and what it *should be*'.<sup>46</sup> The application of interactionalism is to fill this void to better understand the WTO law and practice of compliance, and provide effective remedies for their

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<sup>46</sup> Chios Carmody, 'A Theory of WTO Law' (2008) *Journal of International Economic Law* 527. See Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing 2012) 4-11.

defects. Brunnée and Toope applied interactionalism to climate change, use of force, and torture, so it is the first time the theory, including its constitutive element of interactional law, is applied to the WTO law, which supports this thesis claim of originality. The three interlinked elements of interactionalism are best exemplified as law-making in a circular motion, starting with ‘shared political and legal understandings’, that meet the Fullerian ‘principles of legality’, and which become enmeshed in ‘a practice of legality’, all gravitating around the ideal of ‘fidelity to law’.<sup>47</sup> A rule shall remain ‘reflective’ of substantive shared understandings, conform with legality principles, and get ‘embedded in a practice of legality’ to attract adherence.<sup>48</sup>

The connection between interactionalism’s elements highlight their role in improving compliance, as a rule that has not been supported by actors, does not meet the criteria of legality, and has not been adopted in practice will become ineffective. However, there are four means of providing an answer to the above question on why interactionalism is applicable. They reveal that the theory will: (1) provide a historically accurate explication, avoiding the disagreements of the legalist and anti-legalist scholars on trade sanctions; (2) will explain the ongoing evolution of WTO law in the form of informal rule-making; and (3) will (for the purposes of this thesis) provide an original account. The first reason concerns the peculiarity of the history of WTO law that requires a mechanism appreciating both the economic and legal inputs into the multilateral trading system, and explains the sources of tension between ‘creeping legalism’ and economic pragmatism.<sup>49</sup> Early GATT specialists and practitioners noted the frustration behind diplomats’ resistance to the legalization of GATT in the late 1970s and 1980s, due to their fear that legalization had the potential to reduce efficiency and restrain the flexibility required to conduct trade relations.<sup>50</sup> Anti-legalist scholars affirm that both GATT and WTO have

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<sup>47</sup> Brunnée and Toope, *An Interactional Account* (n 12) 33-55.

<sup>48</sup> *ibid* 123.

<sup>49</sup> See Joost Pauwelyn, ‘The Calculation and Design of Trade Retaliation in Context: What is the Goal of Suspending WTO Obligations?’; John Jackson, ‘Comment on Chapter 2’; Alan Sykes ‘Comment on Chapter 2’ in Chad Bown and Joost Pauwelyn, *The Law Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2013) 34, 66,70.

<sup>50</sup> Robert Hudec, ‘GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade’ (1971) *Yale Law Journal* 1299; Robert Hudec, ‘Review Article : Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization’ (2002) *World Trade Review* 211; Ernst-Ulrich Petersmann, ‘The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public

inherently economic objectives, and the pursuance of these objectives can only be achieved through economic means, rather than verdicts that are either legal or illegal.<sup>51</sup>

Given the significance of such conflicting claims (both of which fail to assist in the explanation of the enforcement of world trade law), interactionalism begins the analysis of the history of WTO law from one important premise: as with the treatment of the concept of law, the ‘legality’ concept as derived from ‘law’ (particularly in the context of the WTO) should be viewed as an ‘essentially ambiguous concept’.<sup>52</sup> Van der Burg maintains that:

An essentially ambiguous concept is a concept which refers to a dynamic phenomenon that can only be described and modelled in at least two different ways that are each essentially incomplete and that are partly incompatible with each other.<sup>53</sup>

Therefore, an ambiguous concept, such as *law*, can only be explained by the ‘legal interactionism’ that goes beyond the view of law as either a product (i.e. doctrine) and/or practice (i.e. process) and provide a ‘pluralistic’ account that contains many characteristics of law as a dynamic phenomenon.<sup>54</sup> Thus, law, like that of the WTO, should be seen as a gradual concept, and contain a plurality of sources, including interactional law (in the Fullerian sense), as well as enacted law.<sup>55</sup> For the purposes of this current thesis, only Van der Burg’s definition of ‘an essentially ambiguous concept’ is relevant for the purpose of interactionalism’s explanation of the world trade law as an interaction between law as a product, and as a process, in accordance with Fuller’s jurisprudence.<sup>56</sup> Van der Burg can be considered justified in stating that ‘the idea of essential ambiguity does not exclude the possibility that law as a product, and law as practice, have at least some characteristics in common that

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Reason’ in the GATT/WTO Dispute Settlement System’ in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015) 182.

<sup>51</sup> See Eric Posner and Alan Sykes, ‘Efficient Breach of International Law: Optimal Remedies “Legalised Noncompliance” and Related Issues’ (2011) *Michigan Law Review* 243; Warren Schwartz and Alan Sykes, ‘The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System’ (2002) *Journal of Legal Studies* 170.

<sup>52</sup> Wibren Van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Routledge 2014) 40.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.* 15.

<sup>55</sup> *ibid.*; Lon Fuller, ‘Human Interaction and the Law’ (1969) *American Journal of Jurisprudence* 1.

<sup>56</sup> Van der Burg, *The Dynamics of Law and Morality* (n 52) 65-75.

determine the distinctively legal'.<sup>57</sup> Regarding law as an ambiguous concept will assist in going beyond the legality debate, and advance the analysis of WTO law and practice of compliance.

The second reason for employing interactionalism, concerns the particular relevance of Fuller's jurisprudence to the subject of this current thesis for the following reasons. Firstly, on a philosophical ground, Fuller's clear distinction between the morality of aspiration and the morality of duty (and the limits and connections between these two types of morality), are illuminating for their relevance to the formation of trade agreements.<sup>58</sup> Fuller illustrates this distinction by recalling the relationship between the economics of exchange (i.e. the economic counterpart of duty) and of marginal utility (i.e. the economic counterpart of aspiration). Fuller further identifies a requirement for the economics of exchange (based on the fidelity to contract and respect for property) to be balanced with an effort to ensure the most effective use of economic resources.<sup>59</sup> Thus, the marginal utility ideal will be frustrated, and the regime of exchange will collapse, should the rules of property and contract become too rigid or too restrictive.<sup>60</sup> Fuller terms this challenge of setting the appropriate balance between aspiration and duty (i.e. 'supporting structure and adaptive fluidity') as being 'shared by morals, law and economics', and best exemplified by the economics of trade.<sup>61</sup> Van der Burg, in order to illustrate this point, cites Jackson for his reliance on the distinction between 'norms of aspiration' and 'norms of obligation', saying:

An example in international law is Jackson's analysis of World Trade and the GATT. Jackson argues that there is a danger in mixing 'norms of obligation' with 'norms of aspiration' in the same instrument. According to Jackson, states have an obligation to fulfil their treaty agreements, but if treaties contain norms of aspiration, there may be the risk that states treat their strict obligations following from those treaties as mere aspirations.<sup>62</sup>

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<sup>57</sup> *ibid* 79.

<sup>58</sup> Fuller, *The Morality of Law* (n 12) 29.

<sup>59</sup> *ibid*.

<sup>60</sup> *ibid*.

<sup>61</sup> *ibid*.

<sup>62</sup> Wibren Van der Burg, 'The Morality of Aspiration: A Neglected Dimension of Law and Morality' in Willem Witteveen and Wibren Van der Burg, *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press 1999) 170 (hereinafter *Rediscovering Fuller*) citing John Jackson, *World Trade and the Law of GATT* (Bobbs Merrill 1969) 761-762.



The unique benefits of Fuller's writings to this thesis are demonstrated by the fact that Fuller's jurisprudence is grounded in the economics of trade, and touches on a delicate issue of the formation of world trade agreements. Following on from this point, the second reason for the relevance of Fuller jurisprudence concerns its particular attention to 'reciprocity' in law-making and administration, and the concept of 'legality' in adjudication. Fuller's first degree was in economics, leading to his respect for the role of 'reciprocity' (as understood in the society of economic traders) in sustaining a good legal order.<sup>63</sup> Therefore, since reciprocity is a central mechanism for compliance with international law, the prominent role of reciprocity in Fuller's jurisprudence also makes the theory more pertinent to the analysis of compliance with WTO law.<sup>64</sup> Interactionalism maintains that, 'it is *interaction* that makes the relationship between [shared understandings, Fuller's criteria of legality, and the community of legal practice] 'horizontal' and 'reciprocal', *and is the core of 'legal legitimacy'*'.<sup>65</sup>

Fuller's jurisprudence, however, is novel for its regard of 'legality' as a gradual concept, in that both its existence and survival depend on meeting, and maintaining, the eight constitutive elements of legality, namely, 'generality, promulgation, non-retroactivity, clarity, non-contradictory, not asking the impossible, constancy, and congruence between declared rules and official action'.<sup>66</sup> Brunnée and Toope note that, when applied to test the legality of an international system of rules, these elements are able to 'force a clear-headed assessment of the posited rule', to distinguish between a legal and social rule that has the ability to become legal over time, depending on the level and type of interaction of the relevant actors.<sup>67</sup> The elements have proven to be 'sufficient conditions of regulative quality' for assessing an adjudicative body and the necessary precepts for procedural justice.<sup>68</sup> They have

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<sup>63</sup> Fuller, *The Morality of Law* (n 12) 23-27; Lon Fuller, 'Freedom-A Suggested Analysis' (1955) *Harvard Law Review* 1305; Lon Fuller, *Anatomy of the Law* (Penguin Books 1971) 118.

<sup>64</sup> See *ibid* 88-92. Also rational choice theorists regard 'reciprocity' as performing a central role in compliance. See Anne Van Aaken, 'Behavioral International Law and Economics' (2014) *Harvard International Law Journal* 421.

<sup>65</sup> Brunnée and Toope, *An Interactional Account* (n 12) 54 (emphasis added).

<sup>66</sup> See Fuller, *The Morality of Law* (n 12) 39, 91-94.

<sup>67</sup> Jutta Brunnée and Stephen Toope, 'History, Mystery, and Mastery' (2011) *International Theory* 348.

<sup>68</sup> Thomas Schultz, 'The Concept of Law in Transnational Arbitral Legal Orders and Some of its Consequences' (2011) *Journal of International Dispute Settlement* 59; Ralf Michaels, 'A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contribution to the Jurisprudence of

also exhibit the character of neutrality required by an international adjudicative system, and can be regarded ‘as something approaching a full-fledged sources theory, combining formal and substantive criteria for the identification of legal rules’.<sup>69</sup> Adherence to the principles of legality will promote stability and predictability which are central to the WTO missions of rule-making and dispute resolution. Because, the Fullerian notion of law mediates stability and change in distinctive ways, and is capable of being illustrated by the characteristics of the legality principles. Interactionalism claims that these principles account for the law’s relative steadiness, as they promote stability, and guide (or even constrain) change.<sup>70</sup> For example, over time, the requirements of *generality*, *clarity* and *constancy* address the need for the predictability and stability of law.

The requirement that *law does not require the impossible* fosters stability, as demands that are unrealistic prompt noncompliance. *Promulgation* promotes stability and facilitates change that is both predictable and orderly. *Non-retroactivity* and *non-contradiction* guard against a particular form of change with the potential to lead to the disregarding of the law. Furthermore, the eighth criterion, *the congruence between official action and the law*, has a unique characteristic, which reveals the circumstances required for law to be stable, and assists in the explanation of the ways in which it changes over time. This is due to the fact that, according to interactionalism, the congruence criterion has a special connection to the third element of interactionalism, the practice of legality.<sup>71</sup> The congruence requirement reveals that, without sufficiently dense interactions between participants in the legal system, law as a product or doctrine (i.e. the positive law) will be ineffective. For this reason, the congruence highlights that stable practices of legality are required to maintain norms, as a lack of congruence can erode the law. However, it should be noted that these requirements of legality do not stifle change or evolution of the law, as they need to be rooted in the framework of interactionalism, which promotes wider interactions of social actors, who demand transparency and accountability.

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Transnational Dispute Resolution-A Reply to Thomas Schultz’ (2011) *Journal of International Dispute Settlement* 417; Colleen Murphy, ‘Lon Fuller and the Moral Value of the Rule of Law’ (2005) *Law and Philosophy* 239.

<sup>69</sup> Jan Klabbers, ‘Constitutionalism and the Making of International Law: Fuller’s Procedural Natural Law’ (2008) *No Foundations: Journal of Extreme Legal Positivism* 48; John Allison, ‘Legal Culture in Fuller’s Analysis of Adjudication’ in Witteveen and Van der Burg, *Rediscovering Fuller* (n 62).

<sup>70</sup> Jutta Brunnée and Stephen Toope, ‘Interactional International Law: An Introduction’ (2011) *International Theory* 307.

<sup>71</sup> *ibid.*

Finally, Fuller's jurisprudence remains relevant, due to its sensitivity to the difference between 'creeping legalism', 'galloping legalism', and 'polycentric' problems in its treatment of the two principles of association by reciprocity and association by common aims, and (more importantly) the limits of adjudication.<sup>72</sup> Given the constant tension between legalism and economism in the WTO, interactionalism's careful handling of 'legality' will loosen this tension, and provide a balanced analysis that gives 'both legalism and diplomacy their due'.<sup>73</sup> The third reason for the relevance of interactionalism concerns the rising phenomenon in the WTO law of informal rules and international standards, which require an analytical framework that explains the evolution of those rules and standards to become an integral part of the formal rule-oriented structure. Pauwelyn's explanation of this phenomenon lacks a framework that demonstrates the ways in which these rules and standards are created, legalized, and enforced.<sup>74</sup> It is for this reason that interactionalism is appropriate to describe this phenomenon, particularly through the use of the element of 'shared understandings', and explaining the ways in which these rules should attract compliance.

To conclude with the fourth reason, interactionalism will also lead to novel recommendations for reforming the DSB other than those provided by scholars, who are focusing on the legalist/anti-legalist dichotomy, and whose recommendations are limited to either the introduction of monetary compensation, or the validation of deviations.<sup>75</sup> This thesis's claim of originality is reflected in its timing and content. With regard to timing, this thesis is the first work to apply interactionalism to world trade law, at a critical time where the WTO legitimacy is at risk, compliance rules are misconceived, and the problems of procedural-delay and delayed-compliance are

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<sup>72</sup> Lon Fuller, 'Two Principles of Human Association' and 'The Forms and Limits of Adjudication' in Kenneth Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (revised edn, Hart Publishing 2001) 81-139.

<sup>73</sup> See Robert Howse's obituary of Robert Hudec <<http://www.nytimes.com/2003/03/31/business/robert-e-hudec-68-expert-on-global-trade-law-dies.html>> accessed 25 October 2014.

<sup>74</sup> Joost Pauwelyn, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties' (2014) *Journal of International Economic Law* 739. cf Shaffer, Wolfe and Le who adopted the Fullerian *interactional view of law* to explain the law of subsidies, see Gregory Shaffer and others, 'Can Informal Law Discipline Subsidies?' (2015) *Journal of International Economic Law* 711.

<sup>75</sup> William Davey, 'Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions' (2005) <<http://www.rieti.go.jp/publications/dp/05e013.pdf>> accessed 06 January, 2015; Claus Zimmermann, 'Toleration of Temporary Noncompliance: The Systemic Safety Valve of WTO Dispute Settlement Revisited' (2011) *Trade, Law and Development* 382.

worsening. The legal maxim, *justice delayed is justice denied*, is pertinent for deconstructing the problems of delayed-compliance and absence of compensation. And with regard to content, this thesis presents an encompassing analytical-framework for assessing compliance, which has not been used in world trade law literature.

Due to the reasons outlined above, this thesis incorporates interactionalism, and is *structured* as follows: Chapter Two will analyse the concept of compliance with public international law. The main three reasons for starting with this chapter are: 1) to highlight the influence of the debate on compliance with international law on world trade law, 2) to introduce interactionalism's account of international legal obligations and compliance, 3) to underline the relationship between international law and world trade law by discussing shared issues concerning enforcement. Chapter Three will apply the first element of interactionalism, *the shared legal and political understandings on compliance*, to probe the WTO legal obligations. Chapter Four will evaluate the legal character of the WTO DSB rules and procedures in accordance with *the Fullerian principles of legality*. Chapter Five will discuss the third element of interactionalism, *a practice of legality*, within the WTO context. Chapter Six will consist of a conclusion of the main findings, followed by the actionable policy recommendations of this thesis.

## **Chapter 2: Compliance with Public International Law: with Reference to WTO Law**

### **2.1 Introduction:**

Ever since Jeremy Bentham coined the term *international law* in 1789 as a preferable term to the old phrase of *the law of nations*, scholarly writings and debates have shaped international law explaining its sources, principles, and peremptory norms. For instance, emphasizing the role of scholars, Weeramantry said:

The revolutionary force that will bring about fundamental change in international law will come not from armed might or economic force but from the world of scholarship. It is scholars alone who will be able to illuminate the principles which lie at the foundation of international law and show how universal they are. It is scholars alone, who can stimulate a wider popular perception of these truths.<sup>1</sup>

Indeed, scholars' contributions to the field and its subfields are noticeable as will be seen in subsection 2.2 below on *The Evolution of Public International Law*. The process of states accepting international law as an enforceable law and internalising its rules was greatly influenced by an old scholarly debate regarding International Relations (IR) certain theories of (realism, constructivism, and institutionalism), and traditional legal theories such as consent, and treaties, together with the legitimacy theory.<sup>2</sup> There are two reasons for discussing IR theories, the first is as Koh said agreeing with Keohane that 'international law and international relations have been two academic fields divided by a common subject: the study of international cooperation'.<sup>3</sup> Second is that world politics is 'in the realm of theories of state behaviour',<sup>4</sup> which will determine how states ought to comply with or react to international law rules either as enforceable legal rules, or merely positive morality

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<sup>1</sup> Christopher Weeramantry, *Universalising International Law* (Brill, 2004) 5-6.

<sup>2</sup> Andrew Guzman, 'A Compliance-Based Theory of International Law' (2002) *California Law Review* 1823.

<sup>3</sup> Robert Keohane, 'International Relations and International Law: Two Optics' (1997) 38 *Harvard International Law Journal* 487 cited in Harold Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 623.

<sup>4</sup> Harvey Glickman, 'Neo-Neo-Realism: A Note on Contemporary International Relations Theory and Foreign Policy Today' (June 2010) <<http://forumonpublicpolicy.com/spring2010.vol2010/spring2010archive/glickman.pdf>> accessed 8 March 2013.

rules.<sup>5</sup> This leads to a relevant question regarding enforcement, namely, ‘why do states comply with international law in the absence of robust enforcement mechanism?’.<sup>6</sup> A brief discussion of the aforementioned IR theories together with the relevance and importance of interactional international law theory (hereinafter *interactionalism*) will answer this question.<sup>7</sup> Interactionalism combines the IR theory of constructivism, Lon L. Fuller’s interactional legal theory, and Emanuel Adler work on transnational ‘communities of practice’.<sup>8</sup> This theory has shown to be able to explain the contemporary practice, the strengths and weaknesses of international law, and the concept of obligation in international society in the areas of climate change, prohibition of torture, and the use of force.<sup>9</sup> For the purpose of this thesis, interactionalism will be adopted to examine the concept of compliance with the World Trade Organization (WTO) law, mainly under the WTO Dispute Settlement Body (DSB) rules and procedures.

It is true that international law as *law* in relation to the criminal responsibility of the states or non-state actors, in the conduct of war or the prevention of extraterritorial human rights violations, is underdeveloped. Especially regarding the law of war, it will remain the case that: ‘international law is one more weapon in the pragmatic political calculations of the great powers’.<sup>10</sup> However, international law and IR scholars were able to show the importance of international law especially in relation to states pursuance of foreign trade and collective security. These historical episodes will be briefly explained in this chapter with regard to the United Nations (UN)

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<sup>5</sup> It was John Austin who said ‘the power of the government is incapable of legal limitation’ and considered the ‘law-like’ behavior among nations as only respect for ‘positive morality’ ‘i.e. mere opinions and sentiments among nations’ not legal rules that have different kinds of consequences when violated. See Roger Fisher, ‘Bringing Law to Bear on Governments’ (1961) *Harvard Law Review* 1130.

<sup>6</sup> Karen Knop, ‘Statehood: Territory, People and Government’ in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) (hereinafter *The Cambridge Companion*).

<sup>7</sup> Jutta Brunnée and Stephen J. Toope, ‘Interactional international law: An Introduction’ (2011) *International Theory* 307.

<sup>8</sup> Alexander Wendt, *The Social Theory of International Politics* (Cambridge University Press 1999); Ian Hurd ‘Constructivism’ in Christian Reus-Smit and Duncan Snidal (eds), *Oxford Handbook of International Relations* (Oxford University Press 2008) 298; Lon Fuller, *The Morality of Law* (rev edn, Yale University Press 1969); Emanuel Adler, *Communitarian International Relations: Epistemic Foundations of International Relations* (Routledge 2005); Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press 1998).

<sup>9</sup> Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) (hereinafter, *An Interactional Account*).

<sup>10</sup> Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007) 216.

mandate that prevent unilateralism, and the WTO law that promotes fair trade. The connection between the UN Charter and its conventions, and the WTO law is very strong, since international agreements have had a positive bearing on the WTO, and subsequently the WTO continues to play an important role in global governance. It was the developments of international law under the UN, and the gradual legalisation under the General Agreement on Tariffs and Trade (GATT) (1948-1994), that led to the creation of the legalistic structure of the WTO.

Nonetheless, there is one problematic area of law that scholars from both fields of ‘the study of international cooperation’, strongly disagree on or have failed to explain: the price of compliance with international law of war or trade. There are a number of disputed issues relating to compliance with public international law. For example, can on the basis of *erga omnes*, i.e. obligations owed by states towards the community of states as a whole, solidarity countermeasures be imposed to sanction the offending state(s)?<sup>11</sup> An attempt to shed some light on similar questions will be provided in subsections 2.2, and 2.3 under the heading *The Enforcement of Public International Law*. Nonetheless, the issue of direct applicability of the contract theory of efficient breach of public international law, including WTO law, clearly stands out in the literature. For instance, Posner and Sykes made the controversial claim that ‘in the absence of welfarist justification for compliance with international law, international law becomes per se irrelevant to the question of how nations should act’, hence ‘a variety of circumstances arise under which violations of international law are desirable from an economic standpoint’.<sup>12</sup>

This economic standpoint entails that the State can deviate from international law rules as long as it is willing to pay the price for non-compliance and will not undermine the stability and integrity of the globalised system of rules; for example, the world trading system.<sup>13</sup> Rationalist/realist scholars justify their argument based on the absence of *welfarist* justification of international law and most of the time on the weakness of the public international law enforcement mechanism, citing the WTO dispute settlement system as an example. It is worth noting that the exponents

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<sup>11</sup> See Frédéric Mégrét ‘International Law as Law’ in *The Cambridge Companion* (n 6).

<sup>12</sup> Eric Posner and Alan Sykes, ‘Efficient Breach of International Law: Optimal Remedies “Legalised Noncompliance” and Related Issues’ (2011) *Michigan Law Review* 243; and by the same authors, *Economic Foundations of International Law* (Harvard University Press 2013).

<sup>13</sup> *ibid* and Warren Schwartz and Alan Sykes, ‘The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System’ (2002) *Journal of Legal Studies* 170.

of efficient breach have mainly relied on the WTO *acquis* to introduce their theory to other subfields of public international law. To deconstruct this argument, subsection 2.3.1 will first make the argument that WTO is not separate from public international law. Subsection 2.3.2 will give a brief account of the DSB in the WTO law literature and how the ineffectiveness of the DSB has led to the efficient breach claim. Subsection 2.3.3, however, will deal with the issue of *Legalisation of Efficient Deviations in the WTO Law*. Overall, this chapter will try to answer this question: Does the lack of ‘welfarist grounds’ justify an efficient breach of existing GATT/WTO rules to serve member states self-interest objectives?

After dealing with the topic of WTO law enforcement, subsection 2.4 will provide a summary of the lessons learned from the evolution of public international law. Finally, subsection 2.5 will provide a conclusion. However, before illuminating compliance with public international law, and assessing whether the present chapter will do justice to this issue, two preliminary points should be acknowledged. Firstly, in his book, *Improving Compliance with International Law*, Fisher distinguished between two kinds of compliance by claiming that an international law enforcement system ‘should concentrate on gaining maximum compliance with the authoritative decisions that apply the law to particular cases of alleged violations (first-order compliance), rather than on causing compliance with the standing-rules of law themselves (second-order compliance)’.<sup>14</sup> For practical reasons this distinction between *first order* and *second order compliances* will be adopted in this chapter and throughout this thesis to show the relevance of authoritative decisions of international courts and tribunals.

This distinction will clarify two points, namely how the decisions and rules ought to be respected by states, and their impact on fostering compliance with international law. Another reason for looking at these decisions is related to the practice of law because ‘the authoritative decisions are the external surface –the ‘canvas’- that is provided to lawyers by international facts, the content of which can be professionally verified’.<sup>15</sup> Furthermore, Fisher’s distinction is constructive for understanding the constitutive elements of compliance with international trade rule of law’s two key aspects of ensuring compliance with WTO rules and rulings.

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<sup>14</sup> Roger Fisher, *Improving Compliance with International Law* (The University of Virginia Press 1981) 163.

<sup>15</sup> Martti Koskenniemi, ‘International Law in the World of Ideas’ in *The Cambridge Companion* (n 6) 60.



Secondly, despite the international legal controversies around themes such as *sovereignty* which try to undermine international law authority, it is this chapter's premise that international law strives to 'achieve an orderly world and progress toward fulfilment of humanity's shared goals, including prosperity'.<sup>16</sup> If 'the cure for the ailments of democracy' as John Dewey famously said 'is more democracy', then the same is true that the cure for the ailments of international law is more international laws of cooperation and sanctions which ensures fairness, equality, and justice for all. Finally, it is also worth noting that international law 'does not contain a readymade blueprint for a better world [but] instead it contains arguments and positions, precedents and principles that may be employed to express contrasting interests or values in a relatively organised way'.<sup>17</sup> The cooperative organizing mission of international law will be explained in the brief account of the evolution of public international law, and the enforcement foundation of its subfield of world trade law.

## **2.2 The Evolution of Public International Law:**

Historically, recognition of international law as governing the relations between sovereign states has evolved in large continents that were torn apart by deadly wars over boundaries, ethno-religious ambitions, or control of colonies. For example, since the rise of the nation state there had been two debates over the divisibility of power 'first concerns the effect of recognition of a government or of a new state by external actors (...) the second debate about international ordering that would be taken up by jurists concerned the question of how to prevent any one state from becoming a new imperial power'.<sup>18</sup> These debates are still discussed today especially in regional forums of community of states, based on their understanding of international law that has become institutionalised under the auspices of international organisations.<sup>19</sup> However, the theoretical approaches to international law are identified by the different theories of the study of IR. For instance, for IR realists like Carr, Morgenthau and Waltz who see anarchy as the fundamental organising concept of IR say, 'states are the only significant actor in world politics,

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<sup>16</sup> Mary O'Connell, *The Power and Purpose of International Law* (Oxford University Press 2011) 14.

<sup>17</sup> Koskenniemi (n 15) (emphasis added) 59.

<sup>18</sup> Anne Orford, 'Constituting Order' in *The Cambridge Companion* (n 6) 277-280.

<sup>19</sup> Jan Klabbers, 'International Institutions' in *The Cambridge Companion* (n 6) 243.

military forces their major instrument, and security their major goal'.<sup>20</sup> Nonetheless, the world has moved beyond realism because:

The theory has become a hindrance rather than a help in structuring theoretical debates, guiding empirical research, and shaping both pedagogy and public discussion. It no longer helps to signal the analyst's adherence to specific deeper assumptions implicated in any empirical explanation of concrete events in world politics.<sup>21</sup>

However, institutionalists like Keohane, Snidal and Oye also view the state as the primary international actor. That said, unlike realists, they consider that institutionalism's major contribution to the field of IR relates to the fact that it can show, despite the lack of a centralised lawmaker and law enforcer, how states can productively and fairly cooperate with each other for a more prosperous and safer world.<sup>22</sup> Nonetheless, when early scholars of traditional legal theories tried to bring law to bear on governments, realists expressed outright hostility toward international law or any form of rules which the world community was trying to introduce to hold sovereign states responsible for their decisions and actions.<sup>23</sup>

For scholars who are inspired by realism like Posner, Sykes, and Goldsmith who claim to use 'rational choice theory' (hereinafter the rationalists) to understand states' behaviour, and after recognising the authority of international law, they believe that states should comply with international law *only if it is in their national interests*.<sup>24</sup> Firstly, by relying on Austin who considered law as 'the command of a sovereign backed by sanctions' meaning that for him 'in the world of states, no state was sovereign over the others, so no state could issue commands, let alone sanction noncompliance', the rationalists said international law is a collection of positive morality rules.<sup>25</sup> Although international law has evolved overtime owing to the writings of a numerous scholars,<sup>26</sup> but there always has been a growing trend among

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<sup>20</sup> Harry Kreisler Interview with Robert Keohane, Professor of Political Science, Duke University (University of California, Berkeley, 9 March 2004); Robert Powell, 'Anarchy in International Relations Theory: The Neorealist-neoliberal Debate' (1994) *International Organization* 313.

<sup>21</sup> Jeffrey Legro and Andrew Moravcsik, 'Is Anybody Still a Realist?' (1999) *International Security* 5.

<sup>22</sup> Robert Keohane and Lisa L. Martin, 'The Promise of Institutional Theory' (1995) *International Security* 39.

<sup>23</sup> O'Connell (n 16) 60.

<sup>24</sup> Sykes and Posner (n 12); Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2005) 13.

<sup>25</sup> *ibid* 33-60 for more on Austin's theory see (n 5). See H. L. A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012).

<sup>26</sup> Significant contributions that shaped international law debating issues such as acceptance, compliance, and sanctions for noncompliance include with Emmerich Vattel's, *The Law of Nations*

contemporary realists/rationalists to consider international law too weak to command respect by governments.

Moreover, those rationalists proposed a different explanation of the field saying that ‘international law emerges from states’ pursuit of self-interested policies on the international stage’ meaning that ‘it is the product of state self-interest’.<sup>27</sup> This narrow view of international law originated from the incorrect assumption that ‘states act rationally to maximise their interests’ and in doing so the states leaders and citizens’ preference for international law compliance must be contrasted with preferences for other goods; for example, bringing security or economic growth.<sup>28</sup> However, the above objections to the role of international law can be summarised in that they first consider international law too weak to command respect, and if it can be respected, either in acquiring first-order or second-order compliance, it is unenforceable and therefore should be subject to the states’ self-interests objectives. As mentioned earlier, realists/rationalists continuously undermine international law by saying that, ‘international law emerges from states acting rationally to maximise their interests’.<sup>29</sup> For instance, they claim states comply with international law not because they, ‘have internalised international law, or have a habit of complying with it, or are drawn by its moral pull, but simply that states act out of self-interest’.<sup>30</sup> But the question is *why states voluntarily comply with international rules and rulings despite their self-interests goals.*

### **2.2.1 Why Do Nations Comply with International Law?**

The realists/rationalists’ claim that compliance with international law will badly affect the state’s self-interest objectives, and that noncompliance, temporary or permanent, should be the appropriate response to any international rule or authoritative decision. However, even if international law is, as realists claim *an epiphenomenon of interests*, why there has been a proliferation of international rules, and why humans wasted so much on international law? Goldsmith and Posner reached their conclusion regarding compliance through the use of rational choice

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(1758); Jeremy Bentham book *The Introduction to the Principles of Morals and Legislation* (1789); Hans Kelsen, *Principles of International Law* (Robert Tucker (ed), 2nd edn, Rinehart and Winston 1966).

<sup>27</sup> Goldsmith and Posner (n 24) 7-9.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid* 225-226.

methodology which utilises a model from economics to evaluate the state's conduct in terms of potential gains and losses with no regard to the vital type of loss, reputational loss.

With this said, scholars disagree about the explanatory elements associated with reputational loss, such as to whom the relevant reputation belongs, the effect of reputational sanctions, and its link to noncompliance. However, *reputational loss* is important for explaining compliance with international law as will be discussed below. Although, Goldsmith and Posner acknowledge that government officials and international organisation personnel are constantly invoking international law because negotiated treaties have influenced state behaviour, but they dismiss this phenomenon as 'cheap talk'.<sup>31</sup> However, the dismissal of an individual's own explanation of his or her conduct is wrong, and no countries' leaders when they seriously speak about their rights or justify their actions under international law, want their claims to be understood as 'cheap talk'.<sup>32</sup> Moreover, Goldsmith and Posner claimed that there is no moral obligation for states to comply with international law because the law conflicts with the principle of democratic sovereignty. Although they say humanity has not lived under moral laws for most of the history, but they overlooked the role of states' voluntary direct participation in international law-making.<sup>33</sup>

However, if domestic wide participation in law-making is important because it makes the law *morally acceptable*, then it is 'logical to accept the law emanating from a worldwide participatory process to be at least as morally compelling, if not more so than that developed in one state'.<sup>34</sup> Such an important role of active participation was further clarified by interactionalism's premise that 'interaction' in law-making makes a legitimate rule, and once this rule meet Lon Fuller's eight constitutive elements of legality, it will tend to attract its own adherence.<sup>35</sup> Furthermore, in answering the question '*why do nations obey international law?*', Koh stated that 'the moral, normative, and legal reasons' that create the state's sense of obligation with the institution's rules are 'conjoined in the concept of

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<sup>31</sup> *ibid* 174.

<sup>32</sup> O'Connell (n 16) 108-130.

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid*.

<sup>35</sup> See Brunnée and Toope, *An Interactional Account* (n 9).

obedience'.<sup>36</sup> Koh further explained that 'a transnational actor's moral obligations to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system'.<sup>37</sup> Moreover, international politics and the practice of the international community of states in creating and enforcing binding legal rules, provide an explanation of the power and purpose of international law. For instance, in response to the realists' argument that legal obligations 'must yield to the national interests of a state', Joyner said:

Such a view denies the existence of a world community and the validity of international law as binding legal rules. Legal rules for international relations can be better understood and appreciated by realizing that they arise chiefly as a result of events, rather than as a cause. The law among states is a social science that derives its validity from a dominant consensus among states. International legal rules undergirded not by pillars of support from a few national politics; rather, their lines of force and obligations stem from the center of international social gravity- that is, from the conduct and behaviour of all states themselves. Consequently, international rules serve as the foundation that lends structure, equilibrium, and order to the process of interstate politics.<sup>38</sup>

The weakness of Goldsmith and Posner's argument, which puts forth that the state party to treaty can choose whether or not to comply with international law, such as the convention against torture, is evident when considering the views of other rationalists. For example, Guzman and Aaken said that Goldsmith and Posner have a 'biased understanding of rationality' which tries to 'deny international law any normative force', and thus makes their book's argument 'inconsistent' and 'simplistic'.<sup>39</sup> Indeed, a number of scholars responded with explanations about the negative consequences of noncompliance. It has become the incentive for many scholars discussing compliance with international law to start with the hopeful approach to this issue by saying that the interdependence and shared interests among states, which are becoming obvious in a globalised world, will, over time, lessen the

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<sup>36</sup> Harold Koh, 'Review Essay: Why Do Nations Obey International Law?' (1997) *The Yale Law Journal* 2599.

<sup>37</sup> *ibid.*

<sup>38</sup> Christopher Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield Publishers 2005) 37.

<sup>39</sup> Anne Van Aaken, 'To do Away with International Law? Some Limits to the Limits of International Law' (2006) *European Journal of International Law* 289; Andrew Guzman, 'The Promise of International Law' (2006) *Virginia Law Review* 533.

noncompliance problem and create a strong and useful cooperative relationships.<sup>40</sup> Fisher identified three external factors which will cause a government to respect international law and will increase first-order compliance (rulings) because of states' self-interest to comply.

First, the automatic self-interest which is derived from some rules' self-enforcing nature means that states find it in their immediate self-interest to comply with these rules, such as rules concerning the use of sea or space. The second factor is that if the state refused to comply with international law, this would badly affect its reputation in the world public opinion by giving it 'a reputation of international irresponsibility'.<sup>41</sup> This would cost it dearly in terms of its reputation for future negotiation or commercial gains as a trustworthy trade partner or an ally for maintenance of security. This is because the offending state failure to comply will lead regional or international states to question its credibility and reliability for future dealings, thus invoking with it bad social, political, and economic consequences.<sup>42</sup> Although, the particularities of state's reputation require an analysis of the factors which result in *high* or *low* reputational loss, but reputation is essential in helping the audience (other governments and non-state actors) to predict the state's future behaviour.<sup>43</sup>

The third external factor in Fisher's book is 'the concern with the consequential action by other countries' as the government respect for international rules is explained in terms of 'reciprocity'. This is explained in the government's desire for either 'gaining reciprocal compliance by setting a good example [...] fear of adverse military or other national reaction [...] fear of reciprocal noncompliance with the same obligation [...] or fear of general disregard of law'.<sup>44</sup> However, preventing a state unilateral military reaction to other states' violation of international law and introducing the imposition of economic sanction is one of the biggest achievements of the UN Charter. It is true that in some situations the UN Security Council did not see the need for the use of force on humanitarian grounds, for instance, in the case of

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<sup>40</sup> Fisher (n 14) 7.

<sup>41</sup> *ibid* 127-140.

<sup>42</sup> Rachel Brewster, 'The Limits of Reputation on Compliance' (2009) *International Theory* 323.

<sup>43</sup> Rachel Brewster, 'Unpacking the State's Reputation' (2009) *Harvard International Law Journal* 231.

<sup>44</sup> Fisher (n 14) 135-140.

Kosovo Crisis, making the effectiveness of economic sanctions improbable.<sup>45</sup> However, the benefits of the UN in providing effective participatory avenues for enforcing international law cannot be ignored. Therefore, discussion should now turn to the enforcement of public international law, which began with unilateral hostile offensive wars, later transformed into the imposition of economic sanctions, and continued to be enhanced by scholars' discussion of more deterrent enforcement mechanisms. But before discussing the role of enforcement it is helpful to explain legitimacy and legality in international law by introducing the interactional international law theory.

### **2.2.2 The Legitimacy and Legality in International Law:**

A number of scholars have responded to the realist/rationalists' misleading assumptions about the role of international law. It is worth recognizing that international law has evolved from positive morality to binding legal rules that are derived from the sources of international law of treaties, international customary law, and general principles of law. According to Howse and Teitel, what is needed in compliance studies is 'much more reflection on the properties of 'law' that makes international law distinctive as a mode of discourse' and more attention to the interpretation process.<sup>46</sup> From 1990s onward there has been a significant rise of prominent norm-oriented compliance theories of international law that were highlighted by major contributions such as Koh's 'norm internalization theory',<sup>47</sup> Franck's legitimacy theory,<sup>48</sup> and contributions by rationalist scholars who are trying to explain how international law works.<sup>49</sup> The emphasis on continuous process of argument and persuasion, 'justificatory discourse', has been the managerial school's main contribution to the study of compliance.<sup>50</sup> Also at the

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<sup>45</sup> The Independent International Commission on Kosovo in (2000) found that the NATO use of force was 'unlawful' but 'legitimate'. See Independent International Commission on Kosovo: The Kosovo Report (25 October 2000).

<<http://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>> accessed 5 April 2013.

<sup>46</sup> Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matter' (2010) *Global Policy* 127.

<sup>47</sup> See Koh (n 3).

<sup>48</sup> Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990).

<sup>49</sup> Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008).

<sup>50</sup> See Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998).

same time IR scholars have been increasingly discussing the role of international legal obligation,<sup>51</sup> and ‘legalisation’ in world politics.<sup>52</sup> For example, in 2000 the journal *International Organization* had a special issue on the concept of ‘legalization’ where the contributors tried to understand ‘the use and consequences of law in international politics’ by focusing on the processes of ‘legalization’ as ‘a particular form of institutionalisation’.<sup>53</sup> However, the story of the evolution of public international law is evident in the historical background of international rule-making, and the scholars’ identification of the principles enshrined in the international rule of law. For instance, the reason IRs and law scholars were able to show the importance of international trade rules was because the uneven distribution of the world’s people, industrial areas, and resources natural or otherwise, induced states to engage in well-regulated cooperative relationships to ensure equal and fair transnational trade for human prosperity.<sup>54</sup>

The states found that the key to start the process of ‘mutually advantageous’ trade was by institutionalising a set of rules which reduces the uncertainty by asserting that they will keep their promises in maintaining their credibility and ensuring fair share of the global markets.<sup>55</sup> Such interstates arrangements in the field of trade or any other subfield of international law is for the sole purpose of upholding ‘the international rule of law,’ which carries any one of the following three possible meanings:

First, the “international rule of law” may be understood as the application of rule of law principles to relations between States and other subjects of international law. Secondly, the “rule of international law” could privilege international law over national law, establishing, for example, the primacy of human rights covenants over domestic legal arrangements. Thirdly, a “global rule of law” might denote the

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<sup>51</sup> Christian Reus-Smit, ‘The Politics and International Legal Obligation’ (2003) *European Journal of International Relations* 591.

<sup>52</sup> Kenneth Abbott and others, ‘The Concept of Legalization’ (2000) *International Organization* 401.

<sup>53</sup> Judith Goldstein and others, ‘Introduction: Legalization and World Politics’, (2000) *International Organization* 385.

<sup>54</sup> Harold Joseph Heck, *Foreign Commerce* (reprint edn, Literary Licensing LLC 2012) 4. On the importance of regulations for states cooperation see Robert Keohane, ‘Governance in a Partially Globalised World’ (2001) *American Political Science Review* 1.

<sup>55</sup> John Jackson, ‘Perceptions about the WTO Trade Institutions’ (2002) *World Trade Review* 101; Keohane, ‘Governance in a Partially Globalised World’ (n 54).



emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.<sup>56</sup>

In 2012 the UN General Assembly adopted a Declaration on the Rule of Law at the National and International Levels, where member states, Non-governmental Organizations, and civil societies proclaim that they ‘recognise that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs’.<sup>57</sup> In practical terms, for instance, in international criminal law, the judges uphold the same domestic principles of the rule of law to adjudicate human rights cases, which sometime involve at the same time heads of states and citizens of those states. For example, Judge Robinson explains his role by saying:

As a judge of an international criminal court, my function is to deal with situations in which the rule of law has failed. In such situations, where there have been violations of international law, it is important that impunity does not follow—that action is taken to punish those responsible. But we must also not forget the importance of focusing our efforts on preventing violations before they occur. Toward this end, we must take an analytical approach, and consider what steps must be taken to strengthen and promote the culture of the rule of law at the international level.<sup>58</sup>

After analysing the same principles that are enshrined in domestic rule of law which include; equal entitlement before, and accountability to the law, Judge Robinson said that those principles apply at the international level to individuals, states, and organizations of legal personality.<sup>59</sup> Although, his argument is strongly supported by the international law treaties, and authoritative decisions about the applicability of an international rule of law, but he was right to identify the obstacle that often renders the rule of law concept non-applicable ‘the intrusion of *real politik*’.<sup>60</sup> This is especially the case with the functioning of international organizations, but Judge Robinson is optimistic that the international rule of law will ‘break through and

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<sup>56</sup> Simon Chesterman, ‘An International Rule of Law?’ (2008) *American Journal of Comparative Law* 331. See *The Economist*, ‘Economics and the Rule of Law: Order in the Jungle’ *The Economist* (London, 13 March 2008).

<sup>57</sup> The UN General Assembly Resolution No (67/1) 42 September 2012.

<sup>58</sup> Patrick Robinson, ‘Affirming the International Rule of Law’ (2012) *European Human Rights Law Review* 32.

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

transcend the many challenges that we face today'.<sup>61</sup> It can be argued that the above meanings of the international rule of law apply to the international trade rule of law which is interpreted and enforced in the WTO. More will be said about the WTO role in ensuring compliance with trade rule of law in the following chapters. However, some scholars have failed to demonstrate how the offending state(s) can reap the benefits of noncompliance with international rules or rulings. For example, the claim of realists-inspired scholars like Cogan and Zimmermann who said 'operational' or 'temporary noncompliance' provisions exist in international law, contain many contradictions, least of all, they do not differentiate between deviating from, and breaching the law. They acknowledged the advantages of full compliance with the rules of international law quoting scholars like Elihu Root who said 'international laws violated with impunity must soon cease to exist'.<sup>62</sup> However, they introduce 'operational noncompliance' that they claim will fill the gaps created by the incapability of the international legal system that appear in, for example, law enforcement and institutional control.

Nonetheless, they failed to mention the credibility and reputational losses suffered by the offending states and the relevant international organizations. There are 'temporary' benefits for noncompliance that will eventually lead the state to face the damaging consequences of isolationism, being a victim of unfair retaliatory sanctions, and reputational and trade relations losses. For instance, Brewster said about the value of reputation 'state count reputational loss due to non-compliance with international law as a cost that must be balanced against the possible benefits of such actions'.<sup>63</sup> Law scholars' responses to the realists misleading assumptions is directed at their lack of understanding the process of creating, formalising, and enforcing international legal obligations. The first response to the realist's argument substance that the sovereigns cannot to be bound by law as they can wage wars regardless of international law, Oppenheim dismissed such claim as baseless saying 'international law recognises the fact that war cannot always be avoided, but at the

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<sup>61</sup> *ibid.*

<sup>62</sup> Jacob Cogan, 'Noncompliance and the International Rule of Law' (2006) *Yale Journal of International Law* 189 citing Elihu Root, 'The Outlook of International Law' (1915) *Proceedings of the American Society of International Law* 2; Claus Zimmermann, 'Toleration of Temporary Non-Compliance: The Systematic Safety Valve of WTO Dispute Settlement Revisited' (2011) *Trade, Law and Development* 382.

<sup>63</sup> Brewster, 'Unpacking the State's Reputation' (n 43).

same time provides regulations with which the belligerents have to comply.<sup>64</sup> There have been many developments in the use of force law and the means for enforcing international law since Oppenheim wrote those words in 1905 based on his belief of enforcing international law through wars and reprisals.

However, Oppenheim was clear in responding to those who did not see a problem with a state abusing its power as a sovereign regardless of other states' interests. International rules are effective in establishing law and order between states by punishing the wrongdoer, and deterring governments from future violations of the law.<sup>65</sup> Although modern law of war imposes a prohibition on the use of force under the UN Charter, but in accordance with the Charter Article (51), states are allowed to use force in individual or collective self-defence or in very limited circumstances.<sup>66</sup> Those principles were further explained in 'the UN Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN',<sup>67</sup> and the 1927 *Lotus Case* legal principle. The Permanent Court of International Justice stated the following principle in its *Lotus Case* judgment, 'international law is the product of the free will of States. International law cannot be created without the consent of States and it cannot be imposed upon them'.<sup>68</sup>

The second response to the realists/rationalists who undermine the legitimacy and the legality of international law is found in the theory of interactional international law. First a brief explanation of what interactionalism is, and then how it effectively responds to sceptics of international law who overlook the role of interactional legal practices. The theory's 'realm of law' comprises practices that meet Fuller eight criteria of legality that apply to individual rules as well as systems of rule-making. According to Brunnée and Toope:

Interactional law only emerges when shared understandings become fused with a 'practice of legality', rooted in Fuller's eight criteria of legality and embraced by a community of practice that adheres to those criteria in day-to-day decision-making (...) the criteria come alive when

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<sup>64</sup> Lassa Oppenheim, *International Law* (vol 2, Longman Green and Co, 1905) 55-56.

<sup>65</sup> O'Connell, (n 16) 77 citing Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 1979) 98.

<sup>66</sup> The UN Charter <<http://www.un.org/en/documents/charter/chapter1.shtml>> accessed 29 March 2013.

<sup>67</sup> The UN General Assembly Resolution No (2625) (1970).

<sup>68</sup> Stephen Allen, *Law Express: International Law* (2nd edn, Pearson Education Limited 2015) 5.

actors reason with the rules in continuing processes of mutual engagement creating a community of legal practice.<sup>69</sup>

The development of interactionalism realm is dependent on the existence of ‘shared understandings’ that ‘are relevant to law’s intelligibility and to perceptions of reasonableness’.<sup>70</sup> Fuller’s eight internal tests of legality of rules are: *generality, promulgation, non-retroactivity, clarity, non-contradictory, not demanding the impossible, constancy, and congruence of official action with underlying rules.*<sup>71</sup> When applied to test the legality of international rules, those criteria, argue the authors, are able to ‘force a clear-headed assessment of the posited rule’ to distinguish between a legal and social rule that can become legal overtime depending on the actors’ level and type of interaction.<sup>72</sup> Fuller says that ‘the existence of law can be a matter of degree’ because for him what really matters when assessing legal systems is that the government that shows the greater respect for those criteria of legality has a legal and hence a legitimate system of law that will attract ‘fidelity’.<sup>73</sup>

Recent studies of Fuller’s work on *The Morality of Law* have brought to light two important clarifications of his work. The first is that the eight principles that constitute ‘the morality that makes law possible’ apply both to the role of legislation and judicial review, for constituting a good social order.<sup>74</sup> The legislatures and judges have to be first bound by the eight principles, and engage with the law-subjects on reciprocal grounds in the law-making so that the applied-law will tend to attract its own adherence. The second study investigates the role of the subjects of the law in clarifying Fuller’s morality of law argument because ‘legal morality loses

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<sup>69</sup> Brunnée and Toope, *An Interactional Account* (n 9) 86.

<sup>70</sup> *ibid* 68.

<sup>71</sup> Fuller, *The Morality of Law* (n 8) 39.

<sup>72</sup> Jutta Brunnée and Stephen Toope, ‘History, Mystery, and Mastery’ (2011) *International Theory* 348. In addition to Fuller’s ‘interactional view of law’ that interested Brunnée and Toope, it is also argued that Fuller’s most significant contribution in his book is ‘the socialising of the law’. The term ‘socialising’, that has some parallel to norm-building in the constructivism theory, is one more reason for combining constructivism and Fuller’s work to enrich interactionalism view of legal obligation. See Edwin W Tucker, ‘*The Morality of Law*’ by Lon L. Fuller (Yale University Press 1964) in *Indiana Law Journal* (1965) 270.

<sup>73</sup> Fuller, *The Morality of Law* (n 8) 197-200.

<sup>74</sup> Kenneth Winston, *The Principles of Social Order: Selected Essays of Lon L Fuller* (rev edn, Hart Publishing 2001) 47-58.

its reasons of being, if we do not understand the subject as a centre of initiative'.<sup>75</sup> It is the latter study, in particular, that shows the relevance of Fuller's work to the role of law in international society since there is growing number of 'cosmopolitan law' scholars who emphasise the role of global citizenry in international rule-making and enforcement.<sup>76</sup> It is true that Fuller did not explore the possibility of international law bearing on the relations between states, but his criticism in, *The Law in Quest of Itself*, of the legal positivism of Kelsen who went on to occupy a prominent position in international law is very noticeable.<sup>77</sup> Moreover, in his discussion of adjudication and the rule of law, Fuller says about international law:

International law (...) is still in the process of being born. What is perhaps most needed is not an immediate expansion of international law, but an expansion of international community, multiplying and strengthening the bonds of reciprocity among nations. When this has occurred-or rather as this occurs- the law can act as a kind of midwife-or, to change the figure- the law can act as a gardener who prunes an imperfectly growing tree in order to help the tree realise its own capacity for perfection. This can occur only when all concerned genuinely want the tree to grow and to grow properly.<sup>78</sup>

In his writings, Fuller has been always mindful of the development and necessity of international law in regulating the relations between nations, for example, he says about adjudication 'it embraces the most formal and even awesome exercises of adjudicatory power: (...) an international tribunal deciding a dispute between nations'.<sup>79</sup> Also in the same article, Fuller's writing on adjudication is relevant for international law, for example, he states two major conditions 'that must exist before

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<sup>75</sup> Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (reprint edn, Hart Publishing 2013) 97-101; Fuller, *The Morality of Law* (n 8) 162-170.

<sup>76</sup> See Thomas Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 483; Philip Allott, *Eunomia: New Order For a New World* (2nd edn, Oxford University Press 2001); Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing 2012); Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (reprint edn, Oxford University Press 2013).

<sup>77</sup> Fuller three lectures that examined legal positivism and natural law were first published by Northwestern University in 1940 the latest publication is *The Law in Quest of Itself* (Lawbook Exchanges 2012) 66-84.

<sup>78</sup> Lon Fuller, 'Adjudication and the Rule of Law' (1960) Proceedings of the American Society of International Law at its Annual Meeting 1.

<sup>79</sup> Lon Fuller, 'The Forms and Limits of Adjudication' (1978) Harvard Law Review 353.

principles of decision maybe expected to emerge as a by-product of adjudication'.<sup>80</sup>

Fuller explains those conditions as follow:

The first is that there must be an extra-legal community, existent or in the process of coming into existence, from which principles of decision may be derived (...) The second condition is that the adjudicative process must not, in attempting to maintain and develop extra-legal community, assume tasks for which it is radically unsuited.<sup>81</sup>

Whether it is the work of the adjudicatory body of the WTO or any other adjudicatory body in other organizations, Fuller's inputs on the roles, limits, forms of adjudication and the relationship between adjudication and the 'rule of law' are relevant.<sup>82</sup> However, Fuller's emphasis on legal interaction and Brunnée and Toope expansion on this concept through interactionalism was to criticise the dominant positivist view of international law that sees law as 'hierarchy of authoritative judicial pronouncement'.<sup>83</sup> In the absence of clear hierarchy in international law, this view has been confusingly reintroduced by realist/rationalists to deny international law any power to influence behaviour.

One shared point between constructivism, Fuller's legal theory, and Adler's communitarian IR, is the concept of social interaction, the sharing of knowledge in the making and administration of norms.<sup>84</sup> While international law scholars are interested in the evolution of international rules, constructivists mainly focus on the building of social norms through interaction, or the process of 'socialization', and the emergence of 'international norms'.<sup>85</sup> Responding to the early constructivist theorists who said that social structures cannot exist without 'instantiation in practices' but did not explain what count as practice, recent constructivists have

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<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> Jutta Brunnée and Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) *Columbia Journal of Transnational Law* 19; and the by the same authors, 'Constructivism and International Law' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 119.

<sup>84</sup> *ibid.*; Fuller, *The Morality of Law* (n 8) 221; Adler (n 8) 15.

<sup>85</sup> Brunnée and Toope, 'Constructivism and International Law' (n 83) 121; Fiona B. Adamson and Chandra Lekha Sriram 'Perspectives on International Law in International Relations' in Başak Çalı (ed), *International Law for International Relations* (Oxford University Press 2010) 37.

begun to further explain the role of practice.<sup>86</sup> For instance, Adler maintains that ‘social understanding’ is produced and re-produced through continuous interactions, and that actors’ participation in social practice generate and maintain collective understandings.<sup>87</sup> For states’ interaction to be effective there has to be a community of actors who are willing to engage in building and maintaining the social norm that will become legally binding. This is why Brunnée and Toope emphasize that interactionalism is both ‘strongly practice oriented, and practice generated’.<sup>88</sup> For them legal rules are created and maintained through legal interaction that meet the threshold of legality by meeting the Fullerian principles, and get enmeshed in community of legal practice.

To recall, interactionalism maintains that ‘it is interaction that makes the relationship between [shared understanding, criteria of legality, and community of practice] ‘horizontal’ and ‘reciprocal’, and is the core of ‘legal’ legitimacy’.<sup>89</sup> Agreeing with Fuller, Brunnée and Toope stress the importance of ‘reciprocity’ that can only exist ‘when actors collaborate to build shared understanding and uphold a practice of legality.’<sup>90</sup> They explained the practical aspect of their theory by saying that when diplomats ‘successfully’ concluded a treaty, ‘the hard work of international law has often just begun’.<sup>91</sup> Treaties have to be regarded as a legal basis for interaction for forming shared understandings and building and maintaining legality. Brunnée and Toope explain the important roles of treaties by saying:

First, they can allow for the crystallization and specification of pre-existing shared understandings. Secondly, in the process of treaty negotiation, existing understandings may be pushed or advanced modestly to allow for normative change, as long as the criteria of legality are met. Thirdly, in some cases treaty rules will be posited that are not grounded in shared understandings with the hope that the new rule may become a reference point around which new law may coalesce. We argue that such “rules” are not interactional law, but may become so

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<sup>86</sup> Alexander Wendt, ‘Collective Identity Formation and the International State’ (1994) *American Political Science Review* 384; Emanuel Adler and Vincent Pouliot, ‘International Practices’ (2011) *International Theory* 1.

<sup>87</sup> Adler (n 8) 52-56. See Wenger (n 8).

<sup>88</sup> Brunnée and Toope, ‘History, Mystery, and Mastery’ (n 72).

<sup>89</sup> Brunnée and Toope, *An Interactional Account* (n 9) 54.

<sup>90</sup> *ibid* 7, 37-42.

<sup>91</sup> *ibid* 48.

over time if they meet the criteria of legality and become the object of a practice of legality.<sup>92</sup>

It is worth noting that Brunnée and Toope stress that their theory is a theory of studying the nature and roots of international legal obligation. Interactionalism's focus on obligation stem from its reliance on constructivism to show how international law is an important power in 'socialising actors and shaping their interests and choices'.<sup>93</sup> Such understanding lends support to the theory's main premise that 'law's obligatory effect results from a commitment or fidelity to law that is generated by adherence to specific traits of legality and maintained by a practice of legality.'<sup>94</sup> Although, it has been claimed that obligation and compliance are intertwined since 'obligation is a reason for rule observance, compliance is the fact of such observance',<sup>95</sup> but interactionalism's concept of compliance is much more than mere *observance*.<sup>96</sup> In defending their theory and explaining the role of obligation, Brunnée and Toope said:

Form is not the essential feature of law; adherence to specific criteria of legality is. International lawyers should care about obligation because obligation is the value-added of law. Neither form nor hierarchy of norms can produce obligation in and of themselves. Close attention to the interactional processes that generate legitimacy and concomitant fidelity is a far more promising strategy to create international law.<sup>97</sup>

This theory has been formulated over ten years stimulating wider scholarly debates in both fields of 'the study of international cooperation', and its authors continue to apply it to current issues that had played defining roles in the evolution of public international law.<sup>98</sup> As neorealism theorist, Kenneth Waltz, once said, quoting a

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<sup>92</sup> Jutta Brunnée and Stephen J. Toope, 'Interactional International Law and the Practice of Legality' in Emanuel Adler and Vicent Pouliot (eds), *International Practices* (Cambridge University Press 2011) 110 (hereinafter *The Practice of Legality*).

<sup>93</sup> Brunnée and Toope, *An Interactional Account* (n 9) 12.

<sup>94</sup> *ibid* 13.

<sup>95</sup> Reus-Smit, 'The Politics and International Legal Obligation' (n 51).

<sup>96</sup> Interactionalism wide conception of compliance also differ from the general understanding about the state's compliance as being 'the observance of obligation' that was originally coined by Louis Henkin when he said "[...] almost all nations *observe* almost all principles of international law and almost all of their obligations almost all the time". cf Henkin (n 65).

<sup>97</sup> Brunnée and Toope, *An Interactional Account* (n 9) 77.

<sup>98</sup> Brunnée and Toope (n 83). See Martha Finnemore and Stephen Toope, 'Alternatives to "Legalization" Richer Views of Law and Politics', (2001) *International Organization* 743; Reus-Smit, 'The Politics and International Legal Obligation' (n 51); Jutta Brunnée and Stephen Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) *Finnish Yearbook of International Law* 273; Brunnée and Toope, 'The Practice of Legality' (n 92) 110.



physicist ‘that the ultimate test for a theory is that people in the field find it worth dealing with by criticising, arguing about, and trying to apply’.<sup>99</sup> However, as has been explained in this section, this quotation is of great help for explaining how interactionalism shows how international law matters and attracts adherence of state and non-state actors.<sup>100</sup> In its application by its authors, interactionalism has shown thorough assessments of law-making and application in these areas: climate change, prohibition on torture, and the use of force.

In climate change, for example, the authors found by following the negotiation history of the regime that ‘a sound basis of shared procedural understandings’ has been cultivated and ‘procedural legality’ has been fostered.<sup>101</sup> But in the use of force, the authors concluded that even after the 9/11 terrorist attacks, the unequivocal prohibition on the use of force as illustrated in the UN Charter Article 2(4) ‘remains healthy as binding legal obligation’.<sup>102</sup> This is because the regime is founded on solid and most widely shared understandings and its rules substantially meets the principles of legality.<sup>103</sup> Nonetheless, the prohibition of torture clearly shows the interrelatedness of interactionalism’s framework. Because the weakness in global shared understanding on prohibition of torture, especially after 9/11, has led to a weak practice of legality that violate the most important criterion, *congruence between official actions and declared rules*.<sup>104</sup> Overall, in all of these examined areas the importance of the practice of legality is evident, since the creation, maintenance, or destruction of any legal regime is dependent on an interactive practice of legality.<sup>105</sup> However, what is relevant for the purpose of this thesis is interactionalism’s concept of compliance that does not merely mean ‘an outcome produced by the norm or by its enforcement, but part of the ongoing process of interactional law-making’.<sup>106</sup>

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<sup>99</sup> Harry Kreisler Interview with Kenneth Waltz, Adjunct Professor of Political Science, Columbia University (University of California, Berkeley, 10 February 2003).

<sup>100</sup> Brunnée and Toope, *An Interactional Account* (n 9) 2.

<sup>101</sup> *ibid* 217.

<sup>102</sup> *ibid* 349.

<sup>103</sup> *ibid*.

<sup>104</sup> *ibid* 269.

<sup>105</sup> Brunnée and Toope, ‘The Practice of Legality’ (n 92).

<sup>106</sup> Brunnée and Toope, *An Interactional Account* (n 9) 122.

Additionally, interactionalism offers four lessons for promoting compliance. The first stresses the role of obligation by building the foundations of compliance through law-making process because ‘law’s obligatory power- its ‘self-binding’ effect- must be cultivated and maintained’.<sup>107</sup> This can be achieved, for example, by ensuring that the regulatory regimes basic principles and goals substantially meet the principles of legality especially the eighth criterion of enforcement, the congruence between official action and the law.<sup>108</sup> The second lesson focuses on the existence of ‘a practice of legality’ that ‘cultivates spaces and opportunities [*for states and non-states actors*] to engage with and around legal norms’.<sup>109</sup> Lesson three, however, extends this practice to encompass ‘non-compliance procedures, dispute settlement, and enforcement’.<sup>110</sup> The authors explained this lesson by saying:

In short, when seen through the lens of our interactional framework, treaty-based non-compliance procedures, binding dispute settlement, and enforcement measures all play potentially important roles both in building legality and in promoting compliance. At the same time, if employed arbitrarily, selectively, or not at all, they can each damage the congruence upon which interactional law depends. The most important question to ask about compliance mechanism and measures, then, is not whether or not they are ‘hard’ or legally in a formal sense, *but whether or not they meet the requirements of interactional legality*.<sup>111</sup>

This particular lesson about the interrelatedness of ‘noncompliance, dispute settlement and enforcement’ is the most relevant for the purpose of this thesis. Because, according to interactionalism, law creation cannot be separated from its enforcement or from the observance through compliance because all are enmeshed in the elements of interactionalism that can show the system’s legitimacy and legality and overall its endurance. Once law (creation) is separated from the interpretative mechanism of its (determination), and the focus is just turned to its (enforcement), its legitimacy will be overlooked, hence its legality will be in question. Traditional international law scholars constantly say that because the law is not effectively enforced does not mean that there is no ‘law’, citing violations of national legal systems as an example.

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<sup>107</sup> *ibid* 98.

<sup>108</sup> *ibid* 99.

<sup>109</sup> *ibid* 100-108 (emphasis added).

<sup>110</sup> *ibid* 108.

<sup>111</sup> *ibid* 114 (emphasis added).

Although this assertion is true, it eschews the important steps of starting with the examination of the law (creation) phase to see how much shared understanding the concerned states have, and through the (determination) phase asking whether the rules meet the legality principles, and then in the (enforcement) phase by maintaining a closer look at legal practice under the treaty. Failure to do so will result in the same baseless claims like the one cited above, which led the realists and rationalists to capitalise on them because they see no separation between law and enforcement. There is no separation, but the ultimate question is how much legal interactions is under the treaty. The final lesson highlights the relevance of ‘the interplay between international and domestic law’ to the pull to compliance with the posited rules. This lesson maintains that ‘the communities of practice must expand to engage domestic actors in their shared legal understandings’, because their engagement with norms ‘is likely to have feedback effects back into the international arena’.<sup>112</sup>

The final lesson is of great relevance to the emerging scholarship on the need for direct effect, for example, in international economic law, to enable citizens ‘as agents of justice’ to domestically invoke WTO law.<sup>113</sup> However, since most of IR and international law discussions on the evolution of public international law focus on the concept of compliance, a more detailed discussion of compliance as an observance of rules through enforcement is needed. Although, interactionalism posits a strong case for understanding compliance, but as Brunnée and Toope have acknowledged, the theory builds and expands on existing IR and international law literature to better articulate a comprehensive theory of international legal obligation. This is one reason, among many, that makes interactionalism an exemplary work of bridging the divide between IR and international law scholars, and explaining legal obligations of international trade. However, after the scholars’ affirmation of the birth of international law, and their important contributions to explaining the benefits of complying with it, most of the discussion has turned to the methods of making this law binding and therefore, enforceable.

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<sup>112</sup> *ibid* 118.

<sup>113</sup> See Petersmann, *International Economic Law in the 21st Century* (n 76).

### 2.3 The Enforcement of Public International Law:

The separation between the international law existence, and its methods of enforcement has been emphasized because ‘the former spoke to the validation and authority of this law as law; the latter to questions of its effectiveness.’<sup>114</sup> Questions about the effectiveness of public international law gave the discipline its uniqueness in being since its invention subject to the scholars’ continuous improvements of deterrent enforcement systems which aim to attract credibility and provide durability. In fact, it is one of any enforcement system objectives, if it deserves the above credentials to provide; for example, in the multilateral trading system, predictability and stability.<sup>115</sup> First, the transition from discussing the existence of international law and the benefits of complying with it, to its different enforcement mechanisms, must be accredited as significant steps in identifying this law’s relevance to the life of countless individuals and the cooperative relationships between states.

There is, as yet, no perfect enforcement system of international law, although there are authoritative decisions, model laws, and articles such as International Law Commission (ILC) 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which push the international enforcement systems toward perfection.<sup>116</sup> International law has gone through a process of *tribunalization* -depoliticization- especially in humanity law and international economic law of investment and trade ‘to purify international legal regimes from politics’.<sup>117</sup> However, the realists/rationalists continue to apply their assumptions to international law enforcement by saying that the state’s consent to international treaties is ineffective, as the states are always changing and, therefore, cannot bind themselves to the future in the same way as they could when they

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<sup>114</sup> Dino Kristiotis, ‘International Law and the Relativities of Enforcement’ in *The Cambridge Companion*, (n 6) 245.

<sup>115</sup> Principles of the Trading System  
<[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm)> accessed 30 March 2013.

<sup>116</sup> The Draft Articles on the Responsibility of State  
<[http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)> accessed 27 March 2013.

<sup>117</sup> Ruti Teitel and Robert Howse, ‘Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order’ (2009) *New York University Journal of International Law and Politics* 959.

signed the treaty.<sup>118</sup> Furthermore, they say that the international law's enforcement system is ineffective when compared to the enforcement of national laws in, for example, liberal democracies. Therefore, the enforceability of the questionable international law rules is impossible between states with completely different forms of governance.

However, the same can be said about individuals and corporations who are constantly changing, and corporations like states bind themselves with contracts regardless of future changes, except in very limited circumstances explained under the frustration of contract doctrine. Also it is helpful to borrow the classification of a political scientist, when she said that ratification of international human rights law treaties has positive effect on domestic human rights practices in countries that are neither stable democratic, nor stable autocratic, but countries-in-transition.<sup>119</sup> It means that countries transitioning toward *nomocracy*, government based on the rule of law, are inclined to incorporate/enforce international laws to develop their legal systems. Nevertheless, in the next subsection, the realists abandoned this simple argument about state's form of governance, by moving from excusing the state from international obligations because of uncertainty, to invoking the domestic doctrine of frustration of contract, which once again leads to inconsistency. This is because they first recognised international law's positive effect on state behaviour, but tried to encourage this state not to comply with international rules, to acquire temporary benefits with long-lasting detrimental effects.

Overall, those realists' assumptions show a lack of understanding the sources of international laws and their enforcement mechanisms in the international and national spheres. It noteworthy that by 1945 the period of enforcing international law through war or reprisals had been outlawed in the specific wording of the Charter Article 2(4).<sup>120</sup> Since then the process of state's effectuating public international law often starts with long negotiations, which might involve the state's declaration of any reservations. Indeed, if the negotiations succeed, the state will be recognised as bound by the law body, or court jurisdiction which can authorise sanctions for noncompliance. There are two ways of enforcement in international

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<sup>118</sup> Goldsmith and Posner (n 24) 189-195; cf Omar Dajani, 'Contractualism in the Law of Treaties' (2012) Michigan Journal of International Law 1.

<sup>119</sup> Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).

<sup>120</sup> The UN Charter (n 66).

law, first through the state's acceptance of the court's jurisdiction, and second subject to the relevant tribunal's authorization, the state can exercise the available countermeasures against breaches of the rules of international governmental organizations (IGOs).<sup>121</sup>.

It is important to highlight one preliminary point about the role of the state in making and enforcing international law. International law gives the states full authority:

To act not only internally but at the international level, to make (or not to make) treaties and other commitments, to relate (or not to relate) to other states in wide variety of ways, to consent (or not to consent) to resolve international disputes.<sup>122</sup>

Therefore, in the view of the voluntary participation of the states in rule-making in transforming formerly international political regimes into legally binding order, states must to respect the obligations that they have created and promised to maintain. The following subsection will demonstrate how the international law subfield of WTO law is enforced by the mechanism of DSB, and self-enforced through WTO member states' interactions on the basis of legality in various settings.

### **2.3.1 The Enforcement of World Trade Law:**

Following from the aforementioned discussion of public international law, and before explaining WTO law enforcement through the DSB, it is conducive to address this question: Is the WTO law *self-contained* regime separate from public international law? To answer it is important at this stage to clarify two points, namely the organization as the subject of international law, and international law in the WTO dispute settlement system. The WTO is an organization with an international legal responsibility of ensuring fair and free trade between member states. A definition of an international organisation with such legal responsibility is provided under Article (2(a)) of the 2011 ILC Draft Articles on the Responsibility of International Organizations, which stipulates:

‘International organization’ means an organization established by treaty or other instrument governed by international law and possessing its own

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<sup>121</sup> *ibid.*

<sup>122</sup> James Crawford, ‘Sovereignty as a Legal Value’ in *The Cambridge Companion* (n 6) 118.

international legal personality. International organization may include as members, in addition to States, other entities.<sup>123</sup>

The WTO Agreement, the result of the 1994 Uruguay Round, contains the basic institutional provisions for an international legal order. In the preamble, parties to the WTO Agreement recognize, among many objectives, member state's entitlement to improve its economy by benefiting from international trade, in accordance with the General Agreement on Tariffs and Trade (GATT) rules, and related sectorial WTO agreements.<sup>124</sup> Disagreement on the WTO rules is adjudicated by the DSB in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In its mission of promoting and protecting fairness in trade, the DSB is often confronted with high profile linkages disputes that involve discrimination in trade and the state's environmental or health policy (e.g. *US-Shrimp-Turtle and EC-Hormones*). However, most of these controversial cases have been adjudicated on the basis of upholding the principles of the world trading system, which recognise member state sovereign decisions to protect its environment, and at the same time, ensure that it should not use its policies to adversely affect trade relations.<sup>125</sup> The Appellate Body (AB) in (*Japan-Alcoholic Beverages II*) stated that:

The WTO Agreement is a treaty -- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.<sup>126</sup>

This explanation is in conformity with the shared understandings about what constitutes an agreement, and how should contracting state exercise its sovereignty within the boundaries of the treaty. For instance, according to the 1969 Vienna Convention on the Law of Treaties (VCLT) Article (2:1) a 'treaty' is 'an international agreement concluded between States in written form and governed by

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<sup>123</sup> The Responsibility of International Organizations  
<[http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_11\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf)> accessed 20 October 2013.

<sup>124</sup> World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (20th printing, Cambridge University Press 2013) 4 (hereinafter *The WTO Legal Texts*).

<sup>125</sup> Joyner (n 38) 261.

<sup>126</sup> The Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, pages 13-14, WT/DS8/AB/R, adopted 4 October 1996.

international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.<sup>127</sup> One commentator on the WTO explains this definition by saying:

A treaty is an instrument by which countries agree to place voluntary limitations on the exercise of their sovereignty, and an international organization is a body that states agree to create in order to facilitate the development and execution of the these sovereignty-constraining instruments.<sup>128</sup>

With regard to the relationship between the WTO law and public international law, the following question has to be asked about whether the WTO law is separate from public international law. Avoiding answering this question or answering it wrongly has been the main source of confusion for realists/rationalists scholars to conclude that in addition to questionable status of public international law, the WTO law, as a separate system of rules, has no normative power to influence state behaviour. The prevailing view regarding the debate about whether the GATT/WTO is 'self-contained' system, not in need of the application of non-WTO norms, namely, treaties, *jus cogens*, and customary international law, is that WTO law is an integral part of public international law.<sup>129</sup> However, some WTO scholars say, because of the mentioning of the word 'customary international law' in the WTO, and the Panel and AB refusal to apply custom (in *EC-Hormones*), or recognise member state commitments to other international agreements, WTO law is 'largely self-contained' legal system *impenetrable* to other regimes.<sup>130</sup> In some occasions this important question about the relationship between WTO and international law has been

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<sup>127</sup> See VCLT <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> accessed 13 July 2016. The Uruguay Round Sub-committee on Institutional, Procedural and Legal Matters relayed heavily on the VCLT for its transitional arrangements from the GATT to the WTO. See Transitional Arrangements (PC/IPL/W/5, 1 September 1994) in The Stanford GATT Digital Library <<https://gatt.stanford.edu/page/home>> accessed 9 June 2015.

<sup>128</sup> Craig VanGrasstek, *The History and Future of the World Trade Organization* (the World Trade Organization 2013) 202.

<sup>129</sup> Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) *American Journal of International Law* 535; Peter-Tobias Stoll, 'The World Trade Organization (WTO)' (2011) *Max Planck Encyclopaedia of Public International Law*; Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press 2013) 264-268.

<sup>130</sup> David Palmeter and Petros Mavroidis, 'The WTO Legal System: Sources of Law' (1998) *The American Journal of International Law* 398; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) *European Journal of International Law* 483. See Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of "Self-Contained Regimes" International Law and the WTO' (2006) *European Journal of International Law* 857.



neglected altogether, because some scholars believe that international law, if it qualifies to be called law, has no effect on WTO law.<sup>131</sup>

Nevertheless, in order to understand to what extent the WTO regime is firmly embedded in public international law and practice, one has to look at what the law itself and its adjudicative body say about the WTO law limitations and application. In accordance with DSU Article (3:2), customary rules of interpretation of public international law under the VCLT apply in the WTO dispute settlement system. The AB stated in its first report in 1996 concerning *US—Gasoline*, that the GATT should ‘not to be read in clinical isolation from public international law’.<sup>132</sup> The authors of the leading textbook on the WTO law referred to this AB report as ‘a genuine turning point in the relationship between international law and international trade law’.<sup>133</sup> The VCLT Article (31:3(c)) establishes that the interpretation of a treaty provision must take into account ‘together with the context [...] any relevant rules of international law applicable in the relations between the parties’.<sup>134</sup> This provision sets the parameters for both the Panel and AB not to interpret any WTO rules in contravention of well-established non-WTO norms or hold another treaty against a member not having ratified it.

This has been explained further in four WTO landmark cases, the *EC-Biotech Products*, *Korea-Government Procurement*, and *Chile-Transit and Importing of Swordfish* (hereinafter *Chile- Swordfish case*). In the *EC-Biotech Products* the Panel said that the provisions of Biosafety Protocol do not affect the trade relations of the US and other states because they have not ratified it. The Panel in *EC-Biotech Products* explains:

Taking account of the fact that Article 31(3)(c) mandates consideration of other applicable rules of international law, and that such consideration may prompt a treaty interpreter to adopt one interpretation rather than another, we think it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted. Requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or

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<sup>131</sup> Sykes and Posner (n 12).

<sup>132</sup> The Appellate Body Report, *US-Gasoline*, para 17, WT/DS2/AB/R, adopted 29 April 2000.

<sup>133</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (3rd edn, Cambridge University Press 2013) 61, 40-59.

<sup>134</sup> See Appellate Body Report, *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, paras. 307-308, and footnote 222, WT/DS379/AB/R, adopted 11 March 2011.

enhances the consistency of the rules of international law applicable to these states and this contributes to avoiding conflicts between the relevant rules.<sup>135</sup>

With respect to the reference to general international law concepts, both Panels, under the GATT the WTO, and the AB, made references to international law when needed to explain the treaty rules. For example, under the GATT, it was in the *US-Nicaragua Trade* case that the Panel acknowledged the Nicaragua statement that ‘GATT did not exist in a vacuum but was an integral part of the wider structure of international law, and that the General Agreement must not be interpreted in a way inconsistent with international law’.<sup>136</sup> Furthermore, the Panel in *Korea-Government Procurement* noted that ‘customary international law applies generally to the economic relations between the WTO Members [...] such international law applies to the extent that the WTO agreements do not “contract out” from it’.<sup>137</sup> Therefore, WTO member states have to recognise that they are bound by the system of international law. As Pauwelyn explains ‘in their treaty relations states can ‘contract out’ of one, more or, in theory, all rules of international law (other than those of *ius cogens*), but they cannot contract out of the system of international law’.<sup>138</sup>

However, the Panel in the *Chile-Swordfish case* found itself in difficult position of having to decide on a case that involved a measure that is permissible under the WTO law, but illegal under the protocol attached to the UN Law of the Sea Convention-the protocol on highly migratory species, signed by both Spain and Chile.<sup>139</sup> The EU requested a consultation with Chile regarding the prohibition on transit or unloading of swordfish in Chilean ports. However, Chile argued the case not based on the WTO law, since the right of transit is guaranteed by GATT Article (V), but based on the law of the sea, saying that the catching of the fish is in contravention of the Spanish fishers’ obligation under the protocol. Although at the time of the consultation at the DSB, Chile had lodged a case at the International

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<sup>135</sup> The Panel Report, EC-Biotech Products, para 7.70, WT/DS291/R, adopted 29 September 2006.

<sup>136</sup> The Panel Report, United State-Trade Measures Affecting Nicaragua, para 4.4 and 5.15, L/6053, adopted 13 October 1986.

<sup>137</sup> The Panel Report, Korea- Government Procurement, para. 7.96, WT/DS163/R, adopted 1 May 2000.

<sup>138</sup> Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 37.

<sup>139</sup> Chile-Measures Affecting the Transit and Importing of Swordfish, WT/DS193/1, adopted 19 April 2000.

Tribunal for the Law on the Sea (ITLOS), but the ITLOS case had been settled by political agreement leading to the WTO dispute to be suspended. But had the DSB Panel issued its ruling in this case, and from the three previous cases (*US-Gasoline*, *EC-Biotech Products*, and *Korea-Government Procurement*) it would have given more weight to the convention and the protocol's obligations, rather than allowing for the transit of illegally caught fish, which would have been permissible under the WTO law.<sup>140</sup>

Furthermore, public international law principles have 'a measure of influence' in the interpretation process, for instance, the international environmental law principle of sustainable development was mentioned in WTO agreement, and reiterated in the AB ruling in *US-Shrimp-Turtle*.<sup>141</sup> This is an illustration of how the DSB have made use of the general jurisprudence of international law through treaty interpretation and the application of procedural public international law principles.<sup>142</sup> Indeed, the AB in *US-Cotton Safeguard* had referred to the rules of general international law on state responsibility as a relevant standard for interpreting WTO law.<sup>143</sup> It is claimed that non-WTO norms can play a role in the WTO dispute settlement system in three

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<sup>140</sup> Chile could have argued the case based on the GATT general exceptions Article (XX:g) on measures relating to 'the conservation of exhaustible natural resources' but it has opted instead to argue it on the law of the sea basis. See Peter-Tobias Stoll and Silja Vöneky, 'The Swordfish Case: Law of the Sea v. Trade' (2002) <[http://www.zaoerv.de/62\\_2002/62\\_2002\\_1\\_a\\_21\\_36.pdf](http://www.zaoerv.de/62_2002/62_2002_1_a_21_36.pdf)> accessed 07 October 2014; Kim Van der Borcht contribution in William Davey, and Nikolas Zaimis panel on 'To What Extent the WTO Disputes Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources outside the WTO Agreements?' in No 5- International Trade under the Rule of Law: An American Society of International Law Centennial Regional Meeting 70-108 (2006) <[http://digitalcommons.law.uga.edu/rusk\\_oc/6/](http://digitalcommons.law.uga.edu/rusk_oc/6/)> accessed 06 October 2014.

<sup>141</sup> Surya Subedi, 'The WTO Dispute Settlement Mechanism as a New Technique for Settling Disputes in International Law' in Duncan French and others (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing 2010) 186; Appellate Body Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products, page 7, WT/DS58/AB/R, adopted 12 October 1998.

<sup>142</sup> James Cameron and Kevin R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body' (2001) *International & Comparative Law Quarterly* 248; Jacques Bourgeois and Ravi Soopramanien, 'The World Trade Organization Dispute Settlement System: Embedded in Public International Law?' in Carl Baudenbacher (ed), *Dispute Resolution* (German Law Publishers 2009) 346-348 citing as examples of AB applying procedural international law principles of 'due process in Brazil-Desiccated Coconuts, standing and right to private counsel: EC-Bananas III, distinction between questions of fact and questions of law: Canada-Periodicals'.

<sup>143</sup> The AB in particular referred to Article (51) of ARSIWA on proportionality see Appellate Body Report, United States- Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan, para. 120, WT/DS192/AB/R, adopted 5 November 2001.

different ways: ‘through direct application, as a source of interpretative material, or as factual evidence’.<sup>144</sup>

This view about the different roles of international law in the WTO dispute settlement system, concerning, for example, the applicable law, is supported by the ILC report on the fragmentation of international law when it explains that:

Even if it is clear that the competence of WTO bodies is limited to considerations of claims under the covered agreements (and not for example under environmental or human rights treaties), when elucidating the content of the relevant rights and obligations, WTO Bodies must situate those rights and obligations within the overall context of general international law (including relevant environmental and human rights treaties).<sup>145</sup>

Also in the same report the ILC concluded that ‘international law is a legal system’ and specialised subfields that emerge within international law, like the WTO, do not erode the systemization of international law.<sup>146</sup> The evolution of the dispute settlement under the WTO is now taking the shape of the increasing incorporation of non-WTO norms.<sup>147</sup> The DSB’s Panel and AB reference to other international agreements and treaties, and the use of customary rules of interpretation of public international law, shows that the argument for excluding GATT/WTO law from international law is fruitless.<sup>148</sup> It has been the case since the establishment of the WTO DSB that the recognition of international law obligations by the Panel and AB supports the goal of achieving compliance pursuant to DSU Article (21:1).<sup>149</sup>

In terms of orientation and practice, the GATT panel procedure and its successor, the quasi-judicial body of the WTO DSB, were following the principles of public

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<sup>144</sup> Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of Environment, Legitimacy and Fragmentation* (Kluwer Law International, 2011) 137-149.

<sup>145</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of International Law Commission finalized by Martti Koskenniemi (UN. Doc. A/CN.4/L.682 13 Apr. 2006) 90-91.

<sup>146</sup> *ibid* para 251.

<sup>147</sup> Kulovesi (n144) 137-149.

<sup>148</sup> See Bossche and Zdouc (n 133) 55-61; John Jackson, *Sovereignty, The WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2006) 164-168 (hereinafter, *Sovereignty, The WTO*); Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International 1997) 1-65.

<sup>149</sup> John Jackson, ‘Editorial Comment: International Law Status of WTO DS Reports: Obligation to comply or Option to “Buy Out”?’ (2004) *American Journal of International Law* 109 (hereinafter, *The Editorial Comment*); John Jackson, *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press 2007) 162-167 (hereinafter, *The Jurisprudence of the GATT and the WTO*).

international law. For example, the absence of binding precedents under the GATT and WTO conform to general international law. There is, to use Jackson's terms 'a *de facto* precedential effect' that has guided the GATT panel procedure and WTO DSB practice.<sup>150</sup> It is through the effective use of the general rules of interpretation of public international law and looking at sources outside the WTO law, that the Panel and AB have well-handled conflicts between WTO law and other international agreements.<sup>151</sup> Therefore, the crucial research question in this regard is not whether the GATT/WTO is still a 'self-contained' system but 'how the relationship between the GATT/WTO law and public international law has transformed the formerly self-contained GATT regime into a WTO system that is more firmly embedded in the broader landscape of international law'.<sup>152</sup> In short, from treaty text and decided cases the WTO as an IGO and its law are subject to, and an integral part of public international law. It is true that the GATT was an economic order the result of diplomatic negotiations, but the establishment of the WTO in 1995 was the result of internationally-made legal order for upholding the international rule of law. As will be discussed in chapter two, the international rule of law enforced by the WTO DSB has significant implications for promoting economic growth, and creating stable and predictable multilateral trading system. To further explain the legalistic structure of the WTO, the enforcement role of the WTO DSB shall be analysed.

### **2.3.2 The Enforcement Role of the WTO DSB:**

This subsection will be more of a critique rather than praising the DSB rules and procedures. However, within this appraisal the enforcement features of the DSB will be highlighted, as the DSB was founded to settle official disputes by reminding WTO members of their rights and obligations, and ensuring their trade regulations consistency with WTO law. However, the enforcement of the WTO law has to be clarified in two preliminary points. First, it is worth recalling Reisman who stated

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<sup>150</sup> Jackson, *The Jurisprudence of the GATT and the WTO* (n 149) 11, 127. James Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 76 (hereinafter, *The Brownlie's Principles*) 37-39. See Ernst-Ulrich Petersmann, 'From 'Member-Driven Governance' to Constitutionally Limited 'Multi-level Trade Governance' in the WTO' in Giorgio Sacerdoti and others (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press 2006) 105.

<sup>151</sup> See Davey, Borght, and Zaimis (n 140).

<sup>152</sup> Thomas Bernauer, Namfred Elsig and Joost Pauwelyn 'Dispute Settlement Mechanism – Analysis and Problems' in Amrita Narlikar and others (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press 2012) 497. See Repertory of Appellate Body Reports, Principles and Concepts of General Public International Law <[https://www.wto.org/english/tratop\\_e/dispu\\_e/repertory\\_e/p3\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/repertory_e/p3_e.htm)> accessed 21 July 2016.

that in an organised community of governments the major factor producing compliance is that the community always presumes compliance for the enforcement of its rules.<sup>153</sup> The organised community enforce its authority, in Reisman's view, through indirect enforcement by imposing 'sanctions on the miscreant in order to persuade him to comply with community norms'.<sup>154</sup> In the case of the WTO, this sanction takes the form of 'suspension of concessions or other obligations under the covered agreements' (DSU 22:2) to compel the offending member to comply with the community norms. The WTO does not use the term 'trade sanctions' as a mean for achieving compliance, however, international trade law scholars and practitioners often refer to DSU Article (22) as a source for providing 'sanctions'.<sup>155</sup> Thus, by consenting to the WTO treaty which provides provisions for retaliatory sanctioning of offending member, member states forgo their right to impose unilateral sanctions and agree to resolve pertinent disputes through the DSU exclusively.<sup>156</sup> Participation in the DSB is not voluntary but subject to a binding system that operates under certain rules and conditions. This means that individual or collective actions of states are prohibited, and that the WTO dispute settlement system will not be guided by the power and wealth interests of different states.

Nonetheless, important questions need to be raised here: how effective is the DSB in settling consultation-related disputes in a timely manner? does developed members refusal to comply with the WTO rules after being sanctioned means that the system is not binding enough to force them into compliance? and how much non-compliance constitutes a danger to the effectiveness of the compulsory jurisdiction of the DSB? A second point that has often been raised in the debate about the enforcement of the WTO law, and in the absence of supra-national authority, is that trade agreements must rely on self-enforcement rather than the DSB. For example, the 2007 World Trade Report entitled 'Six Decades of Multilateral Trade Corporation: What Have We Learnt?' highlighted the challenges associated with the self-enforcement mechanism of the WTO. When examining the rules of

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<sup>153</sup> W. Michael Reisman, 'The Enforcement of International Judgments and Awards' (1969) 63 American Journal of International Law 1. Although this article is old, it retains its relevance to the current practice of the WTO because according to Charnovitz, the WTO DSU 'achieved much of what Reisman envisioned with respect to systematic enforcement of multilateral tribunal decisions' see Steve Charnovitz, 'The Enforcement of WTO Judgments' (2009) The Yale Journal of International Law 558.

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> J. G. Merrills, *International Dispute Settlement* (5th edn, Cambridge University Press 2011) 217.

enforcement and dispute resolution, the report acknowledged that the WTO Agreement is a treaty i.e. 'the international equivalent of a contract'.

However, later in the report the contractual incompleteness, which include the existence of ambiguities in the treaty text, was mentioned as weakening the affected party position to secure an early and effective settlement because of his inability to rely on the text to prove his suspicious.<sup>157</sup> The affected party's challenging task of proving 'nullification or impairment' (NoI) to his state's interest, which amounts to self-enforcement, the report stated, brings with it two disadvantages. Firstly, member states retaliatory power becomes a dominant factor in determining the enforcement capacity. Secondly, the member's task of proving a treaty violation by observing, verifying, and quantifying the offending member's actions is costly and can lead to disagreement.<sup>158</sup> Such disadvantages had been highlighted in Reisman's article when he stated that 'securing enforcement of a particular decision in the contemporary international arena depends ultimately upon the ingenuity, resourcefulness, and energy of the winning party'.<sup>159</sup> This led him to raise the question that still represents a key problem for enforcing the DSB rulings and recommendations, 'how to facilitate the drafting of other participants and their resources in an enforcement action?'.<sup>160</sup>

Nevertheless, one of the difficult issues is the determination of the reasonable period of time (RPT) under DSU Article (21:3) for compliance, which has proven to be challenging in theory and practice, and led to claims for downplaying the bindingness of GATT/WTO rules. To recall, DSU Article (21:3) stipulates that when it is 'impracticable' for the offending states to comply immediately with the rulings and recommendations as stated in the adopted Panel and AB reports, then the member should be afforded the right of having a RPT to comply.<sup>161</sup> The RPT shall be determined by the concerned member, or disputing members, or in case of disagreement, 'binding arbitration within 90 days after the date of adoption of the

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<sup>157</sup> (2007 World Trade Report: Six Decades of Multilateral Trade Corporation: What Have we Learnt?) (hereinafter 2007 World Trade Report)  
<[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report07\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf)> accessed 03 December 2012 155-160.

<sup>158</sup> *ibid.*

<sup>159</sup> Reisman (n 153).

<sup>160</sup> *ibid.*

<sup>161</sup> *The WTO Legal Texts* (n 124) 368-369.

recommendations and rulings'.<sup>162</sup> The RPT period shall not exceed (15) months from the adoption of a Panel or AB's report, and pursuant to DSU Article (21:4), in the case of exceptional circumstances, 'the total time shall not exceed 18 months'.<sup>163</sup> Despite these provisions but they are not effective in forcing recalcitrant states to comply, and they often lead to misunderstanding of the enforcement role of the DSB. Almost all WTO high profile disputes that have not been settled in a timely manner involve abuses of DSU Article (21:3), and scholars who argue against full compliance with WTO law 'the anti-legalist' cite this DSU Article as a justification for their argument.

For example, Zimmermann said that as an important mechanism for 'tolerating temporary non-compliance in the WTO dispute settlement system', the flexibility provided by the RPT is not weakening the WTO's framework.<sup>164</sup> Citing the long-standing *EC-Banana* dispute as an authority for his claim, Zimmermann said:

The weak back-up enforcement under the rules of the DSU does not force WTO Members into compliance, but tolerate *de facto*, that a member remains in breach for as long as that member accepts to pay the price of non-compliance *i.e.* [*EC-Banana*] (...) the fact that WTO Member found in breach does not, *de facto*, have to establish compliance at any cost by the end of the 'reasonable period of time' as set under the rules of Article 21.3 of the DSU, and that it can opt to 'buy' additional time in exceptional circumstances, constitutes not a weakness, but one of the strengths of the WTO legal framework'<sup>165</sup>

In proposing this claim that the WTO's dispute settlement mechanism can accommodate '*temporary non-compliance*', Zimmermann implies that the number of long-term non-compliance disputes will not be damaging for the system as a

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<sup>162</sup> *ibid.*

<sup>163</sup> *ibid.*

<sup>164</sup> Zimmermann, 'Toleration of Temporary Non-Compliance' (n 62). In proposing his claim of temporary noncompliance, Zimmermann relied on Warren Schwartz and Alan Sykes who claim that the WTO system is best understood using 'the economic theory of contract remedies' that include 'liability rule remedy'. According to this rule 'A party who wishes to deviate from its commitments may do so without the need to secure the permission of any adversely affected party, but is liable for damages as a result'. This rule led the authors to consider the provisions of DSU as to 'allow a violator to continue a violation in perpetuity, as long as it compensates or is willing to bear the costs of the retaliatory suspension of concessions' saying that 'If the WTO members really wanted to make compliance with dispute resolution findings mandatory, they would have imposed some greater penalty for noncompliance to induce it' for more information. Overall, this issue between the strict compliance with the WTO rules versus rebalancing argument that sees the objectives of the DSU 'as supplying an insured safety-valve for injuries' will be discussed further in the next subsection. See Schwartz and Sykes (n 13).

<sup>165</sup> Zimmermann (n 62) (emphasis added).



whole as it has not entailed an erosion of confidence in the multilateral trading system.<sup>166</sup> However, by not identifying the *exceptional* or rare scenarios that justify the abuse of the RPT by giving an example of relevant cases, apart from the only cited case of *EC-Banana*, Zimmermann's claim of *toleration of temporary non-compliance as systematic safety valve of WTO dispute settlement* remains unclear. Furthermore, there is a contradiction in Zimmermann's analysis of drawing an analogy between the contract law theory of 'efficient breach' by considering the WTO's system as a system of 'breach and pay' and thus, playing down the 'binding' nature of the WTO law, while at the same time acknowledging that there should be full, but not prompt compliance with the DSB's rulings and recommendations.<sup>167</sup>

It is the assertion of Qian that the WTO member involved in misusing the RPT and failing to bring the measure(s) into conformity with the WTO's law, will 'adversely affect the WTO Members' confidence in the WTO dispute settlement system if not the integrity of the whole of the organisation'.<sup>168</sup> Therefore, it is hard to see Zimmermann's interpretation of DSU Article (21:3) as a reason for deviating, not breaching as he tried to distinguish, from upholding the rules of DSU which include prompt compliance and timely implementation of the DSB's rulings and recommendations. A clear illustration of the DSB qualified success to provide an early and effective settlement of disputes can be demonstrated in brief analysis of the following high profile cases where the attainment of full compliance with the DSB's rulings have been difficult, and have in some cases still not been accomplished. The WTO DSB has an ineffective countermeasure for inducing member states to comply with GATT/WTO rules of fair trade. For instance; after discussing the automatic operation of countermeasures within the WTO, Kristsiotis said:

At first the automatic countermeasures seem a mature method of securing effective and swift justice for world trade, at least when compared with the ICJ which has no equivalent powers to compel

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<sup>166</sup> *ibid.*

<sup>167</sup> See Yuka Fukunaga, 'Securing Compliance Through The WTO Dispute Settlement System: Implementation of DSB Recommendations' (2006) *Journal of International Economic Law* 383; John Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligations to Comply or Options to "Buy Out"?' (2004) *American Journal of International Law* 109; Joost Pauwelyn, 'Enforcement and Countermeasure in the WTO: Rules are Rules-Toward a More Collective Approach' (2000) *The American Journal of International Law* 335 (hereinafter, *The WTO Rules are Rules*).

<sup>168</sup> M. A. Qian, "'Reasonable Period of Time" in the WTO Dispute Settlement Systems' (2012) *Journal of International Economic Law* 257.

compliance with its judgments (...) however the record of WTO practice suggests that this new system has been ‘stranded against the wall of noncompliance’, due in no small measure to ‘an enforcement problem’ where counter-measures have become but one further prop on the field of power politics (e.g. as between the European Union and the United States).<sup>169</sup>

The high profile cases that show the limits of the DSB are *EC-Banana*, *EC-Hormones*, *US-FSC*, and *US-Byrd Amendment*. They are important for the following reasons, first, and more importantly, in these cases member states have fought over ‘not only the underlying trade issues but what the dispute settlement system itself can deliver.’<sup>170</sup> Disagreements about the AB’s interpretation of highly scientific or politicalised disputes related to public health and wellbeing, or the function of Article (21:5) compliance review, have great importance for impending rulings, and shaping the future of the WTO’s DSB work. The rulings in *EC-Banana* and *EC-Hormones* highlighted the ineffectiveness of trade sanctions, as despite the EC found in both cases violating various WTO agreements, they did not correct these violations.

Unlike *US-Steel Safeguards* and *US-FSC* where the threat of retaliation forced the US to remove WTO-inconsistent measure(s), the threat of significant and imminent retaliatory actions did not force the EC to change their policy in *Banana* and *Hormones*. The EC’s refusal not to comply after being sanctioned has led to the critical perspective that the *Banana* and *Hormones* episodes show how fruitless trade sanctions are, as they have not promoted compliance. The ineffectiveness of retaliation is due to a number of disadvantages summarised by Charnovitz when he considered the facts of *Banana* and *Hormones*, finding ‘multiple problems of undermining WTO principles, encouraging discrimination, deprecating human rights, damaging the economy of the sender country, facilitating protectionism, and favouring larger countries’.<sup>171</sup> These problems occurred despite both disputing member states having adopted national laws to facilitate the imposition of retaliation

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<sup>169</sup> Dino Kritsiotis, ‘International Law and the Relativities of Enforcement’ citing Pauwelyn, ‘The WTO Rules are Rules’ (n 167) in *The Cambridge Companion* (n 6) 265.

<sup>170</sup> C. O’Neal Taylor, ‘Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement’ (2007) *University of Pennsylvania Journal of International Economic Law* 309.

<sup>171</sup> Charnovitz, ‘The Enforcement of WTO Judgments’ (n 153).

in accordance with WTO rules and representing private parties' interests.<sup>172</sup> Additionally, these two cases raise many questions concerning Panel and AB jurisdictions to accept or reject whatever standard of review they deem appropriate with regard to the Sanitary and Phyto-Sanitary measures. For example, in *the US and Canada-Continued Suspension of Obligations in the EC- Hormone* dispute, the AB recommended that the disagreement regarding the suspension should be addressed through DSU Article (21:5) compliance review proceeding, yet why did the AB not find that the Panel had no jurisdiction to handle this case from the outset, instead of upholding and reversing some of its findings.<sup>173</sup> In *EC-Banana III* (second recourse to DSU Article (21:5)) the AB received similar criticism of not clarifying the nature and duration of NoI, leaving the arbitrators with little guidance as to how they should deal with '(i) overlap and coincidence of NoI (ii) previously repealed measures, and (iii) the relevant definition of NoI.'<sup>174</sup>

With regard to Banana case, and the view that the EC was seeking to protect its reputation by keeping its promises to the African, Caribbean and Pacific countries, and showing its good faith in valuing one commitment more than the other,<sup>175</sup> can such justification for protecting the developing and least developing countries' interests justify a deviation from WTO law? Also the question has to be asked about how these cases were settled after many years of stalemate and retaliation. For example; in Hormones retaliation, the EC did not change their policy after nine years. Was this eventual change of tact because of the adverse effects of retaliation in hurting the sender and the target country? or was it because the WTO DSB found themselves compelled to resort to the GATT model of settlement by rebalancing concessions, thus allowing space for 'political safeguard' because the EC has 'inconsistent' regulatory system.

In December 2009, the EC reported that it had reached an agreement with the Latin American banana suppliers (the so-called Geneva Agreement on Trade in Banana)

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<sup>172</sup> Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (Oxford University Press 2009) 133.

<sup>173</sup> Markus Bockenforde, 'Hormone Ban in Dispute Again: the WTO Refuses to Reject Either the EC Ban or Canadian/US Trade Sanctions' (2008) <<http://www.asil.org/insights081218.cfm>> accessed on 23 September 2012.

<sup>174</sup> Simon Schropp and David Palmetier, 'Commentary on the Appellate Body Report in EC-Bananas III (Article 21.5): Waiver-Thin, or Lock, Stock, and Metric Ton?' (2010) *World Trade Review* 7.

<sup>175</sup> Juscelino Colares, 'The Limits of WTO Adjudication: Is Compliance the Problem?' (2011) *Journal of International Economic Law* 403.

and a similar agreement with the US, which provides for a new EU tariff schedule on bananas. Similarly, on 17 March 2011 the parties reached a Memorandum of Understanding regarding the importation of hormone-free beef in exchange for increasing the duties applied to certain products of the EC. Both settlements were reached in reciprocal and mutually advantageous arrangements without resorting to the voluntary trade compensation or the continuation of retaliation. Hence, Limenta argues that the purpose of retaliation is not to induce prompt compliance by the recalcitrant WTO member as stated by arbitrators in *EC-Banana III (Ecuador)* (Article 22.6), but to induce a mutually agreeable solution.<sup>176</sup> Regarding the *US-FSC* and *US-Byrd Amendment*, the US Congress in defiance of the DSB rulings, and due to the system's lack of post-retaliation sanctions, kept enacting replacement legislation that contained in them or in their integrated whole measure(s) inconsistent with WTO law.<sup>177</sup>

In the *US-FSC* dispute the US for almost four decades adopted four legislation, the Domestic International Sales Corporation (DISC) of 1971, the Foreign Sales Corporation (FSC) of 1984, the Repeal and Extraterritorial Income Act (ETI) of 2000, and American Job Creation Act of 2004, to deal with the following dilemma, 'how could the U.S maintain the "competitiveness" of U.S exports in the international trade arena with a WTO acceptable tax policy?'.<sup>178</sup> The *US-FSC* case is seen as an impossible case for three reasons. Firstly, it highlights the different views of the disputing members about the status of the method of 'foreign earned income'. Secondly, the EC brought this dispute as a strategic response to the US aggressive approach in *Banana and Hormones*.<sup>179</sup> Thirdly, issues of taxation is believed to be relevant to the sovereignty of member state in deciding the appropriate system.<sup>180</sup>

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<sup>176</sup> Michelle Engel Limenta, 'Non-compliance in WTO Dispute Settlement: The Multiple Purposes of WTO Retaliation' (2012) *Society of International Economic Law* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2091199&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091199&download=yes)> Accessed 5 December 2012.

<sup>177</sup> For example, in the *US-FSC*, the fate of implementing the adopted reports in this dispute was left to the executive branch of the US, the President, who was put in the difficult position of deciding to either save the business affected by the EC sanctions, or 'wash his hands in innocence'. See Andreas Paulus, 'From Neglect to Defiance the United States and International Adjudication' (2004) *European Journal of International Law* 783.

<sup>178</sup> James Nedumpara, 'Lessons Learned from DISC/FSC/ETI Disputes: Reshaping the Quest Towards a GATT/WTO Friendly Corporate Tax Reform in the United States' (2011) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1856686](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856686)> access on 20 December 2012.

<sup>179</sup> Taylor (n 170).

<sup>180</sup> *ibid.*

Such a long and difficult dispute has divided the opinions about how the DSB should resolve it, with one opinion suggesting that the GATT/WTO had little legitimacy and expertise to handle this dispute from the outset.<sup>181</sup>

Another opinion proposes that the DSB should recommend the adjustment of the US tax policy from 'worldwide taxation system' (the country of residence of the tax payer) to a progressive two-tiered consumption tax such as destination basis X tax.<sup>182</sup> However, this adjustment would not be appropriate because of Panel and AB pure textual interpretation of Subsidies and Countervailing Measures Agreement (SCM), thus an examination of whether the tax legislation is based on neutral criteria and whether it meets the definition of subsidy, is recommended for the determination of the measures' consistency with WTO law.

Overall, both perspectives on the adjustment of the taxation system and the advocate for the use of the 'political issue doctrine' maintains that the Memorandum of Understanding of 1981 which allegedly resolved the DISC dispute by clarifying GATT Article (XIV) provisions, should have been upheld to settle the *US-FSC* dispute. From the constitutional flaw mentioned by Barfield to a number of interpretation problems relating to GATT Article (XIV) and the (SCM) footnotes (especially footnote 59), the *US-FSC* dispute remains far from being settled. With regard to *US-Byrd Amendment*, the US showed its good intention by bringing the measures complained of into conformity with WTO obligations by the repeal of the Continued Dumping and Subsidy Offset Act of 2000 into a new act, the Deficit Reduction Act of 2006. However, the EC and Japan disagreed with the US action stating that the measures had not been fully brought into conformity with the DSB's recommendations and rulings; thus they will continue to retaliate, and notified the DSB of a new list of products.

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<sup>181</sup> Barfield said, the WTO DSB, as incompetent world tax court, left a number of conflicting norms and interpretative problems unclear, see Claude Barfield, 'Should the WTO Determine US Tax Policy?' (7 July 2004) <<https://www.aei.org/publication/should-the-wto-determine-u-s-tax-policy/>> accessed 18 December 2012.

<sup>182</sup> The 'destination basis X-tax' is different from the 'origin basis' tax on the basis that the former is imposed on services and goods *consumed* within the taxing jurisdiction, while the latter is imposed on goods and services *produced* within the taxing jurisdiction. See Daniel Shaviro, 'Replacing the Income Tax with a Progressive Consumption Tax' (2004) <<http://www.americantaxpolicyinstitute.org/pdf/ShaviroPCT.pdf>> accessed 20 of December 2012.

As mentioned earlier, the conflicting and unclear interpretations of the Panel and AB of the relevant agreements might be the cause of delayed compliance with the DSB's rulings and recommendations. For instance, in rejecting the Panel's interpretation that the *Byrd Amendment* 'has a specific adverse impact on the competitive relationship between domestic products and dumped [or subsidized] products',<sup>183</sup> the AB failed to explain 'to what extent the *Byrd Amendment* over-compensates affected US industries beyond the acceptable maximum level provided in the WTO Agreements?'.<sup>184</sup> By dismissing the Panel interpretation and paying attention to the letter as opposed to the context of Anti-Dumping and SCM, the AB neglected that these agreements meant to establish a level playing field between domestic and foreign competitor allowing members to impose acceptable import duties.<sup>185</sup> In brief, these four high profile disputes show the limits of the DSB enforcement role, and they have served as a basis for on-going academic debate of introducing the private contract theory of efficient breach to the WTO law.

### **2.3.3 Legalisation of Efficient Deviations in WTO Law:**

The WTO dispute settlement system, which is feared to become 'the victim of its own success', has continued to spark academic debates from both the sceptics and proponents of public international law. One area of disagreement is whether the private contract theory of *efficient breach* should be applied to WTO law. For scholars like Posner and Sykes, international law does not contain a normative argument for compliance as some of it 'may be nothing more than rhetoric for domestic or international political consumption, for example, or may reflect the pursuit of illicit objectives by governments'.<sup>186</sup> But defining international law as such, and because of the absence of third-party enforcement, viewing its enforcement as entirely 'self-enforcing' system, shows very narrow simplistic view of the field and its developments. The authors tried to justify their claim of legalising efficient deviations by focusing on the limitations of the law of treaty; namely the state's right to suspend the operation of the treaty in the face of

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<sup>183</sup> The Appellate Body Report, United States-Continued Dumping and Subsidy Offset Act of 2000, page 41-42, WT/DS217/AB/R, adopted 16 January 2003.

<sup>184</sup> Jagdish Bhagwati and Petros C. Mavroidis, 'Killing the Byrd Amendment with the Right Stone' (2004) *World Trade Review* 119.

<sup>185</sup> *ibid.*

<sup>186</sup> Posner and Sykes (n 12).

economic or political shocks, reservations, and the withdrawal rights. They have used rare scenarios from international economic law under the WTO to interpret a number of articles and decided cases as allowing the states to derogate when the ‘cost exceeds the benefits for compliance’.<sup>187</sup> Furthermore, the proponents of efficient breach attribute positive value to the violation of WTO law, and noncompliance with the DSB rulings, saying that such violations ‘should be considered as an instrument for renegotiation (...) providing indispensable flexibility to the world trading system’.<sup>188</sup>

The reason they have chosen WTO law is because they regarded the WTO member state breach of the treaty, which is sometimes followed by calibrated retaliation, as ‘acceptable from a welfarist perspective and essential for cooperation between states’.<sup>189</sup> It is true that there is uncertainty with regard to DSU Article (22), such as the determination of the RPT, and the level of NoI for the authorisation of retaliation, which the WTO itself recognises as creating problems that poses a threat to the WTO underlying principles of liberation of trade.<sup>190</sup> The ‘suspending concessions or other obligations under the covered agreements’ (DSU 22:2) or as it is commonly known, retaliation, is the most important trade remedy for the violation of WTO law. Its primary goal is not mainly as it used to be under the GATT era (1948-1994), which was rebalancing the rights and obligations or compensation, but under the WTO it plays the key role of sanctioning non-compliance.<sup>191</sup> Explaining the evolution of retaliation, which is mirrored in the evolution of public international law, Pauwelyn said:

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<sup>187</sup> *ibid.*

<sup>188</sup> Heinz Hauser and Alexander Roitinger, ‘Renegotiation in Transatlantic Trade Disputes’ in Ernst-Ulrich Petersmann and Mark Pollack, *Transatlantic Economic Disputes: the EU, the US, and the WTO* (Oxford University Press 2003) 488.

<sup>189</sup> *ibid.*

<sup>190</sup> See The Process- Stages in a Typical WTO Dispute Settlement Case <[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)> accessed 5 April 2013; 2007 World Trade Report: Six Decades of Multilateral Trade Corporation: What Have We Learnt? <[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report07\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf)> accessed 3 December 2012.

<sup>191</sup> Pauwelyn linked this change of terminology from the GATT mere ‘suspension of concession’ to clearer terms that induce compliance or sanction under the WTO to the evolution of countermeasures under public international law from the right of ‘suspension of treaty’ as stipulated under Article (60) of the VCLT to the commonly used term of ‘countermeasure’ under Article (49) of ARSIWA. See Joost Pauwelyn, ‘The Calculation and Design of Trade Retaliation in Context: What is the Goal of Suspending WTO Obligations?’ in Chad Bown and Joost Pauwelyn, *The Law Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2013) 43-49 (hereinafter *The Calculation and Design of Trade Retaliation*).

The contextual goal of WTO suspension as expressed in the DSU is not rebalancing or compensation as such but compliance or settlement (...) this goal is not only backed up by the formal 'equivalent retaliation' remedy (DSU Art. 22.4), but also by informal remedies such as reputation and community costs linked to continued non-compliance. Indeed, it is the repeated expression in the DSU that the ultimate goal of the system is compliance that nurtured a general perception that compliance is, indeed, the goal.<sup>192</sup>

However, the advocates of efficient breach have largely overlooked the contextual analysis, and the Panel and AB interpretations, and mainly relayed on few cases to undermine the efficacy of the WTO compliance regime. For example, apart from the only cited case in Posner and Sykes' article, *EC-Hormone*, and in Zimmermann's article, *EC-Banana*, neither of the two WTO cases involved the occurrence of any economic or political shocks to be examples for legalising efficient breach.<sup>193</sup> In fact, both cases led to retaliation of different kind, tit-for-tat retaliatory actions with the US, not what the authors claimed in their interpretation of DSU Article (22:2). As mentioned earlier, as a strategic response to the US aggressive approach in *Hormones* and *Banana*, the EC brought two complaints against the US in *US-Foreign Sales Corporation* and *US-Byrd Amendments*, and all of these cases of retaliation have posed a risk of making the world trading system unstable and unpredictable.

Also, the proponents of efficient breach have disregarded the second sentence of DSU Article (22:1) which reads 'neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.'<sup>194</sup> They have also wrongly reconsidered the goal of WTO obligations saying that they 'are international obligations of result instead of conduct' so they can be efficiently breached to the extent to benefit the state welfare.<sup>195</sup> However, this view is contrary to the general understanding of the role of the WTO obligations as being 'a code for state conduct' encompassing legal rules for trade liberalisation that

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<sup>192</sup> *ibid* 47.

<sup>193</sup> Posner and Sykes (n 12); and Zimmermann (n 62).

<sup>194</sup> *The WTO Legal Text* (n 124) 370.

<sup>195</sup> Claus Zimmermann, 'The Neglected Link Between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, and the Absence of Retrospective WTO Remedies' (2012) *Trade, Law and Development* 251.



ensure non-discrimination and equality of sovereign states.<sup>196</sup> Nonetheless, the difficulty faced by the GATT/WTO dispute settlement processes on deciding on high profile cases exhibits a more favourable view of the evolution of the international trade regime. To paraphrase Joyner, in international dispute resolution, the fact that most disputes arise over different interpretations of facts or of applications of law does not mean that the treaty failed to preserve cooperation.<sup>197</sup> Because, high-profile cases under the WTO, like that occurred under the GATT, have improved the treaty by providing ‘valuable legal interpretations of relevant GATT/WTO agreement and/or uncovered major defects and design flaws in the DSU procedures’.<sup>198</sup>

As was the case under the GATT, the challenge of handling politically sensitive cases, ‘the wrong cases’, would be resolved by the certainty provided in the firm legalistic approach.<sup>199</sup> It is noteworthy that the controversies surrounding some of the disputes, especially those concerning the protection of public health and the environment, have been unreasonably triggered to undermine the effectiveness of international trade rules for the sole purpose of protectionism.<sup>200</sup> Moreover, the Panel and AB have managed to resolve some ‘wrong’ or ‘impossible’ cases, avoiding protracted litigation, without showing that the rulings were the results of legal failure.<sup>201</sup> For instance, in the *US-Helms-Burton* case concerning legislation enacted by the US Congress regarding trade sanctions against Cuba which was extended to be applied to foreign companies trading with Cuba, was successfully settled as a political rather than a trade matter.<sup>202</sup> Furthermore, a number of WTO scholars like Jackson and Pauwelyn have warned of the inappropriateness of

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<sup>196</sup> Asif Qureshi and Andreas Ziegler, *International Economic Law* (3rd edn Sweet & Maxwell 2011) 345-427.

<sup>197</sup> Joyner (n 38) 121.

<sup>198</sup> Taylor (n 170).

<sup>199</sup> William Davey ‘Dispute-Settlement in GATT’ (1987) *Fordham International Law Journal* 51.

<sup>200</sup> Kyle Bagwell and Robert Staiger, ‘National Sovereignty in the World Trading System: Labor, Environment, and the WTO’ (2001) *Harvard International Review* 54; Kenneth Reinert, *An Introduction to International Economics* (Cambridge University Press, 2012) 94. See Tim Worstall, ‘Forward to Fascism with Compass and its “Progressive Protectionism”’ (2012) <<http://blogs.telegraph.co.uk/finance/timworstall/100016540/forward-to-fascism-with-compass-and-its-progressive-protectionism/>> accessed on 12 July 2012; Jagdish Bhagwati, ‘Why Free Trade Matters’ (23 June 2011) <<http://www.project-syndicate.org/commentary/why-free-trade-matters> > accessed on 17 September 2012.

<sup>201</sup> Taylor (n 170) 301.

<sup>202</sup> *ibid* citing US-The Cuban Liberty and Democratic Solidarity Act, DS38.

drawing analogies from domestic law jurisprudence, such as the contract law theory of efficient breach, to be incorporated into international law.<sup>203</sup> For example, when replying to Schwartz and Sykes, Jackson said:

No language in the DSU explicitly ties it to the concept of efficient breach, and references in Schwartz and Sykes to a tie to some of the language in some of the cases is tenuous, if not erroneous. The notion that if WTO members had really wanted to make compliance with findings mandatory, they would have imposed some “greater penalty for noncompliance” rather than the equilibrating idea that is now contained in the DSU is purely conjectural. Another, more logical and more likely (in terms of the history of the system) explanation for the limitation on compensation or suspension actions that was introduced in the DSU is that the sovereign nation that make up the organization were trying to limit the overall power and to prevent overreaching by some international judicial body that might be tempted to utilize “penalizing approaches”.<sup>204</sup>

Additionally, with regard to the state’s right not to comply in cases of economic shocks, as mentioned earlier, international trade law recognises the state’s welfare and provides exceptions for its sovereign decisions. However, recent studies confirmed predictions from early scholars of international law that the more cooperative, mutual and regulated relationships between states are, the less severe and more resolvable global economic or political problems will become. For instance, Kim said that owing to the role of economic and noneconomic international institutions in being ‘conveyors of information and mechanism of commitment and socialization’ during the 2008 recession, there has been fewer instances of states resorting to protectionist trade measures.<sup>205</sup> This is because the G-20 countries adhered to their commitments not to raise trade and investment barriers during the crisis, and governments resisted the firms’ push for protection until they ‘conduct an investigation to assess the extent of injury’.<sup>206</sup>

The result was that the international community effectively dealt with the crisis as cooperation rules between states were maintained. In addition, the government’s risk assessment before invoking efficient breach confirms with the general practice

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<sup>203</sup> Jackson ‘The Editorial Comment’ (n 149); Pauwelyn, ‘The WTO Rules are Rules’ (n 167).

<sup>204</sup> Jackson, ‘The Editorial Comment’ (n 149) citing Schwartz and Sykes (n 13).

<sup>205</sup> Soo Yeon Kim, ‘Protectionism During Recessions: Is this Time Different?’ citing Leonardo Baccini and Soo Yeom Kim, ‘Preventing Protectionism: International Institutions and Trade Policy’ (2012) *The Review of International Organization* 369 in, *The Political Economist* (Vol: IX, Issue:2, Madison, 2012).

<sup>206</sup> *ibid.*

as codified in ARSIWA Article (23:2(B)) that stipulates that the theory does not apply if ‘the State has assumed the risk of that [unforeseen] situation occurring.’ Because, if the state did not presume the risk by assessment, it need not use unilateral inward protectionist measures which will badly affect its economy and people’s welfare.<sup>207</sup> Indeed, the state would instead seek the available protection from international law as interpreted and applied by international organizations, which will mitigate the damaging effects of isolationism, and promote its reputation as a trustworthy trade partner.<sup>208</sup>

#### **2.4 Lessons Learned from the Evolution of Public International Law:**

The evolution of public international law from the authority of power-politics to an order guided by the international rule of law has four lessons relevant to this thesis. First, the evolution from a world dominated by an IR theory of realism to a more orderly world influenced mainly by the insights of institutionalism and constructivism shows that only legal rules that are socially constructed and institutionalised can maintain international peace, and prosperity for mankind.<sup>209</sup> Second, once an international law is created it cannot be separated from its enforcement, and an analytical framework of assessing the level of legitimacy and legality is needed to show, first whether the state have actually created, and are willing to maintain legal rules, and second how much power the institutional enforcement mechanism can exert to influence state behaviour.

As has been clarified by the compliance promotion lesson learned from *Interactionalism*, ‘noncompliance procedure, dispute settlement, and enforcement’ are all enmeshed in the three elements of interactionalism: shared understandings, Fullerian principles of legality, and the practice of legality.<sup>210</sup> Once those elements are substantially met in the law-making and application, international law will

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<sup>207</sup> See Ian Macneil, ‘Efficient Breach of Contract: Circles in the Sky’ (1982) *Virginia Law Review* 947; Abdulmalik M. Altamimi ‘Can the WTO Rules be Efficiently Breached for Welfarist Objectives?’ (2014) *Manchester Journal of International Economic Law* 79.

<sup>208</sup> See Robert Kolb, ‘History of International Organization or Institutions’ (2011) *Max Planck Encyclopedia of Public International Law*.

<sup>209</sup> See Joyner (n 38); Fred Morrison, ‘Public International Law: An Anchor in Shifting Sands’ (2004) *Law and Inequality* 337.

<sup>210</sup> Brunnée and Toope, *An Interactional Account* (n 9) 108-114. Fuller’s eight internal tests of legality are ‘generality, promulgation, non-retroactivity, clarity, non-contradictory, not asking the impossible, constancy, and congruence of official action with underlying rules’ see Fuller, *The Morality of Law* (n 8) 39.

generate a distinctive legal legitimacy, and subsequently attract its own adherence, or in Fuller's words the '*fidelity*' to law.<sup>211</sup> Hence, from this theoretical-framework emanates interactional unique concept of compliance, 'compliance by a state or actors within a state is not merely an outcome produced by the norm or by its enforcement, but part of the ongoing process of interactional law-making'.<sup>212</sup> This framework has shown remarkable results of thorough assessments pinpointing at the legality flaws that require attention in three areas of international law: climate change, prohibition on torture, and the use of force.<sup>213</sup>

The third lesson is that evolution of public international law has an impact on WTO law especially on the evolution of countermeasures from the 'treaty suspension' to economic sanctions to the growing emphasis on the responsibility of states for wrongful acts. For example, Pauwelyn in his discussion of remedies under the GATT and WTO made an analogy with the default remedies in general international law, comparing the 'treaty suspension' in Article (60) of the VCLT to the right to take deterrent countermeasures to *induce compliance* in Article (49) of ARSIWA.<sup>214</sup>

Pauwelyn explains this analogy by saying:

That the evolution from GATT to WTO suspension has been one from 'treaty suspension' under the *VCLT* to 'countermeasures' under *ARSIWA* is confirmed in the gradual changes of terminology commonly used to refer to GATT/WTO 'suspension'(...) Although we are stuck with the old GATT/*VCLT* term of 'suspension' even in the DSU (but not in the Subsidies and Countervailing Measures (SCM) which does use the term 'countermeasures') for all intents and purposes, what we now have in the WTO is something more akin to retaliation or countermeasures as they are expressed in the *ARSIWA*.<sup>215</sup>

Also as explained in this chapter, the evolution of public international law has strong positive bearing on the practice under the GATT/WTO rules. For example, it has been claimed that when the DSB shows greater institutional sensitivity to other

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<sup>211</sup> Brunnée and Toope, *An Interactional Account* (n 9) 34-36.

<sup>212</sup> *ibid* 122.

<sup>213</sup> *ibid* 216-219, 268-270, 349.

<sup>214</sup> The Draft Articles on the Responsibility of State

<[http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)>; the Vienna Convention <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> accessed 23 October 2014.

<sup>215</sup> Pauwelyn, 'Calculation and Design of Retaliation' (n 191) 49 (emphasis added). For more on the relationship between WTO law and international law see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 37.

international organizations it serves ‘to add legitimacy to its decision making and benefit the trading system’ as a whole.<sup>216</sup> However, the fourth lesson is that the realist/rationalist scholars inadequate accounts of the evolution of legal obligation from the GATT to the WTO, led them to introduce the efficient breach of contract theory to international law. This fact is evident when the ‘anti-legalists’ scholars try to justify breaching international law rules for the promotion or protection of the economic concept of the state-welfare, which can be translated into *state interests*.<sup>217</sup>

The legalists, however, maintain that the Uruguay Round improvements to dispute settlement system, and the states practice under the WTO treaty show that the use of terms like ‘increasing state-welfare’ or ‘sovereignty’ to justify breaching the WTO treaty is highly unwarranted.<sup>218</sup> For instance, the creation of the DSB AB to decide on issues of law and legal interpretation ‘encouraged petitioners, respondent states, and panellists to take more legalistic approach to cases’.<sup>219</sup> Nevertheless, the debate between the legalists and anti-legalists is on-going, and for the purpose of this thesis an overview of this debate will be provided in the next chapter under the heading *mapping the anti-legalists versus legalists debate on compliance*. The issue about the goal(s) of trade sanctions has proven to be problematic for academics and practitioners from both schools of theory, especially the anti-legalist scholars<sup>220</sup>

Furthermore, under this heading a number of reasons will be provided as to why this debate is flawed and confusing especially to those who are not familiar with the past and present states practice under the GATT/WTO rules. However, the history of the multilateral trading system has so much to tell us about why states with different political systems and various economic powers willingly came together to form the GATT, and when the GATT had been exhausted, formed another more obligatory organization named the WTO. The WTO law and practice will be illuminated in the

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<sup>216</sup> Marina Foltea, *International Organizations in WTO Dispute Settlement: How Much Institutional Sensitivity* (Cambridge University Press 2012) 292.

<sup>217</sup> Posner and Sykes (n 12); Eric Posner, *The Perils of Global Legalism* (University of Chicago Press 2009).

<sup>218</sup> See Jackson, *Sovereignty, The WTO* (n 148).

<sup>219</sup> VanGrasstek, *The History and Future of the World Trade Organization* (n 128) 244.

<sup>220</sup> Mangus said state’s treaty breach should not outweigh the importance of political decision see John Magnus, ‘Compliance with the WTO Dispute Settlement Decisions: Is there a Crisis?’ in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press 2005) 249.

next three chapters that focus on interactionalism's interlinked elements of shared understandings on compliance, principles of legality, and the practice of legality.

## **2.5 Conclusion:**

There have been great contributions by international law and IR scholars to prove the relevance and importance of *the study of international cooperation*, and provide effective means for enforcing international rules. One area of interest for scholarship is the formation of international legal obligation, which the above incorporated theory of interactionalism has tried to explain its origin and optimal function. The disciples of Morgenthau who believe that states (meaning here the powerful) should not be bound by international law, should be mindful of the reality now that both states and individuals within those states are constantly invoking and seeking the protection of international law. The national and international courts and tribunals' reflection on the responsibility of the state to respect its obligations toward its own citizens, and toward the rights of other states, is landmark legal achievement of the twenty first century. The role of international law cannot be simply reduced or linked to a limited number of cross-border business transactions, diplomacy, or right of transportation, which have been developed by civilizations as customs or traditions for the subjects of different states.

It is in the interest of international peace, security, and prosperity for mankind that the states' actions must be always placed under the scrutiny of international law. For example, as will be demonstrated in the following chapters with regard to the WTO, the state interactive participation in the multilateral trading system in accordance with the binding rules of the WTO, is beneficial for state welfare. The promotion of international rule of law, that serves many objectives including economic growth, has become a requirement for the subjects of international law: International organizations and states of legal personality. It is true that there remain uncertainties in the enforcement of public international law, but since 'the writings of publicists' was referred to as one of the sources of international law, and scholars from various subfields continue to devise credible enforcement mechanisms, the hope is always alive that international law will play greater role in promoting peace and security. To borrow the words of Brierly in his 1954 classic, *Law of Nations*, international law is truly 'neither a myth on the one hand, nor a panacea on the other, but one institution

among others which we can use for the building of a saner international order' (page V).<sup>221</sup>

Finally, as has been indicated earlier, the interactionalism theory appears to offer a comprehensive understanding of international legal obligation, that this research requires to explain compliance with WTO law. Therefore, in the second chapter about the evolution of the dispute settlement system from the GATT to the WTO, interactionalism will be incorporated to the extent to explicate the evolution of legal obligation and adjudication. The evolution from the GATT to the WTO is a story of voluntary transformation from establishing political norms to legal rules that the member states were heavily involved in it as the main actors. Interaction for either building shared understandings on compliance with WTO law, or ensuring that the GATT/WTO rules meet the principles of legality, or that there is a robust practice of legality- even though these tasks have not been named as such- but their mere existence is further evidence of the importance of interactionalism in explaining the role of law in the WTO. This is why the theory is an important analytical-framework for this thesis to illuminate the WTO law and practice of compliance.

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<sup>221</sup> Cited in Boleslaw Boczek, *International Law: A Dictionary* (Scarecrow Press 2005) xiv.

### Chapter 3: Shared Understandings on Compliance with the WTO Law

#### 3.1 Introduction:

The preceding chapter about the concept of compliance in public international law has strong bearing on the topic of this chapter about the origins of the World Trade Organization (WTO) obligations and their adjudication. Like the origins of the General Agreement on Tariffs and Trade (GATT) obligations, the WTO obligations rests on the reciprocal promises made by individual member states, and extends to the observance of the GATT rules and their exceptions in non-discriminatory manner.<sup>1</sup> The role of WTO member states continuous interaction for forming shared understandings of the multilateral trading agreements is very important. Speaking of the 1994 Uruguay Round, Jackson said, ‘overall, the Uruguay Round is a huge Package that many governments, including some of the most advanced and developed, most surely do not entirely understand’.<sup>2</sup> This clearly indicates that the true test of treaty, is not only by accepting its rules and signing it, but also by legally interacting on the basis of these rules to cultivate solid shared understandings for optimal performance.

Additionally, it is through an institutionalised adjudicative process that the effectiveness of GATT/WTO obligations is tested, and the ways of complying with them are clarified. During the early years of the GATT, adjudication was mainly a consultation process, but it has gradually evolved into a rules-oriented system with settlement by panel procedure. The Uruguay Round came up with an ambitious procedure for settlement of disputes with a fully established body, the Dispute Settlement Body (DSB), and elaborate rules, the Dispute Settlement Understanding (DSU) that govern the settlement procedure and the work of the DSB chambers, the Panel and Appellate Body (AB). It is through the examination of the origins of

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<sup>1</sup> The reference to the GATT/WTO law connotes the evolution of the GATT (1947) rules toward a legalistic system through the strengthening and elaboration on the rules and procedures in the subsequent rounds of negotiations and later its incorporation in the Agreement Establishing the World Trade Organization under (Annex 1A) as the GATT (1994). The GATT remains the central instrument in the WTO order and its annex does not understate its significance. See Raj Bhala, *Modern GATT Law: A Treaties on the Law and Political Economy of the GATT & other World Trade Organization Agreements* (2nd edn, Sweet and Maxwell 2013) 3-15 (hereinafter *The Modern GATT*).

<sup>2</sup> John Jackson, ‘The WTO Dispute Settlement Procedures-A Preliminary Appraisal’ in Jeffrey Schott (ed), *The World Trading System: Challenges Ahead* (Peterson Institute 1996) 153.



WTO law, and the evolution from the GATT settlement procedure to the WTO DSB rules, which will show the defining features of this states-driven voluntary transition toward a legalistic order. As has been firmly established in Chapter One, the WTO law in terms of its orientation, principles, and practice is an integral part of public international law. In fact, as it will be argued in this thesis, the evolution of public international law under various treaties has had an influence on the *progressive legalization* during the lifetime of the GATT (1948-1994).<sup>3</sup> An examination of this external influence on the law-making and administration under the world trade law can only be done by using an analytical-framework. This is because the application of a framework that is based on a complete theory of law will provide a comprehensive and original treatment of the concept of compliance with the WTO trade rule of law.

This is why Brunnée and Toope's interactional international law theory (hereinafter *interactionalism*) is incorporated.<sup>4</sup> Interactionalism's unique concept of compliance that looks at the law system in its totality starting with the minimum requirement of law-making, the shared understandings, then ensuring that the rules meet Lon Fuller's principles of legality, and finishing with the maintenance of a continuous practice of legality, is an attractive and convincing account.<sup>5</sup> Due to the special attention of interactionalism to the concepts of *reciprocity* and *legality*, and the current ongoing debate between the legalist and anti-legalist scholars, this chapter argues that interactionalism is suitable to explicate the contemporary WTO law and practice. The debate between the legalist scholars, who say that the DSB rules and settlement reports are *binding international obligations*,<sup>6</sup> and the anti-legalists who say that the rules can be breached, and the compliance with the reports delayed to

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<sup>3</sup> The term 'progressive legalization' was first used by Ernst-Ulrich Petersmann in *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International 1997) (hereinafter *The GATT/WTO Dispute Settlement System*) 84-87.

<sup>4</sup> Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) (hereinafter, *An Interactional Account*).

<sup>5</sup> For reviews of interactionalism's convincing account of international law see Wibren Van der Burg, *The Dynamics of Law and Morality* (Ashgate Publishing Limited 2014); Wibren Van der Burg, 'The Work of Lon Fuller: A Promising Direction for Jurisprudence in the Twenty-first Century' (2014) *University of Toronto Law Journal* 736.

<sup>6</sup> For an overview see Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May 2002) 34; John Jackson, 'Editorial Comment: International Law Status of WTO DS Reports: Obligation to Comply or Option to "Buy Out"?' (2004) *American Journal of International Law* 109 (hereinafter *The Editorial Comment*).

increase state-welfare, has centred on the goal(s) of trade sanctions.<sup>7</sup> In fact, this debate is far from over and the gulf between the legalists, anti-legalists, and those who are trying to find a middle ground, the quasi-legalist, is widening with no answer to these compliance-related questions: what does the evolution of the GATT tell us about the WTO law? and what is the nature of the WTO DSB rules and settlement reports?<sup>8</sup> In order to shed light on this debate, subsection 3.2 will provide an overview, and argue why interactionalism has the right mechanism to contain this debate and better explain the dynamic WTO law. It has been established by law and political scientists that the GATT had evolved into a legal system, however, it is the contention of anti-legalists that the world trading system had evolved into procedural rules that does not designate it as an *intrinsically obligatory*.

The reference here to political scientists is helpful as the same legalist/anti-legalist debate has a parallel in the political economy field. For instance, some scientists believe that the WTO dispute settlement system primarily serves as an enforcement device (in support of the legalist account that it ought to sanction noncompliance).<sup>9</sup> Yet others believe that the system has evolved into a set of procedural rules (in favour of the anti-legalists), and that these rules have failed to achieve fair and prompt settlements.<sup>10</sup> However, despite the political scientists' findings, the debate between legalist and anti-legalist is not yet settled, if anything, those opposing findings prolong the legality debate as each side will only cite the political study finding that supports their argument, neglecting the other side (un)reliable findings.

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<sup>7</sup> Eric Posner and Alan Sykes, 'Efficient Breach of International Law: Optimal Remedies "Legalised Noncompliance" and Related Issues' (2011) *Michigan Law Review* 243; Eric Posner, *The Perils of Global Legalism* (Chicago University Press 2009); Warren Schwartz and Alan Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System' (2002) *Journal of Legal Studies* 170.

<sup>8</sup> One reason for the complete divergent views between the legalist and anti-legalist is their completely different narrations of the history of world trade law see John Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, MIT Press 2002) (hereinafter *The World Trading System*); cf Douglas Irwin, Petros Mavroidis and Alan Sykes, *The Genesis of the GATT* (Cambridge University Press 2008).

<sup>9</sup> See Christina Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton University Press 2012); Thomas Sattler, Gabriele Spilker and Thomas Bernauer, 'Does WTO Dispute Settlement Enforce or Inform?' (2014) *British Journal of Political Science* 877.

<sup>10</sup> See Marc Busch and Eric Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes' (2000) *Fordham International Law Journal* 158; Benjamin Liebman and Kasaundra Tomlin, 'World Trade Organization Sanctions, Implementation, and Retaliation' (2015) *Empirical Economics* 715. Alter said that the system has failed by allowing 'rich countries to buy their way out of compliance' see Karen Alter, 'Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System' (2003) *International Affairs* 783.

In other words, the latest studies from political scientists about what is the purpose of the WTO dispute settlement system, and why *consenting state* comply or not comply with the rulings, that provide completely different results, is not helping to settle the legality debate but makes it more perplexing.<sup>11</sup>

That is why a mechanism like interactionalism is needed to provide an innovative reading of the legal evolution that corresponds with the reality of the made and currently enforced WTO law. The first element of interactionalism is the existence of shared understandings that are ‘relevant to law’s intelligibility and to perceptions of reasonableness’.<sup>12</sup> Shared understandings will be the focus of this chapter under subsection 3.3 that will introduce it by exploring the social foundations of world trade law. Subsection 3.4 will propose ‘an interactional world trade law’ view relying on interactionalism’s two theoretical bases, the International relations (IR) theory of constructivism and Lon Fuller’s interactional legal theory. The interactional world trade law will explore the shared political and legal understandings in the GATT and WTO that have led to the formation of interactional legal obligations, and provided the agreement on legalistic adjudicative processes.

Interactionalism’s sub-element of shared legal understandings focuses on the values of legal interactions for the constitution of obligation, and ‘the practice of legality’ for generating and maintaining the shared behavioural principles.<sup>13</sup> This sub-element in particular is of pivotal relevance to the interactional world trade law, and will be explored in the last section of this chapter, and in depth in the next chapter on the legality of the DSB rules and settlement procedures. The *shared understandings* is the appropriate element for analysing the origins of the WTO’s legal obligations, and its institutional design for adjudicating those obligations for maintaining an orderly society of economic traders. It will be demonstrated that the analysis of those obligations and their adjudication cannot be completely separated from each other especially for the purpose of examining the WTO compliance regime. Because the main weakness in the WTO compliance studies is the neglect of elaborating on

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<sup>11</sup> The GATT’s term of ‘contracting parties’, and WTO’s ‘member states’ will be used interchangeably depending on the historical context to refer to the states that consented to ‘the WTO legal texts’ that include the GATT 1994. But the term ‘consenting states’ will be used for explaining the procedural context that GATT and WTO share.

<sup>12</sup> Brunnée and Toope, *An Interactional Account* (n 4) 68.

<sup>13</sup> *ibid* 70-77.

the notion of legal obligation that led to misleading conclusions on the need for more stringent compliance rules or less thereof. This is added to an obvious lack of recommendations of how to improve the institutional settings of the WTO to make member states delayed compliance or noncompliance, an exception not the norm.

### **3.2 Mapping the Anti-legalists versus Legalists Debate on Compliance:**

Since the positions of the legalist and anti-legalist scholars are explained above, the following discussion shall give a brief overview of the conclusions of both disputants, and why interactionalism is needed to advance the compliance analysis of WTO law. As already stated, the legalist/anti-legalist dichotomy and its practical implications that led to the rise of the third strand of the debate, the quasi-legalist, does not reflect the evolution of world trade law and practice. It is helpful to start here with the conclusion of the legalist position, and after the split in this position, the conclusion of quasi-legalist to know the sources of disagreement. Three seminal articles by Jackson, a legalist, and two by Pauwelyn, a quasi-legalist, are important in not only explaining those scholars' positions but also to introduce the analytical framework of interactionalism.<sup>14</sup>

On the legalist position, and writing in 1994 Jackson concluded his review of the legal meaning of the GATT dispute settlement reports with a proposal to the Uruguay Round negotiators 'to make explicit that there is an international legal obligation upon disputing parties to carry out the adopted results of a dispute settlement procedure'.<sup>15</sup> Unfortunately, however, the improvements introduced by the Uruguay Round neither made this obligation explicit, nor sufficiently clarified the legal meaning of the DSU rules, regarding which Jackson expressed regret in his later publications.<sup>16</sup> This is also added to the WTO DSB procedural delays; for example, the time lag problem which 'arises largely because it takes three years to get through the dispute settlement process, and thus countries have a three-year 'free

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<sup>14</sup> Jackson, 'The Editorial Comment' (n 6); John Jackson and Carlos Vazquez 'Some Reflections on Compliance with WTO Dispute Settlement Decisions' (2002) *Law and Policy in International Business* 555; Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules toward a More Collective Approach' (2000) *American Journal of International Law* 335 (hereinafter *The WTO: Rules are Rules*); Joost Pauwelyn, 'The Transformation of World Trade' (2005) *Michigan Law Review* 1.

<sup>15</sup> John Jackson, *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press 2007) 127 (hereinafter *The GATT/WTO Jurisprudence*) 131-132.

<sup>16</sup> Jackson, 'Editorial Comment' (n 6); Jackson, *The GATT/WTO Jurisprudence* (n 15) 112, 162-167.

pass'.<sup>17</sup> This problem allowed developed states in particular to go ahead with whatever WTO-inconsistent actions they intended, and take the consequences in the dispute settlement process. Jackson said, 'if higher duties can be amassed during those three years, and if there are also monopoly rents involved, the state can garner rewards adding up to millions, if not (in the steel industry, for instance) billions of dollars'.<sup>18</sup> The vagueness of the DSU rules on its legal status coupled with the problems of procedural delays and delayed-compliance with the WTO DSB rulings and recommendations are the central issues in the legalist/anti-legalist debate.

The delayed-compliance issue, in particular, has been the focal point in both legal and political analyses that looked at the quality and timeliness of compliance actions, and pre-and post-ruling procedures.<sup>19</sup> For example, after considering these factors, Davey said in 2009 that the compliance rate with DSB rulings and recommendation of (83%) does not reflect success, if not a crisis in the making.<sup>20</sup> However, on the quasi-legalist position, and in relation to the rules' vagueness and compliance issue, Pauwelyn admittedly stated a statement that has been widely cited by anti-legalists when he said, 'the "legalization" of disputes under the WTO stops, in effect, roughly where noncompliance starts'.<sup>21</sup> But when reviewing the evolution of the world trade law, Pauwelyn proclaimed the departure from his statement that rules are rules under the WTO law and they need to be 'respected as *binding* international obligations, not as some political promise that can be withdrawn or exchanged for another',<sup>22</sup> to a position that calls for more politics, escape clauses, and exist options, i.e. validation of deviations.<sup>23</sup>

More will be said about this important review by Pauwelyn, but the question remains where does the legalist/quasi-legalist difference leave the anti-legalist scholars, and to keep track on the topic of this thesis, what is their position on the proposals for more prompt compliance procedure or less thereof. What can be described as core anti-legalist scholars remain firmly entrenched in their belief that

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<sup>17</sup> John Jackson, 'The Case of the World Trade Organization' (2008) *International Affairs* 437.

<sup>18</sup> *ibid.*

<sup>19</sup> Busch and Reinhardt (n 10); Gary Horlick and Judith Coleman, 'The Compliance Problems of the WTO' (2007) *Arizona Journal of International and Comparative Law* 141.

<sup>20</sup> William Davey, 'Compliance Problems in the WTO Dispute Settlement' (2009) *Cornell International Law Journal* 119.

<sup>21</sup> Pauwelyn, 'The WTO: Rules are Rules' (n 14).

<sup>22</sup> *ibid.*

<sup>23</sup> Pauwelyn, 'The Transformation of World Trade' (n 14).

the political flexibility outweigh, if not, override legalism even the current legalistic order that regulate the trade conducts of political powers.<sup>24</sup> On the theoretical basis, anti-legalist academics agree with IRs theory of realism by not only objecting to the GATT and WTO legalistic orders, but also doubting the power of international law including that of the WTO to force compliance.<sup>25</sup>

On the practical basis, anti-legalist practitioners citing the limited cases of delayed or non-compliance call for deviations, efficient or not i.e. economic judgment of cost-benefit analysis, to justify ‘temporary’ breach of the GATT/WTO rules for what they claim the state ‘welfaristic objectives’.<sup>26</sup> On the one hand, the argument of anti-legalist scholars’ lacks historical accuracy, empirical evidence, and reflection on the contemporary practice of the world trade law. The legalists’ argument, on the other hand, is also too literalistic and narrow when in fact according to their own admission the text itself does not explicitly state that the DSU rules are obligatory.<sup>27</sup> The use of interactionalism’s terminology is useful in digesting this lack of accuracy and breadth in the analyses of both divides of the legalist/anti-legalist dichotomy, and since the legalist scholars have the strongest argument, it is worth focusing on their narrative only.

It is worth saying that in his 2004 article replying to the anti-legalists arguments, Jackson had tried to apply a mechanism similar to interactionalism’s by saying that if the DSU is not explicit enough about its obligatory effect then we should look at ‘context, drafters’ intent or ‘preparatory work’, state practice under the agreement, and predicting what the Appellate Body will do’.<sup>28</sup> This approach is derived from the 1969 Vienna Convention on the Law of Treaties (VCLT) rules on interpretation,

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<sup>24</sup> Eric Posner and Alan Sykes, *Economic Foundations of International Law* (Harvard University Press 2013) 263-287. Posner justifies the “pattern of American international law-breaking” on grounds of national cost-benefit analyses see Posner, *The Perils of Global Legalism* (n 7) xi.

<sup>25</sup> *ibid*; Simon Schropp, *Trade Policy Flexibility and Enforcement in the WTO: A Law and Economics Analysis* (Cambridge University Press 2014).

<sup>26</sup> Claus Zimmermann, ‘Toleration of Temporary Noncompliance: The Systemic Safety Valve of WTO Dispute Settlement Revisited’ (2011) *Trade, Law and Development* 382; Claus Zimmermann, ‘The Neglected Link Between the Legal Nature of WTO Rules, the Political Filtering of WTO Disputes, And the Absence of Retrospective WTO Remedies’ (2012) *Trade, Law and Development* 251; John Magnus, ‘Compliance with the WTO Dispute Settlement Decisions: Is there a Crisis?’ in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: the First Ten Years* (Cambridge University Press 2005) 249.

<sup>27</sup> *ibid*; Jackson, ‘The Editorial Comment’ (n 6); Posner and Sykes Book Symposium: Comment by Steve Charnovitz (28 March 2013 < <http://opiniojuris.org/2013/03/27/posner-and-sykes-book-symposium-comments-by-steve-charnovitz/>> accessed 26 October 2014.

<sup>28</sup> Jackson, ‘The Editorial Comment’ (n 6).

in particular Articles (30-31).<sup>29</sup> However, the reference here to ‘context, preparatory work and state practice under the agreement’ are comparable factors to interactionalism interrelated elements that look at the rudimentary shared understandings that include reviewing the history of negotiations, and states practice to determine the distinctively legal system. Jackson’s approach can be a good starting point for exploring the obligatory force of the WTO law, but in some respects it falls short of being a complete and final analysis of the legal issues involved. For example, his article neither covered the question of inclusive ‘practice of legality’ and its effect on sustaining compliance with the WTO obligations, nor looked at the key role of ‘reciprocal exchanges of promises’ in creating and maintaining GATT/WTO obligations.

Some scholars have stressed the importance of a practice that involves the interplay between WTO and domestic law saying that the lack of direct effect ‘seriously affects the pull to compliance with obligations under the WTO law’.<sup>30</sup> However, Davey in his 2014 article on the dispute settlement system clearly shows the relevance of interactionalism. Davey considered the three functions of the WTO namely; ‘negotiations, oversight of existing WTO agreements, and dispute settlement’, as separate from each other, and then said ‘the credibility of the WTO as a functioning international organization essentially depends on ensuring the effectiveness of its dispute settlement function’.<sup>31</sup> However, this is an incomplete analysis because it eschews the important influence of the interrelated elements of shared understandings and practice of legality on promoting compliance with and maintaining WTO obligations. For example, Davey rightly declared after considering the failures of the Doha Development Round (DDR) of 2001 and the recent Ninth Ministerial Conference in Bali on trade facilitation that it is ‘fair to say

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<sup>29</sup> See the Vienna Convention on the Law of Treaties  
<<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>  
accessed 10 June 2015.

<sup>30</sup> Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press 2013) 271. See Ernst-Ulrich Petersmann ‘Prevention and Settlement of Transatlantic Economic Disputes: Legal Strategies for EU/US Leadership’ in Ernst-Ulrich Petersmann and Mark Pollack, *Transatlantic Economic Disputes: the EU, the US, and the WTO* (reprint edn, Oxford University Press 2005) 36 (hereinafter, *Transatlantic Economic Disputes*).

<sup>31</sup> William Davey ‘The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success and Future Challenges’ (2014) *Journal of International Economic Law* 679.

that as of mid-2014 the WTO negotiating mandate is basically not functional'.<sup>32</sup> Although, the Bali ministerial conference did not propose any improvements to the DSU, unlike the DDR, but how can the failure of the important function of 'negotiation' be separated from the discussion about the overall effectiveness of the dispute settlement system? In other words, do the shared procedural understanding and state practice matter for assessing the obligatory effect of the WTO dispute settlement system?

Those questions are important especially since Davey has rightly noted that the negotiation failure and the lack of an effective member state oversight on existing WTO agreements, have driven influential members to form Preferential Trade Agreements (PTAs), which their dispute settlement mechanisms raise questions about 'fairness' and 'transparency'.<sup>33</sup> Economists and law academics said that the dead function of negotiation will badly affect the multilateral rule making system to become more preferential ceding to the powerful states pressure.<sup>34</sup> Because of the negotiation stalemate, developed member states, in particular, are becoming less cooperative and inclined to secure domestic ratification of WTO agreements.<sup>35</sup> Furthermore, this issue will force the WTO DSB to unfairly decide on bilateral cases affecting the core founding principle of non-discrimination.<sup>36</sup> However, Davey three recommendations to solve the compliance problem are narrowly sanction-focused

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<sup>32</sup> *ibid.* It is only the 2001 DDR that includes DSB reform proposals but this round is in stalemate. With the death of the DDR, in effect, the WTO has forsaken its timely-needed development goals, and focused instead on narrowly-focused negotiation such as the one on information technology. See FT View, 'The Doha Round Finally Dies a Merciful Death' *Financial Times* (London 22 December 2015); Paul Blustein, *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambition, and the Great Shambles of the World Trading System* (Public Affairs 2009).

<sup>33</sup> *ibid.* See also William Davey, *Non-Discrimination in the World Trade Organization: The Rules and Exceptions* (Hague Academy of International Law 2012) 133-136; Ernst-Ulrich Petersmann, 'Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?' (2015) *Journal of International Economic Law* 579; Andrew Mitchell and others, 'PTAs and Public International Law' in Simon Lester and others, *Bilateral and Regional Trade Agreements* (2nd edn, Cambridge University Press 2016) 115.

<sup>34</sup> See Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermines Free Trade* (Oxford University Press 2008); Petros Mavroidis, 'Dealing with PTAs in the WTO: Falling through the Cracks between 'Judicialization' and 'Legalization'' (2015) *World Trade Review* 107; cf Bagwell, Bown and Staiger who said that the WTO is still relevant largely because the DSB, that provided state-to-state level interaction, has a good record of resolving bilateral disputes see Kyle Bagwell and others, 'Is the WTO Passé?' (2015) <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/06/12/090224b082f234f9/1\\_0/Rendered/PDF/Is0the0WTO0passe00.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/06/12/090224b082f234f9/1_0/Rendered/PDF/Is0the0WTO0passe00.pdf)> accessed 18 August 2015.

<sup>35</sup> Anu Bradford, 'When the WTO Works, and How It Fails' (2010) *Virginia Journal of International Law* 1 citing Daniel K. Tarullo, 'The End of the Big Trade Deal: Why Doha Will Be the Last of the Grand Multilateral Trade Negotiations' (2006) *International Economics* 46.

<sup>36</sup> *ibid.*



that include ‘some adjustment mechanism to increase the level of sanctions over time, so as to preclude noncompliance from becoming an acceptable status quo position.’<sup>37</sup> But Davey’s analysis does not look at the totality of the WTO system, and the interactional legal factors that have an influence on how compliance is generated and maintained.<sup>38</sup>

The citation of the quasi-legalist scholar, Pauwelyn, who appeared to misunderstand interaction between law and political economy in the world trade law, might be useful in illustrating the reality of the legalism/anti-legalism debate. Pauwelyn has tried to settle the debate with third strand that lean toward legalists, but differ by saying there are other goals that can be achieved in breach, while stressing, what he regards, the primary role of informal remedies of reputation and community costs in forcing compliance.<sup>39</sup> He had attributed the success of the early model of the GATT post-1947, and the later successful development of the GATT during the 1960s and 1970s to ‘bidirectional interaction between law and politics’.<sup>40</sup> Writing about the GATT pre-1960s period, Pauwelyn explains this bidirectional interaction by saying:

Because of low levels of law or discipline in the form of escape clauses and weak dispute settlement, the low level of politics or participation, such as majority voting, become digestible and could be sustained. At the same time, because of low levels of participating or politics, only relatively low levels of discipline or law could be agreed to and only such levels were manageable.<sup>41</sup>

However, writing about the same bidirectional interaction that occurred in the 1970s, and early 1980s, this time in favour of legalization, Pauwelyn explains:

In the same way that low discipline and low participation mutually supported each other in the original GATT text, during the GATT’s forty-seven years of operation, gradually increasing levels of politics, participation and contestation enabled, and were the consequences of, progressive levels of discipline or law. More politics enabled more law. In turn, more law required more politics. (...) GATT legalization called

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<sup>37</sup> Davey, ‘The WTO Dispute Settlement Historical Evolution’ (n 31).

<sup>38</sup> See George Downs and others ‘Is the Good News about Compliance Good News about Cooperation?’ (1996) *International Organization* 379.

<sup>39</sup> Joost Pauwelyn, ‘The Calculation and Design of Trade Retaliation in Context: What is the Goal of Suspending WTO Obligations?’ in Chad Bown and Joost Pauwelyn, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2013) 56-64 (hereinafter, *The Calculation and Design of Trade Retaliation*); cf this with Pauwelyn, ‘The WTO: Rules are Rules’ (n 14).

<sup>40</sup> Pauwelyn, ‘The Transformation of World Trade’ (n 14).

<sup>41</sup> *ibid.*

for and cemented the need for more politics, participation, and contestation, including the GATT consensus practice.<sup>42</sup>

Albeit Pauwelyn's balanced analysis but his recommendation in favour of more politics by going back to the pre-1960s GATT period raises a question about whether the return to the power-politics model is a call for unidirectional process of politicization that does not qualify to be an interaction appreciative of the evolution toward a legalistic order. It might be too simplistic to deal with the evolution of the world trade law as unidirectional interaction on the basis of politics-law poles by giving more weight and value to one of the poles to sustain the world trading system. Simplistic as it seems, but Pauwelyn should have reconsidered two true statements that he stated to introduce his review before recommending what seems to be the return to the political-power model of 1960s. In his objection to the anti-legalist proposal for more politics and less law and discipline, Pauwelyn rightly said:

Yet, this proposal neglects almost 100 years of trade history. If the inter-war period and GATT have taught us one lesson it is that for actual trade liberalization to occur, trade commitments must have legal value and be backed by a strong, independent dispute mechanism.<sup>43</sup>

It is uncertain why Pauwelyn recommended what appears to be a unidirectional politicization of the world trade law after writing this true statement about the GATT history. Unless the theoretical-framework of 'exit (i.e. more discipline) and voice (i.e. more politics)' that he borrowed from the economist Albert Hirschman had led to inconsistency. If anything the above statement and Pauwelyn recommendations represent contradiction, unless he means that in the evolving world trading system with new agreements in goods, services, and information technology, trade liberalization has stopped, and therefore the system need less law and discipline and more politics. The second true statement in Pauwelyn review that is relevant to the concept of law was in his demand for the need *to strike the right balance between economic efficiency, and loyalty to the system*. He explains the difference between the extremes of either calling for 'just more politics' or 'just more law' by saying:

Discipline or legalization without sufficient politics or accountability risks an unsupported and unsustainable system that in the meantime imposes its whim on the people in the name of economic efficiency: efficiency without loyalty. In contrast, politics, participation, and

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<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

flexibility without sufficient discipline or precommitment would lead to an inefficient, even inactive, trade regime in which important gains from trade are forgone: loyalty without efficiency.<sup>44</sup>

But again Pauwelyn statement here is unclear especially with his regard of the current WTO law as mere ‘discipline or precommitment’ that should be improved with more political flexibility for striking the right balance between economic efficiency and loyalty. The review raises this question: has not the current WTO legal order regulated politics with disciplines so that any proposed amendments for promptness, efficiency, accountability, and transparency should be seen as acting within the law not outside it? It is true that, some of the decision-making and political flexibility reforms that Pauwelyn has recommended require the amendment of the WTO law.

However, by recalling interactionalism’s two interrelated elements of ‘shared legal understandings’ and ‘practice of legality’, Pauwelyn’s borrowed framework for reviewing world trade law seems incomprehensive. Because, by neglecting the role of shared political and legal understandings that led to the creation of the WTO law, a reviewer would underestimate that ‘trade commitments must have legal value and be backed by a strong, independent dispute mechanism’.<sup>45</sup> Furthermore, a concept so instrumental in interactionalism that has been borrowed from Fuller’s jurisprudence, ‘the fidelity to law’, might help in understanding ‘the loyalty’ to the system in Pauwelyn’s review. Brunnée and Toope explain the relevance of this Fullerian concept to their theory by saying:

What distinguishes law from other types of social orders is not form, but adherence to specific criteria of legality: generality, promulgation, non-retroactivity, clarity, non-contradictory, not asking the impossible, constancy, and congruence between rules and official action. When norm creation meets these criteria and is matched with norm application that also satisfies the legality requirements-when there exists what we call a ‘practice of legality’- actors will be able to pursue their purposes and organize their interaction through law. These features of legality are crucial to generating a distinctive legal legitimacy and a sense of commitment- what Fuller called ‘fidelity’- among those to whom law is addressed. They create legal obligation.<sup>46</sup>

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<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> Brunnée and Toope, *An Interactional Account* (n 4) 6-7.

Therefore, interactionalism provides an explication of the loyalty 'i.e. fidelity to law' for setting the balance between aspiration and duty in economic regulation. Regrettably, the conclusion of Pauwelyn review might have been the reason that led him in his discussion of the goal of trade sanctions -to see a dispute settlement system that can only exist in theory but not in practice especially under the WTO - with rules that can be honoured in breach and/or adherence due to multiplicity of goals.<sup>47</sup> The unique feature of interactional law in 'exerting distinctive 'compliance pull' by inspiring a sense of obligation -fidelity- in actors' cannot only be measured by looking at a system of rules through the bidirectional interaction between law and politics or lens of legal positivism (a command backed up by sanctions).<sup>48</sup>

The legal value of sovereignty in public international law that 'does not mean freedom from law but freedom within the law (including freedom to change the law)' is useful in understanding the role of law in regulating the interactions of political powers.<sup>49</sup> Interactionalism offers two lessons for understanding the relationship between reciprocal interactions and 'compliance pull', the first is that 'rules are not simply posited and projected out to willing or unwilling recipients. Like obligation itself, compliance is built in large measure through interactive practices of legality'.<sup>50</sup> So defining the distinctively legal that ought to attract compliance due to the active and continuous role of reciprocal interactions is very important in understanding the legal obligation. The second lesson that follow from this is that 'compliance dynamics are not unidirectional' meaning that compliance force depends on the existence and maintenance of 'shared principles', and the overall process of interactional law-making. Once this understanding of compliance is applied to the WTO law, it will clarify a number of legal and practice-related issues that have been misinterpreted because of the legality debate.

To sum up, it can be seen that the different contributors to this debate (with the notable exception of Jackson) should not focus narrowly on the calculation, design, or the ultimate central goal(s) of trade sanctions. Instead they should look at 'compliance as a continuum' in the wider process of interactional law-making. In accordance with the interactional approach, compliance should be seen as the active

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<sup>47</sup> Pauwelyn, 'The Calculation and Design of Trade Retaliation' (n 39).

<sup>48</sup> Brunnée and Toope, *An Interactional Account* (n 4) 96.

<sup>49</sup> James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 122.

<sup>50</sup> Brunnée and Toope, *An Interactional Account* (n 4) 121.

legal interaction of the participants in the system of law making and application, rather than compliance with the rulings and recommendations of the adjudicative body. Interactionalism's idea of *compliance continuum* highlights 'the interlinkages between the processes and substance of law making and the potential for success of various compliance strategies'.<sup>51</sup> Brunnée explains this idea that is relevant to international law by saying:

Questions about the binding effect –the strength- of international environmental law and questions about compliance lead to the same point: to the extent that law has an inherent ability to promote compliance, it is rooted in internal characteristic that give norms distinctive legal legitimacy [Fuller's internal criteria of legality]. When the underlying norms are generated with the attention to these factors they are more likely to support meaningful compliance strategies.<sup>52</sup>

However, the question that remains is, what are the social foundations of the GATT system that led to the establishment of the WTO as the unanimously recognised 'legal order'? Some economists and diplomats find this recognition of legality somewhat troubling, but if we read the words of the former Director-General of the WTO, Pascal Lamy, on this matter we might find some satisfaction. He says:

The WTO comprises a true legal order. If we take up Professor Jean Salmon's definition, 'a body of rules of law constituting a system and governing a particular society or grouping', we see there exists, within the international legal order, a specific WTO legal order (...) But the fact that it is specific does not mean that it is insular or isolated.<sup>53</sup>

Therefore, in light of the analytical framework of the interactional approach, the question that should be raised is, were the social foundations of WTO designed to shape consenting state behaviour, and legally engineer compliance?

### **3.3 The Social Foundations of the World Trading System:**

Moving away from the legalist/anti-legalist narratives of the world trading system and looking at recent researches that tried to make sense of the trade norms formation, misinterpretation of this system still persists. There are two causes for

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<sup>51</sup> Jutta Brunnée, 'Multilateral Environmental Agreements and the Compliance Continuum' in Gerd Winter eds, *Multilevel Governance of Global Environmental Change* (Cambridge University Press 2006) 402.

<sup>52</sup> *ibid* (emphasis added). See Jutta Brunnée and Stephen Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) *Finnish Yearbook of International Law* 273.

<sup>53</sup> Pascal Lamy, 'The Place of the WTO and its Law in the International Legal Order' (2007) *European Journal of International Law* 969.

this misinterpretation, the first is concerned with the relationship between the legal means for achieving trade liberalisation, and the normative ideals such as human rights and environmental concerns. If the aim of opening trade is to improve people welfare, then how can this aim be separated from normative concerns such as respecting human rights and the environment. The second reason is the division in the WTO law-administration between the legal means, rules collectively made and maintained (not enforced) for achieving trade liberalization, and the individual implementation of those rules by WTO member states who are *able* to bring a claim against the offending state. There is collective role for law-making, but not in law-implementation.

Those two causes have made it harder to determine whether a respondent state justifying its breach based on normative concerns under GATT Article (XX) is in fact for the sake of those concerns, or the breach is to reinforce protectionism. In this dilemma one cannot tell whether the rules or rulings can be fulfilled by upholding the WTO law at the expense of normative concerns or vice versa. It is true that WTO enforcement is based on ‘reciprocal bilateral obligations’ between member states but would not the obligations enforced collectively better serve the rules of the treaty and ‘public goods’ like health, human rights, and sustainable development.<sup>54</sup> The implications of the first challenge concerning trade liberalization and normative concerns will be briefly addressed here, while the second problem regarding the division between *collective consciousness* on WTO norms, and *collective punishments* proposal will be discussed in the subsequent chapters.

It has been claimed that by comparison to the European Union or international human rights law, the law of the WTO was not, at least explicitly, made with the aim of creating a community of shared norms or values.<sup>55</sup> Instead, ‘the normative orientation’ of WTO law is very specific in being primarily concerned with the elimination of discriminatory behaviour in trade relations.<sup>56</sup> However, this claim is widely disputed between two groups of scholars, those who claim that the WTO has

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<sup>54</sup> Joost Pauwelyn, ‘A Typology of Multilateral Treaty Obligation: Are WTO Obligations Bilateral or Collective in Nature’ (2003) *European Journal of International Law* 907; cf Chios Carmody, ‘WTO Obligations as Collective’ (2006) *European Journal of International Law* 419; Tarcisio Gazzin, ‘The Legal Nature of WTO Obligations and the Consequences of their Violation’ (2006) *European Journal of International Law* 723.

<sup>55</sup> Robert Howse, and others, ‘Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*’ (2015) *George Washington International Law Review* 89.

<sup>56</sup> *ibid.*

been successful in constructing a community of law with ‘normative consciousness’, and others who say that the WTO is an active community of trade law but it is oblivious to normative concerns.<sup>57</sup> For instance, relying only on constructivism, Cho has tried to identify the social foundations of the world trading system by first dismissing the effectiveness of its original ‘reciprocal bargaining’ and the ‘semi-contractual model’ saying that the contract model is flawed and ‘is inherently insensitive to normative concerns, such as “development”’.<sup>58</sup> Instead, he is proposing a ‘communicative’ or ‘sociological’ approach that aims to enhance social interactions based on improving communication techniques between interested actors.<sup>59</sup>

This communicative approach conforms with interactionalism in two aspects, first, in recognising the historical shift in norms formation from the logic of interests and temporal gains of open trade benefits, to the logic of appropriateness and communication establishing a system of learning and mirroring (the norm-cycle).<sup>60</sup> The second aspect of agreement with interactionalism, and especially with Fuller’s interactional legal theory, is in Cho’s expression of uncertainty when he said:

*Perhaps* the biggest contribution of the WTO jurisprudence *may be* that it promotes *fidelity to law*, rather than *fidelity to power*, and thus unites participants of the world trading system around this ideal. In the absence of *fidelity to law*, myopic parameters, such as political contingencies, would fill in any legal vacuum. Therefore, an essential element of community of law is the participants’ self-consciousness of the normative context of the community operation.<sup>61</sup>

However, Cho has attributed almost every successful development in the history of the world trade to the success of social communication. For example, he said about the WTO dispute settlement system:

The evolution of the WTO dispute settlement system for the past six decades has dramatically increased the potential for trade discourse, both

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<sup>57</sup> See Steve Charnovitz, *The Path of World Trade Law in the 21st Century* (World Scientific Publishing 2014).

<sup>58</sup> Sungjoon Cho, *The Social Foundations of World Trade: Norms, Community, and Constitution* (Cambridge University Press 2014) 5, 101-119 (hereinafter, *The Social Foundations of World Trade*).

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid* 20-26.

<sup>61</sup> *ibid* 25 (emphasis added) citing Kenneth Abbott, ‘The Trading Nation’s Dilemma: The Functions of the Law of International Trade’ (1985) *Harvard International Law Journal* 501; (Panel Report, United States- Section 301-310 of the Trade Act of 1974, WT/DS152/R, adopted 22 December 1999); Laurence Helfer and Anne-Marie Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) *Yale Law Journal* 237.

by expanding its scope and improving the level of clarity. Beyond merely arbitrating particular adversarial disputes between members, the WTO adjudicative discourse “communitiz[es]” what would have been bilateral resolutions and eventually builds a common (trade) law that guides the future behaviours of the entire WTO Membership.<sup>62</sup>

It is true that from a historical prospective, the WTO dispute settlement system has been an effective communication tool for trade law-making and implementation, but it can also be equally regarded as ‘establishing a system of reciprocity and *creating* a normative reference system that imposes significant constraints on the unilateral exercise of power (right over might)’.<sup>63</sup> But regardless of the designation of the dispute settlement system, Cho’s approach suffers from a number of issues that can be summarised in this question: what is the basis of the social interaction he is proposing. Interactionalism maintains that:

Social norms can only emerge when they are rooted in an underlying set of shared understandings supporting first the need for normativity, and then particular norms that shape behaviour (...) Once in existence, shared understandings become background knowledge or norms that shape how actors perceive themselves and the world, how they form interests and set priorities, and how they make or evaluate arguments.<sup>64</sup>

After this process, social norms have to meet Fuller’s principles of legality, and get enmeshed in a practice of legality to deserve the designation of legal norms that will attract compliance.<sup>65</sup> The ‘socialization of norms’ that links constructivism to Fuller’s jurisprudence becomes clearer when one considers how rules become *persuasive* and legal systems *legitimate* only ‘when they are broadly congruent with the practices and shared understandings in society’.<sup>66</sup> Nevertheless, Cho’s approach, which does not focus on the notion of legal obligation, does not differ much from

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<sup>62</sup> Cho, *The Social Foundations of World Trade* (n 58) 8.

<sup>63</sup> Thomas Bernauer, Manfred Elsig, and Joost Pauwelyn, ‘Dispute Settlement Mechanism – Analysis and Problems’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press 2012) (hereinafter *The Oxford WTO Handbook*) 489 (emphasis added).

<sup>64</sup> Jutta Brunnée and Stephen Toope, ‘Interactional International Law: An Introduction’ (2011) *International Theory* 307.

<sup>65</sup> Brunnée and Toope said that Fuller’s jurisprudence inspired them because of its focus on two key ideas ‘the generation of social norms through interaction and the sense of responsibility that arises only from the human ability to reason with norms.’ see Brunnée and Toope, *An Interactional Account* (n 4) 20. See Lon Fuller, *The Morality of Law* (revised edn, Yale University Press 1969).

<sup>66</sup> Gerald Postema, ‘Implicit Law’ (1994) *Law and Philosophy* 361. See Philip Selznick, ‘Review of The Morality of Law’ (1965) *American Sociological Review* 94; Philip Allott, ‘The Concept of International Law’ (1999) *European Journal of International Law* 31.



the neoliberal classical economists' theory that neglects the evolution toward rule-orientation in the world trading system. For example, when he tried to reconcile the always-troubling relationship between legalism and economism in the world trading system, Krugman famously declared 'if economists ruled the world, there would be no need for a World Trade Organization'.<sup>67</sup> Furthermore, it is hard to see the two phenomena, the 'global value chain': goods produced in one country (e.g. India), assembled in another (China), and then sold in third country (the United States); and globalization with the force of information technology revolution, that Cho relied on to justify his approach, are not the results of member states honouring WTO commitments. Though, Cho is in agreement on this beneficial causation of a world growing more interdependent when he rightly said 'this is why it is imperative, for the purpose of this book, to fully appreciate that the conventional orthodoxy of the world trade contract is of a historical legacy'.<sup>68</sup> But the question is what role, if any, did the legal obligation play in this legacy of the world trading system. None of the 'three pathways to build and also enhance the world trading community: 'communicative competence, public education, and enlightened leadership' that Cho is proposing contain any reference to building and maintaining legal obligations.<sup>69</sup>

The incomplete though innovative approach of Cho could have benefited from an analysis of *the legal culture* not only the constructivist culture in the WTO. For example, Cho claims that member states compliance with the AB decisions is attributed 'to the state habit, namely, to its internalized norm-abiding culture as a member of the WTO (constructivism) (...) meaning it is rather intrinsic since it is largely cultural'.<sup>70</sup> But this analysis could have been improved by the discussion of the value of interaction on the basis of legality. Because, the dismissal of the reciprocal contractual model of the world trading system, and the emphasis only on social interactions modes, community, solidarity, and social networks, negates the value of legal interactions. A legal cultural analysis that is the primary focus of interactionalism 'is actor-centric focusing on aspects of law as it is lived and the cultural values that animate a legal system, recognising that law is a complex,

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<sup>67</sup> Paul Krugman, 'What Should Trade Negotiators Negotiate About?' (1997) *Journal of Economic Literature* 113.

<sup>68</sup> Cho, *The Social Foundations of World Trade* (n 58) 6.

<sup>69</sup> *ibid* 228.

<sup>70</sup> *ibid* 39.

socially-constructed phenomenon'.<sup>71</sup> The reason for a legal cultural analysis is to recognise the progressive acculturation of legalism throughout the evolution of the world trading system as represented by the history of the GATT and WTO's expanded regulatory agenda.<sup>72</sup> Such process of acculturation was primarily driven by the agreement on shared principles, and emanating from this, shared responsibility on adherence to the GATT/WTO commitments.<sup>73</sup> In sum, every historical analysis of the world trading system has to take into account both the social, economic as well as the legal bases of the system, and the consenting state's interactions on those bases for enhancing legal legitimacy. At the time of writing this chapter and from looking at the WTO law literature, very few scholars have successfully analysed both the economic rationale and interactional legal history of the world trade law in one compositional work.<sup>74</sup>

### **3.4 An Interactional World Trade Law:**

The following application of the interactional approach using the element of 'shared understandings' shows its suitability for illuminating the often-distorted notion of legal obligation in WTO law. It is imperative to consider the creative or generative powers of law in the social life of concerned actors, outside the tribunal, in this case the DSB. Because, the informal law has often resulted from shared political and legal understandings on key concepts such as sovereignty and compliance. And the formal treaty-made law has played a major role in creating and shaping the life of

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<sup>71</sup> Colin Picker and Lisa Toohey, 'The Role of Legal Culture in an Increasingly Heterogeneous WTO' in Won-Mog Choi (ed), *International Economic Law: The Asia-Pacific Perspectives* (Cambridge Scholars Publishing 2015) 2.

<sup>72</sup> *ibid.* See Ryan Goodman and Derek Jinks, 'Incomplete Internationalization and Compliance with Human Rights Law' (2008) *European Journal of International Law* 725.

<sup>73</sup> See Anne Van Aaken, 'Shared Responsibilities in International Law: A Political Economy Analysis' in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015).

<sup>74</sup> Robert Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (2005) *European Journal of International Relations* 339; Jackson, 'The Editorial Comment' (n 6); Jackson, *The World Trading System* (n 8); Picker and Toohey (n 71); Colin Picker, 'Comparative Legal Cultural Analyses of International Economic Law: Insights, Lessons and Approaches' (2014) *Indian Journal of International Economic Law* 54; Lisa Toohey, 'Accession as Dialogue: Epistemic Communities and the World Trade Organization' (2014) *Leiden Journal of International Law* 397; Gregory Shaffer, 'How the World Trade Organization Shapes Regulatory Governance.' (2015) *Regulation and Governance* 1; Julien Chaisse, 'Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process' (2015) *Fordham International Law Journal* 58.

institutions like the GATT and WTO.<sup>75</sup> This is evident in the evolution of shared understandings on compliance, and the many rules that the GATT and WTO share, and the degree to which these rules comply with Fuller's principles of legality. Two reasons for considering *the shared understandings on compliance* element, shall be identified with references to the voluntary nature of compliance with public international law. First, compliance with international law reflects 'social conscience' as derived from actors' perceived legal legitimacy of the rules.<sup>76</sup> Second, contrary to the view that increased legalization increases compliance, Finnemore and Toope argued that obligation are best explained by 'an approach rooted in social processes of interaction'.<sup>77</sup> The gradual evolution of legalization in human rights law illustrates this point. For instance, after examining three human rights law related issues: Torture, disappearance, and democratic governance in Latin America, Lutz and Sikkink found that delayed-compliance is in the most 'legalized' area, namely torture, and the most compliance is in the least 'legalized' area, democratic governance.<sup>78</sup> The reason for this difference is the social variables and the 'norm cascade' that spread through Latin America in the 1970s-80s.

In light of this background, and in relation to this thesis this question shall be addressed: what is best for compliance with WTO rules, norms that are socially constructed through horizontal social interaction modes, or laws imposed by a sanctioning authority? In other words, what is the best account of WTO law, the one according to legal positivism, perceive GATT/WTO rules as posited norms for actors to comply with or ignore, or the one according to interactionalism, socially-constructed norms that derive their legal legitimacy from constructivism and compliance with the principles of legality.<sup>79</sup>

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<sup>75</sup> Martha Finnemore and Stephen Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) *International Organization* 743.

<sup>76</sup> Jutta Brunnée, 'Enforcement Mechanism in International Law and International Environmental Law' in Ulrich Beyerlin and others, *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Brill Online Books 2005) 5 citing Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990) 3. See Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press 2015).

<sup>77</sup> Finnemore and Toope, 'Alternatives to "Legalization"' (n 75).

<sup>78</sup> Ellen Lutz and Kathryn Sikkink, 'International Human Rights Law and Practice in Latin America' (2000) *International Organization* 366.

<sup>79</sup> On the role of interaction for adopting the principle of transparency in the context of member states implementation of SPS measures see Ljiljana Biukovic, 'Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan, in Debra Steger, *Redesigning the World Trade Organization for the Twenty-first Century* (Wilfrid Laurier University Press 2009) 193 (Hereinafter,

Agreeing with interactionalism, Wolfe said about the WTO:

I have no difficulty in speaking of the WTO as a legal system, but to call the trading system rule-based is not to say much at all. Any system of social interaction is rule-based, and power can always trump. The Appellate Body may be at the top of the great pyramid of the WTO legal order, but there is no necessary hierarchical relation among the elements. All the other WTO processes, the social interaction structured by the institution, are forms of learning and sources of law that are central to how obligations are interpreted. Individuals, firms, associations, states, international (non)-governmental organizations- all are in 'interaction', to use Fuller's term, with each other, and with the effects of globalization, every day.<sup>80</sup>

Interactionalism argues that the foundations for compliance with international rules and rulings should be built through a socially-constructed interactional law-making process because:

spaces and opportunities for compliance must be created for interactions on the basis of legality; that dispute settlement and enforcement too are best understood as elements of a practice of legality; and that the requirements of interactional law-making must also be heeded in the internalization of international law into state's domestic spheres.<sup>81</sup>

The constructivism element of shared understandings is primarily concerned with the norm-cycle or the 'socialisation' of norms in the international society, based on the need for normativity.<sup>82</sup> One sub-element in particular that clearly shows the importance of 'the shared understandings' is the agent-focused 'norm cycle'. First, there have to be 'norm entrepreneurs' that include states, Non-Governmental Organizations (NGOs), and individuals who work towards the standardization of behaviour.<sup>83</sup> Second, a number of states have to embrace the norm by the socialisation process of invoking the norm in their diplomatic practices, and allowing governmental organizations and NGOs to hold them accountable to the new standard.<sup>84</sup> Finally, the state has to internalise the norm through its

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*Redesigning the WTO*). Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance' (2009) *European Journal of International Law* 575. On the difference between 'soft law' (i.e. a law with non-binding force), and 'hard law' (i.e. binding) in relation to WTO law, see Chris Brummer, 'Why Soft Law Dominates International Finance-And Not Trade' (2010) *Journal of International Economic Law* 623.

<sup>80</sup> Robert Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (n 74).

<sup>81</sup> Brunnée and Toope, *An Interactional Account* (n 4) 91.

<sup>82</sup> *ibid* 56-65.

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid*.

incorporation into its national system for conformity and optimal compliance.<sup>85</sup> Simultaneously, while the norm is going through this cycle, there are two more sub-elements that support the constitution of shared understandings, ‘an epistemic community’ for knowledge-based activities, and a ‘community of practice’ for social learning.<sup>86</sup> Once those three sub-elements have been substantially met, the norm will shape the behaviour of the state enabling it to conform to the new standard.

However, this process has to be continuously interactive and legally valid to attract adherence, and this when the consideration of Fuller’s jurisprudence becomes most relevant. A fundamental pillar in Fuller’s morality of law thesis that has not received much attention in jurisprudence, and its study is relevant for illuminating the notion of international legal obligation is the economic basis of the morality of law. The main message of the following section on this thesis is twofold; first, a minimum knowledge of economics is essential for understanding the morality of law thesis. Second, applying Fuller’s jurisprudence to issues that involve the use of legal rules for economic management defeats the claim that moralising the concept of law is fanciful. Throughout Fuller’s famous thesis, the use of economic science, especially in explicating the institutional design of law, is very prevalent. This is not surprising given that Fuller’s first degree was in economics, which also explains his strong support for the socio-legal studies that include economics and other social science fields.<sup>87</sup>

The following section will show that the morality of law is acutely relevant to international institutions of economics such as the WTO. Because, the theory will define the challenges of setting the right balance between the ‘aspiration’ and ‘duty’ in economic regulation, and more importantly, how ‘fidelity to law’ is socially constructed.<sup>88</sup> Fuller had been aware of the limitations of an institutional setting adjudicating rules that apply to the allocation of economic resources. This makes his

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<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> Fuller was against the fragmentation of educational system with too much specialization and lack of interdisciplinary outreaches and engagements. For example, he wanted legal education to include social sciences, chiefly economics. See Robert Summers, *Lon L. Fuller* (Stanford University Press 1984) 3, 106, 148.

<sup>88</sup> See Selznick, ‘Review of the Morality of Law’ (n 66).

jurisprudence useful for discussing the compliance problems facing any body responsible for adjudicating rules for the management of economic resources. The attempt to connect Fuller's theory to the WTO might seem premature; especially that he was sceptical of a legalistic institutional order responsible for the allocation of economic resources.<sup>89</sup> But this attempt is to show the acute relevance of economic science to Fuller's jurisprudence, an attempt that is often overlooked in most major works that looked at his theory including interactionalism. Furthermore, Fuller's take on the role of voluntary social interactions for creating legal obligations and the pivotal role of institutions in maintaining those obligations are the most elaborate and relevant to this present thesis. In light of the interactional approach, the focus should be on the internal characteristics of reciprocal process for law-making rather than the outcomes of enforcement body.

#### **3.4.1 The Morality of Law and Economic Management in the WTO:**

The relation between law and economics, according to Fuller, is not determined by merely the role of law in mitigating or removing inequality, but that law has to be translated into corrective and distributive justice that refocuses the attention on the role of institutional setting responsible for economic management.<sup>90</sup> Viewing law as such will facilitate the kinds of actions that will be needed to remedy economic inequalities that 'arise within a framework of legal compulsions'.<sup>91</sup> With regard to the morality of law thesis, Fuller sees three problems that led him to regard 'law as inherently moral', and see the close affinity between 'the two moralities and the modes of judgment characteristic of economic science'.<sup>92</sup> He notes the first problem as his, 'dissatisfaction with the existing literature concerning the relation between law and morality' because of 'the failure to clarify the meaning of morality itself'.<sup>93</sup> Such failure is derived from the presumption that when law is compared with morality it is readily assumed that by virtue of the comparison everyone knows what

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<sup>89</sup> Fuller, *The Morality of Law* (n 65) 173, 176.

<sup>90</sup> Fuller adopts Aristotle's distinction between *corrective* and *distributive justice*, which the former is concerned with the restoration of 'a previous relationship that has been upset in some improper manner', whilst the latter refers to the nature of socially just allocation of resources among society members. See Lon Fuller, 'Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom through Law"' (1954) *Columbia Law Review* 70.

<sup>91</sup> *ibid.*

<sup>92</sup> Fuller, *The Morality of Law* (n 65) 15.

<sup>93</sup> *ibid.* 3.

morality embraces.<sup>94</sup> Fuller sees the implication of this problem in the common misunderstanding of what law actually implies, and how it can be distinguished from non-law.<sup>95</sup> In addressing this problem, he proposes two kinds of morality that shows the moral content of law, the morality of aspiration, and the morality of duty. The former refers to the morality of good life or ‘the expression directed toward the achievement of human excellence’, while the latter refers to the conditions essential for orderly social living or existence.<sup>96</sup>

The morality of aspiration resembles that of aesthetics -the artistic expression of excellence-, whereas the morality of duty resembles law. The two moralities are intertwined in that the morality of aspiration has *overtones of a notion approaching that of duty* through its consideration of the kinds of activities that are worthy of human capacities and would fulfil the criteria of good life. For instance, by recalling that in the law of contract mutual misapprehension of relevant facts means that the agreement is void, Fuller says, ‘what the morality of aspiration loses in direct relevance for the law, it gains in the pervasiveness of its implications’.<sup>97</sup> However, after he determined the relationship between law and morality, he noted a second problem concerning a neglect in existing literature to address the morality that makes law possible, or, what he calls, the demands of ‘the inner morality of law’.<sup>98</sup> To address this problem, Fuller focuses on the problems of legal pathology that are resulting from the neglect of those demands or the eight desiderata for law-making.<sup>99</sup>

By associating ‘the inner morality of law’ with the morality of aspiration, Fuller attempted to convey the message that a respect for those eight desiderata will limit, ‘the kinds of substantive aims that may be achieved through legal rules’.<sup>100</sup> Simmonds argues that Fuller’s systems, ‘count as law in virtue of their approximation to the ideal of compliance with the eight desiderata’.<sup>101</sup> This

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<sup>94</sup> *ibid* 4.

<sup>95</sup> *ibid*.

<sup>96</sup> *ibid* 5.

<sup>97</sup> *ibid* 9.

<sup>98</sup> *ibid* 4.

<sup>99</sup> *ibid* 33-94.

<sup>100</sup> *ibid* 4.

<sup>101</sup> Nigel Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (4th edn, Sweet & Maxwell 2013) 258.

approximation provides for a minimum respect for human agency ‘i.e. activism’ within the law.<sup>102</sup> The third problem that Fuller initially faced when he laid down the above premises of his thesis, and the one that he returned to at the end of his book, when he wrote about the substantive aims of law and institutional design, was ‘the proper location of the moral scale’s pointer as a basic problem of social philosophy’.<sup>103</sup> He explains this problem by using the analogy of ‘a scale or yardstick that begins at the bottom with the most obvious demands of social living, and extends upward to the highest reaches of human aspirations’.<sup>104</sup> He says that the difficulty with this moral scale is in locating the pointer that ‘marks the dividing line where the pressure of duty leaves off, and the challenge of excellence begins’.<sup>105</sup> Fuller explains this by saying:

If the pointer is set too low, the notion of duty itself may disintegrate under the influence of modes of thought appropriate only to the higher levels of a morality of aspiration. If it is set too high, the rigidities of duty may reach up to smother the urge toward excellence and substitute for truly effective action a routine of obligatory acts.<sup>106</sup>

In order to express this problem, throughout his thesis Fuller uses economic management modes to show the difficulty of locating this pointer, and the interconnection and limitations of the two moralities. Firstly, he selected two concepts relating to economics: the first is concerned with ‘the relationships of exchange’, and the second with what he regarded as something at the heart of economics namely ‘the principle of marginal utility, by which we make the most effective allocation of the resources at our command’.<sup>107</sup> Fuller sees a close correlation between these concepts and the two moralities. He regarded the marginal utility as the economic counterpart of ‘the morality of aspiration’, and the economics of exchange as having a close affinity with the morality of duty.<sup>108</sup> Fuller says when an economist is trying to create a stable and productive economy by advising consumers on the most efficient ways of equalising the return for the money they

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<sup>102</sup> See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing 2012).

<sup>103</sup> Fuller, *The Morality of Law* (n 65) 170 (emphasis added).

<sup>104</sup> *ibid* 9-10.

<sup>105</sup> *ibid* 170.

<sup>106</sup> *ibid*.

<sup>107</sup> *ibid* 16.

<sup>108</sup> *ibid*.



spend, he usually resorts to the 'utility' criterion, which is an undefined criterion for the optimum allocation of resources.<sup>109</sup> The 'aspiration moralist' who is concerned with our efforts to make the best use of our lives is unable to define what is best for the human.<sup>110</sup> Therefore, it is within this undefined criterion, relating to ideas about the highest moral or economic good, that the marginal utility economist and aspiration moralist share, which would ultimately lead to a consideration of the notion of balance.<sup>111</sup> The primary concern of both the morality of aspiration and marginal utility is maintaining the right balance in every life-fulfilling human endeavour, and this means that the prudent management of resources is of paramount importance.<sup>112</sup>

The morality of duty, however, finds its closest kinship cousin with the economics of exchange and out of duties that arise by the exchange of promises. Fuller maintains that 'to establish the affinity between duty and exchange' there needs to be 'a mediating principle that can only be found in the relationship of reciprocity'.<sup>113</sup> When trying to answer the question, 'under what circumstances does a duty, legal or moral, become most understandable and most acceptable to those affected by it?' Fuller identifies three conditions to achieve 'the optimum efficacy of the notion of duty'.<sup>114</sup> Firstly, the reciprocal exchanges of promises must be voluntary, and secondly, the parties' reciprocal performances 'must be equal in value'.<sup>115</sup> Thirdly, the relationship of duty must be in theory and practice 'reversible'. Fuller explains these conditions as follows:

When we ask, "in what kind of society are these conditions most apt to be met?" the answer is a surprising one: *in a society of economic traders*. By definition the members of such a society enter direct voluntary relationships of exchange. As for equality it is only with the aid of something like a free market that it is possible to develop anything like an exact measure for the value of disparate goods. Without such a measure the notion of equality loses substance and descends to the level of a kind of a metaphor. Finally, economic traders frequently change roles, now

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<sup>109</sup> *ibid* 17.

<sup>110</sup> *ibid*.

<sup>111</sup> *ibid* 18.

<sup>112</sup> *ibid*.

<sup>113</sup> *ibid* 19.

<sup>114</sup> *ibid* 22.

<sup>115</sup> *ibid*.

selling, now buying. The duties that arise out of their exchanges are therefore reversible, not only in theory but in practice.<sup>116</sup>

Therefore, the relationship between the trade principle of reciprocity and the formation of legal obligation is a very intimate and productive one. However, it is worth concluding by relating a cautionary tale discovered by Fuller. He suggests that the contemplation of interactional theory proves productive for realising the limits of adjudicating legal rules that were primarily made for prudent management of economic resources. However, when he discussed ‘legal morality and the allocation of economic resources’, Fuller raises an issue about the challenge of locating the pointer on the moral scale but this time to advance this thought:

The task of economic allocation cannot be effectively performed within the limits set by the internal morality of law. The attempt to accomplish such tasks through adjudicative forms is certain to result in inefficiency, hypocrisy, moral confusion, and frustration (...) As lawyers we have a natural inclination to “judicialize” every function of government. Adjudication is a process with which we are familiar and that enables us to show to advantage our special talents. Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources.<sup>117</sup>

Those who are becoming more sceptical about the judicialization of world trade law advocating noncompliance for welfaristic objectives, might be relieved to read the above paragraph.<sup>118</sup> However, from a historical perspective the ideas of those advocates who can be labelled ‘anti-legalists’ scholars, and those of the ‘legalists’ who remain entrenched in their beliefs that judicialization is the only way forward, are very distinct. This is true, especially when one considers their take on the ideas about duty or obligation that arise out of the reciprocal exchanges of promises and the proper function of institutional setting that organises such activity. Both the legalists and anti-legalist scholars seem to agree about the benefits of trade conducts as guided by the principle of reciprocity, but they do not agree on the status of the obligations arising out of this conducts or how they should be properly adjudicated. This is why Fuller’s theory is relevant to this thesis in order to highlight the function

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<sup>116</sup> *ibid* 23 (emphasis added) citing Giorgio Vecchio, *Justice: An Historical and Philosophical Essay* (Philosophical Library 1953) 96.

<sup>117</sup> *ibid* 173, 176. See Lon Fuller, ‘Freedom as a Problem of Allocating Choice’ (1968) *Proceedings of the American Philosophical Society* 101.

<sup>118</sup> See Judith Goldstein and Lisa Martin, ‘Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note’ in Judith Goldstein and others, *Legalization and World Politics* (MIT Press 2001) 219.

of the principle of reciprocity in the institutional setting for the society of economic traders who use adjudication as an appropriate method of settling disputes.

However, the above summary invites the following reflections on the link between the morality of law and economic management. First, Fuller's thesis is helpful when addressing the discussions that either separately focuses on the fulfilment of aspiration, or on duty, without realising the close interactive relationship between the two kinds of morality, and their connection to the concept of law. Fuller's jurisprudence is relevant to show the moral content of law in relation to the institutionalised economic conducts of trade. By applying Fuller's notion of law, and his inner morality of law criteria to institutionalised trade conducts, the morality of law will always have positive bearing on such analyses. For example, trade experts' deliberation on the 'collective moral responsibility' for the consequences of trade practices highlights the suitability of the morality of law as an appropriate analytical framework to address this contentious issue.<sup>119</sup> Furthermore, the clear analogy between harm-based and duty-based moral restraints and Fuller's moralities of aspiration and duty show the relevance of Fuller's thesis to the discussion on the moral foundation of economic behaviour.<sup>120</sup>

Second Fuller's jurisprudence is also helpful for addressing the arguments of the anti-legalist 'law and economics' jurisprudential school with its ultimate goal of 'wealth maximization'.<sup>121</sup> The so-called 'Chicago School of Jurisprudence' that overemphasise the efficient breach of contract i.e. breach with impunity, and the dilution of liability, i.e. the discarding of responsibility, has done immeasurable harm to the study of law and economics including WTO law.<sup>122</sup> Because along the Fullerian lines, a theory that neither finds its reason in law and morality, and instead analyse legal obligations purely on the basis of economic calculation, will be devoid

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<sup>119</sup> Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford University Press 2011) 353; Robert Howse, Joanna Langille and Katie Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*' (2015). New York University Public Law and Legal Theory Working Papers <[http://lsr.nellco.org/nyu\\_plltwp/506](http://lsr.nellco.org/nyu_plltwp/506)> accessed 2 April 2015.

<sup>120</sup> See David Rose, *The Moral Foundation of Economic Behavior* (Oxford University Press 2014); Lang, (n 119) 350-352.

<sup>121</sup> See Richard Posner, *The Economics of Justice* (Harvard University Press 1981); Posner and Sykes, *Economic Foundations of International Law* (n 24).

<sup>122</sup> See Posner and Sykes, 'Efficient Breach of International Law' (n 7); John Dillbary, 'Tortfest' (2013) *The University of Chicago Law Review* 953.

of any sense of justice. A society where breaching the law ‘efficiently’ means restoring some levels of justice is prone to inequality and instability. The Chicago school of jurisprudence is oblivious to the notion of moral obligation, because it neglects the aim of providing ‘security and predictability’ to economic actors to orient their actions to a clearly stated rules of conduct.<sup>123</sup> The terms: Stability, security, and predictability are peculiarly alien to the law and economics’ school.<sup>124</sup>

Finally, and following from the earlier remarks on the WTO, it is worth considering the applicability of Fuller’s informed theory of interactionalism to the WTO. Because some scholars have claimed that this organization suffers from the lack of ‘normative consciousness’, public reason, and undetermined legality status.<sup>125</sup> For instance, Petersmann has rightly observed that the WTO law lacks ‘public reason’, and this can have a detrimental effect on its enforcement.<sup>126</sup> The interactional approach can contribute to better understanding these causes of defects that emanate from either a lack of shared understandings, rules that contradict Fuller’s principles of legality, or the lack of a practice of legality.<sup>127</sup> With regard to the lack of public reason, the above explications on the appropriate role and form of law, as pioneered by Fuller, are very relevant for the fulfilment of the project of ‘cosmopolitan justice’.<sup>128</sup>

According to Viner, Fuller’s jurisprudence contains this highly needed cosmopolitan aim, ‘respect for all those who are affected by the laws’.<sup>129</sup> Thus, it is by applying the morality of law that the ‘deficiencies’ of the world trade law can be identified and readily remedied. Furthermore, from reading Fuller it is clear that his ‘purposive interpretation’ conforms to the ‘internationalist model’ of interpretation, which gives

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<sup>123</sup> See Jackson, *The World Trading System* (n 8) 8-11.

<sup>124</sup> Posner and Sykes, ‘Efficient Breach of International Law’ (n 7); Posner and Sykes, *Economic Foundations of International Law* (n 24).

<sup>125</sup> See Charnovitz, *The Path of World Trade Law in the 21st Century* (n 57); Cho, *The Social Foundations of World Trade* (n 58).

<sup>126</sup> Ernst-Ulrich Petersmann, ‘The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public Reason’ in the GATT/WTO Dispute Settlement System’ in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015) 182 (hereinafter, *The GATT Legal Office*); Petersmann, ‘Transformative Transatlantic Free Trade Agreements’ (n 33).

<sup>127</sup> See Brunnée and Toope, *An Interactional Account* (n 4).

<sup>128</sup> See Petersmann, *The GATT Legal Office* (n 126); Frank Garcia, *Global Justice and International Economic Law* (Cambridge University Press 2015) 205-272.

<sup>129</sup> Steve Viner, ‘Fuller’s Concept of Law and Its Cosmopolitan Aims’ (2007) *Law and Philosophy* 1.

effect to only those intentions of the lawmakers that serve the ideals of justice.<sup>130</sup> Continuing on this interpretation note, it is fair to say that the content of a law, like the world trade law, cannot be explained by the reliance on Ronald Dworkin's 'legal interpretivism', or classical legal positivism.<sup>131</sup>

Unlike Fuller, Dworkin did not identify constraints on lawgiver's power to respect the 'inner morality of law', and the essential role of human agency in law-making and application. In short, whether it is the national or international law of economics, the morality of law is capable of providing the most comprehensive analysis of legal rules made for one of the most important enterprise of mankind, the prudent management of economic resources. It is true not every legal problem can be suitably solved by legal verdict, because there are other factors impacting the functioning of this society that transcend the subject of law, be they social or purely managerial. However, law always asserts its relevance in the modes of social interaction that are working toward the achievement of a normative order. For Fuller the legal texts matter but 'the source of normativity is social interaction'.<sup>132</sup> Once this order has been established, the question that whether it can be best served by prudent managerial decisions, or legal rulings is a different matter altogether.

Additionally, whether it is the research for the social, ethical, or moral dimensions of world trade law, the morality of law can contribute to these researches by revealing *the legal consciousness* as derived from actors' interactions. Fuller's preference for using economics to clarify the right content and purpose of law is very clear. The re-reading of the morality of law, in light of the contemporary relevance of its economic basis, can provide an original elaborate account of the complex relations between law and economics. Various biographical accounts of Fuller's life reveal his strong enthusiasm for bridging the divide between economism and legalism. This is added to his focus on the institutional role of law in adjudicating rules for

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<sup>130</sup> Nicholas McBride and Sandy Steel, *Great Debates in Jurisprudence* (Palgrave 2014) 125. See the Vienna Convention on the Law of Treaties Articles (18) (31-33) that emphasis the 'purposive interpretation of treaties. For more on the moral purposive view of international law see Stephen Allen, *Law Express: International Law* (2nd edn, Pearson Education Limited 2015) 6.

<sup>131</sup> Petersmann mainly relied on Dworkin theory to explain his argument for public reason see Petersmann, 'The GATT Legal Office' (n 126).

<sup>132</sup> Robert Wolfe, 'Kaleidoscopic Multilateralism: Lon Fuller, Rod Macdonald and the WTO' in Richard Janda and others (eds), *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (McGill-Queen's University Press 2015) 90; Lon Fuller, 'Human Interaction and the Law' (1969) *American Journal of Jurisprudence* 1.

economic disputes. Communications between him and the constitutional political economy scholar, James M. Buchanan, is a testament to Fuller's enduring passion for a law and economics field of study, which does not rid law of its essential obligatory effect, or economics of its marginal utility ideal.<sup>133</sup>

### 3.4.2 The Shared Understandings on Compliance with WTO Law:

From a closer look at the shared understandings on compliance in the WTO law, especially through the prism of legalist/anti-legalist dichotomy, it is clear that compliance rule is misconstrued both in history and practice. Starting from the contemporary practical aspect, the WTO has both a designated 'compliance body', the DSB, and 'an implementation review mechanism', the Trade Policy Review Mechanism (TPRM).<sup>134</sup> This put the WTO in a unique position in comparison to the compliance controlling mechanisms in human rights treaties or multilateral environmental agreements, which can only have one of those mechanisms. The sole objective of those WTO mechanisms is to deter non-compliance that usually results from either 'norm ambiguities' and/or 'capacity limitations'.<sup>135</sup> Under the WTO regime, the preamble of the TPRM that can be read as assessing member state *capacity limitations* that might hinder an optimal compliance, stipulates that the purpose of the TPRM is:

To contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.<sup>136</sup>

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<sup>133</sup> Letters exchanged between Fuller and Buchanan between 8-13 January 1964 (The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 2) cited in Nicola Lacey, 'Out of the 'Witches' Cauldron'?' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010) 30-31; Buchanan said the constitutional political economy focuses on 'the working properties of rules, and institutions within which individuals interact, and the process through which these rules and institutions are chosen or come into being' see James M. Buchanan, 'The Domain of Constitutional Economics' (1990) *Constitutional Political Economy* 1.

<sup>134</sup> Jutta Brunnée, 'Compliance Control' in Geir Ulfstein and others (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press 2007) 382.

<sup>135</sup> *ibid* 373.

<sup>136</sup> See the TPRM Agreement in World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (20th printing, Cambridge University Press 2013) 4 (hereinafter *The WTO Legal Texts*) 380.

Nonetheless, despite the existence of the WTO DSB and the TPRM, the misunderstanding on WTO compliance rule persists because of the lack of historically accurate analysis based on the above sub-elements of shared understandings especially the norm-cycle. An example of this misunderstanding can be found in some historical analyses of world trade law that conclude that compliance cannot be expected in the face of the hypothetical situations of ‘economic’ or ‘political shocks’.<sup>137</sup> For instance, Goldstein concluded her article on trade liberalization and domestic politics by saying:

The GATT/WTO regime has provided access to markets by brining exporters into the free trade coalition to balance the voice of the pro-protection lobby. However, economic shocks cannot be ignored and politicians who want to retain support must be able to shelter their economy when necessary, for legitimate domestic reasons (...) But when the regime creates problems by forcing compliance in a mechanistic manner, it may no longer be viewed as useful in support of open markets.<sup>138</sup>

This analysis against compliance raises this pivotal question of whether or not GATT/WTO jurisprudence can negotiate the role of a member state’s sovereignty. If WTO law is ‘an integral part of public international law’ it does then follow that sovereignty, as a legal value does not mean ‘freedom from law but freedom within the law (including freedom to change the law)’.<sup>139</sup> As mentioned in Chapter Two, the DSB AB described this view of sovereignty in *Japan–Alcoholic Beverages II* as follows:

The WTO Agreement is a treaty -- *the international equivalent of a contract*. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.<sup>140</sup>

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<sup>137</sup> Posner and Sykes, ‘Efficient Breach of International Law’ (n 7).

<sup>138</sup> Judith Goldstein, ‘Trade Liberalization and Domestic Politics’ in *The Oxford WTO Handbook* (n 63) 80-81. See Goldstein and Martin (n 118) 219; Lisa Martin, ‘Against Compliance’, in Jeffrey Dunoff and Mark Pollack (eds), *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship* (Cambridge University Press 2013) 591-610.

<sup>139</sup> Crawford (n 49) 122; See John Jackson, *Sovereignty, The WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2006) 164-168.

<sup>140</sup> Appellate Body Report, *Japan–Alcoholic Beverages II*, page 13-14, WT/DS11/AB/R, adopted 4 October 1994.

The AB then went on to remind the respondent state in this case, Japan, of the commitment it had made to one of the core shared non-discrimination principles of the GATT Article (III) on *National Treatment on Internal Taxation and Regulation* (NT).<sup>141</sup> Therefore, the question that might be put to the anti-legalists who support non-compliance is that since the WTO has the full compliance controlling mechanisms, the DSB and the TPRM, and the legal value of sovereignty has been clarified in the GATT/WTO jurisprudence, and other than the rules and exceptions provided in the WTO agreements, what is it that excuses member states from full compliance? However, it has to be noted that one of the claims raised by the anti-legalist scholars in the debate on the goal(s) of trade sanctions is that the DSB is *not* a compliance body, and both divides of the legalist/anti-legalist dichotomy sparingly discuss the TPRM.<sup>142</sup>

One reason for the lack of analysing the TPRM in compliance discussions is that the frequency of reviews depends on ‘the impact of individual Members on the functioning of the multilateral trading system, defined in terms of their share of world trade’.<sup>143</sup> For this reason, in particular, the TPRM had been criticised for adopting the wrong periodicity that makes it fail its enforcement mechanism goal.<sup>144</sup> However, the TPRM is crucial in terms of its value as a public good, and fostering good practices ensuring fuller interaction of member states in the multilateral trading system.<sup>145</sup> But the above question to the anti-legalist scholars leads to a deeper inquiry to investigate whether there have been shared understandings on compliance or the world trading system was originally designed to validate deviations i.e. breach with impunity. Such a challenging question requires the evoking of (70) years of history of trade commitments from the GATT time in 1947 up until 2015, which is the twentieth anniversary year for the WTO. However, through the lens of interactionalism, and especially its element on shared understandings, reviewing this long history of trade negotiations will be somewhat conceivable. The reason for

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<sup>141</sup> The GATT Article III ‘requires equal treatment of imported and locally produced goods in respect of like or directly competitive or substitutable products’. See Davey, *Non-Discrimination in the World Trade Organization* (n 33) 31.

<sup>142</sup> Alan Sykes, ‘The Dispute Settlement Mechanism: Ensuring Compliance’ in *The Oxford WTO Handbook* (n 63) 560-584.

<sup>143</sup> *The WTO Legal Texts* (n 136) 380.

<sup>144</sup> Bernard Hoekman and Petros Mavroidis, ‘WTO Dispute Settlement, Transparency and Surveillance’ (2000) *The World Economy* 527.

<sup>145</sup> *ibid*; see Sam Laird and Raymund Valdes, ‘The Trade Policy Review Mechanism’, in *The Oxford WTO Handbook* (n 63) 482.



recalling the length of this history, and unlike the application of interactionalism to climate change or the use of force regimes, is to highlight the difficulty of selecting the norm or norms that constitute the essence of the world trading law. The principles on non-discrimination, especially those codified under GATT Articles (I) and (III), might be the core principles of the world trading system, but so does the guiding principle of reciprocity and non-reciprocity for developed and less-developed consenting states.

The second challenge of applying interactionalism is the obvious lack of interaction from non-state actors in the GATT/WTO's norms formation and socialisation. In contrast to the climate change regime, for example, where social justice movements and NGOs have played an active role in the law-making and administration, the GATT/WTO negotiations have been quite exclusive of those non-state actors.<sup>146</sup> For instance, states even the most powerful have failed to balance the interests of the pro-protectionists, pro-free trade, and pro-labour rights groups despite the existence of the historical reciprocal bilateral agreements that stipulate interaction with such groups.<sup>147</sup> For example, the United States (US) had what is regarded as the backbone of the GATT, the 1934 Reciprocal Trade Agreements Act, which instructed the US president at that time to consult with concerned governmental bodies and groups before lowering the tariffs.<sup>148</sup>

However, the multilateralising of the trade agreements under the auspice of the GATT from 1947 onward made trade liberalization more politically stable, but governments much less interactive with domestic politics on free trade policies.<sup>149</sup> The multilateral format of trade liberalization with its provision of either adhering to the rules or opting out of the GATT, shifted the political power of consenting states toward compliance, but the question is was it a habitual compliance based on interactional law principles, or compliance by the prerogative decisions of state officials.<sup>150</sup> Similarly, social movements and NGOs were until recently excluded

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<sup>146</sup> Brunnée and Toope, *An Interactional Account*, (n 4) 141-177.

<sup>147</sup> Judith Goldstein, 'Trade Liberalization and Domestic Politics' in *The Oxford WTO Handbook* (63) 80-81.

<sup>148</sup> *ibid* 74. See Kenneth Dam, 'Cordell Hull, The Reciprocal Trade Agreement Act, and the WTO' (2005) *New York Journal of Law and Business* 709.

<sup>149</sup> Goldstein, 'Trade Liberalization and Domestic Politics' in *The Oxford WTO Handbook* (63) 75; Giovanni Maggi and Andres Rodriguez-Clare, 'The Value of Trade Agreements in the Presence of Political Pressures' (1998) *Journal of Political Economy* 574.

<sup>150</sup> *ibid*.

from any ‘on-site-inputs’ into multilateral trade negotiations for the peculiar reason that secrecy was necessary to secure negotiations, and ensure the smooth functioning of the system.<sup>151</sup>

Notwithstanding the grave challenges facing social justice movements within civil societies, and NGOs in terms of the lack of interaction with WTO law, however, there have been some successful communications. For instance, the NGOs from 1990s onward have gained significant achievements by working on two fronts at the same time.<sup>152</sup> The first is working on the basis of the so-called ‘pull factors’ manifested in the WTO need for help from NGOs to draft and implement policies.<sup>153</sup> The second front was the ‘push dynamics’ whereby NGOs have been seeking to perforate the closed settings of the WTO to obtain information on good governance practices that are essential for the fairer free trade.<sup>154</sup> But variations exist in this regard, in that the role of non-state actors like NGOs is more developed and effective in developed member states, and much less effective in developing countries because of their restrictions on representations and assemblies.<sup>155</sup>

Nonetheless, the members-driven character of the WTO in rule-making and implementation in, for example, relying on member states’ denouncements of treaty violations as a compliance monitoring strategy, and the continuing secrecy of trade negotiations does not change the closed setting nature of the WTO. This issue is raised, not only by NGOs but also by developing and least developing member states who are excluded from policy-setting in trade negotiations, and it poses the question about what kind of interaction the WTO is pursuing that would be beneficial for its legal legitimacy, and henceforth facilitate compliance with its rules and rulings.<sup>156</sup> For example, some scholars claimed that the low participation rate of developing member states in the WTO system negotiations and litigations is reflecting badly on their economy and developmental goals. Because despite ‘the

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<sup>151</sup> Jens Steffek, ‘Awkward Partners: NGOs and Social Movements at the WTO’ in, *The Oxford WTO Handbook* (n 63) 315.

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid* 303.

<sup>154</sup> *ibid.*

<sup>155</sup> Oluf Langhelle, Arild A. Farsund, and Hilmar Sommetvedt, ‘The Intermestic Politics of Trade’ in Oluf Langhelle (ed), *International Trade Negotiations and Domestic Politics: The Intermestic Politics of Trade Liberalization* (Routledge 2014) 194.

<sup>156</sup> See Robert Wolfe, ‘Decision-Making and Transparency in the “Medieval” WTO: Does the Sutherland Report have the Right Prescription?’ (2005) *Journal of International Economic Law* 631.

progressive legalization' especially during the GATT years, but the world trading system is still chiefly serving the interests of developed states.<sup>157</sup>

The pivotal factor that had safeguarded the legitimacy of the GATT and inspired fidelity to its law and continues to affect the work of the WTO is the shared understandings on core principles of trade conduct. However, with increasing WTO cases of delayed or non-compliance that arise because of member states widely different approaches to risk and efficacy in trade, the WTO is facing a legitimacy crisis. Esty explains this link between shared understandings and legitimacy deficit by saying:

In the past, only the close-knit trade community - united by a common vision of a world of open markets, a commitment to a well-defined set of core principles (for example, non-discrimination), and common traditions of education (particularly a belief in the centrality of economics) - paid attention to the work of the WTO. Today, a broader community that does not share this cultural affinity and understanding stands in judgment on the organization. Different standards of efficacy are being applied. As a result, the WTO's marks are coming in much lower, eroding the organization's legitimacy. Fundamentally, the closed-door approach to decision-making that was a virtue under the Club Model has now emerged as an obstacle to popular understanding of and support for the WTO.<sup>158</sup>

Albeit this lack of interaction but it is questionable whether this status of non-state actors in the world trade law lowers the value of WTO obligations, and therefore excuses developed states from full compliance. In other words, does the lack of developing and least developing member states and non-states actors' interactions with the WTO law, which is derived from the WTO denying them or not facilitating opportunities to communicate and reason with the law, mean that the WTO rules and rulings have no obligatory effect. Again from looking back at legalist/anti-legalist debate it is clear that neither non-state actors nor the concerns of developing or least developing member states about the lack of interactions, are the main concerns of the debaters. In fact, the anti-legalist scholars claim that the WTO should facilitate deviations from the rules to the extent that it does not affect the stability of the

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<sup>157</sup> See Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed' in James Hartigan (ed), *Trade Disputes and the Disputes Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing Ltd 2009) 167; Mervyn Martin, *WTO Dispute Settlement Understanding and Development* (Martinus Nijhoff Publishers 2013); Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2015 – A Statistical Analysis' (2016) *Journal of International Economic Law* 289.

<sup>158</sup> Daniel Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) *World Trade Review* 7. See Sungjoon Cho, 'A Quest for WTO's Legitimacy' (2005) *World Trade Review* 391.

multilateral trading system, and there is no comment from the legalists on how legalising non-compliance will not affect the benefits accruing to weaker member states.<sup>159</sup>

The obvious questions that follow from the anti-legalism claim are: how to maintain ‘the stability’ of the system while validating non-compliance as a system safety valve, and does not the lack of interactions from non-state actors by, for example, not allowing direct effect of GATT/WTO rules, badly affect ‘the pull to compliance’ with WTO obligations.<sup>160</sup> The effect of interactions between member states’ policymakers with non-state actors on how to comply with WTO rulings is understudied. Because the main focus of the literature is on ‘the demand-side’ of compliance, ‘that is, how to increase the pressure on the state to comply’, and not on ‘the supply-side’ that involves considerations of domestic factors.<sup>161</sup> Moreover, the discussion on compliance with the WTO law often misses the important distinction in classical international law compliance studies that differentiation between the first order compliance (i.e. compliance with the tribunal’s authoritative decisions that apply the law) and second order compliance (i.e. compliance with the standing-rules of law).<sup>162</sup> This distinction is relevant to the interactional approach for assessing the effectiveness of the WTO rules including DSU, through the consideration of Fullerian principles, especially the eighth criterion, the congruence between official actions and the law, and assessing the work of the tribunal that enforce the law, the WTO DSB.

Furthermore, through the lens of interactionalism that sees the making of law as a process in *a continuum*, law as a gradual concept according to Fuller, it is not going to be a forthright conclusion that because of the lack, not a complete absence of non-state actors’ interactions with the GATT/WTO law, means that the law lacks legal legitimacy. Proposals for the WTO to address the lack of transparency include allowing public input into the negotiations and dispute resolution by facilitating

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<sup>159</sup> See Zimmermann (n 26).

<sup>160</sup> See Herdegen (n 30) 271. See H el ene Ruiz Fabri, ‘Is there a Case –Legally and Politically–For Direct Effect of WTO Obligations?’ (2014) *European Journal of International Law* 151.

<sup>161</sup> Rachel Brewster and Adam Chilton, ‘Supplying Compliance: Why and When the United States Complies with WTO Rulings’ (2014) *Yale Journal of International Law* 201. See Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (n 9); James Cohee, ‘The WTO and Domestic Political Disquiet: Has Legalization of the Global Trade Regime Gone Too Far?’ (2008) *Indiana Journal of Global Legal Studies* 351.

<sup>162</sup> Roger Fisher, *Improving Compliance with International Law* (The University of Virginia Press 1981) 163.

those groups direct observation of the trade talks, and enhancing the communication between the non-state actors and the WTO DSB.<sup>163</sup> Also, it is the case that ‘domestic constraints encourage litigation as public action that signals responsiveness to domestic interests .States with less need to engage in political theatre can avoid court action and resolve their disputes through informal settlements’.<sup>164</sup> However, protracted litigation in the DSB neither serve the interests of member states or their citizens, instead public participation and informal settlement should be facilitated within the WTO.

Overall, those issues will be covered in the fifth chapter of this thesis on compliance in the WTO practice of legality. Although it should be noted that this thesis single recommendation for non-state actors’ involvement is limited to getting their views on how to make WTO law effective in practice for the sole purpose of improving member states compliance with their commitments. Non-state actors involvement in the DSB should be limited to receiving their amicus curiae briefs, for fear that their involvement beyond this role might delay the settlement process even further. Still, as will be suggested below, the WTO should always facilitate public deliberations on the WTO law-making and application. Interactions based on the WTO law, from states and concerned non-state actors, which include independent experts, traders, consumer groups, civil societies etc. will be beneficial for enforcing WTO rules. The WTO must be an effective open forum for facilitating these interactions.

However, the wide agreement on the following shared principles of the world trading system does not loosen the negative effect of the lack of interactions of some member states and almost all non-state actors in the WTO. But the architects of those principles have envisioned and empirically determined that many states have benefited from the stability and prosperity provided by trade liberalization.<sup>165</sup> Because the greater wealth that has been generated by trade liberalization has improved states’ capacity to provide for their citizens, and engaged them in greater

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<sup>163</sup> Alter (n 10) citing Claude Barfield, *Free Trade, Sovereignty, Democracy* (American Enterprise Institute 2001) 135-143, and Sophie Meurneir, ‘Trade Policy and Political Legitimacy in the European Union’ (2003) *Comparative European Politics* 67. See Yves Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge University Press 2014); Panagiotis Delimatsis, ‘Transparency in the WTO Decision-Making’ (2014) *Leiden Journal of International Law* 701.

<sup>164</sup> Davis (n 9) 300.

<sup>165</sup> See Jagdish Bhagwati, *Free Trade Today* (Princeton University Press 2003); Peter Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Texts, Cases and Materials* (3rd edn, Cambridge University Press 2013) 17-21. See Stephen Krasner, *Power, the State, and Sovereignty: Essays on International Relations* (Routledge 2009) 130-141.

economic interdependency which is ‘likely to reduce the risk of war’, as exemplified by the European Community’s rationale.<sup>166</sup> It is noteworthy that this might not be the case for developing and least-developing states who are still finding it difficult to fully and effectively participate in the trading system by, for example, challenging the offending states’ WTO-inconsistent measures through the dispute settlement system.<sup>167</sup>

Furthermore, a number of initiatives have shown that world trading system is gradually moving toward more transparent democratic system that highly value states and non-states interactions within the WTO.<sup>168</sup> After all, the sole objective of the WTO law, as we have been told, is ‘improving the welfare of people of member states’.<sup>169</sup> Additionally, states and traders are faced with the quandary that trade restrictions which are ‘invariably rationalised in terms of national welfare are advocated by protectionist groups that stands to exclusively benefit from such restrictions’.<sup>170</sup> So the claim that non-compliance is a *welfare maximisation strategy* has to be balanced with the objective that the WTO was designed to improve the welfare of member state’s people, through their governments’ adherence to WTO law.

### **3.4.3 The Interactional Objectives of the World Trading System:**

The following question might be helpful in illustrating the case for world trading system, namely, why international trade needed to be institutionalised and preferably multilateralised. First a brief historical account is needed to show the inseparable relationship between legal rules and economic management. The standard view of the association between law and economy in the context of the world trading system

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<sup>166</sup> Michael Trebilcock, ‘Critiquing the Critics of Economic Globalization’ (2005) *Journal of International Law and International Relations* 213.

<sup>167</sup> See Chad Bown, *Self-enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution 2009).

<sup>168</sup> See (Decision by the WTO General Council, Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452, 16 May 2002); (The WTO General Council Decision on Derestriction of Official GATT 1947 Documents, WT/L647, 13 June 2006); (Decision by the WTO General Council, Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162, 23 July 1996). See Bonzon, *Public Participation and Legitimacy in the WTO* (n 163); Robert Wolfe, ‘An Anatomy of Accountability at the WTO’ (2015) *Global Policy* 13.

<sup>169</sup> The WTO in Brief <[http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm)> accessed 30 November 2014.

<sup>170</sup> Dominick Salvatore, *International Economics: Trade and Finance* (11th edn, John Wiley and Sons Ltd 2014) 211.

maintains that at the national level ‘law makes the economy’,<sup>171</sup> while at the international level ‘international law has always had considerable ‘economic content’’.<sup>172</sup> Such relationship between law and economics provided the main rationale for an institutionalised world trading system where states are *engaging in a purposive enterprise of subjecting their trade conducts to the governance of rules*.<sup>173</sup> The elementary relationships between law and economic life is epitomized by the contractual relationship between the promisor, the owner of the property or object, and the promisee, to whom a promise of exchange was made.<sup>174</sup> Legal guaranty gives to the latter ‘a specific certainty of the durability of the power’ of control over his property, while it gives to the former ‘a higher degree of certainty that the promise will be kept’.<sup>175</sup> However, according to Weber:

Law can also function in such a manner that, in sociological terms, the prevailing norms controlling the operation of the coercive apparatus have such a structure as to induce, in their turn, *the emergence of certain economic relations which may be either a certain order of economic control or a certain agreement based on economic expectations. This occurs when law is expressly created for a particular purpose*.<sup>176</sup>

As best illustrated by the economic basis of Fuller’s jurisprudence, and ‘the constitutional political economy’ of Buchanan and Brennan, rules find their reason in the social interactions for the establishment and preservation of a productive social order like market economy.<sup>177</sup> Furthermore, Fuller and Buchanan and Brennan’s approaches to studying the reason of rules is also in agreement with international compliance studies that claim that rules and institutions rather than outcomes should be the central focus of inquiry for exploring how the fidelity to law

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<sup>171</sup> Philip Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press 2002) 86.

<sup>172</sup> John Jackson, ‘International Economic Law: Complexity and Puzzles’, (2007) *Journal of International Economic Law* 3.

<sup>173</sup> This is a paraphrasing of Fuller’s notion of law as ‘the enterprise of subjecting human conduct to the governance of rules’ see Fuller, *The Morality of Law* (n 65) 96.

<sup>174</sup> Edward Shils and Max Rheinstein (trans), *Max Weber on Law in Economy and Society* (3rd printing, Harvard University Press 1969) 98-99.

<sup>175</sup> *ibid.*

<sup>176</sup> *ibid* (emphasis added).

<sup>177</sup> James M. Buchanan and Geoffrey Brennan, *The Reason of Rules: Constitutional Political Economy* (reprint edn, Liberty Fund 2000) 3.

can be made and preserved.<sup>178</sup> The need for regulated trade under the auspices of the GATT and WTO, as crucial means for security and prosperity, is supported by very rich history of world trade.<sup>179</sup> This history is filled of examples of interregional interactions based on customary rules of transnational trade relations,<sup>180</sup> and trading states through institutional settings have cultivated the shared understandings on compliance with existing rules to improve their economic welfares.<sup>181</sup>

However, the answer to the question on institutionalisation of trade is found in the model of comparative advantage and the subsequent international economic theories that have improved this model. The economist David Ricardo's formula for dealing with the absolute advantage challenge, the so-called 'comparative advantage' is the founding economic theory of international trade.<sup>182</sup> The theory stipulates that trade restrictions do not contribute to the state economic welfare, and 'if nations specialise in those areas in which they have a comparative cost advantage and trade where the advantage is lacking then there would be an overall increase in world production of the product in question'.<sup>183</sup> For example, if the US is superior at producing 'wheat', but less superior at producing 'cloth', which is China's main product, then each can still benefit via the US investing resources in what it does best –wheat production–

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<sup>178</sup> Buchanan and Brennan elaborated on the reason of rules by saying 'without a shared "constitutional mentality", without some initial common ground from which discourse can proceed, all argument on design comes to naught. Persons must be cognizant of the *reason* of rules before they can enter into dialogues devoted to questions concerning choices among rules' *ibid* 10.

<sup>179</sup> See William Bernstein, *A Splendid Exchange: How Trade Shaped the World* (Atlantic Monthly Press 2008); Ralph Ossa, 'WTO Success: No Trade Agreement but No Trade War' (11 June 2015) <<http://www.voxeu.org/article/wto-success-no-trade-agreement-no-trade-war>> accessed 11 August 2015; Gilbert Winham, 'The Evolution of World Trading System- The Economic and Policy Context' in Daniel Bethlhem and others, *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 5; World Trade Organization, '10 Benefits of the WTO Trading System' (World Trade Organization 2009) 2.

<sup>180</sup> For a classical account of the benefits of free trade see Kathryn Sutherland (ed), *Adam Smith: An Inquiry into the Nature and Causes of the Wealth of Nations, A Selected Edition* (Oxford University Press 2008) 295-312; Ronald Findlay and Kevin O'Rourke, *Power and Plenty: Trade, War, and the World Economy in the Second Millennium* (Princeton University Press 2009).

<sup>181</sup> Fakhri claimed that the 1902 Brussels Sugar Convention established the first modern multilateral trade institution, see Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge University Press 2014).

<sup>182</sup> Understanding the WTO: Basics: The Case for Open Trade <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm)> accessed 21 March 2015; Raj Bhala, *Dictionary of International Trade Law* (LexisNexis 2008) 85-88.

<sup>183</sup> Asif Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester University Press 1998) 11.



and export its surplus to China, while China do the same with its 'cloth' and export its surplus to the US in exchange for the wheat.<sup>184</sup>

However, according to Bhagwati, 'the Ricardian analysis implied that this technical possibility of gaining from trade through specialisation would only be realised if a policy of free trade were adopted in an institutional setting where prices guided resources allocation'.<sup>185</sup> Over the years, the Ricardian comparative advantage that has been designated as 'the law of comparative advantage' has provided the main rationale for rules oriented toward freer trade. Because it has constituted 'the stated logic for negotiating, drafting, implementing, and enforcing rules to liberalise trade on a multilateral, regional, or bilateral basis'.<sup>186</sup>

So the main goal of the institutionalised liberal trade is 'to minimize the amount of interference of governments in trade flows that cross national borders'.<sup>187</sup> That is why the WTO as an institutional setting for rules making and administration is essential in achieving two goals for realising the benefits of free trade to improve national welfare. First, it guides the 'reciprocal bargaining' process by establishing a level playing field as a policy goal for competing traders interests.<sup>188</sup> Second, it corrects the market distortions created by the distractions to foreign market access via the WTO DSB binding rulings on the status of the respondent state's distorting measure(s), and if needed, recommending the adjustment of its measure accordingly.<sup>189</sup> According to Trebilcock, there are seven qualifications to the case of free trade that the GATT and WTO rules have played a major role in promoting,

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<sup>184</sup> This is a simple example because it was based on two products, two countries, and labour input (the theory of labor value). There are factors such as decreasing transportation cost and IT innovations that have changed the face of world trade. That is why this theory had been developed by twentieth century economists who criticized, but did not dismiss it, saying that the theory need to be improved to enable economies to reap trade benefits with due regard to national economic welfare. See Bhagwati, *Free Trade Today* (n 165) 4; Paul Samuelson, 'The Gain from International Trade Once Again' (1962) *Economic Journal* 820; Gottfried Haberler, 'Some Problems in the Pure Theory of International Trade' (1950) *Economic Journal* 223; Salvatore (n 170) 34, 48-53.

<sup>185</sup> Bhagwati, *Free Trade Today* (n 165) 4 (emphasis added).

<sup>186</sup> Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice* (3rd end, LexisNexis 2008) 207.

<sup>187</sup> Jackson, *The World Trading System* (n 8) 11.

<sup>188</sup> *ibid* 19-21; Bhagwati, *Free Trade Today* (n 165) 95-120.

<sup>189</sup> *ibid*.

namely, ‘reciprocity, the optimal tariff, infant industries, revenue raising, national security, adjustment costs, and health, safety and environmental concerns’.<sup>190</sup>

In 2012 a panel of prominent persons convened by the former Director-General of the WTO, Pascal Lamy, reiterated the benefits of liberalising trade, especially through the institutional mechanisms of the WTO saying:

The fundamental case for trade is widely acknowledged, but not always fully understood. By taking advantage of differences in productivity or endowments, countries that participate in trade benefit from greater efficiency in the allocation of resources. Citizens are able to enjoy more goods and services than they could in the absence of trade. They can also consume a greater variety of goods (...) Strong property rights, competition rules and independent judiciaries matter. Trade opening, especially if it is through policies bound under the WTO’s rules-based system, results in the adoption of norms and practices (transparency, non-discrimination, procedural fairness) that strengthen or improve the quality of domestic institutions.<sup>191</sup>

The world trading system founding principles explained below are the main motivation behind the historical institutionalisation of international trade under the auspices of the GATT and WTO. However, as will be demonstrated by interactionalism, a legalization of the world trading system does not merely mean ‘a particular form of institutionalisation’, but a more legalistic social order that aim to provide predictability and stability to economic actors.<sup>192</sup> The interactional account of the WTO will also illustrate the intrinsic historical relationship between law and economics, because in the interactional legal theory, Fuller makes the case for law morality by using the economics management modes.

With regard to multilateralised trade, states were not prevented from forming PTAs outside the GATT/WTO framework, but the benefits to join those multilateralising trade organizations outweigh the costs. The main benefits of a multilateral trading system are the non-discrimination standard, that is in the interests of both the weaker and powerful states, and under the WTO, the more effective and fairer dispute

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<sup>190</sup> Michael Trebilcock, *Advanced Introduction to International Trade Law* (Revised edn, Edward Elgar Publishing 2015) 5-8.

<sup>191</sup> The Future of Trade: Challenges of Convergence, (13th of April 2012) <[https://www.wto.org/english/thewto\\_e/dg\\_e/dft\\_panel\\_e/future\\_of\\_trade\\_report\\_e.pdf](https://www.wto.org/english/thewto_e/dg_e/dft_panel_e/future_of_trade_report_e.pdf)> accessed 24 March 2015.

<sup>192</sup> Judith Goldstein and others, ‘Introduction: Legalization and World Politics’, in Goldstein and others, *Legalization and World Politics* (n 118) 5.

settlement system, ‘that is less power based than in preferential agreements’.<sup>193</sup> However, since its inception the world trading system has been constantly challenged by ‘the tension between the necessity for legal rules conducive to stability and predictability, and the human need for solutions to short-term and ad hoc problems’.<sup>194</sup> Balancing those competing needs of consenting states has been the crucial and most difficult tasks of the GATT and WTO, which is why there is no subject of intense debates more than the value of compliance with the GATT/WTO rules.

For example, answering the question ‘what did the GATT framers have in mind?’ Mavroidis said that the international economic theory has advanced two theories to rationalise trade agreements ‘the commitment theory’ and ‘the terms-of-trade theory’.<sup>195</sup> The former refers to the government representation of private sectors by asserting their commitments in an international agreement, while the latter refers to international externalities on the benefits of trade agreements to the contracting country.<sup>196</sup> However, Mavroidis and the team he represents said ‘the study of the GATT negotiating record does not make a conclusive case for either [the above theories of trade agreements rationales]. Indeed, this is one of the reasons why we decide to undertake a separate study on *the economic rationales* for the GATT’.<sup>197</sup> The primary focus of this study is analysing the effect of the GATT principles in

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<sup>193</sup> Davey, *Non-Discrimination in the World Trade Organization* (n 33) 133-136. See Petros Mavroidis, ‘WTO and PTAs: A Preference for Multilateralism? (or, The Dog That Tried to Stop the Bus)’ (2010) *Journal of World Trade* 1145. See the current debate over whether the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) need an Investor State Dispute Settlement (ISDI) see W. Michael Reisman and others, ‘An Open Letter about Investor-State Dispute Settlement’ (April 2015) <<https://www.mcgill.ca/fortier-chair/home>> accessed 10 August 2015.

<sup>194</sup> Jackson, *The World Trading System* (n 8) 10.

<sup>195</sup> Petros Mavroidis, ‘The Genesis of the GATT Summary’ in Henrik Horn and Petros Mavroidis, *Legal and Economic Principles of World Trade Law* (Cambridge University Press 2013) 7.

<sup>196</sup> *ibid.*

<sup>197</sup> *ibid.* (emphasis added); Mavroidis and other’s finding is contrary to the findings of Bown and Reynolds who after considering trade agreements and enforcement under the WTO DSB support the ‘terms-of-trade’ theory account of state upholding their binding commitments under the WTO see Chad Bown and Kara M. Reynolds, ‘Trade Agreements and Enforcement: Evidence from WTO Dispute Settlement’ (20 April 2015) <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/04/20/090224b082de6832/1\\_0/Rendered/PDF/Trade0agreemen00dispute0settlement0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/04/20/090224b082de6832/1_0/Rendered/PDF/Trade0agreemen00dispute0settlement0.pdf)> accessed 18 August 2015.

disciplining the domestic instruments on trade.<sup>198</sup> This study is conclusive in attributing the success of liberalising trade to the interactions of the GATT and WTO consenting states on the basis of reciprocity and non-discrimination principles.<sup>199</sup> What is overlooked in this study, however, and left unclear or to the ‘more efficient’ measurement is the question on whether the bulk of GATT/WTO rules, that only the above principles represents relatively small fraction, have legal status and therefore worthy of full compliance.<sup>200</sup> Such neglect is due to the lack of understanding the role of shared understandings to the formation of world trade norms and eventually the constitution of institutional obligations.

It is clear that world trade economists are all on agreement on the beneficial role of the dispute settlement procedures in maintaining the right balance in *the reciprocal adjustments* to the WTO bargain. One way of setting this balance right is through disciplining economic retaliation and ‘converting it from a weapon of economic warfare to an instrument of international order’.<sup>201</sup> But what seems to be puzzling to those economists is the enforcement of trade sanctions through the WTO DSB that is becoming more judicially unconstrained; while retaliation, as a countermeasure, is not providing an equal footing in a WTO dispute. Because even though developing members states are becoming more economically active in the international arena, but under the WTO order that does not allow for ‘collective retaliation’, understandably their individual retaliatory powers cannot match those of developed members.<sup>202</sup>

This uncertainty expressed by economists expounds the case for a historical analysis of the WTO compliance regime that takes into account the evolution of the world trading norms from their institutional economic origins of the GATT to their

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<sup>198</sup> Mavroidis, ‘The Genesis of the GATT Summary’ in Horn and Mavroidis, *Legal and Economic Principles of World Trade Law* (n 195) 7. In the same volume see Kyle Bagwell, Robert Staiger and Alan Sykes, ‘Border Instruments’ 200-201.

<sup>199</sup> *ibid.*

<sup>200</sup> *ibid*; Schropp, *Trade Policy Flexibility and Enforcement in the WTO* (n 25).

<sup>201</sup> Kyle Bagwell and Robert Staiger, ‘The WTO: Theory and Practice’ (2010) *Annual Review of Economics* 223 citing Petersmann, *The GATT/WTO Dispute Settlement System* (n 3) 83.

<sup>202</sup> *ibid* citing Judith Goldstein and Richard Steinberg, ‘Regulatory Shift: The Rise of Judicial Liberalization at the WTO’ in Walter Mattli and Ngaire Woods, *The Politics of Global Regulation* (Princeton University Press 2009); Robert Hudec, ‘Broadening the Scope of Remedies in WTO Dispute Settlement’ in Freidle Weiss, *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 390.

legalistic forms under the WTO. And for this reason, interactionalism is right to undertake this analysis through the element on shared understandings on compliance, by assessing the historical record of negotiations in terms of the consenting states' reinforcements of commitments on the system core principles. For instance, contrary to the premise of the above study, that the GATT negotiations record does not support the commitment theory, a search in the available GATT digital database shows a rich record of requests for clarifications and reassurances on commitments by GATT contracting parties that aim to facilitate their observance of GATT rules. This was the case even during the time of the GATT legitimacy crisis in the 1980s and early 1990s when there were increasing cases of delayed-compliance and political deadlocks.<sup>203</sup>

However, contracting parties sought clarifications on trade liberalization, and the GATT itself sought clarifications and assurances from experts on how to help contracting parties best reap the benefits from liberalising trade while maintaining the access to foreign markets.<sup>204</sup> Throughout the subsequent eight rounds of negotiations during the GATT era, contracting parties (initially there were (23) states that negotiated the GATT, and in (1986) (123) states were negotiating in the last Uruguay Round) were engaged in communicative discourse on building and socialisation of trade norms.<sup>205</sup> The original GATT working parties procedures for the settlement of disputes (that mid-1950 later evolved into panel), the accession processes for individual GATT and WTO consenting states, the WTO DSB

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<sup>203</sup> The Stanford GATT Digital Library 1947-1994 < <https://gatt.stanford.edu/bin/search/simple> > accessed 23 March 2014 (hereinafter The Stanford GATT Digital Library). References to shared understandings and the need for finding a solution to the common problem of delayed-compliance are best expressed in the following documents: (Statements Delivered at the Second Ministerial Meeting Tokyo, MTN (73) SR/Add.2, 8 October 1973); (Group of Negotiation on Services: Note on the Meeting, MTN.GNS/23, 11 July 1989); (Statement by the Informal Group of Developing Countries, MTN.TNC/W/18, 1 March 1990).

<sup>204</sup> See the Leutwiler 'Eminent Persons' Report of (1985) prepared for the GATT that similarly explained the relevance of the Ricardian theory, *The Trade Policies for Better future: Proposals for Action* (GATT 1985) 23.

<sup>205</sup> (The Geneva Tariff Conference 1947, 23 countries, 45,000 tariff concessions were exchanged); (The Ancey Round 1948-49, 33 countries, 5000 concessions); (The Torquay Tariff Conference 1950-51, 34 countries, 8,700 concessions); (The Geneva Round 1955-56, 22 countries, US \$2.5 billion of trade); (The Dillon Round 1960-62, 37 contracting parties of which 23 countries offered 4,400 concessions); (The Kennedy Round 1964-67, 76 contracting parties of which 31 offered concessions worth the value of US \$40 billion of trade); (The Tokyo Round 1973-79, 85 contracting parties of which 36 granted tariff concession worth the value of US \$300 billion); (The Uruguay Round 1986-94, 118 contracting parties and covered US \$3.7 trillion of trade). See Bhala, *The Modern GATT* (n 1) 671-694.

deliberations, and the various WTO technical committees clearly show the importance of institutionalized dialogue for the formation of world trade law.<sup>206</sup>

The WTO committee system that is attached to the specialist councils on goods, services, and intellectual property perform a major role in safeguarding the weak legitimacy of the organization.<sup>207</sup> Furthermore, the operations of WTO Agreements are also subject to the review of non-specialist committees that have to report directly to the member states' General Council. Examples of this type of committees include trade and the environment, trade and development, and regional trading arrangements.<sup>208</sup> The legitimacy of the WTO, like that of the GATT, has been largely sustained by the facilitation of interactive means of regular meetings and discussions, argumentation and compromise in order to come up with binding agreements supported by all consenting states.<sup>209</sup>

This dialogue has been largely sustained by four founding principles: *reciprocal trade concessions*, *non-discrimination rules*, *special and differentiated treatment (SDT)*, and *an institutional and procedural design for collective action for maintaining world trade norms*. The last two features, the SDT and the GATT/WTO institutional structures have largely evolved from the consenting states constant deliberations on the first two core principles of reciprocity and non-discrimination. For the WTO, and especially the GATT during its early years of structuring, 'reciprocity and non-discrimination have been both the ends and the means of WTO, they have been its purpose as well as its process'.<sup>210</sup> According to Wolfe:

The trade regime is not the WTO treaty or decisions of the Appellate Body, it is the way in which traders think about reciprocity and non-discrimination in global trade (...) the WTO is a site for the elaboration

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<sup>206</sup> See Yuji Iwasawa 'Settlement of Disputes Concerning the WTO Agreement: Various Means other than the Panel Procedures' in Michael Young and Yuji Iwasawa, *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy* (Martinus Nijhoff 1995) 377; Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices* (Cambridge University Press 2001) 73-78; Toohey, 'Accession as Dialogue: Epistemic Communities and the World Trade Organization' (n 74).

<sup>207</sup> Deborah Cass, *The Constitutionalization of the World Trade Organization* (Oxford University Press 2005) 14.

<sup>208</sup> WTO Agreement Article (IV:6 -7) in *The WTO Legal Texts* (n 136) 4-5.

<sup>209</sup> Sungjoon Cho, 'How the World Trade Community Operates: Norms and Discourse' (2014) *World Trade Review* 685.

<sup>210</sup> Wolfe, 'Kaleidoscopic Multilateralism: Lon Fuller, Rod Macdonald and the WTO' (n 132).

of a system of 'law' that arises from and provides a framework for self-directed human interaction.<sup>211</sup>

The principle of non-discrimination, in particular, has a central role in the GATT and WTO overall institutional designs, and their mechanisms for settling trade disputes. The prohibition of according 'less favourable treatment' to the products of another consenting state has been the threshold for non-discrimination principle and a trade relationship standard. The consenting states' engagement in the process of deliberation for law making- supported by the work of transnational epistemic communities- and their social acceptance of GATT/WTO constrains are not enough for creating a WTO *constitution*. Because, with the unconstrained judicial activism of the AB, and a broken function of negotiation, the last thing the WTO needs is a constitution. What is needed is that participant states should 'trade democracy with objective of making development the central aim' to the on-going *constitutionalization* project.<sup>212</sup>

However, the above-mentioned features of this project that conform with interactionalism element of 'shared understandings' and its sub-elements of 'norm cycle, epistemic community, and a community of practice' are pertinent for the study of compliance with WTO law. Nevertheless, the success of the GATT negotiations was due to two defining characters, the contractual nature of rules, and special and differentiated treatment for less-developed countries.<sup>213</sup> Those characters are best illustrated under the following GATT Articles: exceptions to the GATT obligations (XX) (XXI), the tariff negotiations (XXVIII *bis*), highlighting the role of consent (XXXV), reiteration on the GATT principles and objectives with due regard to less-developed contracting parties (XXXVI), and reassurances on commitments (XXXVII).<sup>214</sup> The late introduction of the important GATT Articles of (XXVIII *bis*) on tariff negotiations in (1957), and (XXXVI (8)) on the concept of non-reciprocity

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<sup>211</sup> Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading' (n 74).

<sup>212</sup> Cass (n 207) 30, 231-246.

<sup>213</sup> Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO* (n 206) 7-23; Trebilcock, *Advanced Introduction to International Trade Law* (n 190) 16-22.

<sup>214</sup> *The WTO Legal Texts* (n 136) 455-471.

for less-developed countries in (1966), show the vital role of the Review Sessions that consist of concerned contracting parties.<sup>215</sup>

The elaborations on the following GATT principles of reciprocity and non-discrimination, will better illustrate the dynamic interactions under world trade law, and highlight the areas where those legal interactions were lacking. This will be accomplished by using interactionalism to explain the social foundations and limitations of those principles of association in the world trading system with due regard to the shared understandings on compliance with GATT/WTO rules. It is the task of interactionalism to examine the objectives of these rules, and how they ought to be complied with for improving the economic welfare of the WTO member states. Final point to note is that world trade law is best perceived as a collection of *rules of conduct* that have emanated from a continuous deliberative process for law-making and implementation. The reason for economic rules is to provide a mechanism for dealing with the central ‘problem of social order’, namely ‘reconciling the behaviour of separately motivated persons’ so as ‘to generate patterns of outcomes that are tolerable to all participants’.<sup>216</sup>

However, regulations should not be regarded as the alternative to rules in international trade, because WTO law was made, and continue to be remade with the force of binding obligations in an interactional process of law-making that respect ‘flexibility’ and ‘proceduralism’.<sup>217</sup> It is true that this process might be lacking in the fulfilment of some elements of interactionalism, especially the practice of legality, but that does not make GATT/WTO rules as regulations for the willing and unwilling actors to comply with or flout. The whole WTO apparatus, as acknowledged by the organization itself, is made of rules for decision-making, specialised agreements, and dispute resolution. According to the WTO, ‘the fact that there is a single set of rules applying to all members greatly simplifies the entire trade regime. And these agreed rules give governments a clearer view of which trade

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<sup>215</sup> *ibid* 8-7; (Minutes of the Meeting of a Group of Less Developed Countries on, LDC/M/16, 9 October 1964) in The Stanford GATT Digital Library (n 203).

<sup>216</sup> Buchanan and Brennan (n 177) 7.

<sup>217</sup> See Cass’s argument for ‘Regulation not Law’ (n 207) 86; cf Peter Van den Bossche and Denise Prevost, *Essentials of WTO Law* (Cambridge University Press 2016) 1-12.



policies are acceptable'.<sup>218</sup> Nevertheless, giving the intrinsic relationship between 'reciprocity and obligation' in public international law and the world trade law, two explanations will be provided on this important relationship. These explanations will be offered with the help of the analytical frameworks of Fuller's interactional legal theory and interactionalism.

#### **3.4.4 The Interactional Account of Trade Reciprocal Obligations:**

The centrality of reciprocity to the creation of international obligation is very clear especially in the rationalist theory of IR and positivists in international law, that see international law as functioning on the basis of reciprocal obligations rooted in interests.<sup>219</sup> However, constructivism differs by highlighting the role of social construction of norm, and interactions in generating the necessary information for shaping actors' behaviour.<sup>220</sup> According to Wendt, 'it is through reciprocal interaction that we create and instantiate the relatively enduring social structure in terms of which we define our identities and interests'.<sup>221</sup> Furthermore, informed by Fuller's jurisprudence, interactionalism offers this view of reciprocity saying:

Interests are rooted in identity and identity is formed in large measure through social interaction (...) For Fuller, and for us, reciprocity is deeper than the exchange flowing from the calculation of material interests, or the direction inherent in what he called 'managerial control'. *Fidelity to law* depends upon the reciprocal fulfilment of duties. Lawmakers must adhere to the criteria of legality because in so doing they give citizens the opportunity to reason with rules. If the criteria of legality are neglected, these norms will have failed to become law and citizens will feel resentment; they will have no desire to abide by the promulgated norms. Reciprocity will fail.<sup>222</sup>

According to Brunnée and Toope, this analysis resonates with the 'logic of appropriateness' that focuses on social norms and how actors desire arrangements

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<sup>218</sup> The World Trade Organization  
<[https://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b03\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b03_e.htm)> accessed 3rd of December 2015. On the WTO central mission to develop institutional rules for decision making and trade conduct see Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization 2013) 201-228.

<sup>219</sup> See Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2006).

<sup>220</sup> See Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012).

<sup>221</sup> Alexander Wendt, 'Anarchy is What States Make of It' (1992) *International Organization* 391.

<sup>222</sup> Brunnée and Toope, *An Interactional Account* (n 4) 39.

guided by ‘duties’ and ‘obligations’ for sustained interactions.<sup>223</sup> Interests might be the reason for state actors engagement in the international society, but social interactions on the basis of legality is the primary reason for continuous engagement. The point about creating and maintaining reciprocity collectively, and the importance of that to the law-making will be addressed in the next subsection on the WTO principle of reciprocity and fifth chapter on the practice of legality. However, through the lens of the interactional approach, and the economic basis of Fuller’s morality of law thesis, a different more innovative reading of the formation of trade agreements will be provided.

As summarised above, according to Fuller’s morality of law thesis, the mediating principle of reciprocity in the relationships of exchange has a central role in the creation of legal obligation as evident in the society of economic traders.<sup>224</sup> When Fuller writes about the moral scale problem he highlighted the relation between the economics of exchange, which is founded on the principle of reciprocity, and the economics of marginal utility which is founded on the notion of balance.<sup>225</sup> He claims that the economics of exchange is based on ‘fidelity to contract and respect for property’, saying:

Without a self-sacrificing deference toward these institutions, a regime of exchange [like the WTO] would lose its anchorage and no one would occupy a sufficiently stable position to know what he had to offer or what he could count on receiving from another. On the other hand, the rigidities of property and contract must be held within their proper boundaries. If they reach beyond those boundaries, society’s effort to direct its relation toward their most effective use is frustrated by a system of vested personal and institutional interests (...) Here we encounter again what is essentially the problem of locating the imaginary pointer at the right place.<sup>226</sup>

The relation between aspiration and duty, and their economic counterpart of marginal utility and relationship of exchange, speak directly to the law and

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<sup>223</sup> *ibid.* The ‘logic of appropriateness’ was first coined by two sociologists of organization, James March and Johan Olsen, who authored, *Rediscovering Institutions* (Free Press 1989). According to those sociologists, the ‘logic of appropriateness’ is the perspective that sees human action as driven by social norms on good behaviour. This analysis of appropriateness correlates with the investigation for the moral foundation of economic behavior and its focus on ‘the culture of trust’ for fruitful and sustained economic relations see Rose, *The Moral Foundation of Economic Behaviour* (n 120).

<sup>224</sup> Fuller, *The Morality of Law* (n 65) 23.

<sup>225</sup> *ibid* 28.

<sup>226</sup> *ibid.*

economics jurisprudence school with its only focus on ‘wealth maximisation’.<sup>227</sup> Fuller central point of invoking the moral scale problem is to show the interconnection and independence between aspiration and duty and their economic counterparts. The law and economics jurisprudence school that influenced the anti-legalist scholars’ views of WTO reciprocal obligations, often does not locate the pointer or recognise the moral scale altogether, because anti-legalists have not discussed the notions of economic stability and predictability, and the intertwined relation between aspiration and duty. This led them to overlook the legal and moral implications of the reciprocal exchanges of promises and their connection to the notion of obligation.

This is added to their inaccurate views that the WTO rules are neither contractual, nor belong to the property rights, therefore they are always susceptible to efficient breach. These views do not correspond to the reality of GATT/WTO rules and procedures that will be explained below. Moreover, Fuller’s view on reciprocity is informed by his proposed though incomplete project of ‘*Eunomics*’ or ‘the principles of social order’.<sup>228</sup> Fuller argues that values like reciprocity could act as constraints on power saying “‘informal” or “real” power is subject to intrinsic limitations even in its most direct and brutal manifestations (...) the holder of power will find himself hedged in by a network of reciprocities that trace and limits his control’.<sup>229</sup> He highly regards the explicit reciprocity or contract as a form-setting device of free social exchanges as aptly demonstrated in the trade relations.<sup>230</sup>

When Fuller wrote about the concept of ‘freedom’, he differentiated between the organization by common ends and reciprocity.<sup>231</sup> The former refers to the parties joining forces for the accomplishment of common aims that they cannot accomplish individually, while the latter refers to the principle of reciprocity in the literal sense

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<sup>227</sup> Richard Posner, *Economic Analysis of Law* (9 edn, Wolters Kluwer Law & Business 2014).

<sup>228</sup> See Kenneth Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (revised edn, Hart Publishing 2001).

<sup>229</sup> Lon Fuller, ‘Irrigation and Tyranny’ in Winston, *The Principles of Social Order* (n 228) 215.

<sup>230</sup> *ibid* 218. Fuller’s recognition of reciprocal freedom is similar to Adam Smith who regards ‘liberty’ as the freedom of social exchanges in the market. Smith also criticizes protectionist trade policies that have negative consequences on commerce and ‘public opulence’, and called for the establishment of ‘free and uninterrupted commerce’. See Ronald Meek and others (eds), *Adam Smith Lectures on Jurisprudence* (Indianapolis 1982) 263-265.

<sup>231</sup> Lon Fuller ‘Freedom- A Suggested Analysis’ (1955) *Harvard Law Review* 1305.

of the parties' exchanges of rights or privileges for reciprocal gain.<sup>232</sup> A prime example of an organization that is founded on the model of reciprocity and aspires to achieve common ends is the WTO. However, Fuller considers the organization by reciprocity to highlight the challenge of providing a mechanism for an optimal realization of the gains of reciprocity.<sup>233</sup> For Fuller the 'economic freedom *cannot be fully discussed* in isolation from the specific mechanisms or procedures by which that freedom is determined, or, as I should prefer to say, by which freedom to choose is allocated and conflicting choices are reciprocally adjusted'.<sup>234</sup> Again, this line of thought corresponds in its generality with the institutional work of the WTO and the key role of its DSB in trying to provide optimal reciprocal readjustments subject to the general exceptions to the GATT/WTO obligations.

The WTO has the role of affirming the GATT obligations, especially the ones relating to the common ends of association such as the articles on 'shared principles and objectives', GATT Article (XXXVI), and 'joint action' Article (XXXVIII) that were drafted for furthering the social, economic, and development objectives relevant to trade. The history of trade agreements reveal how the economic and the legal analyses are not so much immutable essences as they are concepts that have a common ground for cross-fertilization, especially with the emergence of the modern states, and a world of growing interdependence.<sup>235</sup> In practice, the legalists depend on the expertise of economists to determine the maintenance of trade balance, or existence of treaty violations especially in relation to highly-economized areas such as antidumping duties and subsidies.<sup>236</sup> However, one particular area where the economic literature is disadvantaged while the legal is advantaged is the design of reciprocal trade agreements. Political economy scientists admittedly say that when it comes to the process trade agreements are negotiated and concluded 'the economic literature is less clear'.<sup>237</sup> Their emphasis is rather on the importance of shared

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<sup>232</sup> *ibid.*

<sup>233</sup> *ibid.*

<sup>234</sup> Fuller 'Some Reflections on Legal and Economic Freedoms' (n 90) (emphasis added).

<sup>235</sup> Jackson, 'International Economic Law: Complexity and Puzzles' (n 172). See Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale University Press 2016)

<sup>236</sup> Trebilcock, *Advanced Introduction to International Trade Law* (n 190) 66-70, 81-86.

<sup>237</sup> Gene Grossman and Henrik Horn 'An Introduction to the Economics of Trade Agreements' in Horn and Mavroidis, *Legal and Economic Principles of World Trade Law* (n 195) 29-30.

understandings between the parties through the sharing of information and establishing common knowledge on the technicalities of trade agreements.<sup>238</sup>

The legalists who are accustomed to contract formation find it easy to explain the design of trade agreements and its enforcement. However, the lack of focusing on areas where economists emphasize the most in relation to these agreements namely, that trade agreements must be self-enforcing and they are incomplete contracts, disadvantages the legalists too. Furthermore, the ‘constitutional political economy’ is helpful for illuminating to economists the legal trade rules, since it focuses on examining these rules, and the constraints within which political agents acts to protect and improve their economies.<sup>239</sup> This subfield of economics is also useful for explaining ‘the model of voluntary exchange between states’ who are willing to subject themselves to coercive elements to further their trade interests.<sup>240</sup> This subfield that focuses on the reason for rules will be conducive for elucidating that trade rules have risen out of the will of political actors to restrict their policies to rules of conduct that will protect and further their country’s economic interests.

It is true that neither the legalist nor the economist would be able individually or collectively to explain the delay in trade negotiations despite the accessibility of information.<sup>241</sup> And it is out of the scope of this thesis to explain a politically complex phenomenon such as the DDR. However, the fault line in the analyses of both the legalist and economist is their failure to ascertain the legal status of trade agreements that involve reciprocal exchanges of concessions. For example, the different views on the status of the principle of reciprocity in tariff negotiations shows the discrepancy between the legalists and economists. The legalist and economist disagreement on the status of this principle is marked by the former regard of this principle as legal requirement under the GATT agreement.<sup>242</sup> While the latter see it as a ‘negotiating norm that reflect the balance between the trade

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<sup>238</sup> *ibid.*

<sup>239</sup> James Buchanan, ‘The Constitution of Economic Policy’ (1986)  
<[http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/1986/buchanan-lecture.html](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1986/buchanan-lecture.html)>  
accessed 3rd of December 2015.

<sup>240</sup> *ibid.*

<sup>241</sup> Gene Grossman and Henrik Horn ‘An Introduction to the Economics of Trade Agreements’ in Horn and Mavroidis, *Legal and Economic Principles of World Trade Law* (n 195) 29-30.

<sup>242</sup> Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO* (n 206) 8.

effects of concessions offered and received'.<sup>243</sup> But the question is what role did the shared understandings on compliance performed in the formation of the key norms of reciprocity and non-discrimination.

#### **3.4.4.1 The GATT Principle of Reciprocity:**

The engagement in *reciprocal relationships* converting political concessions into legal entitlements is a central process for the making of GATT/WTO obligations and preservation of trade relations. According to Trebilcock, 'the institutional arrangements that govern international trade' are dependent on 'trade agreements incorporating reciprocal tariff reductions that offer governments a means of escape from a Prisoner's Dilemma'.<sup>244</sup> Moreover, from a political economy point of view, reciprocal trade agreements 'represent credible commitments by governments that they will not protect certain industries'.<sup>245</sup> The GATT preamble stipulates that contracting parties should engage in 'reciprocal and mutually advantageous arrangements directed to the substantial reductions of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce'.<sup>246</sup> Under Article (XXVIII *bis* (1)) of the GATT, consenting states commit themselves to entering into periodic negotiations on the same reciprocal basis for substantial reduction of tariffs.<sup>247</sup> In the course of those negotiations, the agreed tariff concessions become 'tariff bindings' which are set out in particular member's tariff schedule that form an Annex to the GATT, and now the WTO.<sup>248</sup>

The WTO defined 'tariff bindings' as a 'commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound, it may not be raised without compensating the affected parties'.<sup>249</sup> The WTO term of 'national schedule' is 'the equivalent of tariff schedules in GATT, laying down the commitments accepted-

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<sup>243</sup> Gene Grossman and Henrik Horn 'An Introduction to the Economics of Trade Agreements' in Horn and Mavroidis, *Legal and Economic Principles of World Trade Law* (n 195) 51.

<sup>244</sup> Prisoner's Dilemma is where one trade participant unconvinced by the benefits of liberalization, employ protectionist strategy at the expense of the other participant. See Trebilcock, *Advanced Introduction to International Trade Law* (n 190) 5 citing Kyle Bagwell and Robert Staiger, *The Economics of the World Trading System* (MIT Press 2002) 3.

<sup>245</sup> *ibid.*

<sup>246</sup> *The WTO Legal Texts* (n 136) 424.

<sup>247</sup> *ibid* 464.

<sup>248</sup> *ibid* 425-426.

<sup>249</sup> WTO Glossary <[https://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm)> accessed 05 June 2015.

voluntarily or through negotiation- by WTO members'.<sup>250</sup> By virtue of GATT Article (II) all consenting states must observe these tariff bindings by not imposing custom duties in excess of those set forth in each member's schedule.<sup>251</sup> For example, GATT Article (II:5) stipulates that when a consenting state because of the national tariff laws accords a discriminatory treatment to consenting state's product contrary to the agreed tariff concessions, 'the two contracting parties, together with the third parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter'.<sup>252</sup> The explicit reference in this article to the offending state 'court or other proper authority' that has ruled against the tariff classification of the product in question because it does not accord with its tariff laws, highlight the role of internalising the 'tariff bindings' into consenting states legal systems before committing to the reciprocal obligations.

As to the measurement of reciprocity, there is no explicit reference in the GATT or in the WTO rules about how it should be measured. At the beginning of the GATT, the product-by-product method was employed with some success, but later the linear or across-the-board method that was adopted in the Kennedy Round in 1963, had become the agreed formula. The product-by-product method that worked well in the early Rounds of the GATT was implemented according to the principal supplier rule. Bhala recounts this history saying:

The theory underlying the principal suppliers rule is only those countries that are significant exporters of a product ought to have a right to request tariff cuts in that product. In this way, demands for tariff cuts would remain reasonable, and problems of free riding would be avoided. Once concessions on a product are agreed to on a reciprocal, mutually advantageous basis between principal suppliers, the deal is multilateralised by operation of the Most Favoured Nation (MFN) obligation in Article I:1. The new, lower tariff is bound as a result of Article II:1(b).<sup>253</sup>

However, Hoda recall that overtime product-by-product method becomes ineffective because of two problems, first the approach 'dependence on the extent to which the principal supplier was willing to reciprocate the reduction of duty in a particular

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<sup>250</sup> *ibid.*

<sup>251</sup> See GATT Article (II:3-4) that discourage defection see *The WTO Legal Texts* (n 136) 424.

<sup>252</sup> *ibid* 427.

<sup>253</sup> Bhala, *The Modern GATT* (n 1) 681.

product led to very small reductions which were worthless in commercial terms'.<sup>254</sup> Second, because of the increasing number of contracting parties offering a wide range of products the approach had become cumbersome to implement.<sup>255</sup> Those problems of selectivity and lack of efficiency that did not fit with the objectives of the GATT had led to the adoption of the linear approach in the Kennedy Round. Dam explained this linear method by saying:

The Linear method presupposed that all countries would reduce tariffs by the prescribed percentage on all items. If some countries exclude certain items from the scope of the linear reductions (that is, if they tabled "exceptions" with respect to certain items), other countries would inevitably be forced to weigh concessions received and concessions granted much as under the old product-by-product method.<sup>256</sup>

The 6<sup>th</sup> of May 1964 Resolution that was adopted by the GATT Trade Negotiations Committee meeting at a Ministerial Level noted with regard to tariffs:

(i) The rate of 50 per cent has been agreed as a working hypothesis for the determination of the general rate of linear reduction (ii) the ultimate agreement on tariff reductions in accordance with the application of this hypothesis is linked with the solution of other problems arising in the negotiations, for example, tariff disparities, agricultural problems, exceptions and non-tariff problems, and, in general, with the achievement of reciprocity (iii) it is the intention of the participants to co-operate to solve these problems (...) (4) there should be a bare minimum of exceptions which should be subject to confrontation and justification.<sup>257</sup>

Nonetheless, the same 1964 Resolution also recognised 'the problem of countries with a very low average level of tariffs or a special economic or trade structure such that equal linear tariff reductions may not provide an adequate balance of advantages'.<sup>258</sup> Although the Resolution noted that 'developed countries cannot expect to receive reciprocity from the less-developed countries' and due regard should be given to these countries developmental and trade needs, but there was no explicit GATT provision to that effect. The Resolution noted that 'countries with a very low average level of tariffs (...) reserve the right to submit proposals in this

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<sup>254</sup> *ibid* 685 citing Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO* (n 206) 30-31.

<sup>255</sup> *ibid* 685.

<sup>256</sup> Kenneth Dam, *The GATT Law and International Economic Organization* (The University of Chicago Press 1970) 69.

<sup>257</sup> (TN.64/27, 11 May 1964) in The Stanford GATT Digital Library (n 203).

<sup>258</sup> *ibid*.



connexion at a later date'.<sup>259</sup> The wording of this Resolution represent the preceding deliberations on 'the concept of non-reciprocity', which was primarily advocated by developing countries in 1960s.

Less-developed countries voiced their concern that the application of the linear method is to their detriment saying 'trade liberalization has to be considered in light of their developmental, financial and trade needs'.<sup>260</sup> It was in 1966 when developing countries succeeded in winning the approval to incorporate Article (XXVI (8)) into the GATT that stipulates 'developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties'.<sup>261</sup> Overall, since 1948 the task of classifying 'less-developed' countries, who should be exempted from full reciprocity, and were entitled to waivers from the MFN obligation, were the result of constant deliberations between contracting parties that facilitated the agreement on new norms and standards of behaviour.<sup>262</sup>

The world trading system has evolved based on the fact that "rules-based" international trade is to the benefit of all, especially when the rules take into account the differences in economic development between countries'.<sup>263</sup> These norms of differential treatment based on the economic and developmental needs of less-developed states gave rise to the legal principle of *special and differential treatment* (SDT).

The logic of the SDT is that the world trade law was purposely designed to calibrate and accept that there would be suppleness in so far as accommodating the demands of states for trade liberalization and some necessary adjustments that would have to be made, given different levels of development between consenting states. So for

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<sup>259</sup> *ibid.*

<sup>260</sup> (Committee on Trade and Development, Past Discussions on the Concept of Non-reciprocity, Com.TD/W/79, 14 October 1968) in The Stanford GATT Digital Library (n 203).

<sup>261</sup> *The WTO Legal Texts* (n 136) 469.

<sup>262</sup> This is a problematic issue, for example, China is still classified as *a developing country* while its economic power has grown substantially since it became a member in 2001. See Andrew Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) World Trade Review 445; Statement by the Representative of Japan on 21 February 1977 'An apparent equality in the treatment of all developing countries would in fact produce unequal benefits depending on the country. We consider it appropriate to work out a way in which developing countries may enjoy the benefits of differentiated and more favorable treatments on an equitable basis in the light of the needs of each developing country' (MTN/FR/W/3, 1 March 1977) in The Stanford GATT Digital Library (n 203).

<sup>263</sup> Bossche and Zdouc, *The Law and Policy of the World Trade Organization* (n 165).

this purpose not all consenting states should observe the same level of compliance with respect to their tariff obligations. Therefore, due to their weak economic standing less-developed states has to be accorded special and differential treatment that is embodied in the regulatory freedom provided by the principle of SDT.<sup>264</sup> With this agreement on the linear method, and special treatment for less-developed countries, the principle of reciprocity has since been functioning well serving the trade interests of consenting states because it has constituted mutual and reciprocal trade connexion.<sup>265</sup>

The world trade law principle of reciprocity is often reiterated by individual member states in their trade communications, and communications between the GATT and international organizations such as the International Chamber of Commerce.<sup>266</sup> Furthermore, in light of the interactional approach, it appears that the GATT/WTO formula for ‘reciprocal exchanges of promises’ satisfies Fuller’s criteria for ‘the optimum efficacy of the notion of duty’ that are essential for the making of obligations.<sup>267</sup> Because the GATT/WTO promises are ‘voluntary in nature’, the reciprocal performances, with the exception of those of developing countries, are ‘equal in value’, and the relationship of duty ‘is in theory and practice reversible’.<sup>268</sup> However, those ‘reciprocal promises’ that aptly arise in the social context of the community of economic traders and are essential for the creation of obligation, have to be supported by ‘shared legal understandings’ with its explicit focus on obligations.

As will be illustrated in the next section, both the GATT and WTO legal texts highlight the role of honouring obligations and legal interactions for the benefits of all consenting states. However, consenting states’ reciprocal interactions have been instrumental for the purpose of enforcing the GATT/WTO obligations. For instance, the WTO countermeasure of ‘suspension of concessions or other obligations under the covered agreements’ (DSU Article 22:2), can be read as ‘reciprocal suspension,

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<sup>264</sup> (Differential and More Favourable, Treatment, Reciprocity and Fuller Participation of Developing Countries: Decision of 1979, L/4903, 3 December 1979) in The Stanford GATT Digital Library (n 203).

<sup>265</sup> See Joseph Finger, ‘A Diplomat’s Economics: Reciprocity in the Uruguay Round Negotiations’ (2005) *World Trade Review* 27.

<sup>266</sup> (The Liberalization of International Trade During the Next Decade, L/3233, 30 July 1969) in The Stanford GATT Digital Library (n 203).

<sup>267</sup> Fuller, *The Morality of Law* (n 65) 22-23.

<sup>268</sup> *ibid* 23.

tit-for-tat reduction in trade flows (along the lines of Art. 60 VCLT, a kind of *exceptio non adimpleti contractus*).<sup>269</sup> Notwithstanding, the crucial importance of the principle of reciprocity that has been collectively made and maintained by almost all active GATT/WTO consenting states, but the efficacy of this principle have been always dependent on countries' adhering to the non-discrimination principle. It was 'the work in concert' between those two principles that presented an ideal multilateral trading system, a harmony that PTAs failed to achieve.<sup>270</sup> In other words, reciprocity and enforcement of anti-discrimination rules present the two key features of the GATT/WTO, features that conform to the economic and legal theory of world trade law.<sup>271</sup>

#### **3.4.4.2 The GATT Principle of Non-Discrimination:**

Unlike the reciprocity principle, the principle of discrimination has been mainly developed by case law rather than consenting states' argumentation. The reason is the difficulty of 'deciding whether two situations are sufficiently alike such that they should be treated the same', which requires certain rules for determining 'similarity of situations and fair treatment'.<sup>272</sup> These situations cannot be devised by consenting states because of their widely different preferences and interests, but by the evolving jurisprudence of neutral adjudicators from the work of GATT working parties/panels, and the WTO Panels and AB.<sup>273</sup> However, as this subsection is concerned with the shared political understandings, and from the above explications it is clear that the evolution of the principle of reciprocity has been largely dependent on the consenting states shared understandings on the principle of non-discrimination. In other words, there would not have been full reciprocity, if the

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<sup>269</sup> Joost Pauwelyn, 'Cool Arbitrator Finds That Only Lost Trade is "Recoverable" Not Broader Economic Harm Suffered by Canada/Mexico' (10 December 2015) <<http://worldtradelaw.typepad.com/ielpblog/2015/12/cool-arbitrator-finds-that-only-lost-trade-is-recoverable-not-broader-economic-harm-suffered-by-canadamexico.html#comments>> accessed 14 December 2015.

<sup>270</sup> Kyle Bagwell and Robert Staiger, 'Reciprocity, Non-discrimination, and Preferential Agreements in the Multilateral Trading System' (2001) *European Journal of Political Economy* 281.

<sup>271</sup> See Kyle Bagwell and Robert Staiger, 'Economic Theory and the Interpretation of GATT/WTO' in Michael Szenberg and Lall Ramrattan, *New Frontiers in Economics* (Cambridge University Press 2004) 205-234.

<sup>272</sup> Davey, *Non-Discrimination in the World Trade Organization* (n 33) 58-59.

<sup>273</sup> Nicolas Diebold, 'Standards of Non-discrimination in International Economic Law' (2011) *International Comparative Law Quarterly* 831; Trebilcock, 'Critiquing the Critics of Economic Globalization' (n 166).

consenting states have not adhered to the non-discriminatory treatment as a standard of behaviour.

The principle of non-discrimination is the GATT most important general principle of the rule of law that has performed an essential role in achieving and sustaining trade agreements.<sup>274</sup> The principle is embodied in two GATT Articles, the first is Article (I) (MFN) that ‘forbids discrimination in respect of like products originating in different members states’ in relation to tariffs, internal taxes, and internal regulation.<sup>275</sup> That means if a consenting state is making a binding tariff concessions to another state, ‘it must extend exactly the same concession to all other members of the GATT/WTO, without being able to demand quid pro quos as a condition of the extension’.<sup>276</sup> The second rule is under Article (III) (NT) that ‘requires equal treatment of imported and locally produced goods in respect of like or directly competitive or substitutable products’.<sup>277</sup> The MFN is also formulated in Article (II) of the General Agreement on Trade in Services (GATS), and Article (4) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), whereas NT is formulated in Article (XVII) of the GATS and Article (3) of TRIPS, subject to the exceptions of those agreements.<sup>278</sup> The so-called Sutherland Report noted with regard to the MFN rule:

58. At the heart of the GATT was the principle of non-discrimination, characterized by the (MFN) clause and the national treatment provision (...) The MFN clause was regarded as the central organizing rule of the GATT, and the world trading system of rules it constituted (...)

59. The choice of unconditional MFN as the defining principle of the GATT reflected widespread disillusionment with the growth of protectionism and especially of bilateral arrangements during the inter-war period (...) Some key political leaders as well as most students of international trade concluded that MFN, and its attendant non-discrimination, was the best way to organize international trade among the community of nations.<sup>279</sup>

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<sup>274</sup> Wilfred Ethier, ‘Political Externalities, Nondiscrimination, and a Multilateral World’ (2004) *Review of International Economics* 303.

<sup>275</sup> Davey, *Non-Discrimination in the World Trade Organization* (n 33) 31.

<sup>276</sup> Trebilcock, *Advanced Introduction to International Trade Law* (n 190) 17.

<sup>277</sup> *ibid*; The WTO Glossary, <[https://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm)> accessed 06 June 2015.

<sup>278</sup> *The WTO Legal Texts* (n 136) 287, 299, 323.

<sup>279</sup> The report cited US Secretary of State (1933-1944) Cordell Hull, and two famous economists, John Keynes and Gottfried Haberler as principal proponents of (MFN) for peace and prosperity

As mentioned above the principle of non-discrimination has fundamental role in the development of the GATT and the WTO's institutional and procedural rules. For example, in addition to the GATT Articles (I) and (III)), there are a number of GATT's general rule of law principles that are derived from the non-discrimination principle: GATT (Article (X) *Publication and administration of trade regulations*), (Article (XIII) *Non-discriminatory administration of quantitative restrictions*), (Article (XVII) *State trading enterprises*), and (Article (XXIII) *Nullification or impairment*).<sup>280</sup> Under GATT Article (XXIII:2) the offending party's serious failure to conform to the non-discrimination standard that entails authorization of retaliation, subject that party to the choice of 'no later than sixty days after such action [retaliation] is taken to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement'.<sup>281</sup>

Similarly, the WTO Agreement that encompasses the GATT provides more elaborate provisions on the institutional structure of the WTO stressing equal representations of all member states and their equal participation in the decision-making in the Ministerial Conference, various sub-councils, and committees. The WTO Agreement stipulates in its preamble that the parties to this agreement's affirm their commitment of eliminating discriminatory treatment in international trade relations.<sup>282</sup> However, the basis for the WTO dispute settlement system is found under GATT Articles (XXII) on 'consultation', and (XXIII) on 'nullification or impairment' that worked very well during the GATT years, until the problem of noncompliance broke out in (1980s).<sup>283</sup> The two main novel modifications to the dispute settlement system made by the DSU are first the replacement of the positive consensus rule with the negative consensus rule (only a consensus of all Members favouring rejection leads to non-adoption of the settlement report) (DSU (16:4) and (17:14)).

The second improvement is the establishment of a standing AB of seven members to hear appeals on 'issues of law covered in the Panel report and legal interpretation developed by the panel' (DSU (17)). The WTO General Council that is composed of

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among nations. See Peter Sutherland (chairman), *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (World Trade Organization 2004) 19.

<sup>280</sup> *The WTO Legal Texts* (n 136) 424-457.

<sup>281</sup> *ibid* 457.

<sup>282</sup> *ibid* 4.

<sup>283</sup> See Robert Hudec and others, 'A Statistical Profile of GATT Dispute Settlement Cases, 1948 to 1989' (1993) *Minnesota Journal of Global Trade* 1.

all representatives of member states hold it's meeting as the DSB for administering dispute settlement rules and procedures. Moreover, Article (3) of the WTO DSU on 'General Provisions' maintains that the broader coverage of the DSB is to administer the application of the non-discrimination principle and ensuring that its solution 'shall be consistent with the covered agreements [WTO agreements] and shall not nullify or impair benefits accruing to any member under those agreements'.<sup>284</sup> In brief, as two scholars of WTO law said 'the MFN treatment obligation is arguably the single most important rule in WTO law. Without this rule, the multilateral trading system could and would not exist'.<sup>285</sup>

With regard to developing countries, and under the SDT principle these countries can obtain waivers from MFN obligation. This is subject to the approval of all consenting states and must be granted as a temporary derogation from the non-discrimination principle. The WTO defines waivers as a 'permission granted by WTO members allowing a WTO member not to comply with normal commitments. Waivers have time limits and extensions have to be justified'.<sup>286</sup> The SDT principle that was derived from consenting states deliberations on the reciprocity and non-discrimination principles clearly shows the importance of interaction for sustaining the GATT/WTO legal legitimacy. Due to the historical collective development of the SDT principle by consenting states, the process of granting a waiver that involve balancing the SDT against non-discrimination means that consenting states, rather than the tribunals, are the most capable of settling any waiver dispute.<sup>287</sup> In addition to the waiver scheme, the GATT contracting parties devised a set of 'rules on the conflict between trade liberalization and other social values and interests' that become known as the 'general exceptions' to the non-discrimination and full reciprocity principles. These exceptions are embodied in GATT Articles (XX) and (XXI) and GATS Articles (XIV) and (XIV *bis*) and consist of economic and non-economic values and interests that include protection of domestic industry and public health.<sup>288</sup>

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<sup>284</sup> *The WTO Legal Texts* (n 136) 457.

<sup>285</sup> Bossche and Zdouc, *The Law and Policy of the World Trade Organization* (n 165) 36.

<sup>286</sup> The WTO Glossary < [https://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm) > accessed 05 June 2015.

<sup>287</sup> Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (n 262).

<sup>288</sup> Bossche and Zdouc, *The Law and Policy of the World Trade Organization* (n 165).

Despite the wide agreement among consenting states on the need for those exceptions, but like the case with the non-discrimination principle, the interpretation of the defining characters of these exceptions has been largely developed in case law rather than consenting states deliberations.<sup>289</sup> Impartial adjudicators like the Panel or AB, with full authority and defined roles and responsibilities must settle disputes on non-discrimination treatment and its exceptions. That is why adjudication has played a fundamental complementary role to the GATT contracting parties and WTO member states' shared understandings on compliance. Without the GATT/WTO function of adjudication, there would have been no stability or predictability in the economic and political sense for an optimal realization of world trade benefits. However, there still a number of issues relating to the interpretation of the non-discrimination principle under GATT Articles (I) and (III) that raises concerns about the lack of shared understandings. These articles are the most-disputed provisions of WTO law, especially Article (III), and have proven problematic for the DSB to interpret and enforce.<sup>290</sup>

As will be demonstrated in the following chapters on the principles and practices of legality, the main reason for the vagueness of the non-discrimination principle is the lack of amendments and clarification from the WTO, and members' miscomprehension of what these articles entail. These articles are neither the subject of WTO reforms, they are merely tested for legality and conformity once a dispute arises under the DSB. As will be highlighted, the DSU rules and procedures lacks legality to enable the DSB to be the 'only' arbiter of a thorny issue like defining non-discrimination. A number of suggestions will be made regarding these articles, and the importance of constructing the GATT/WTO rules along the Fullerian lines. Nonetheless, what has substantiated the solid wide agreement on the core principles of world trading system is the shared legal understandings on compliance with its focus on interactional legal obligations.

Notwithstanding the legalist's interpretation of the WTO obligations of compliance, but their analysis often lacks an understanding of the dialectical interactions for law-

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<sup>289</sup> For a critical review of the nondiscrimination and its exceptions see T. N. Srinivasan 'Nondiscrimination in GATT/WTO: Was there anything to begin with and is there anything Left?' (2005) *World Trade Review* 65.

<sup>290</sup> Gaetan Verhoosel, *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy* (Hart Publishing 2002); Julia Qin, 'Defining Nondiscrimination Under the Law of the World Trade Organization' (2005) *Boston University International Law Journal* 215; Federico Ortino, 'GATT' in Bentlehem and others, *The Oxford Handbook of International Trade Law* (n 179) 138-142.

making. This is added to their often mistaken premise that the high level of compliance with WTO shows that the dispute settlement mechanism is a success, when in terms of quality and timeliness and the overall structure of compliance monitoring strategies, the WTO DSB lacks effectiveness.<sup>291</sup> Albeit, the DSB lack of efficacy, but the world trade law has cultivated shared legal understandings on compliance in the GATT and WTO. By considering these shared understandings, as they are found in negotiation history and legal texts of the GATT/WTO, the enforcement of world trade law will be better comprehended.

### **3.4.5 Shared Legal Understandings on Compliance (the Focus on Obligation):**

From a socio-legal perspective the world trading system has ‘a community of law’, however, the legitimacy of this system cannot only be improved by references to enhancing communication skills and public knowledge about trade.<sup>292</sup> Because the foundations of this system of rules have to be examined with reference to the obligatory effect that these rules intended to exert on actors to acculturate to the legal norms. The evolution toward ‘rules-oriented procedure’ was vividly clear in the last three GATT rounds, where the political interests of contracting parties clearly shifted from diplomatic cooperation to the focus on obligations and curbing what Bhagwati called the ‘aggressive unilateralism’ policies of the Quad states (Japan, Canada, the European Union, and most notably the US).<sup>293</sup> So how the shared legal understandings on trade commitments have been formed and cultivated ever since the GATT era? A primary reference for investigation is the shared political understandings on compliance, but as the preceding section confirms, there have been wide shared understandings in terms of the constructivism logic that shaped the actions of consenting states.

From their origins in the international trade theory to their formulation in core principles for an orderly functioning of the world trading system, trade norms have

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<sup>291</sup> Davey, ‘Compliance Problems in the WTO Dispute Settlement’ (n 20).

<sup>292</sup> Cho, *The Social Foundations of World Trade* (n 58) 211.

<sup>293</sup> Jagdish Bhagwati, *The World Trading System at Risk* (Princeton University Press 1991) 48. See Petersmann, *The GATT Legal Office* (n 126); Davey, ‘The WTO Dispute Settlement Historical Evolution’ (n 31). See Jackson who cited ‘the speech of King Hassan II for the host government of the April 1994 Marrakesh ministerial meeting to conclude the Uruguay Round, where he said: “By bringing into being the World Trade Organization today, we are enshrining the rule of law in international economic and trade relations, thus setting universal rules and disciplines over the temptation of unilateralism and the law of the jungle”, Jackson, ‘The WTO Dispute Settlement Procedures-A Preliminary Appraisal’ (n 2) 159.



gone through the ‘norm-cycle’ in the institutions of GATT and WTO, and were always supported by the work of epistemic communities and communities of practice. The GATT/WTO economic and legal experts have been at the forefront of the norms entrepreneurship mission complementing each other’s understandings of trade agreements, and a large number of states have adopted trade norms in their trade relations, and internalised them into their domestic legal system for optimal compliance.<sup>294</sup> In cases of confusion about the characteristics of these norms, consenting states have always found the background-knowledge and information provided by epistemic communities of great help, and learned from the practice of other consenting states that work individually or in community of states for collective bargaining and agenda-setting.<sup>295</sup> All of these activities of norm entrepreneurs and consenting states and the rich information they had generated during the GATT years had given birth to the WTO and new legal texts.<sup>296</sup> There were two defining features of the 1994 Uruguay Round negotiations that led to the establishment of the WTO, first there was clear emphasis on the GATT’s and the newly negotiated agreements’ obligations.<sup>297</sup> Second, the VCLT provided the indispensable basis for the formation of the WTO Agreement and completion of the transitional arrangements from GATT to the WTO.

In particular, the Uruguay Round negotiators mostly relied on the VCLT Article (30) on ‘application of successive treaties relating to the same subject-matter’, and Article (70) on ‘consequences of the termination of a treaty’.<sup>298</sup> The reliance on GATT obligations to substantiate the formation of WTO norms is a clear indication of the legal status of those obligations for constituting the world trade law. There is a number of GATT provisions that highlight the value of compliance most obvious of all is GATT Article (XXIV:12) that stipulates ‘each contracting party shall take such reasonable measure as may be available to it to ensure observance of the

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<sup>294</sup> See Petersmann, *Transatlantic Economic Disputes* (n 30).

<sup>295</sup> Amrita Narlikar, ‘Collective Agency, Systemic Consequences: Bargaining Coalitions in the WTO’ in *The Oxford WTO Handbook* (n 63) 184-209.

<sup>296</sup> Bhala, *The Modern GATT* (n 1) 695-700.

<sup>297</sup> (Sup-Committee on Institutional, Procedural, and Legal Matters: Transitional Arrangements, PC/IPL/W/5, 7 September 1994) in *The Stanford GATT Digital Library* (n 203).

<sup>298</sup> *ibid.*

provisions of this Agreement by the regional and local governments and authorities within its territories’.<sup>299</sup>

Furthermore, the GATT dispute settlement system that has evolved from that GATT working party to the panel procedures, and was challenged by influx of noncompliance cases during 1980s, played a crucial role in maintaining GATT obligations. According to Hudec, ‘after 1980, the GATT dispute settlement process transformed itself into an institution based primarily on the authority of legal obligation’.<sup>300</sup> This important authority had been transformed to the WTO DSB’s Panel and AB that work on the basis of more elaborate rules and strict timeframe for the settlement of trade disputes in a timely manner. This WTO quasi-judicial body responsible for resolving disputes ‘is a reminder of the legality, rather than the protection of particular interests of contracting governments’.<sup>301</sup> The WTO legal texts are testaments to the shared understandings on legality among member states especially the Marrakesh Agreement Establishing the WTO (the WTO Agreement). Under Article (II:2) of the WTO Agreement, the agreements and associated legal instruments that form the annexes and include the 1994 GATT ‘(hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of [WTO Agreement], binding on all members’.<sup>302</sup> Moreover, the WTO Agreement Article (XVI:3) prescribes that ‘in the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict’.<sup>303</sup>

Another important provision of the WTO Agreement is Article (XVI:4) that stipulates ‘Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’.<sup>304</sup> When read in relation to the WTO Agreement, the WTO dispute settlement rules, the DSU, aims and objectives can be better understood. They include the overarching aim of ‘providing security and predictability to the

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<sup>299</sup> *The WTO Legal Texts* (n 136) 460.

<sup>300</sup> Robert Hudec, ‘The New WTO Dispute Settlement Procedure: An Overview of the First Three Years’ (1999) *Minnesota Journal of Global Trade* 1.

<sup>301</sup> Chaisse, ‘Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process’ (n 74).

<sup>302</sup> *The WTO Legal Texts* (n 136) 4 (emphasis added).

<sup>303</sup> *ibid* 14.

<sup>304</sup> *ibid*.

multilateral trading system' (DSU Article (3:2)) and ensuring conformity of member states' legal systems with WTO law.<sup>305</sup> The primary role of the WTO DSB Panel and AB is to determine whether national measures conform to WTO law.<sup>306</sup> According to Jackson, the DSB rulings are binding and there is 'a legal obligation to comply', but the question is how that obligation is formed and can be improved?<sup>307</sup> In other words, is the legal obligation to comply originated only from the DSU, or the concerned WTO legal texts, or from both sources of rules on performance of GATT/WTO obligations?

In light of interactionalism's element of shared legal understandings on compliance that primarily rely on Fuller's principles of law-making, it appears that the provisions of the GATT/WTO legal texts instantiate Fuller's principles. Since the WTO Agreement is mainly concerned with the WTO institutional structure, the GATT enforced substantive provisions are the ones that aptly adhere to the legality principles. But since both agreements are in force and they complement each other they both provided rules that comply with Fullerian principles in being: *general* (GATT Articles (I)-(XIII)) (WTO Articles (III) and (XVI)); *promulgated* (GATT Article (XXVI) on acceptance, entry into force and registration) (WTO Article (II) on scope of the WTO); *clear* (GATT Articles (I)-(IX); (XXXII); (XX)-(XXI); (XXXV)); (all WTO Agreement Articles); *non-contradictory* ( GATT Articles (XXIX), (XIV), (XXXVI (8))); (WTO Articles (II) and (XVI (3))); *not asking the impossible* (GATT Articles (XX-XXI) (XXVII *bis*), (XXXVI (8))); *constant* (WTO Articles (IX) and (X)). This is largely a subjective test but two principles, non-retroactivity and congruence between officials' action and declared rules, were left out for an objective test that look at the WTO enforcement mechanisms in their totality in terms of rules, procedures and case law.

However, some of the above GATT/WTO Articles that instantiate Fuller's principles can be the subject of an objective test. For example, the rules relating to generality, general rules that require, permit, or prohibit certain conducts, and especially the ones relating to the non-discrimination treatment, can only be assessed

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<sup>305</sup> Chaisse, 'Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process' (n 74).

<sup>306</sup> The Appellate Body Report, United States- Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, page 9 para. 24, WT/DS213/AB/R, adopted 28 November 2002.

<sup>307</sup> Jackson, 'Editorial Comment' (n 6).

by an objective test applied by impartial adjudicators. As mentioned earlier, the principle of non-discrimination embodied in the MFN is the fundamental GATT tariff principle that provided the compulsory basis for the world trade law. The legal obligation to comply can be traced to *the obligation of conformity* as explicitly stated in the WTO Agreement Article (XVI:4), and the DSU Articles (19:1), (22:1) and (22:8).

The significance of WTO Agreement Article (XVI:4) is evident by the large number of (52) disputes citing it, disputes the range from minor to a high profile ones, that involve developing but mainly developed member states.<sup>308</sup> In fact, Article (XVI) is the only cited Article from the WTO Agreement (in 59 disputes), which shows the importance of this article as an instrument for forcing compliance.<sup>309</sup> According to Chaisse, when *the obligation of conformity* is deconstructed it demonstrates that:

Firstly, the WTO system is exerting an influence on domestic systems, which have to transform in order to reach some degree of similarity-with the WTO and, consequently, across them. Secondly, the influence is due to a centripetal force which is formed by the general obligation of conformity –primary conformity obligation- complemented by the rulings of the DSB-secondary conformity obligation.<sup>310</sup>

The first transformation in the form of *the obligation of conformity* takes place in the procedure for adopting the DSB Panel and AB reports. The DSB, which is composed of all WTO member states, have the legal authority for adopting these reports that instruct the concerned member to bring its measures into conformity with the WTO law. This transformation from the wording of WTO Agreement Article (XVI:4) to the collective ruling against the offending state's measures is also subject to two qualifications 'the prompt compliance' under the DSU Article (21:1), and if it is impossible to comply within the specified timeframe, then the member is entitled to reasonable period of time determined by the violating party, or parties to the dispute, or an arbitrator.<sup>311</sup> Second *the obligation of conformity* gets transformed in terms of its content since 'the DSB decision specifies the content of the primary

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<sup>308</sup> Disputes by Agreement  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A29](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A29)> accessed 9 December 2015.

<sup>309</sup> See Appellate Body Report, US-Shrimp II (Viet Nam), WT/DS429/AB/R, adopted 7 April 2015.

<sup>310</sup> Chaisse, 'Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process' (n 74).

<sup>311</sup> *ibid.*

obligation and sometimes indicates the means to achieve conformity of domestic law with the law of the WTO'.<sup>312</sup>

Furthermore, in relation to the WTO work, the Advisory Centre on WTO Law (ACWL) plays a crucial role in promoting compliance through its interaction with developing member states advising them on rules implementation.<sup>313</sup> However, the ACWL should play a greater role in improving shared understandings on WTO law by advising businesses and NGOs, and it should also advise developing member states on PTAs law. In brief, the focus on legal obligation in the world trade law can be read as the construction of 'an interactional theory of compliance'. Because, the WTO member states engagement in the process of determining the legal obligation to comply means that compliance is 'dialectal process in a continuum'.<sup>314</sup> However, the legalist scholarship that focused on WTO obligations lacks an understanding of the role of dialectical interactions for the making of obligation. For example, as mentioned above, Jackson in his famous editorial comment overlooked the role of 'reciprocal exchanges of promises' and 'practice of legality' for making and maintaining GATT/WTO obligations.<sup>315</sup>

The GATT/WTO obligations that include explicit or implicit references to the value of compliance, were largely made in the interactions between consenting states, the obligations of non-discrimination and conformity are the prime examples. As Hudec said, noting the pressure of compliance with WTO law, 'despite some notorious examples of foot dragging, I know of no case in which a government has failed to promise compliance'.<sup>316</sup> Because, it was mainly the participants-led interactional process that was supported by economic analysis of international trade and legal expertise for designing trade agreements that cultivated and fostered the shared understandings on compliance.<sup>317</sup> It is by looking at this process with the interactionalism analytical framework starting with shared understandings, Fuller's

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<sup>312</sup> *ibid.*

<sup>313</sup> Shaffer, 'How the World Trade Organization Shapes Regulatory Governance' (n 74).

<sup>314</sup> Chaisse, 'Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process' (n 74); Jackson and Vazquez, 'Some Reflections on Compliance with WTO Dispute Settlement Decisions' (n 14).

<sup>315</sup> Jackson, 'Editorial Comment' (n 6).

<sup>316</sup> Robert Hudec, 'Review Article: Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization' (2002) *World Trade Review* 211.

<sup>317</sup> Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (n 74).

principles of legality, and practice of legality, that any shortcomings can be identified and remedied.

### **3.5 Conclusion:**

The social interactions for making and maintaining GATT/WTO trade norms are clear indication of a community of actors who are working toward a standardization of behaviour for realising world trade benefits. Agreeing fully with Cho's *communicative* thesis, the GATT had been active in cultivating shared understandings that provided the basis for trade liberalization norms. In the WTO law, however, there are two types of non-hierarchical beneficial interactions, an internal members' interactions on the basis of reciprocity and non-discrimination, and an interaction between the WTO and other regimes of international law.<sup>318</sup> One crucial lesson learned from the above analysis is that the political dialectical understandings that sustained the GATT obligations for 50 years has to be extended to the WTO to issues relating to good governance such as transparency and public participation. Because, trade protectionism often finds its reason of being in the domestic political justification for noncompliance, that is often voiced as a response to the concerns of national constituencies.

The WTO with its obligations and their exceptions for societal values and interests often got blamed for infringing national sovereignty. The solution to this problem is opening up the WTO for public scrutiny to attract the engagement of non-state actors in the work of the sub-elements of the shared understandings, from norm-cycle to community of practice. By doing this the WTO might get over its long lasting political deadlock that poses a serious threat to its legitimacy and ultimately affect the pull to compliance with its rules and rulings. The political, economic and legal bases of the WTO are intertwined in the circle of norms and the organization law-making process; and the WTO compliance regime are best deconstructed by the interactional account. With regard to the DDR deadlock that continues to impede the cultivation of shared political understandings, it has been argued that 'WTO

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<sup>318</sup> See Pascal Lamy, *The Geneva Consensus: Making Trade Work for All* (Cambridge University Press 2013).

procedures permit ‘clubs’ of countries to agree on additional policy disciplines if the benefits extend on a non-discriminatory basis to all WTO members’.<sup>319</sup>

However, the WTO should urgently focus on institutional and legal reforms to sustain shared political understanding concerning its specialised agreements, and avoid the looming legitimacy deficit.<sup>320</sup> In terms of the shared *legal* understanding on compliance, the legal obligation to comply originates from the provisions of the GATT and WTO founding Agreements, and other specialised WTO agreements such as the TRIPS Articles (40-50) on enforcement. The GATT Article (XXIV:12), and WTO Agreement Article (XVI:(4)) have two crucial roles to play, first internalising GATT/WTO commitments into consenting states legal systems. Second, transforming this primary obligation of conformity into collective interactional process for enforcement, engaging by law both the DSB procedures and WTO member states to adopt the rulings. For creating *interactional legal obligations* under the principles of reciprocity and non-discrimination, and member states engagement in the enforcement procedure, the WTO obligations are best regarded as collective and *erga omnes* obligations.<sup>321</sup> Chaisse’s work on deconstructing the WTO obligation of conformity is very useful despite its disputed premises most contentious of all is his statement that the WTO compliance record is ‘impressively high’.<sup>322</sup>

As evidenced by the long delays in settling WTO disputes in the consultation stage, and delayed-compliance in high profile cases, the quality and timeliness of compliance actions are worrisome. According to Colares the WTO ‘compliance-related issues must be viewed in a broader perspective that transcends narrow legalistic views’.<sup>323</sup> This is why the compliance record itself needs to be

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<sup>319</sup> Bernard Hoekman and Petros Marvroidis, ‘Clubs and the WTO post-Nairobi: What is Feasible? What is Desirable?’ (3 February 2016) <<http://www.voxeu.org/article/clubs-and-wto-post-nairobi>> accessed 4 February 2016.

<sup>320</sup> See Debra Steger, ‘Why Institutional Reform of the WTO is Necessary’ in Debra Steger, *Redesigning the World Trade Organization for the Twenty-first Century* (Wilfrid Laurier University Press 2009) 3; Michael Cardwell and Fiona Smith, ‘Renegotiation of the WTO Agreement on Agriculture: Accommodating the New Big Issues’ (2013) *International and Comparative Law Quarterly* 865.

<sup>321</sup> Carmody, ‘WTO Obligations as Collective’; Gazzin, ‘The Legal Nature of WTO Obligations and the Consequences of their Violation’ (n 54).

<sup>322</sup> cf Busch and Reinhardt (n 10); Davey, ‘Compliance Problems in the WTO Dispute Settlement’ (n 20).

<sup>323</sup> Juscelino Colares, ‘The Limits of WTO Adjudication: Is Compliance the Problem’ (2011) *Journal of International Economic Law* 403.

deconstructed because the lack of clear rules, and prompt and effective compliance are not only resulting from a weak enforcement system but also extends to the process of law-making. The WTO compliance regime needs to be interactional, and provide shared norms that comply with the Fullerian eight constitutive elements of legality to inspire *fidelity to law*.

The second issue in Chaisse's analysis is his reference without sufficient elaborations to 'the liability rule' rather than property rules for breaching WTO obligations. When writing about the principle of good faith, he said 'states may on some occasions escape liability for breaching their promises if their defences are determined to be applicable as a matter of law, such as the defences of necessity'.<sup>324</sup> The anti-legalist scholars claim that the WTO system is best understood using 'the economic theory of contract remedies' that includes 'liability rule remedy'; according to this rule, 'a party who wishes to deviate from its commitments may do so without the need to secure the permission of any adversely affected party, but is liable for damages as a result'.<sup>325</sup> This rule led those scholars to consider the provisions of DSU as to 'allow a violator to continue a violation in perpetuity, as long as it compensates or is willing to bear the costs of the retaliatory suspension of concessions' saying that, 'if the WTO Members really wanted to make compliance with dispute resolution findings mandatory, they would have imposed some greater penalty for noncompliance to induce it'.<sup>326</sup> Although, property rule seems preferable in public international law, because of its suitability to international cooperation,<sup>327</sup> in the WTO context, both property and liability rules have been used against an infringing member state, with the Panel and AB issuing a ruling against inconsistent measures, and an arbitrator(s) determining the level of damage. Continued noncompliance after such rulings and recommendations is neither beneficial to the infringing member's reputation, nor to multilateral trade essential character of stability.

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<sup>324</sup> Chaisse, 'Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process' (n 74).

<sup>325</sup> Schwartz and Sykes (n 7).

<sup>326</sup> *ibid.*

<sup>327</sup> Posner and Sykes Book Symposium (2013): Comment by Rachel Brewster, (26 March 2013) <<http://opiniojuris.org/2013/03/26/posner-and-sykes-book-symposium-comment-by-rachel-brewster/>> accessed 25 August 2013.



Notwithstanding these issues, but Chaisse's article is a good addition to the legalist's literature on WTO law and practice of compliance.<sup>328</sup> However, since his article approvingly shares the legalist literalistic interoperation of rules, it also shares the legalist shortcomings. They are, namely; the neglect of answering how the *legal obligation to comply* is formed and maintained in the overall structure of WTO, and following from this question, what is the role of the legal practices for improving compliance with WTO law. The GATT dispute settlement procedure and the WTO DSB have performed a fundamental role in supplementing the consenting states shared understandings on compliance. For example, adjudication has provided the fair basis for strengthening the non-discrimination principle by determining the discriminatory treatment threshold in case law. The scheme of granting a waiver is left to the member states' voting and reviews because it is a task that is best performed by them, and not by an adjudicative body.

To sum up, what the interactional approach reveals is that the GATT and WTO, to some extent, have been successful in cultivating shared understandings on compliance in the political and legal sense. The GATT/WTO rules instantiate most of Fuller's principles of law-making, revealing that the world trading system has been successful in attracting the fidelity to its law. The interactional process of law-making is novel in taking into account the needs of less-developed countries, and the likely conflict between trade liberalization norms and member states societal values and interests. What is left is to apply Fuller's principles of legality to the WTO DSB rules. This will be done in the next chapter on the legal character of the DSB's rules and procedures. As argued in subsections 3.4.4.2 and 3.4.5 on non-discrimination and shared legal understandings, the first element of interactionalism is relevant to the topic of assuring compliance with WTO law as required in the DSB reports, because the non-discrimination principle depends on having effective adjudication procedures. Hence, it is imperative to examine the legality of the WTO dispute settlement system to assess its role in upholding the international trade rule of law's principle of non-discrimination.

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<sup>328</sup> See Jackson, 'The Editorial Comment' (n 6); Jackson, *The World Trading System* (n 8); Jackson and Vazquez, 'Some Reflections on Compliance with WTO Dispute Settlement Decisions' (n 14); Carmody, 'WTO Obligations as Collective' and Gazzin, 'The Legal Nature of WTO Obligations and the Consequences of their Violation' (n 54); Picker and Toohey (n 71); Shaffer, 'How the World Trade Organization Shapes Regulatory Governance.' (n 74).

## **Chapter 4: The WTO DSB and the Fullerian Principles of Legality:**

### **4.1 Introduction:**

The previous chapter applied the first element of Brunnée and Toope's interactional international law theory (hereinafter *Interactionalism*), *the shared understanding on compliance*, to the World Trade Organization (WTO) law. This Chapter will apply the second central element in interactionalism, *the principles of legality as developed by Lon L. Fuller*, to the WTO Dispute Settlement Body (DSB). It was argued that these elements are relevant for deconstructing compliance with WTO law because the non-discrimination principle is dependent on effective adjudication. At first glance, evaluating the legality of the rules and procedures of the DSB, in accordance with the Fullerian principles of legality might seem a curious approach. The Fullerian principles were developed by the jurist Lon L. Fuller as 'the inner morality of law criteria', and they can be regarded as *the eight constitutive elements of legality*.<sup>1</sup> However, one might ask, why, after almost 20 years of operation should the legality of the WTO dispute settlement system be probed, as the WTO member states' extensive use of the system shows a clear indication of its legal validity and presumed legitimacy. Nonetheless, when examining the following references to scholarship and compliance records, which focus on the quality and timeliness of compliance actions (with particular focus on the lack of settling consultation and high profile disputes), the premise of this thesis: that the DSB system is ineffective, is not inexplicable.

This premise requires an investigation based on a theoretical framework that takes into account the interlinked functions of rule-making, interpretation, and enforcement. Furthermore, the WTO is facing a crisis of legitimacy, as manifested by the negotiation impasse in the area of institutional reform, which has had a detrimental impact on this issue: The undetermined legality status of the DSB rules, the Dispute Settlement Understanding (DSU).<sup>2</sup> A legitimacy deficit reduces the WTO ability to liberalise trade or maintain rules, and eventually leads to widespread

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<sup>1</sup> Lon L. Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969) 197-200.

<sup>2</sup> See Manfred Elsig, 'The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?' (2007) *Journal of World Trade* 75; Daniel Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) *World Trade Review* 7.

non-compliance by member states with their WTO commitments.<sup>3</sup> It is noteworthy, that recurring instances of non-compliance stemming from unresolved textual or institutional defects, would be against the core purpose of the WTO.<sup>4</sup> The WTO was founded originally to secure effective compliance with world trade rules and rulings, which its predecessor, the General Agreement on Tariffs and Trade (GATT), failed to accomplish.<sup>5</sup> Although, full operation and extensive reliance on the DSB shows member states trust the WTO dispute settlement system, as will be argued below, this does not mean that the enforcement system is not in need of improvement and clarification. Thus, examining the system's legality by analysing its procedures, rules, and compliance record, is a rational research strategy. Hence, part two of this chapter will revisit the WTO DSB effectiveness claim, by evaluating the DSB compliance record and associated procedure. Part three, however, will provide a brief comparative analysis between the DSB, and other compliance regimes of international law. The purpose of this comparison is to evaluate the DSB law and practice in terms of its ability to award compensation and finalize disputes.

However, any discussion of the WTO compliance regime must proceed from the premise that the WTO functions are not divisible from each other, or insular, requiring individual evaluation. That is, the overuse of one mechanism, for example, by pressuring the DSB to legislate while adjudicating, indicates that the other WTO mechanism(s) are not functioning to serve their purposes adequately.<sup>6</sup> The 2001 Doha Development Round (DDR) stalemate, and the weakness of the Trade Policy Review Mechanism (TPRM), that have detrimental effects on the DSB in terms of revision of rules, and the lack of facilitating interactions on GATT/WTO rules, are testaments to this overuse problem.<sup>7</sup> The framework of *Interactionalism* that links

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<sup>3</sup> See Joshua Meltzer, *The Legitimacy of the World Trade Organization* (Hart Publishing 2010).

<sup>4</sup> Carolyn Birkbeck, 'Reinvigorating Debate on WTO Reform: The Contours of a Functional and Normative Approach to Analyzing the WTO System' in Debra Steger (ed), *Redesigning the World Trade Organization for the Twenty-first Century* (Wilfrid Laurier University Press 2010) 15.

<sup>5</sup> See (Dispute Settlement Proposal, MTN.GNG/NG13/W/30, 10 October 1988) in Stanford GATT Digital Library <<http://sul-derivatives.stanford.edu/derivative?CSNID=92060026&mediaType=application/pdf>> accessed 1 December 2015.

<sup>6</sup> See Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization 2013) 557.

<sup>7</sup> See Paul Blustein, *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambition, and the Great Shambles of the World Trading System* (Public Affairs 2009); Bernard Hoekman and Petros Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) *The World Economy* 527.

the elements of ‘shared understandings, the principles of legality and practice of legality’, can provide a comprehensive account of compliance with WTO law.<sup>8</sup>

Interactionalism is adopted to explicate the dynamism of world trade obligations, and how these obligations should be effectively enforced.<sup>9</sup> The discussion of the WTO DSB issues, such as judicial activism, whether or not the GATT/WTO rules should be collectively enforced, and whether the DSU should be revised for clarity, will always involve issues of rulemaking *negotiation*, and supervision. The three interrelated elements of interactionalism can explain the interdependency between the WTO functions. Specifically, however, interactionalism is particularly relevant for analysing the WTO law because of Fuller’s jurisprudential insights on legality and adjudication. Because of his background in economics, Fuller bases his morality of law theory on the interactional obligation founded in trade law, providing eight constitutive element of legality. His writings on the forms and limits of adjudication continue to be the most elaborate on this topic.<sup>10</sup>

The aim of this chapter is to invoke Fuller’s notions of legality and adjudication to evaluate the DSB constructively. The reasons that the principles of legality are only applied to the DSB to evaluate its purpose and process, are first the DSB is relevant for this thesis topic on securing prompt compliance with WTO law, and second it is beyond this thesis scope to evaluate the legality of all of the GATT/WTO rules. The application of Fuller’s jurisprudence to the WTO dispute settlement will illuminate the ideal of *procedural fairness* that the WTO, including the DSB, is intended to uphold. Thus, part four, will further argue for the application of Fuller’s conceptions of legality and adjudication to the DSB. Part five, will divide the legality principles into four subparts, covering both the WTO DSB rules and procedures, and referring to exemplary disputes. Finally, part six will provide a conclusion. However, before applying the legality principles to the DSB, it is helpful to revisit the claim that the performance of the DSB is successful.

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<sup>8</sup> Legality for Fuller, and Brunnée and Toope, must be practiced through rules and practices that conform with the Fullerian principles of legality, because through such conformity, the ideal of ‘fidelity’ to law would be upheld. See Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) (hereinafter, *An Interactional Account*) 96-97; Robert Wolfe, ‘See You in Geneva? Legal (Mis)Representations of the Trading System’ (2005) *European Journal of International Relations* 339.

<sup>9</sup> *ibid.*

<sup>10</sup> See Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) *Harvard Law Review* 353.

#### 4.2 The WTO Dispute Settlement System Efficacy Claim Revisited:

In a new WTO publication to commemorate the organization's 20<sup>th</sup> anniversary, a chapter on 'The Dispute Settlement-Clarifying Rules and Resolving Disputes' maintains that, the WTO DSB is the most active international adjudicative body as measured by caseload.<sup>11</sup> The chapter stated that, since 1995 the WTO DSB has issued 300 reports (judgments), and in terms of accessibility, 'to date developing country members have initiated 226 disputes compared to the 292 initiated by developed country members'.<sup>12</sup> The chapter proclaims that 'the fact more disputes are coming to the WTO reflects a growing faith in the system, and the increasing importance members attach to the rule of law in international trade relations'.<sup>13</sup> The section of the WTO website pertaining to dispute settlement is particularly revealing, especially in terms of chronological order and the current status of disputes.

To date, the DSB has dealt with (508) disputes, which can be broken down as follows: currently in *consultation* (151 disputes); *implementations notified by respondents* (89 disputes); *reports adopted with recommendation to bring measure(s) into conformity* (36 disputes); and *settled or terminated (withdrawn, mutually agreed solution found)* (94 disputes)).<sup>14</sup> So when add to the categories of (*implementations notified/settled or terminated*), the number pertaining to the category of (*reports adopted, no further action(s) required* (29 disputes)), it can be found that out of the (508) disputes, only (212) disputes had been finalized. Some of them had been completed with or without the DSB help, because some of the (*settled or terminated*) disputes had been finalized by WTO members own deliberations.<sup>15</sup> The remaining pending (296) disputes have been proceeding very

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<sup>11</sup> The World Trade Organization, *The WTO at Twenty: Challenges and Achievements* (The World Trade Organization 2015) 61 <[https://www.wto.org/english/res\\_e/booksp\\_e/wto\\_at\\_twenty\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf)> accessed 07 October 2015.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> Current Status of Disputes <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm)> accessed 07 October 2015.

<sup>15</sup> However, Alschner said, 'by offering a negotiated solution to hard cases, mutually agreed solution (MAS) have added stability to the multilateral trading system. MAS, however, also raise concerns. Settlements favour the instant resolution of disputes, but may conflict with third party interests and collective stakes. Where WTO members use their MAS to contract out of WTO law ('WTO+'/'WTO-'MAS), the multilateral trading system may be at risk. In addition, new forms of bilateral (interim-) settlements not foreseen in the DSU have recently emerged which currently

slowly in the process, and some of them came to a standstill, delayed for very long time such as most of the consultations. Notwithstanding these statistics, there are two narratives can be applied to the statement that the mere initiation of disputes ‘reflects a growing faith in the system’. The first narrative suggests that seeking the help of the DSB to settle disputes clearly reflects the member states’ trust in the system and the importance they and the DSB adjudicators attach to the rule of law.

However, the second raises the suggestion that this heavy caseload with (less than a half of the disputes settled), raises two problems: A) member states misinterpretation of GATT/WTO rules, B) the DSB lack of early settlement and quality judgments. The first problem is manifest in the (508) complaints, which cover almost all WTO agreements, with the GATT (1994) being the most cited in (412) disputes.<sup>16</sup> According to Chayes and Chayes, in international relations, rather than from deliberate disregard, noncompliance often results from either ‘norm ambiguities’ and/or ‘capacity limitations’.<sup>17</sup> The first of these, ‘norm ambiguities’, relates to the formation of norms and the shared understandings that a norm requires to be adopted as a socially acceptable standard of conduct. In the literal sense, the word ‘dispute’ connotes the following: heated argument, contention, and ‘in a weakened sense, a difference of opinion’.<sup>18</sup> These terms of dispute reflect the difficulties WTO members experience when dealing with each other, and when interpreting GATT/WTO rules.

Interactionalism maintains that norms must be socially constructed, starting with bottom up interactions that involve all concerned actors in their formation and application. As highlighted in the previous chapter, the missing component in ‘the norm cycle’ under world trade law is the lack of involving developing states, and non-state actors in the formation of norms, because of the closed sittings of the GATT/WTO negotiations. However, if the ‘norms ambiguities’ factor is taken at

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escape multilateral disciplines.’ see Wolfgang Alschner, ‘Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System’ (2014) *World Trade Review* 65. See Gregory Shaffer and others, ‘The Law and Politics of WTO Dispute Settlement’ (2016) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2748883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748883)> accessed 22 March 2016.

<sup>16</sup> Resolving Trade Disputes between WTO Members <[https://www.wto.org/english/thewto\\_e/20y\\_e/dispute\\_brochure20y\\_e.pdf](https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf)> accessed 7 October 2015.

<sup>17</sup> Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 3.

<sup>18</sup> See *Dispute* entry in Oxford English Dictionary <<http://www.oed.com/view/Entry/55213?rskey=NCeUoU&result=1#eid>> accessed 12 November 2015.

face value, the complaints come to represent a deeper problem, suggesting almost all consenting states misapprehend GATT/WTO norms. Certainly, it would not be necessary for a member to initiate a dispute, if the concerned agreements and DSU rules were intelligible, feasible, and followed by officials. Thus, further studies of the type of agreements cited, and the way they are interpreted, are needed to explain the activism surrounding the DSB, and its qualified success to deliver quality judgements in a timely fashion.

Once more, the DSB statistics are revealing. For example, if through the accession process, member states have properly understood and internalised the GATT rules for optimal compliance then disputes would be predicted to be few. Both the GATT and WTO founding Agreements stipulate under GATT Articles (XXVI) and (XXIV:12), and the WTO Articles (XIV) and (XVI:4), that upon acceptance and entry into force, consenting states must implement the GATT/WTO concessions and obligations. Moreover, annexed to the WTO Agreement, a number of texts issue ‘understandings’ on specific GATT provisions, such as Article (II:1(B)) on *schedules of concessions*, and Article (XXIV) on *regional trade agreements*. Nevertheless, since the establishment of the WTO, the GATT has been cited in (412) cases starting with requests for consultations, with the non-discrimination principles of national treatment under Article (III:4) being the most cited in (95 disputes), followed by the most favoured nation under Article (I), cited (in 86 disputes).<sup>19</sup>

Had consenting states have understood and internalized the rules, by instructing national authorities and courts to observe GATT/WTO concessions and obligations, there would be no reason to initiate (412) disputes on the most basic rules of the GATT. It might be claimed that mere *initiation of consultation* is intended to exact assurances from the DSB and concerned members on the GATT rules for ‘optimal observance’; in this case, the large number of disputes show that the DSB has a central role in facilitating trade norms. However, the DSB is not the only enforcement mechanism, the TPRM is also available and primarily concerned with the task of norms facilitations. According to the DSU Article (3:7), ‘the aim of the

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<sup>19</sup> In the third place GATT Article XI on *General Elimination of Quantitative Restrictions* cited in (76) disputes, fourth place Article III in (73) disputes, and fifth place Article II on ‘*Schedules of Concession*’ cited in (67) see Disputes <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A9](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A9)> accessed 12 November 2015.

dispute settlement mechanism is to secure a positive solution to a dispute' that has arisen because of conflicting interpretations of the provision(s) of the GATT/WTO rules.

Under international dispute settlement procedure, the reason for the 'initiation of consultation' is that one state has *anticipated*, 'a decision or a proposed course of action my harm' its rights and obligations, therefore consultation can be 'a way of heading off a dispute' by engaging in a dialogue with the offending state to find a mutual solution.<sup>20</sup> The WTO affirms the legal basis of consultation, stipulating, 'the request for consultations formally initiates a dispute in the WTO and triggers the application of the DSU'.<sup>21</sup> Furthermore, the WTO also acknowledges that 'a majority of disputes so far in the WTO have not proceeded beyond consultations, either because a satisfactory settlement was found, or because the complainant decided for other reasons not to pursue the matter further'.<sup>22</sup> Despite this statement, the reality is that *the majority* of disputes did not proceed to full litigation with a significant lack of notification of mutually agreed solutions (MAS). The DSB has not been notified of MAS to most consultation, and complainants' reasons for not requesting a Panel are unknown. However, one strong possibility is that members are simply failing to comply with the procedural requirement in DSU Article (3:6) which reads 'Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto'. So the fact that disputing members have not notified the DSB of solutions in the current 151 consultations shows their disregard of this provision.

The lack of MAS notifications may imply other reasons, for example, is that despite *the good office, conciliation and mediation* procedures under DSU Article (5), the complainants still lack the legal or financial capacity to find a solution or proceed to

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<sup>20</sup> J. G. Merrills, *International Dispute Settlement* (5th edn, Cambridge University Press 2011) 2.

<sup>21</sup> The Process-Stages in a Typical WTO Dispute Case: Consultation  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s2p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm)> accessed 24 November 2015.

<sup>22</sup> *ibid.* The WTO said in another webpage, 'By January 2008, only about 136 of the nearly 369 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase-some since 1995' see *Understanding the WTO: Settling Disputes: A Unique Contribution*  
<[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm)> accessed 23 July 2016



litigation. The rules under DSU Articles (4 and 5) permit *immediate* resort to panels' proceedings, but it appears that this option leaves members with the hard choice of trying to reach a settlement, which they often fail to do, or endure the cost of litigation. According to the last sentence of DSU Article (11) on *function of panels*, 'Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution'. This raises two questions: It is not clear why, after the case has reached litigation, would the Panels take the role of mediating; have the DSU Articles (4-5) procedures been exhausted? All in all, the large number of unresolved DSB disputes involving the basic rules of the GATT, and other rules stated in WTO specialised agreements, highlight two problems, the weaknesses of the DSB, and the ambiguities of the GATT/WTO rules.<sup>23</sup>

The rules of the GATT and WTO founding Agreements largely instantiate Fuller's principles of legality, aside from the principle of promulgation that the WTO has effectively satisfied, these principles largely remain an aspirational ideal to uphold the system's legal morality. The principles of legality have to be satisfied by all GATT/WTO rules, including the DSU to inspire *fidelity* to law. The fundamental notion of *fidelity* cannot be measured merely by the large number of disputes brought before the DSB, but by the least number of disputes. Understandably, disputes are more likely to arise in a society where its members have willingly engaged in the enterprise of subjecting their conduct to the governance of rules.<sup>24</sup> However, an appropriate measurement of the success of these rules depends on their ability to inspire full adherence they inspire, and continuous practice. Conversely, delayed implementation or non-compliance suggests rules are ineffective. Moreover, the notion of fidelity connotes the fundamental term of 'reciprocity' in relation to the idea of interaction internal to the concept of law.

The WTO is founded on the principle of reciprocal obligations, yet a large number of disputes concerning the most basic of these obligations, such as the articles on schedules of concession and non-discrimination show that they are not fully

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<sup>23</sup> Murray Smith 'Accession to the WTO: Key Strategic Issues' in Jeffrey Schott (ed), *The World Trading System: Challenges Ahead* (Peterson Institute 1996) 180; Sam Laird and Raymond Valdes, 'The Trade Policy Review Mechanism' in Amrita Narlikar and others, *The Oxford Handbook on The World Trade Organization* (Oxford University Press 2012) 482 (hereinafter *The Oxford Handbook on the WTO*).

<sup>24</sup> This is a paraphrasing of Fuller's notion of law as 'the enterprise of subjecting human conduct to the governance of rules' see Fuller, *The Morality of Law* (n 1) 74.

understood with the result that fidelity to law is frustrated. This key problem of misapprehension of rules, combined with the failure of the WTO function of negotiation, reveals that the only effective organs of the WTO are its committees. These committees that perform a role in the function of the *oversight of rule* should not *judicialize* trade relation rules, where ambiguous norms have exhausted the formal functions of negotiation and enforcement. Moreover, if as claimed, vague WTO norms are the cause of judicial activism, then the absence of precise treaty texts often leads to intrusive rulings and recommendations from the DSB's Panel and Appellate Body (AB).<sup>25</sup> A proposed solution here is that the history of WTO negotiations should be compiled 'to guide AB's approach to ambiguous treaty texts'.<sup>26</sup> Although, the DSB is bound by the Vienna Convention on the Law of Treaties (VCLT), which refers to negotiating instruments for interpretation (VCLT 1:2(b)), the AB rarely refers to such instruments to finalize the disputes. The ambiguous GATT/WTO norms are the main cause of prolonged dispute-related deliberations between member states, and the lack of clear and conclusive DSB rulings and recommendations.

This analysis is open to criticism, and cannot be fully understood unless one looks at how the DSB, tries and often fails to settle disputes. The aforementioned discussion on consultations leads naturally to the second problem of the DSB effectiveness claims, namely the *lack of early settlements and quality judgments*. This issue has to be deconstructed by distinguishing between two types of cases, those relating to pre-panel, and those relating to post-ruling procedures. With regard to the latter, after examining the data for requests for consultation one observer noted, 'a vast majority of WTO members simply do not channel their trade disputes through the Dispute Settlement Understanding'.<sup>27</sup> This is an accurate claim, especially when one considers the startling number of consultation disputes that are not settled in a timely manner. In 2015 the WTO rightly claimed that '110 disputes have been resolved bilaterally or withdrawn' and just '282 disputes have proceeded to the litigation

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<sup>25</sup> Intrusive interpretations are usually found in the AB adjudication of anti-dumping rules see Susan Esserman and Robert Howse, 'The WTO on Trial' (2003) <<http://www.steptoe.com/assets/attachments/1236.pdf>> accessed 25 November 2015.

<sup>26</sup> *ibid.*

<sup>27</sup> Geraldo Vidigal, 'WTO: The First 500 Disputes and the Last 100 Disputes' (11 November 2015) <<http://www.ejiltalk.org/wto-the-first-500-disputes-and-the-last-100-disputes/>> accessed 24 November 2015.

phase’, meaning the Panel and AB review.<sup>28</sup> However, this evidence contradicts another revealing WTO statistic, which reveals some disputes have been in consultation since 1995. Of these, some concern requests for consultation on the same issue; for example, in 1995, Canada, Uruguay, and Thailand requested consultations with the European Community (EC) on the duties it imposes on imports of rice and cereal.<sup>29</sup> It seems that neither the DSB, nor the EC as a major trading block, have been troubled by such alleged *anticipation of violation* of GATT/WTO rules; hence, consultations have been adjourned (or are ongoing if borne out by the data) for (20) years. Also according to the DSU Article (4:7) ‘If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel’.

In terms of the weakness of post-panel and AB rulings procedures, the WTO statistics again offer a helpful illustration. DSU rules have been cited in (15) disputes in the requests for consultation phase, with DSU Article (23) provisions on *strengthening of multilateral system* being the most cited in (9 disputes), followed by Article (22) on *compensation and suspension of concessions* in (6 disputes).<sup>30</sup> The DSU *consultation* Article (4), and compliance review Article (21:5) have been cited in (4) disputes apiece, and *general provisions* Article (3) cited in (8 disputes).<sup>31</sup> The large number of citations of DSU articles concerning post-ruling procedures in Articles (21-23) is indicative of member states’ lack of understanding of these rules for optimal compliance. It is worth noting that the disputes involving challenges to the legal interpretations of the DSU, especially Articles (21) (22) and (23), were between *developed* member states, mainly the US and EC.<sup>32</sup> The vagueness of these DSU articles has been highlighted in a number of critical reviews, and high profile

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<sup>28</sup> WTO Disputes Reach 500 Mark  
<[https://www.wto.org/english/news\\_e/news15\\_e/ds500rfc\\_10nov15\\_e.htm](https://www.wto.org/english/news_e/news15_e/ds500rfc_10nov15_e.htm)> accessed 12 November 2015.

<sup>29</sup> (EC- Implementation of the Uruguay Round Commitments Concerning Rice, WT/DS25/1, request received 14 December 1995); (EC- Duties on Imports of Cereals, WT/DS29/1, request received 30 June 1995); (EC-Duties on Imports of Rice, WT/DS17/1, request received 5 October 1995).

<sup>30</sup> The WTO Dispute Settlement  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm)> accessed 07 October 2015.

<sup>31</sup> *ibid.*

<sup>32</sup> Disputes by Agreement  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A5#](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A5#)> accessed 29 December 2015.

disputes, which despite the authorization of retaliation, and compliance proceedings under Article (21:5), have endured a prolonged settlement period.<sup>33</sup>

Examples of high profile disputes include, *US-Large Civil Aircraft (2<sup>nd</sup> complaint)*, *US-Offset Act (Byrd Amendment)*, and *EC-Fasteners (China)*.<sup>34</sup> In these disputes, the procedures have been exhausted with no settlement, and currently in (2) disputes *the compliance proceedings were completed with finding(s) of non-compliance*, i.e. reports were adopted but no settlements reached, and in (6 disputes) *the compliance proceedings are ongoing*.<sup>35</sup> In most of these noncompliance disputes, the respondent merely expresses its ‘intention’ to implement the DSB adopted reports, or simply disregard the ruling(s).<sup>36</sup> There are many reasons for the delay in resolving consultations, and high profile disputes, but these mainly emanate from the weaknesses in the DSB procedures and rules. For instance, the reason for failing to force compliance is the inherited weaknesses of retaliation as a remedy for noncompliance. In addition to being an unsuitable remedy, it unsurprisingly makes little or no economic sense, as evidenced by its failure to affect US firms in *US-Offset Act (Byrd Amendment)*, following a decade of retaliation.<sup>37</sup> In addition, contrary to the free fair trade ideal, persistent retaliatory measures harm the private economic actors, and developing countries involved in the disputes.<sup>38</sup>

After examining the WTO compliance procedure, Eeckhout said, ‘the rule of law plays but a limited role in WTO dispute settlement, and that it all depend on the politics of power’.<sup>39</sup> This reflects a growing debate among WTO experts over whether ‘trade rule of law’ is manifested by compliance with ‘rulings’, or ‘rules’, or the equal attainment of both. For example, challenging Cho’s view that the ‘trade

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<sup>33</sup> See Karen Alter, ‘Resolving or Exacerbating Disputes? The WTO’s New Dispute Resolution System’ (2003) *International Affairs* 783.

<sup>34</sup> (United States-Measures Affecting Trade in Large Civil Aircraft-Second Complaint, DS353); (United States-Continued Dumping and Subsidy Offset Act 2000, DS217); (European Communities-Definitive Anti-Dumping Measures on Certain or Steel Fasteners from China, DS397).

<sup>35</sup> The WTO Dispute Settlement  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm)> accessed 07 October 2015.

<sup>36</sup> See (Canada-Measures Affecting the Export of Civilian Aircraft, DS70); (United States-Certain Country of Origin Labelling, DS384, DS386).

<sup>37</sup> Benjamin Liebman and Kasaundra Tomlin, ‘World Trade Organization Sanctions, Implementation, and Retaliation’ (2015) *Empirical Economics* 715.

<sup>38</sup> R. Rajesh Babu, *Remedies under the WTO Legal System* (Martinus Nijhoff Publishers 2012) 333-342.

<sup>39</sup> Piet Eeckhout, ‘Remedies and Compliance’ in Daniel Bethlehem and others, *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 437.

rule of law' is reflective of compliance with rules, Pauwelyn stated 'we do not know exactly how many WTO violations are out there and not challenged. Rule of law is not merely court compliance, but primary norm compliance, and my fear is that the WTO does much better on former (compliance with rulings) than latter (compliance with rules)'.<sup>40</sup> This implies that the WTO lacks a comprehensive system for ensuring compliance, thus, transparent amicable solutions for settling disputes should be reached by member states who should continuously interact on the sound basis of legality. Member states should be able to amend the law, and judge issues relating to inconsistency with WTO law

With (508) caseload record, apparently the DSB is not the last resort, but is overburdened with tasks unsuited for adjudication. Nonetheless, the DSU rules lack legal validity, in the sense that they are not intelligible or explicitly binding; rendering the practice of legality weak and increasingly in disarray, burdening the DSB with tasks such as economic allocation and determining social regulatory policies. Although adjudication differs from arbitration, as in the latter, there is procedure for the selection of arbitrators by the disputants, and type of law applied, but in the DSU both adjudication and arbitration are intertwined. Under Article (25), the DSU has a separate arbitration procedure, however, the most commonly used procedure is arbitration by 'the original panel or an arbitrator appointed by the Director-General' to determine the level of countermeasures under DSU Article (22). The *US-Foreign Sales Corporations Tax* is an example of a high profile dispute in which the DSB through arbitrators engaged in an allocative task, by awarding (\$4) billions of countermeasures, yet failed to compel the offending state into compliance and finalize the dispute.<sup>41</sup>

On 30<sup>th</sup> of August 2002, the complainant, the EU, welcomed the award in the words of its then Commissioner, Pascal Lamy, who said 'we are satisfied by today's decision that makes the cost of non-compliance with WTO crystal clear (...) this countermeasure will create a major incentive for the US to eliminate this huge

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<sup>40</sup> Joost Pauwelyn, 'Cool Arbitrator Finds That Only Lost Trade is "Recoverable" Not Broader Economic Harm Suffered By Canada/Mexico' (10 December 2015) <<http://worldtradelaw.typepad.com/ielpblog/2015/12/cool-arbitrator-finds-that-only-lost-trade-is-recoverable-not-broader-economic-harm-suffered-by-canadamexico.html#comments>> accessed 14 December 2015 (emphasis added).

<sup>41</sup> See US-FSC, DS108. See Esserman and Howse, 'The WTO on Trial' (n 25).

illegal export subsidy'.<sup>42</sup> Yet, although since 2002 there have been two second recourses to compliance proceedings by the Panel and AB under Article (21:5), and the EU has maintained its sanctions, the US has defiantly refused to comply. Overall, the DSB seems to be ineffective in terms of an enforcement mechanism and timeline. The following section will provide a comparative analysis between the DSB, and three compliance regimes of international law, namely, the International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), and International Centre for Settlement of Investment Dispute (ICSID). The purpose of this analysis is to examine the DSB role in protecting the trade rights of private parties, and its ability to bring finality to disputes to avoid protracted litigation.

Chapter Three on shared understandings on compliance critiqued the WTO system's lack of facilitating non-state actors' interaction with WTO law, and the effect of this in undermining the legal legitimacy of the WTO. However, in terms of procedural fairness, the access of affected non-state actors to the DSB is a critical issue that needs to be addressed. Although the DSB is a tribunal for deciding interstate disputes, firms are represented in these disputes, and at the receiving end of adverse DSB's decisions, suffering because of lost cases, procedural delay, or delayed compliance of offending member state(s). It can be argued that by virtue of representation, non-state actors have legal personality that should be recognised and protected throughout proceedings. Moreover, the lack of finalizing disputes in a timely manner contradicts the aims of providing stability and predictability in the multilateral trading system (DSU 3:2), prompt settlements conducive to the WTO mission (DSU 3:3), and prompt compliance with the DSB rulings and recommendations (DSU 21:1).

#### **4.3 The WTO DSB and the ICJ, ITLOS and ICSID:**

The DSB is an adjudicative body firmly embedded in international law and practice. In terms of source, WTO procedural law and the DSB rules and procedures were drafted in accordance with general principles of public international law.<sup>43</sup> In practice, the Panel and AB members often refer to international procedural rules and

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<sup>42</sup> Foreign Sales Corporations: EU Welcomes WTO Award (2002)  
<[http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc\\_114513.pdf](http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114513.pdf)> accessed on 24 November 2015.

<sup>43</sup> On the influence of public international law on the WTO see Chapter Two section (2.3.1).

practices to decide on issues not covered by the DSU. For instance, in *EC-Banana III* the AB decided that member states are permitted to use private counsels in proceedings, as it is consistent with ‘the prevailing practice of international tribunals’.<sup>44</sup> However, legal practices of international courts and tribunals vary, particularly concerning their ability to finalize disputes and award compensation. Even though, they invoke principles of international law, and are intended to settle disputes between states, or states and nationals, or entities of other states quickly and effectively, they are markedly different in terms of their ability to force compliance. The following paragraphs will provide a brief overview of the ICJ, ITLOS, and ICSID rules and practices of compliance, and their positions on awarding compensation, and compare them to those of the DSB. It is noteworthy to say that the finality of judgment here refers to the existence of clear judicial and arbitral rules that stipulate that the judgment is final, not subject to further reviews.

With regard to the ICJ, and pursuant to Article (36:2) of its Statute, the court can make decisions on ‘any question of international law’ including the interpretation of a treaty, and ‘the nature or extent of the reparation to be made for the breach of an international obligation’.<sup>45</sup> Still, since its inception in 1946, the ICJ has only once awarded compensation in a diplomatic protection case, ordering a state that violated the human rights of a foreign national to pay compensation.<sup>46</sup> The finality of dispute resolution is recognised in Article (59) of the ICJ Statute, which maintains that the decisions of the court are binding ‘between the parties and in respect of that particular case’, whilst Article (60) reads, ‘the judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party’.<sup>47</sup> The rules regarding revision of ICJ judgments are specified in Article (61), within clause (61:3): ‘The Court may require

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<sup>44</sup> Chiara Ciorgetti, ‘Cross-Fertilisation of Procedural Law Among International Courts and Tribunals: Methods and Meanings’ in Arman Sarvarian and others, *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law 2015) 227-228 citing (The Appellate Body Report, *EC- Regimes for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997).

<sup>45</sup> Statute of the International Court of Justice <[http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II)> accessed 7 June 2016.

<sup>46</sup> Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) ICJ Judgment of 19 June 2012. See Dapo Akande, ‘Award of Compensation by International Tribunals in Inter-State Cases: ICJ Decision in the Diallo Case- Update’ (12 June 2012) <<http://www.ejiltalk.org/award-of-compensation-by-international-tribunals-in-inter-state-cases-icj-decision-in-the-diallo-case/>> accessed 8 June 2016.

<sup>47</sup> Statute of the International Court of Justice <[http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II)> accessed 7 June 2016.

previous compliance with the terms of the judgment before it admits proceedings in revision’, and clause (61:5): ‘No application for revision maybe made after the lapse of ten years from the date of judgment’.<sup>48</sup>

According to Article (41:1) of the ICJ Statute, the court has the power to ‘indicate’ interim measures to prevent an imminent risk of irreparable damage that might prolong the dispute.<sup>49</sup> Article (41:2) stipulates that, ‘Pending the final decision, notice of the measures suggested shall forthwith be given to parties and to the Security Council’.<sup>50</sup> Finally, Article (88) of the ICJ Rules of the Court maintains that the court can accept parties’ agreement to discontinue the proceedings, and remove the case from the list.<sup>51</sup> In terms of the practice of compliance, this can be seen in the landmark case of *Nicaragua v the US*,<sup>52</sup> where the US defiantly refused to comply, and Nicaragua gave up on its proposed compensation claim, although compliance has been largely positive in other cases. A study concluded that ‘almost all of the Court’s decisions have achieved substantial, albeit imperfect, compliance’, stating that ‘the Court will remain a vital tool in resolving inter-state disputes’.<sup>53</sup>

However, ITLOS has a very detailed set of rules and procedures under the United Nations Convention on the Law of the Sea (UNCLOS), and the Statute of ITLOS. Articles (296) of UNCLOS, and (33) of the Statute of ITLOS, on the *finality and binding force of decisions* have identical clauses, which stipulate that ‘the decision of the Tribunal is final and shall be complied with by all parties to the dispute’, and stress that the decision is binding for state parties ‘in respect of that particular dispute’.<sup>54</sup> If the parties choose to settle the dispute through arbitration, then Article (11) of Annex VII on *arbitration* maintains that ‘the award shall be final and without

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<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*

<sup>52</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Judgment of 27 June 1986.

<sup>53</sup> Aloysius Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2007) *European Journal of International Law* 518.

<sup>54</sup> United Nations Convention on the Law of the Sea, and Annex VI Statute of ITLOS <[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf)> accessed 9 June 2016.



appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute'.<sup>55</sup>

With regard to *an ad hoc chamber*, Article (39) of the ITLOS Statute reads, 'the decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought'.<sup>56</sup> According to Article (25) of the ITLOS Statute, the tribunal has the full power to 'prescribe' interim measures to bring about effective finality to a dispute.<sup>57</sup> Article (290:5) of UNCLOS stipulates that ITLOS and the chamber have the power to 'prescribe, modify, or revoke provisional measures', and Article (290:6) reads: 'the parties to the dispute shall comply promptly with any provisional measures prescribed under this article'.<sup>58</sup> Concerning the award of compensation, UNCLOS Articles (235) and (263) stress 'the responsibility and liability' of states and competent international organizations to pay compensation for damages resulting from pollution of marine environment or research activities.<sup>59</sup> Furthermore, UNCLOS Articles (110) on *right of visit*, and (111) on *right of hot pursuit*, stipulate that when a state has stopped or arrested a ship on suspicion of illegal activities, and the suspicion turns out to be unfounded, it should compensate the ship 'for any loss or damage that may have been sustained'.<sup>60</sup> In the M/V "SAIGA" (No. 2) case, ITLOS awarded compensation because the respondent state, Guinea, was found to be responsible for unfairly stopping and arresting a Vincentian ship and detaining its crew.<sup>61</sup>

However, due to the option for the state party to settle the law of the sea dispute via arbitral tribunal or the ICJ, ITLOS has seen a notably small number of cases (25 since it began in 1996).<sup>62</sup> Compliance with ITLOS decisions has been achieved in 23 of those cases, despite delayed compliance in ongoing cases like *the Arctic Sunrise*.<sup>63</sup> In this case, the respondent state party, Russia, arrested a Dutch ship and detained its

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<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> The M/V "SAIGA" (No. 2) ITLOS Case (Saint Vincent and the Grenadines v. Guinea) 1 July 1999.

<sup>62</sup> ITLOS List of Cases <<https://www.itlos.org/en/cases/list-of-cases/>> accessed 9 June 2016.

<sup>63</sup> *ibid.*

crew, and refused to appear before ITLOS, denying its jurisdiction.<sup>64</sup> The ITLOS order, which was conditional upon the Dutch government posting a bank guarantee, stated that non-appearance ‘does not constitute a bar to the proceeding and does not exclude the Tribunal from proscribing provisional measures’.<sup>65</sup> Additionally, the order considered the Russian ‘*note verbale*’, where Russia claimed it has exercised its jurisdiction in accordance with UNSCOL, as ‘a basis on which the jurisdiction of the arbitral tribunal might be founded’.<sup>66</sup> The Dutch government posted the bond, Russia released the ship and its crew a month from the date of the order, and an arbitral award for damages is to be decided by the Permanent Court of Arbitration.<sup>67</sup>

Finally, ICSID, which was established in 1966 to settle investor-state and interstate disputes, is by far the most active dispute settlement body, in terms of caseload (with 372 concluded, and 214 pending disputes, totalling 586 disputes).<sup>68</sup> It is also the most active body in terms of issuing awards on compensation due to the nature of disputes between states and investors, which might implicate the state in direct infringement of the private ownership rights of foreign investors. For example, a dispute can arise because of governmental actions that ‘seize or cancel property rights owned by an investor; or change legislation or regulations, causing economic detriment to the investment protected by a *bilateral investment treaty* (BIT)’.<sup>69</sup> On the finality of judgment, Article (54) of the ICSID Convention explicitly maintains that:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were final judgment of a court in that state. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may

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<sup>64</sup> The Arctic Sunrise ITLOS Case (Kingdom of the Netherlands v. Russian Federation) Provisional Measures.

<sup>65</sup> Press Release The ‘Arctic Sunrise’ Case <[https://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR\\_205\\_E.pdf](https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_205_E.pdf)> accessed 9 June 2016.

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid.*; Steve Gutterman, ‘Russian Amnesty’ (19 December 2014) <<http://www.reuters.com/article/us-russia-greenpeace-amnesty-idUSBRE9BH0FO20131219>> accessed 9 June 2016.

<sup>68</sup> Settlements or discontinuances were reached in (161) disputes, the majority were discontinuances of the proceedings pursuant to ICSID Arbitration Rules (44 and 45). See ICSID Cases <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?>> accessed 10 June 2016.

<sup>69</sup> Jeswald Salacuse, *The Law of Investment Treaties* (2<sup>nd</sup> edn, Oxford University Press 2015) 393 (emphasis added).

provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.<sup>70</sup>

On arbitral awards, and of the 586 recorded disputes, 229 have the outcome status of ‘concluded’ and ‘award rendered by the Tribunal’.<sup>71</sup> Awards in investor-state arbitrations under the auspices of the ICSID tend to be very high; for example, the tribunal stipulated an award of US\$133.2 million against Argentina.<sup>72</sup> It is noteworthy that the purpose of the ICSID is to provide a procedurally fair dispute settlement mechanism for deciding an investor-state dispute, and ensuring adequate compensation to investors injured by the actions of the host state.<sup>73</sup>

Unlike the ICSID, the rules and procedures of other international courts and tribunals do not refer to the protection of private rights, as they decide on interstate disputes concerning legal interpretations or losses of a non-pecuniary nature. For example, writing on procedural fairness in WTO law, Carmody said that, ‘WTO law is not a body of law that places direct emphasis on fairness. Instead, its most immediate concern is the ‘equality of competitive conditions’. That concern is tied to the law’s general orientation as an order of obligations’.<sup>74</sup> This order of obligations is manifest in *the obligation of conformity*, which stipulates that a WTO member state shall ensure the conformity of its laws with its obligations under WTO law (WTO Agreement Article (XVI:4), DSU Articles (19:1) (22:1) and (22:8)).

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<sup>70</sup> ICSID Convention, Regulations and Rules  
<[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR_English-final.pdf)> accessed 10 June 2016.

<sup>71</sup> See ICSID Cases  
<<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?>> accessed 10 June 2016.

<sup>72</sup> *GMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8 (Final Award) (12 May 2005) (US-Argentina BIT).

<sup>73</sup> Compensating injured investors is a practice recognized in many BITs signed by states to protect their nationals, see Salacuse, *The Law of Investment Treaties* (n 69) 393,416-415; Onagh Sands, ‘Procedural Fairness in Investor-State Arbitration’ in Sarvarian and others, *Procedural Fairness in International Courts and Tribunals* (n 44) 293-310. Similarly, see the United Nations Convention on Contracts for the International Sale of Goods which provides precise rules on compensation, for instance, Article (74) stipulates that, ‘Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach’. See the UN CISG <<https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>> accessed 23 June 2016.

<sup>74</sup> Chios Carmody, ‘Fairness as Appropriateness: Some Reflections on Procedural Fairness in WTO Law’ in Sarvarian and others, *Procedural Fairness in International Courts and Tribunals* (n 44) 278 citing as examples of cases that have emphasized the ‘equality of competitive conditions’, (The Appellate Body Report, *Japan- Taxes on Alcoholic Beverages*, page 16, WT/DS8/AB/R, adopted 4 October 1996); (The Appellate Body Report, *Korea-Taxes on Alcoholic Beverages*, para. 120, WT/DS75/AB/R, 18 January 1999); (The Appellate Body Report, *Chile- Taxes on Alcoholic Beverages*, para. 54, WT/DS87/AB/R , adopted 13 December 1999).

WTO law emphasis on *the obligation of conformity* can explain why the WTO law do not have explicit rules and practices of compliance comparable to those of the tribunals discussed above. The WTO rulings are open to extended deadlines and compliance reviews, as argued in the introduction of this thesis and Chapter One on the reasonable period of time under DSU Article (21:3). Furthermore, it can be argued that the DSB's ruling on the consistency with WTO law, to merely recommend that the offending state brings its measures into conformity with its WTO obligations, and in the cases of noncompliance, authorize retaliation, do not amount to effective and fair judgments.

This is because the rules and procedures have no indication to finality of judgment or compensation for financial losses sustained because of procedural delay or delayed compliance. In fact, the DSU is silent on *provisional measures*, leaving traders without protection throughout proceedings. Unlike the ICJ rules, the DSU has *no rules on revision of judgments*, and the AB has *no authority to remand*, i.e. to send the case back to the trier of facts, the Panel. Overall, the DSB rules and procedures lack the weight to force compliance, and the current compliance deficit highlighted in the previous section, will assuredly affect developing member states' trust in the system. There is a need to theorize and conceptualize fairness in WTO law by reviewing the legal character of DSU, which is intended to serve and promote fairness in trade. In brief, from the above analysis, it is contradictory to designate the DSB a fully-fledged legal system, as it lacks legality in terms of law and implementation; thus, the case for evaluating its procedures and rules is compelling.

#### **4.4 The Applicability of the Principles of Legality to the WTO DSB:**

The relationship of reciprocity in the society of economic traders, according to Fuller, that shows the value of reciprocal obligations, best represents the morality of duty.<sup>75</sup> The history of international trade relations reflects this conception of obligation in the operation of the principles of reciprocity and non-discrimination. The optimal functioning of the principle of non-discrimination is under the authority of neutral adjudicators who treat like cases alike. As explained in the previous chapter, the '*progressive legalization*' of the world trading system has a long history

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<sup>75</sup> Fuller, *The Morality of Law* (n 1) 19-27.

that began with the founding principles of reciprocity and non-discrimination, applying the influence of the latter to the evolution of the dispute settlement system.<sup>76</sup> The phrase ‘rule orientation’ highlighting the responsibility of rule-makers to set the right balance between, to use Fuller’s terms, ‘supporting structure and adaptive fluidity’ was also key.<sup>77</sup> In other words, there needed to be a structure to provide *predictability and stability* that is conducive to *the marginal utility ideal*, i.e. the efficiency of economic activities. The role of law is to mediate between these two inherently economic ideals, while upholding the principles of procedural fairness and equality, while crucially minimising disputes.

Reasons have already been provided in the previous chapter about the interlinking between ‘shared understandings’ in the GATT and WTO, and adjudication as represented by the interdependency between the principles of reciprocity and non-discrimination. This established link supports the case for an innovative thinking that rely on a newer concept of law, the Fullerian concept, and international law, the interactionalism’s legality-centred elements, for answering this timely question: how can compliance with WTO law be improved in light of the procedural, textual, and organizational defects that the DSB currently faces? According to interactionalism, law is distinguished from non-law by the adherence to Fuller’s principles of legality, and once legality has been substantially satisfied, it has to be practised, internalised, and supported by a community of concerned actors.<sup>78</sup> With references to a rich record of trade negotiations, the GATT/WTO norms had been made (and continue to be made in the case of evolving WTO agreements such as the Technical Barriers to Trade (TBT)) largely in accordance with the constructivist account of norm-making. Trade norms are being advocated by entrepreneurs, i.e. individuals, organizations and states, supported by the knowledge produced by epistemic community of experts, and finally embraced by a community of practice of states.<sup>79</sup> Variation in

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<sup>76</sup> Ernst-Ulrich Petersmann, ‘The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public Reason’ in the GATT/WTO Dispute Settlement System’ in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in The Multilateral Trading System* (Cambridge University Press 2015) 182 (hereinafter, The GATT Legal Office).

<sup>77</sup> Fuller, *The Morality of Law* (n 1) 29; John Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs 1998) 61.

<sup>78</sup> Brunnée and Toope, *An Interactional Account* (n 8) 96.

<sup>79</sup> *ibid* 60-64. According to Haas, an epistemic community is ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.’ see Peter Haas, ‘Epistemic Communities and International Policy Coordination’ (1992) *International Organization* 1; Lisa Toohey, ‘Accession as

this formula exists in relation to specific agreements, and member states lack of understanding these agreements, but still the constructivist account is the most accurate of norms' formation, and the WTO Committees continue to play a crucial role in norms formation and facilitation.

However, one important issue that had been realised in the GATT years, and is a source of attention under the WTO is the role of the dispute settlement mechanism in upholding the non-discrimination standard. Recognizing the importance of this mechanism was not accidental, as the development of the principle of non-discrimination testifies that only impartial working parties or adjudicators, not consenting states, should distinguish between discriminatory and non-discriminatory treatment. The history of trade relations, the expansion of trading states membership and trade agenda required the progressive legalization of the GATT dispute settlement system that eventually led to the establishment of the WTO DSB. Furthermore, this need for an adjustment mechanism to supervise reciprocal trade obligations, and decide on discrimination related disputes are supported by Fuller's jurisprudence. In the morality of law and other publications that were mainly influenced by the economics of trade, Fuller maintains his position that 'economic freedom cannot be fully discussed in isolation from the specific mechanisms or procedures by which (...) freedom to choose is allocated and conflicting choices are reciprocally adjusted'.<sup>80</sup>

Fuller defines adjudication as 'a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favour'.<sup>81</sup> This participation has to be 'institutionally guaranteed', and the adjudicators' task of interpreting collective bargaining agreements, '*is not to bend the dispute to the agreement, but to bend the agreement to the unfolding needs of industrial [commercial] life*'.<sup>82</sup> The organization by reciprocity and common aims, which Fuller embraces for deconstructing the concept of freedom, is epitomized by the WTO purpose. Additionally, Fuller's elaboration on the task of interpreting 'collective bargaining agreements' like trade agreements,

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Dialogue: Epistemic Communities and the World Trade Organization' (2014) *Leiden Journal of International Law* 397.

<sup>80</sup> Lon Fuller, 'Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom through Law"' (1954) *Columbia Law Review* 70.

<sup>81</sup> Lon Fuller, 'Collective Bargaining and the Arbitrator' (1963) *Wisconsin Law Review* 3.

<sup>82</sup> *ibid* (emphasis added).

with due regard to ‘the commercial stability and predictability’, is illuminating for the WTO, as it is supported by its mission statement.<sup>83</sup>

As a further step to linking Fuller’s informative jurisprudence to the WTO, this section will apply the inner morality of law criteria, or what he interchangeably called ‘the principles of legality’, to adjudication in the WTO context. As will be argued below, this linkage will be conducive for exploring the ideal of procedural fairness which the WTO DSB is meant to uphold.<sup>84</sup> Using the fictional character of hapless King Rex, Fuller speaks of ‘*eight ways to fail to make a law*’.<sup>85</sup> These practices then contradict the following eight constitutive elements of legality, namely, using Kenneth Winston’s terminology:

1. Generality: there must be rules;
2. Publicity: the rules must be made available to those expected to comply with them;
3. Clarity: the rules must be understandable or intelligible to legal subjects;
4. Prospectivity: the rules must typically be enacted and promulgated prior to the time when compliance is expected, hence not retroactive;
5. Noncontradiction: the rules must not require conflicting actions;
6. Conformability: the rules must not require actions that are impossible to perform;
7. Stability: the rules must remain relatively constant over time; and
8. Congruence: the rules promulgated by the lawmaker must be the rules actually administered and enforced.<sup>86</sup>

The consequence of failing to observe these elements *simultaneously*, is that when the bond of reciprocity between the lawgiver, and the law-subjects, with respect to the observance of rules, is ‘‘ruptured’ by [lawgiver], nothing is left on which to

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<sup>83</sup> See the panel that adopted a clear purposive interpretation that recognizes that ‘Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.’ (Panel Report, United States-Sections 301-310 of the Trade Act of 1974, para 7.73, WT/DS152/R, adopted 22 December 1999).

<sup>84</sup> On procedural fairness Sarvarian said, ‘As Vaughan Lowe underlines, fairness in international law is not something instrumental to law or derivative from it, but something that lies outside of the framework of positive law. The ‘elemental fairness’ comes very close to Lon Fuller’s ‘inner morality of law’ and represents the near-intuitive sense of fairness that leads to crystallisation of its basic components in specific international legal and juridical framework’, see Arman Sarvarian, ‘Procedural Fairness in International Courts and Tribunals’ in Arman Sarvarian and others, *Procedural Fairness in International Courts and Tribunals* (n 44) 6 citing Vaughan Lowe, *International Law* (Oxford University Press 2007) 98, and Fuller, *The Morality of Law* (n 1).

<sup>85</sup> Fuller, *The Morality of Law* (n 1) 33-34 (emphasis added).

<sup>86</sup> Kenneth Winston, ‘The Internal Morality of Chinese Legalism’ (2005) *Singapore Journal of Legal Studies* 313.

ground the [law-subject's] duty to observe the rules'.<sup>87</sup> The word *simultaneously* can be used here not to indicate that there should be a hierarchy in observing the principles, but to highlight the principle of *constancy*. The lawgiver, King Rex, efforts to make the law *general, promulgated, prospective, clear, non-contradictory, and possible to comply with*, have failed as 'the substance of the code has been seriously overtaken by events [leading to] a daily stream of amendments'.<sup>88</sup> Frequent changes have deprived the law-subjects of sufficient time 'for adjustment to the new state of the law'.<sup>89</sup> This means a failure to simultaneously observe one principle; for example, *constancy*, will violate the other principles.

However, Fuller notes that, with the exception of *promulgation*, these principles are largely *an aspirational ideal*. He explained, the inner morality of law 'suggest[s] eight distinct standards by which excellence in legality may be tested [it is] condemned to remain largely a morality of aspiration and not of duty. Its primary appeal is to a sense of trusteeship and the pride of craftsman'.<sup>90</sup> For this reason, he associates these principles with the morality of aspiration, to demonstrate that they compromise 'a moral ideal that is internal to the concept of law'.<sup>91</sup> Nonetheless, he notes the exception that *promulgation* 'lends itself with unusual readiness to formalization', because this desideratum can be pursued as an aspirational ideal, but has to be legally required as a formalized standard for law making.<sup>92</sup> In other words, *promulgation*, and it can also be inferred, that the *congruence between formulation and implementation*, are non-derogable principles. Following on from the simultaneous and aspirational ideal, it should be emphasised that only the complete failure to observe one of these principles, 'can result in a failure to make law'.<sup>93</sup> For example, a law that is kept in complete secrecy, or makes unrealistic demands, or

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<sup>87</sup> Fuller, *The Morality of Law* (n 1) 39 citing section 4 'Interaction in the Idea of Law' in Kurt Wolff (trs, and ed), *The Sociology of Georg Simmel* (The Free Press 1950) 186-189. (Emphasis added). See Lon Fuller, 'Human Interaction and the Law' (1969) *American Journal of Jurisprudence* 1

<sup>88</sup> Fuller, *The Morality of Law* (n 1) 37.

<sup>89</sup> *ibid* 80.

<sup>90</sup> *ibid* 41-43, 62 (emphasis added).

<sup>91</sup> Nigel Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (4th edn, Sweet & Maxwell 2013) 256.

<sup>92</sup> Fuller, *The Morality of Law* (n 1) 43.

<sup>93</sup> See Robert Moffat, 'Fuller, Lon L. (1902-1978)' in Christopher Gray (ed), *The Philosophy of Law: An Encyclopedia* (Routledge 2013) 321; Fuller, *The Morality of Law* (n 1) 39.



the application of which is contrary to its original purpose, is not a genuine law worthy of compliance; in Fuller's terms, it will not inspire '*fidelity*'.<sup>94</sup>

However, interaction in the idea of law is derived from the fundamental reciprocal relationship between lawgiver and law-subject, with respect to the observance of rules.<sup>95</sup> The notion of obligation, according to Fuller, is traced to the principle of reciprocity, which guides the relationship of exchange in a society of economic traders.<sup>96</sup> Both customary law and contract law, in so far as they have positive bearing on the evolution of international trade law, are best treated as 'interactional phenomena' dependent on the development of 'stable interactional expectancies' between lawgiver and subject.<sup>97</sup> Law as perceived through 'interaction' should continue to facilitate '*an interplay of reciprocal expectancies*', and not impose itself by '*an exercise of authority*'.<sup>98</sup> Nevertheless, the relationship of exchange, which depends on fidelity to contract and ensure respect for property must always be balanced with 'the marginal utility' ideal, because if the contract and property rules become too rigid and restrictive then utility will be frustrated, and the regime of exchange will collapse.<sup>99</sup> This is clearly visible in legalist versus anti-legalist scholars' accounts of WTO law, in which legalists defend the economic counterpart to the morality of duty, the reciprocal obligations, while the anti-legalists defend the economic counterpart of the morality of aspiration, the marginal utility.<sup>100</sup>

However, Fuller's point involves highlighting the need to set the right balance between aspiration and duty in economic regulation, which is again to highlight the notion of balance in pursuing the inner morality of law criteria to perfection. Additionally, the principles of legality, he argued, 'constitute a special morality of

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<sup>94</sup> Fuller, *The Morality of Law* (n 1) 39-41. Fuller says 'the fidelity to Law can become impossible if we don't accept the broader responsibilities (themselves purposive, as all responsibilities are and must be) that go with a purposive interpretation of law'. See Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) *Harvard Law Review* 630.

<sup>95</sup> See Wolff, 'Interaction in the Idea of Law' (n 87) 187.

<sup>96</sup> Fuller, *The Morality of Law* (n 1) 22-24.

<sup>97</sup> Fuller, 'Human Interaction and the Law' (n 87).

<sup>98</sup> *ibid* (emphasis added).

<sup>99</sup> Fuller, *The Morality of Law* (n 1) 28.

<sup>100</sup> John H. Jackson, 'Editorial Comment: International Law Status of WTO DS Reports: Obligation to Comply or Option to "Buy Out"?' (2004) *American Journal of International Law* 109 (hereinafter *The Editorial Comment*); Warren Schwartz and Alan Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System' (2002) *Journal of Legal Studies* 170. On the importance of having the right balance between 'norms of aspiration' and 'norms of duty' in trade agreements see John Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill Company 1969) 761-762.

role attaching to the office of law-maker and law-administrator'.<sup>101</sup> However, the tasks of economic allocation cannot be performed, not only by adjudication, but also by economists and managers' prudent management of resources.

Under the heading, 'legal morality and the allocation of economic resources', Fuller maintains:

When we attempt to discharge tasks of economic management through adjudicative forms there is a serious mismatch between the procedure adopted and the problem to be solved [...] tasks of economic allocation cannot be effectively performed within the limits set by the internal morality of law. The attempt to accomplish such tasks through adjudicative forms is certain to result in inefficiency, hypocrisy, moral confusion, and frustration.<sup>102</sup>

Therefore, applying laws that meet these principles through adjudication for 'allocative tasks' like economic management will be ineffective.<sup>103</sup> The above summary is illuminating for the WTO with its primary allocative task of administration, and secondary task of adjudication. However, before connecting the Fullerian principles to the WTO, it is helpful to provide a brief account of the applicability of these principles to international dispute resolution. After all the WTO law is an integral part of public international law, as it has to adhere to the international treaty rules of law-making and interpretation. The principles of legality were invoked once in relation to international dispute resolution, in what amounts to a series of commentaries, prompted by Schultz's article.<sup>104</sup> Schultz relied on Fuller's principles, viewing them as analogous to a certain conception of the rule of law, as a means to illustrate the procedural justice that a system of international arbitration is intended to represent. Schultz explains that the Fullerian understanding of the concept of law based on the inner morality of law criteria is:

A device for expressing the necessary- though not always sufficient- conditions of regulative quality that every arbitral regime must follow in

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<sup>101</sup> Fuller, *The Morality of Law* (n 1) 209.

<sup>102</sup> *ibid* 172-173.

<sup>103</sup> *ibid* 171.

<sup>104</sup> Thomas Schultz, 'The Concept of Law in Transnational Arbitral Legal Order and some of its Consequences' (2011) *Journal of International Dispute Settlement* 59; Ralf Michaels, 'A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution-A Reply to Thomas Schultz' (2011) *Journal of International Dispute Settlement* 417; Peer Zumbansen, 'Debating Autonomy and Procedural Justice: The *Lex Mercatoria* in the Context of Global Governance Debates- A Reply to Thomas Schultz' (2011) *Journal of International Dispute Settlement* 427.

order to be considered procedurally just, and thus to deserve the label of law, with all of its attendant rhetorical consequences'.<sup>105</sup>

This claim was reiterated and supported by Michaels who offered more jurisprudential insights into the transnational dispute resolution, drawing on Fuller's writings on customary law, and the proper function of adjudication.<sup>106</sup> And the final comment came from Zumbansen who embraces the Fullerian principles of procedural justice, but added fresh reflections on political, and democratic theories of law and legitimacy to connect these principles to 'the global administrative law'.<sup>107</sup> Although, applied to test the legality of an international arbitral system, and subsequently endorsed by experts in this field, Fuller's account of the rule of law can be equally and usefully applied to the WTO DSB, because the WTO dispute settlement system involves arbitration, and requires the same regulative qualities of procedural justice and autonomy. Thus, the applicability of the Fullerian principles to the international arbitration supports its application to the WTO DSB.

Nevertheless, Schultz was selective when chosen which principle of legality to apply to international dispute resolution, by ruling out the principle of *conformability* or *feasibility*, or what he endorsed as 'compliability'.<sup>108</sup> Schultz's justification for dismissing this principle was that it speaks of a substantial condition of legality, as 'it relates to both the precise contents of the rules and the concrete abilities of their addressees [hence its fulfilment] does not depend on procedural qualities of regulative system'.<sup>109</sup> This preclusion poses a problem for three reasons. Firstly, it should be recalled that a complete failure to observe one principle, for example, so-called *compliability*, results in a failed law. According to Fuller, 'infringements of legal morality tend to become cumulative', for instance, 'carelessness about keeping the laws possible of obedience may engender the need for a discretionary enforcement which in turn impairs the congruence between official action and enacted rules'.<sup>110</sup> The procedures and rules that comprise a dispute settlement system must endeavour to make realistic demands, to ensure compliance with the concerned

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<sup>105</sup> Schultz (n 104) citing MH Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2007) 185.

<sup>106</sup> Michaels (n 104).

<sup>107</sup> Zumbansen (n 104).

<sup>108</sup> Schultz (n 104).

<sup>109</sup> *ibid* (emphasis added).

<sup>110</sup> Fuller, *The Morality of Law* (n 1) 92.

agreement(s), and rulings of the dispute settlement body. Secondly, from the above summary of the principles, and the attempt to apply them to the DSB, ‘compliance’ can be both a procedural and substantial condition.

To illustrate; according to the DSU Article (3:3), the DSB has to always subject its rulings to the requirement of ‘prompt settlement’, and that is ‘essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members’. This implies that both the interpretation of rules and the phraseology of rulings have to ensure the prompt compliance of the concerned member states. The *compliance* can also be a procedural condition by virtue of the subject matter of the dispute that requires accelerated settlement, as illustrated by the DSU requirement of faster settlement of disputes which concern perishable goods. Thirdly, as will be demonstrated by the application of this principle to the DSB below, consideration of *compliance* also includes the crucial issue of ‘legal capacity for obedience’, and understandings of the implications of this issue on the on-going progressive legalization of world trade law.<sup>111</sup> There are persistent concerns that because of capacity limitations, many developing and least-developing countries in the WTO struggle to participate effectively in the dispute settlement system.<sup>112</sup> Therefore, all of the principles of legality are applicable in the case of a dispute settlement system because of their inseparability, and the procedural and substantial characteristics they share.<sup>113</sup>

However, there are two major reasons for the applicability of the principles of legality to the adjudication of GATT/WTO rule. First, regarding the adherence to the principle of constancy, the GATT/WTO rules have been reasonably stable for a very long time (the focus of too many disputes, the GATT rules, have not been reformed for over seventy years), hence the law is lacking fundamental reforms to cater for economic, political, social, and institutional changes. The consensus, and the single undertaking rules, *nothing is agreed until everything is agreed*, have led to continuous negotiation debacles, making reciprocal bargaining in the shadow of an

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<sup>111</sup> *ibid* 73; Marc Busch, Eric Reinhardt, and Gregory Shaffer, ‘Does Legal Capacity Matter? A Survey of WTO Members’ (2009) *World Trade Review* 559.

<sup>112</sup> See Chad Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution 2009) (hereinafter *Self-enforcing Trade*); Chad Bown and Bernard Hoekman, ‘Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is not Enough’ (2008) *Journal of World Trade* 177.

<sup>113</sup> See David Luban, ‘The Rule of Law and Human Dignity: Re-examining Fuller’s Canons’ (2010) *Hague Journal of the Rule of Law* 29.

outdated WTO law. The requirement that *the law must not change too rapidly* does not mean that it should not be changed at all, because uncertainty can result from norms that lack clarity and consistency. Second, it can be deduced from Fuller's remarks on the ineptitude when using adjudicative forms for allocative tasks, that adjudication procedures and rules that meet the inner morality of law criteria are unsuited for economic allocation. This issue relates to aforementioned problem of overuse of one WTO function at the expense of other function(s).

Institutional design, for Fuller, has to be perceived as 'a problem of economising', where economic managers execute their jobs with skills and prudence, trying to sit the right balance between aspiration and duty in economic regulation.<sup>114</sup> Adjudication alone cannot perform satisfactorily as an allocative task, as it is limited by declared rules and procedures that only affirm the rights and obligations of the members of the society of economic traders. Further, as Fuller notes, adjudication, 'is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources'.<sup>115</sup> For instance, the purpose of the WTO dispute settlement system is to ensure the free flow of trade, by instructing the offending state to withdraw the market distorting measure(s); hence, it plays a role in trade liberalization. However, it has to be emphasised that the significance of the role of interactional law within the WTO institutions, when shaping member states' behaviours exceeds that of adjudication. After examining the operation of the WTO Agreement on Sanitary and Phyto-sanitary Measures (SPS) through members' constant *interactions* for setting standards and even settling disputes, Wolfe said:

The simple existence of courts (like the WTO dispute settlement) does not prove that *the* or a *rule of law* exists. Actors, including states officials, can be *governed by law* without needing courts. To speak of the role of adjudication in the 'enforcement' of 'binding' rules obscures what the WTO actually does in helping to provide transparency, consensual knowledge, and legitimation for the regime.<sup>116</sup>

It is noteworthy, therefore, that interactional law between economic traders existed prior to the WTO, and will continue to exist for generations regardless of its continuance. Furthermore, the remedy of the last resort for breaching the

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<sup>114</sup> Fuller, *The Morality of Law* (n 1) 178-181.

<sup>115</sup> *ibid* 176.

<sup>116</sup> Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading Regime' (n 8) (emphasis added); Gregory Shaffer and others, 'Can Informal Law Discipline Subsidies?' (2015) *Journal of International Economic Law* 711; Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance' (2009) *European Journal of International Law* 575.

GATT/WTO rules, ‘suspending concessions or other obligations under the covered agreements’, (DSU Article (22:2)), the so-called retaliation, can be seen as undoing the benefits of trade liberalization. For example, arguing against this remedy as an apt compliance strategy, Charnovitz says:

It is somewhat ironic that the trading system, which ostensibly favours trade, is so willing to undo the benefits of trade through authorised retaliation. No other regime would take such self-contradictory action: for example, the World Health Organization does not threaten to spread disease.<sup>117</sup>

This is also added to the growing problem that WTO member states are increasingly forming Preferential Trade Agreements (PTAs) that are not effectively scrutinised by the WTO for upholding the non-discrimination standard.<sup>118</sup> For this major reason, it is unclear whether a PTA is complementary to, or negatively competing with WTO law.<sup>119</sup> Moreover, a recent study found that ‘WTO disputes do not, on average, increase a country’s imports of the products at issue’, saying that only by, ‘looking at particular dispute outcomes and issue areas, [that] certain types of disputes have been associated with increased trade, and many have resulted in decreases’.<sup>120</sup> Both the negotiation fiascos, and the overuse of the WTO DSB have provided unhospitable environment where the compliance strategy is outdated, and PTAs allegedly violate the non-discrimination principle *unchecked*. This clearly supports Fuller’s argument, that adjudication alone cannot perform all of the functions of an economic institution, like the WTO, because there has to be an adjustment of ‘the

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<sup>117</sup> Steve Charnovitz, *The Path of World Trade Law in the 21st Century* (World Scientific 2014) xi.

<sup>118</sup> Once notified to the WTO, PTAs are only subject to the Transparency Mechanism for PTAs that organizes the Committee on Trade and Development, Committee on Regional Trade Agreements (CRTA), and WTO Secretariat’s monitoring schemes. However, according to CRTA ‘no examination report by the CRTA has been finalized since 1995 because of lack of consensus’, and only one case relating to PTA consistency with WTO law was reviewed by the DSB: (Turkey-Restriction on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted 22 October 1999). See Work of the Committee on Regional Trade Agreements <[https://www.wto.org/english/tratop\\_e/region\\_e/regcom\\_e.htm](https://www.wto.org/english/tratop_e/region_e/regcom_e.htm)> accessed 29 December 2015; Petros Mavroidis, and Bernard Hoekman, ‘WTO ‘a la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements’ (2015) *European Journal of International Law* 319; Michael Trebilcock, *Advanced Introduction to International Trade Law* (revised edn, Edward Elgar Publishing 2015) 45-52.

<sup>119</sup> See Adrian Johnston and Michael Trebilcock, ‘The Proliferation of Preferential Trade Agreements: The Beginning of the End of the Multilateral Trading System’ in Rainer Hofmans and others (eds), *Preferential Trade and Investment Agreements from Recalibration to Reintegration* (Baden-Baden: Nomos 2013).

<sup>120</sup> Stephen Chaudion and others, ‘Do WTO Disputes Actually Increase Trade?’ (2016) *International Studies Quarterly* 1.

institutional design of administrative agencies to the economic tasks assigned to them'.<sup>121</sup>

One crucial point to note here is that when discussing adjudication, Fuller is mainly concerned with, 'the problem of finding the most apt institutional design for governmental control over the economy'<sup>122</sup>. Thus, his focus was primarily national; although it can be inferred easily from his thesis's acknowledgment of international law, and his other writings where he praised international adjudication, and called for an adjustment mechanism for economic freedoms, that he would also have endorsed the WTO DSB.<sup>123</sup> Such endorsement would be subject to two guarantees: A) adjudication has to be an accessible social process for all those who are affected by its rules and rulings, b) it should not perform the administrative tasks of economic allocation.<sup>124</sup> For example, he noted the problem of adjudication limiting individual freedoms by defining and restricting the litigant's participation, hence giving a decision without full understanding the litigant's situation.<sup>125</sup> Fuller recognizes that adjudication, 'includes adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission, as in labor relations and international law'.<sup>126</sup>

Nonetheless, he had always noted the problem of assigning allocative tasks that are not suited for adjudication, but for legislative or administrative bodies. This is illuminating for this chapter, since the WTO DSB is burdened with a large number of unsettled disputes, and despite this lack of efficacy, it legislates rather than adjudicate issues of law. Furthermore, the competitive nature of international economic activities requires a strict enforcement of non-discrimination rules to ensure stability and predictability for economic operators. This clearly supports the role of the DSB in enforcing GATT/WTO rules to uphold 'the external morality of law' principles of fairness and justice. This Fullerian designation of the external morality of law would not be respected without adjudication. Therefore, examining

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<sup>121</sup> Fuller, *The Morality of Law* (n 1) 174.

<sup>122</sup> *ibid* 175.

<sup>123</sup> *ibid* 232-234, 236-237; Fuller, 'Some Reflections on Legal and Economic Freedoms' (n 80); Fuller, 'The Forms and Limits of Adjudication' (n 10).

<sup>124</sup> *ibid*.

<sup>125</sup> Lon Fuller, 'Freedom: A Suggested Analysis' (1955) *Harvard Law Review* 1305.

<sup>126</sup> Fuller, 'The Forms and Limits of Adjudication' (n 10).

the WTO DSB procedures and rules is important to evaluate the DSB in terms of its legality, and perceived legitimacy as an impartial arbiter.

#### **4.5 The DSU and the Principles of Legality:**

The DSU contains the WTO dispute settlement system's rules and procedures, and unlike the GATT settlement procedures, it sets out elaborate rules and a timeframe. The DSU is supported by a Code of Conduct for the officials of the DSB, which its *governing principle* stresses that 'each persons covered by these Rules shall be independent and impartial'.<sup>127</sup> The system was expected to be reviewed after five years of operation, by 1<sup>st</sup> of January 1999, but member states kept extending the deadline with no prospect for concluding negotiations. Since the proposed review of the system is dependent on the successful conclusion of the 2001 DDR, 'the improvements and clarifications' of the DSU are tied to the WTO overcoming this negotiation stalemate.<sup>128</sup> The legality, as well as the legitimacy of this system depends largely on its ability to force compliance with the GATT/WTO rules, by ensuring timely and effective settlements.

According to Bradford, 'the best argument for the continuing relevance of the WTO stems from its internationally unique ability to enforce legally binding commitments'.<sup>129</sup> Thus, the diminishing ability of the WTO to ensure compliance will constitute a danger to the predictability and stability of the world trading system. Notably, the DSB was founded to uphold the ideal of fairness in trade relations. Notwithstanding the WTO negotiation impasse on institutional reforms, the absence of standards for testing the legality of DSU is very prevalent in the

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<sup>127</sup> The Rules of Conduct were supposed to be reviewed within two years of their adoption (11 December 1996) see Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes <[https://www.wto.org/english/tratop\\_e/dispu\\_e/rc\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm)> accessed 24 May 2016. The Rules came under the spotlight after they were cited in an open letter of 13 former AB members concerning the recent AB member reappointment saga. The members underscore the Rule of Conduct's clause on 'impartial independence' saying it is 'essential to uphold the rule of law in international trade; moreover, we see it as a prerequisite to providing security and predictability for the rule-based multilateral trading system', see Former Appellate Body Judges Open Letter, (31 May 2016) <<http://worldtradelaw.typepad.com/files/abletter.pdf>> accessed 2 June 2016. See Gregory Shaffer and others, 'The US is causing a Major Controversy in the World Trade Organization' *The Washington Post* (Washington, 6 June 2016).

<sup>128</sup> This seems unlikely to happen as in the Tenth WTO Ministerial Conference in Nairobi, the WTO has in effect abandoned its developmental goals under the DDR and concentrated on narrowly-focused negotiations. See Shawn Donnan, 'Trade Talks Lead to 'Death of Doha and Birth of New WTO'' *Financial Times* (London, 20 December 2015).

<sup>129</sup> Anu Bradford, 'When the WTO Works and How It Fails' (2010) *Virginia Journal of International Law* 1.



WTO member states and scholars' proposed amendments to the DSU.<sup>130</sup> Current proposals focus on improving existing procedures, or introducing new procedures; for example by, 'enhancing third party rights, and introducing an interim review and 'remand' (referring a case back to a panel) at the appeal phase'.<sup>131</sup> However, there appears to be two proposals from members that directly address the need to amending the text, the first is from Mexico and calls for retroactive remedies to address the three years procedural delay from the time the measure was alleged to be WTO-inconsistent until the dispute reach countermeasures phase.<sup>132</sup>

The second proposal was by Japan (the only developed country to have submitted a revision report) and addresses the vagueness of compliance rules, and proposed amendments to the DSU including the insertion of Article (21*bis*) on 'determination of compliance'.<sup>133</sup> Aside from these proposals, there has been no proposal to amend the DSU in accordance with agreed-upon standards of legality, nor have the WTO Secretariats proposed, or facilitated proposals for such amendments. Nevertheless, proposals from experts advance legality-related issues that include the need for greater transparency, the GATT/WTO rules have 'direct effect', and strengthening the non-compliance remedies, while having due regard for disputes involving developing members.<sup>134</sup> Nonetheless, scholars who propose retrenching the dispute

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<sup>130</sup> See Dencho Georgiev, Stephen Kho, and Amy Dwyer, 'Should the WTO Dispute Settlement System be Modified or Reformed' (2006) An American Society of International Law Centennial Regional Meeting <[http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1005&context=rusk\\_oc](http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1005&context=rusk_oc)> accessed 12 April 2016; (Dispute Settlement Body-Special Session- Negotiations on the Dispute Settlement Understandings, proposals on DSU by India and other countries, TN/DS/W/18, 7 October 2002); Cancun WTO Ministerial 2003 Briefing Notes- Dispute Settlement: Force of Argument, not Argument of Force <[https://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/brief\\_e/brief13\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief13_e.htm)> accessed 3 December 2015.

<sup>131</sup> *ibid.*

<sup>132</sup> (Dispute Settlement Body- Special Session- Negotiations on Improvements and Clarifications of Dispute Settlement Understanding, Proposal by Mexico, page 3, TN/DS/W/23, 4 November 2002) in The World Trade Organization Documents <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S001.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx)> accessed 3rd December 2015 (hereinafter The WTO Documents Website).

<sup>133</sup> (Dispute Settlement Body-Special Session- Amendment of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Proposal by Japan, TN/DS/W/32, 22 January 2003) the Japanese proposed amendment for DSU Article 21 is under Appendix A; (Proposal by Ecuador, TN/DS/W/33, 23 January 2003) in The WTO Documents Website (n 132).

<sup>134</sup> Report by the Consultative Board to the Director-General Supachai Panitchakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (World Trade Organization 2004) 80-81; (Report by the Chairman, Ambassador Ronald Saborio Soto, to the Trade Negotiations Committee, TN/DS/25, 12 April 2011). See Dencho Georgiev and Kim Van der Borgh (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May 2006).

settlement system, the anti-legalists, acknowledge the power of the DSB has grown substantially, ‘relative to the political decision-making organs of the WTO’; hence, noncompliance should be permitted.<sup>135</sup> However, some of these proposals have mistaken legality as providing either an open authoritative court system, or merely a balance between the political organs of the WTO, regardless of the WTO legislative role.

Overall, the above incomplete proposals further support the argument to employ Fuller’s principles of legality to elucidate the rules and procedures of the DSB, and the WTO aim of *fidelity* to the law. Still, the question here remains: why should the legality of the DSB be scrutinised in accordance with the principles of legality? Three reasons necessitate the research into the legal and procedural validity criteria for the DSB. The first reason is the undetermined legality status of the WTO dispute settlement system in view of the absence of explicit binding terms in the DSU. This absence has prompted the anti-legalist scholars to declare that both the DSB rules, rulings, and recommendations are mere formalities that can be breached in pursuit of welfarist objectives.<sup>136</sup> Legality in the WTO context has been grossly misconceived as merely the authority of the DSB to enforce its settlement reports, and assure some members’ compliance with its findings. What is at the heart of Fuller’s notion of legality is his high regard for ‘interaction’, perceiving legality as an interactional process of law-making that involves practices that correspond with the purpose of the law. After adopting Fuller’s notion of law with the aim of deconstructing the WTO legality, Wolfe said:

It is not helpful to define WTO law in terms of its texts, and its evolution in terms of disputes, for that is to define the thing by breaches not by adherence to its normative order. A stable prosperous world is one in which law enables the agency of individuals and collectivities, including states. In this view of law as plural, implicit and pervasive, any formal dispute settlement system only plays a small, if important, part in the maintenance of a rule of law. The WTO exists to facilitate diffuse

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<sup>135</sup> See Trebilcock, *Advanced Introduction to International Trade Law* (n 118) 29-30; Claude Barfield, ‘Should the WTO Determine US Tax Policy?’ (7 July 2004) <<https://www.aei.org/publication/should-the-wto-determine-u-s-tax-policy/>> accessed 18 December 2012.

<sup>136</sup> Eric Posner and Alan Sykes, ‘Efficient Breach of International Law: Optimal Remedies “Legalised Noncompliance” and Related Issues’ (2011) *Michigan Law Review* 243; Schwartz and Sykes, (n 100).

everyday interaction in the trading system and not to issue liberalization edicts from Geneva.<sup>137</sup>

The second reason for requiring precise procedural criteria is the functioning of the DSB system itself which shows unclear mixed messages about its effectiveness, while continuously failing to live up to the standards of timely and quality judgments.<sup>138</sup> The third reason is the persistent challenge of interpreting WTO and non-WTO law. The large number of cases cited in WTO judgments evidences the existence not of a precedent system but a 'precedential effect'.<sup>139</sup> Additionally, the AB has been criticised for its unconstrained judicial activism that goes beyond adjudicating rules and deciding on issues of law.<sup>140</sup> For example, DSU Article (21:5) concerning compliance procedure, 'may be abused to undermine the finality and certainty of rulings, extending or even expanding the dispute instead of resolving it'.<sup>141</sup> According to Kelly, judicial activism at the WTO contradicts the economic developmental goals of the WTO because it is 'the wrong process for developing social regulatory policy'.<sup>142</sup> The problems of excessive adherence to legalism, and lack of dissenting opinions have been voiced by developing WTO member states who have said, 'the panels and the Appellate Body have displayed an excessively

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<sup>137</sup> Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (n 8).

<sup>138</sup> William Davey, 'Compliance Problems in the WTO Dispute Settlement' (2009) *Cornell International Law Journal* 119; Marc Busch and Eric Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes' (2000) *Fordham International Law Journal* 158.

<sup>139</sup> John Jackson, *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press 2007) 127.

<sup>140</sup> See Michael Lennard, 'Navigating by Stars. Interpreting the WTO Agreements' (2002) *Journal of International Economic Law* 17; James Cohee, 'The WTO and Domestic Political Disquiet: Has Legalization of the Global Trade Regime Gone Too Far?' (2008) *Indiana Journal of Global Legal Studies* 351, citing as an example of judicial activism (The Appellate Body Report, Argentina-Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted 12 January 2000). See the recent AB saga where the US blocked (for the second time) the reappointment of an AB judge because of judicial activism. See Gregory Shaffer, 'Will the US Undermine the World Trade Organization?' (23 May 2016) <<http://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the-b-10108970.html>> accessed 24 May 2016.

<sup>141</sup> Robert Howse, 'The Tuna/Dolphin Appellate Body 21.5 Ruling: A Decision that could Threaten the Integrity and Efficiency of WTO Dispute Settlement' (24 November 2015) <<http://worldtradelaw.typepad.com/ielpblog/2015/11/the-tunadolphin-appellate-body-215-ruling-a-decision-that-could-threaten-the-integrity-and-efficiency-of-wto-dispute-settl.html>> accessed 27 November 2015.

<sup>142</sup> J. Patrick Kelly, 'Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint' (2002) *Northwestern Journal of International Law and Business* 353 citing as examples of judicial activism: (The Appellate Body Report, EC- Regimes for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997); (The Appellate Body Report, EC- Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, adopted 16 January 1998); (The Appellate Body Report, US-Import Prohibition of Certain Shrimp and Shrimp Product, WT/DS58/AB/R, adopted 12 October 1998).

sanitized concern with legalisms, often to the detriment of the evolution of a development-friendly jurisprudence'.<sup>143</sup> The social process to address developmental concerns can only be performed through the WTO negotiation function, where social issues and disparity between economic powers can be recognised and respected.

Following from this point on the role of interpretation, Klabbers argued that Fuller's principles of legality are neutral for 'addressing substantive validity without invoking universal values', and they offer sufficient 'standard for law-making' that is applicable to formal and informal standard-settings.<sup>144</sup> Klabber's general point for invoking Fuller is to highlight the confusion surrounding the international law sources doctrine. Unlike Hart's rule of recognition, or Kelsen's 'Grundnorm', i.e. the basic norm, Fuller's principles are sufficient criteria for assessing the law validity.<sup>145</sup> When Klabbers introduced Fuller's jurisprudence to international law, he noted the problem of 'international lawyers' preoccupation with the rules of interpretation, citing the WTO law as an example.<sup>146</sup> Klabbers said:

There is, for example, a serious debate going on within the WTO as to how WTO-law ought to be most properly interpreted, with the various dispute settlement organs (...) constantly invoking the rules of treaty interpretation as laid down in the Vienna Convention on the Law of Treaties, and with WTO's policy-making organs happily creating new, and somewhat different rules of interpretation. This is not an isolated phenomenon, peculiar to the WTO alone, and its logic is obvious: *whoever controls the way a treaty is interpreted also controls the contents of its provisions.*<sup>147</sup>

This issue of legal interpretations of WTO law will be addressed below in relation to the intelligibility and congruence principles. But Klabber's main point is that Fuller's jurisprudence should be regarded, 'as something approaching a full-fledged sources theory, combining formal and substantive criteria for the identification of

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<sup>143</sup> (Dispute Settlement Body-Special Session- Negotiations on the Dispute Settlement Understandings- Proposal by the LDC Group, TN/DS/17, page 2, 9 October 2002) The WTO Documents Website (n 132). See Meredith Lewis, 'Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement' (2012) *Stanford Journal of International Law* 1.

<sup>144</sup> Jan Klabbers, 'Constitutionalism and the Making of International Law: Fuller's Procedural Natural Law' (2008) *No Foundations: Journal of Extreme Legal Positivism* 48.

<sup>145</sup> *ibid.*

<sup>146</sup> *ibid.*

<sup>147</sup> *ibid* (emphasis added) citing Lennard (n 140); Jan Klabbers, 'On Rationalism in Politics: Treaty Interpretation and the WTO' (2005) *Nordic Journal of International Law* 405.

legal rules'.<sup>148</sup> The following evaluation of the WTO dispute settlement system, based on the Fullerian principles of legality, will further explicate the above reasons, and provide greater insights into the DSB ideal of procedural fairness. The next eight subsections will analyse the DSB in terms of its interlinked functions of interpretation and enforcement. It suffices to say that these principles will be broadly applied to the *purpose* and *process* of the DSB. The DSB's process requires general and clear settlement rules to improve *legal practice*, which is central to the rule of law principle.

#### 4.5.1 Generality:

The first and most basic principles relate to the existence of *general* meaning the existence of rules responsible for permitting, requiring or prohibiting certain conducts. According to Jackson, the WTO dispute settlement rules:

are incapable of playing their important role unless they are set in a framework of an effective 'legal system' a system that provides for application of the rules to particular facts, objective methods determining those facts, trusted interpretations of the rules, and methods by which these actions are kept consistent and reasonably predictable.<sup>149</sup>

The DSU Articles (1-3) on '*coverage and application*', '*administration*', and '*general provisions*' clearly proscribe the scope of the DSU, and the defects that it intends to remedy. According to DSU Article (3:1), 'members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947 and the rules and procedures as further elaborated and modified herein [in the DSU]'.<sup>150</sup> One of these defects, which caused a major problem for the GATT settlement procedures, and was raised during the Uruguay Round in the 1980s, was *delayed compliance*.<sup>151</sup> The DSU tried to resolve the noncompliance defect by stipulating under Article (3:3) that 'the prompt settlement (...) is essential to the effective functioning of the WTO and the

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<sup>148</sup> Klabbers, 'Constitutionalism and the Making of International Law: Fuller's Procedural Natural Law' (n 147).

<sup>149</sup> Jackson, *The Jurisprudence of GATT and the WTO* (n 139) 114.

<sup>150</sup> Also the WTO Agreement Article II:2 stipulates that the DSU under Annex 2 is 'binding on all members' see World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (20th printing, Cambridge University Press 2013) (hereinafter *The WTO Legal Texts*) 4, 355 (emphasis added).

<sup>151</sup> (Dispute Settlement Proposal, MTN.GNG/NG13/W/30, 10 October 1988) in Stanford GATT Digital Library < <http://sul-derivatives.stanford.edu/derivative?CSNID=92060026&mediaType=application/pdf> > accessed 1 December 2015.

maintenance of a proper balance between the rights and obligations of Members'.<sup>152</sup> DSU Article (21:1), however, stresses that 'prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all members.'<sup>153</sup>

Elsewhere, DSU Article (22:9) stipulates 'when the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance', adding the failure to do so will invoke countermeasures.<sup>154</sup> This provision is crucial because of the shared understandings among member states that noncompliance will obstruct 'the aim of the dispute settlement mechanism (...) to secure a positive solution to a dispute' (DSU Article 3:7), thus remedies in the forms of compensation and/or retaliation shall be applied.<sup>155</sup> The final sentence of DSU Article (3:7) acknowledges that retaliation, the remedy of 'last resort', shall be applied 'on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures'.<sup>156</sup> However, the DSB does not assume a supervisory role as 'the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence'.<sup>157</sup> Nevertheless, the generality standard should be applied to the role performed by these rules, which must be adjudicative not allocative, providing guidance, and assisting in the settlement of issues of law.<sup>158</sup> Still, the DSU is inconsistent on this matter, stipulating under Articles (3) and (2) that the primary task of the DSB is adjudicative, but under Article (22:6), in the case of noncompliance, that arbitrators (usually the original Panel members) should determine the monetary level of any retaliation. As evidenced by the disputes in which member states were authorized by the DSB to retaliate, this measure rarely if ever secures timely compliance.<sup>159</sup>

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<sup>152</sup> *The WTO Legal Texts* (n 150) 355.

<sup>153</sup> *ibid* 368.

<sup>154</sup> *ibid* 372.

<sup>155</sup> *ibid* 356.

<sup>156</sup> *ibid*.

<sup>157</sup> The Appellate Body Report, United States-Wool Shirts and Blouses, page 13-14, WT/DS33/AB/R, adopted 23 May 1997.

<sup>158</sup> Fuller, *The Morality of Law* (n 1) 46-47.

<sup>159</sup> See (Canada- Export Credits and Loan Guarantees for Regional Aircraft, DS222, authorised to retaliate 18 March 2003); (United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, DS285, authorised to retaliate 28 January 2013).

The inconsistency and lack of clarity also relates to the pertinent issue of judicial economy, whereby the Panel refused to rule on *all* of the litigants' arguments. The Panel is not required to rule on all issues raised, because under DSU Article (7:2) it 'shall address the relevant provisions in any covered agreements or agreements cited by the parties to the dispute', and under Article (11), it *should* make 'such findings as will assist the DSB' in making recommendations and rulings.<sup>160</sup> However, the AB cautioned the Panel not to invoke this principle, stating it should instead address all of the claims raised, to secure a positive resolution to disputes, and prompt concerned member(s) to compliance under DSU Articles (3:7) and (21:1).<sup>161</sup> Yet, despite this warning, a study concluded that in the (41%) of cases where the Panel invoked judicial economy, it did so to 'politically appease the wider WTO membership, and not just to gain the litigants' compliance'.<sup>162</sup>

Moreover, the AB has raised concerns that it has exercised judicial economy by freeing itself from the precise wording of DSU Article (17:12), which instructs it to address each law-related issue raised during proceedings.<sup>163</sup> Therefore, despite the existence of seemingly general rules, we ask if the inconsistency on the primary role of the DSB (adjudicative, allocative, or both?), and challenges to its interpretation that swing between judicial economy and activism, might hamper the effect of the rules and violate the fairness principle.<sup>164</sup> As will be explored in the next chapter, generality does not only mean the existence of rules, but also a practice of legality from both the law-giver and subject that support the purpose of these rules. As evidenced by the number of DSU rules cited in WTO disputes (15 in total), covering preliminary rules and most substantive ones on compliance, member states are increasingly holding each other accountable for the DSU rules as binding

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<sup>160</sup> *The WTO Legal Texts* (n 150) 360, 362 (emphasis added).

<sup>161</sup> (Appellate Body Report, Canada- Certain Measures Affecting the Automotive Industry, para 115, 117, WT/DS139/AB/R, adopted 31 May 2000, citing Appellate Body Report, Australia-Measures Affecting Importation of Salmon, para 223, WT/DS18/AB/R, adopted 20 October 1998).

<sup>162</sup> Marc Busch and Krzysztof Pelc, 'The Politics of Judicial Economy at the World Trade Organization' (2010) *International Organization* 257.

<sup>163</sup> Alberto Alvarez-Jimenez, 'The WTO Appellate Body's Exercise of Judicial Economy' (2009) *Journal of International Economic Law* 393 citing Appellate Body Report, *United States -Subsidies on Upland Cotton*, para.510, WT/DS267/AB/R, adopted 3 March 2005.

<sup>164</sup> See Tomer Broude, "'Judges Shalt Thou Make Thee in All Thy Gates": Reforming Judicial Office in the WTO Dispute Settlement System' (2005) *Free University of Amsterdam Journal of International and Comparative Law* 30.

obligations.<sup>165</sup> Regardless, compliance and final settlement of many disputes have not been secured, at least in a timely manner, because of the lack of precise general rules on the DSB conduct, which have exacerbated problems and delayed compliance. Therefore, because the general rules are limited in scope and number, the legality of the DSU will be negatively affected. The rules, as will be argued under the clarity principle, should be precise to guide the Panel and AB members to settle disputes early and effectively.

#### **4.5.2 Promulgation:**

With regard to *promulgation*, this element is highly relevant to the DSB's purpose and process. As stated under generality, rules that do not specify the procedures clearly, for example failing to address publicity, will undermine legality. Promulgation is also pertinent to the adjudicative requirement of having an open setting, hence its application below to the DSB's process and the principle of transparency. The WTO has well-satisfied this element as the DSB rules, rulings, and updates on negotiations and interpretations are accessible on various platforms, the most effective of them being the WTO website. Under GATT Article (X:1) on *publication and administration of trade regulation*, member states should publish all legal documents relevant to trade 'to enable governments and traders to become acquainted with them'.<sup>166</sup> However, this remains necessary, from a procedural justice viewpoint, as the rules and procedures are promulgated so that the submissions and deliberations of parties and DSB chambers can be made publically available. The Panel or AB judgment reports are released to the public only after completion of the timespan allocated to disputes (usually three years, but in some cases up to five years or longer). This issue also relates to the lack of accessible information on consultation cases that include only one or two short documents concerning *allegations of breach*, and in some cases, requests to join a consultation, presented by the respondent state.<sup>167</sup>

However, it is imperative to open up the system to public scrutiny, especially to Non-Governmental Organization (NGOs) and other affected parties who should not only have access to this process, but 'the right of standing as intervenors or *amicus*

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<sup>165</sup> See United States-Section 129 (C) (1) of the Uruguay Round Agreements Act, DS221; United States- Anti-Dumping Measures of Certain Shrimp from Viet Nam, DS429.

<sup>166</sup> *The WTO Legal Texts* (n 150) 435-436.

<sup>167</sup> See Japan-Measures Affecting the Purchase of Telecommunications Equipment, DS15, request for consultations received 18 August 1995.



*curiae*' during proceedings.<sup>168</sup> Permitting this might carry the risk of prolonging a dispute's duration, but this point should be taken into account in the overall reform objectives of the DSU, which should aim to shorten this timespan, and provide more elaborate rules concerning dispute documents, subject to the confidentiality requirements. In fact, opening up the process might result in a positive effect from shortening the duration of a dispute, since the demands of the affected parties, which might include business firms, trade associations, and NGOs might pressure the DSB to deliver timely and quality judgments acceptable to the disputants. In addition, it remains the responsibility of the WTO to help member states to make effective use of the promulgated GATT/WTO rules, and honour their treaty obligations by reforming their legal systems for optimal compliance.

It is the primary responsibility of the WTO Secretariat, and the Advisory Centre on WTO Law (ACWL) to perform this crucial role, but they should become more effective in helping developing and least-developing member states, to understand WTO and non-WTO law such as PTAs.<sup>169</sup> The ACWL should expand its mission to advise NGOs and businesses to improve their legal expertise and knowledge of WTO law. Nevertheless, the WTO should not bear the sole burden of publicity, member states should be more open to public scrutiny, as should the input of their trade policies and relations before they reach the halls of the WTO to demand just treatment.<sup>170</sup> Hence, promulgation is shared between the WTO and member states, since they jointly perform the role of law-maker, with the sub-subjects being economic traders in member states, and stakeholders affected by their activities, who should be equally permitted to challenge WTO law.<sup>171</sup>

Rather than allowing officials to sign up to the WTO (where the bulk of WTO membership are undemocratic states), to later get criticized by traders and stakeholders, the law-making process should allow a bottom-up interaction agreement from the outset, allowing for a basis of legality. Because the lack of promulgation during the accession process, the WTO negotiation, and adjudication will unsurprisingly come into conflict with the practice of legality, leading member

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<sup>168</sup> Michael Trebilcock, 'Critiquing the Critics of Economic Globalization' (2005) *Journal of International Law and International Relations* 213.

<sup>169</sup> See Gregory Shaffer, 'How the World Trade Organization Shapes Regulatory Governance' (2015) *Regulation and Governance* 1.

<sup>170</sup> Trebilcock, 'Critiquing the Critics of Economic Globalization' (n 168).

<sup>171</sup> See Petersmann, 'The GATT Legal Office' (n 76).

states to deviate from ‘i.e. breach’ the rules.<sup>172</sup> Promulgation should be firmly embedded in the WTO’s aims as well as in its interactional processes, namely rules-sitting, decision-making, and more importantly, adjudication.<sup>173</sup>

#### 4.5.3 Prospectivity:

Enshrined in many constitutions, the principle of *prospectivity* requires the prohibition of *ex post facto* laws that retroactively change the legal consequences of acts that were committed before the enactment of a law.<sup>174</sup> The failure to uphold this principle will undermine the cause of legality, rendering the lawgiver unaccountable to abuses of power.<sup>175</sup> Although perfection in pursuing the principles of legality is ‘an elusive goal, it is not hard to recognize blatant indecencies’, especially those associated with retroactive laws.<sup>176</sup> However, retroactive statutes might be introduced by the legislature only ‘to cure irregularities of form’ that were resulting from the legislature’s failure to previously uphold other principles of legality, such as promulgation and feasibility.<sup>177</sup> For example, the legislature might pass a retroactive statute to legally validate an action that a previous retroactive law made illegal, but it was not well publicized or capable of being obeyed.<sup>178</sup>

Points raised concerning the constructive role of the legislature highlight the role of the WTO as an institution endowed with *legislative capacity*, and the DSB’s role in mitigating the negative effect of retroactive laws, when encountered. The latitude given to AB members to become active in their interpretations, going beyond the stated laws, might qualify the performance of a legislative role, in some cases engaging in an act of retroactive legislation.<sup>179</sup> Hudec, for example, highlighted that the AB judicial activism is likely to arise because of the WTO’s ‘legislative

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<sup>172</sup> See (China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, DS431, DS432, DS433); Qingjiang Kong, *China and the World Trade Organization: A Legal Perspective* (World Scientific 2002) 92, 109-112.

<sup>173</sup> See Petros Mavroidis and Robert Wolfe, ‘From Sunshine to a Common Agent: The Evolving Understanding of Transparency in the WTO’ (2015) RSCAS Policy Papers <[http://cadmus.eui.eu/bitstream/handle/1814/34860/RSCAS\\_PP\\_2015\\_01.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/34860/RSCAS_PP_2015_01.pdf?sequence=1)> accessed 23 December 2015; Bown and Hoekman, ‘Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is not Enough’ (n 118).

<sup>174</sup> Fuller, *The Morality of Law* (n 1) 52-53.

<sup>175</sup> *ibid* 54.

<sup>176</sup> *ibid* 62.

<sup>177</sup> *ibid* 54.

<sup>178</sup> *ibid*.

<sup>179</sup> *ibid* 56; Robert Hudec, ‘Review Article: Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization’ (2002) *World Trade Review* 211.

impotence' which has left 'WTO existing legal texts suffered from gaps, papered-over differences and other forms of legal incoherence'.<sup>180</sup> Hudec explained that in many judicial systems, like the WTO, there is a need to deal effectively with the problem of inadequate legal texts, as there has been a measure of '*judicial creativity*', 'by ruling against the claimed obligation- a result that involves no overreaching, and *imposes no obligations that were never agreed to*'.<sup>181</sup>

Nevertheless, Hudec noted the challenge of handling 'the wrong cases' i.e. those involving politically sensitive disputes that arise from conflicting promises that members have made to their national constituencies, and the community of world trade law.<sup>182</sup> In Hudec's view, these wrong cases should never reach the DSB, as they will exhaust the system with no final settlement, instead being resolved by disputant states' own deliberations, in cases where they are willing to show more perseverance.<sup>183</sup> However, it can be deduced from this issue that because there are two legislatures involved, those of the WTO and its member states, this will always give rise to member states passing retroactive laws contradictory to WTO law. In reality, since the WTO legislation is dysfunctional, the likely scenario is that the WTO will continue to seek to enforce its outdated laws, while the active legislative branches of member states, with the help of their commercial agencies, will actively devise ways of bypassing the WTO commitments, *unnoticed*.<sup>184</sup> The existence of two lawgivers in the WTO context makes it difficult to pinpoint where the adversarial effects of retroactive laws would come from, and how the DSB should deal with

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<sup>180</sup> *ibid*. Despite all of these defects, the WTO is still faced with the lack of legislative response, by being unable to issue reformatory or curative legislation because of the consensus rule see Thomas Cottier, *The Challenge of WTO Law: Collected Essays* (Cameron May 2007) 219-252.

<sup>181</sup> Hudec, 'Review Article: Free Trade, Sovereignty, Democracy: The Future of the World Trade' (n 179) (emphasis added) citing as examples, the AB invoking the principle of *dubios mutis*, that is in the case of doubt adjudicators must rule against an obligation limiting state sovereignty in (*EC-Hormones*, para. 165 and Footnote 154, WT/DS26/AB/R, adopted 16 January 1998), and rejected to expand the scope of the obligation under the doctrine of *reasonable expectations* in (Appellate Body Report, *India- Patent Protection for Pharmaceutical and Agricultural Chemical Products*, para. 33-48, WT/DS50/AB/R, adopted 19 December 1997). See John Lockhard and Tania Voon, 'Reviewing Appellate Review in the WTO Dispute Settlement System' (2005) *Melbourne Journal of International Law* 474.

<sup>182</sup> *ibid* citing as examples of such cases (US- Shrimp, DS58); and (United States- Tax Treatment for 'Foreign Sales Corporation, DS108). See William Davey, 'Dispute Settlement in GATT' (1987) *Fordham International Law Journal* 51.

<sup>183</sup> Hudec, 'Review Article: Free Trade, Sovereignty, Democracy: The Future of the World Trade' (n 179).

<sup>184</sup> *ibid*; John Jackson, 'The WTO Dispute Settlement Procedures-A Preliminary Appraisal' in Jeffrey Schott (ed), *The World Trading System: Challenges Ahead* (Peterson Institute 1996) 159.

them.<sup>185</sup> Nonetheless, based on a number of disputes involving GATT Article (X) on *publication and administration of trade regulation* (58 disputes), it appears that member states are implicitly holding each other accountable to the *prospectivity* principle.<sup>186</sup> A feature uniting these disputes is that the DSB has been unable to settle them effectively; only in very few have members themselves settled or terminated disputes (withdrawn, mutually agreed solution found) and many remain unsettled, some having been in the consultation phase for many years.<sup>187</sup>

However, *non-retroactivity* is recognised as a contentious issue for the DSU in relation to the prospective nature of its remedies, that does not retrospectively take into account the trade losses and harm suffered by the imposition of WTO-inconsistent measure(s).<sup>188</sup> The so-called ‘free pass’ problem, that is epitomized by a complaining state suffering trade losses during the three-year period of litigation, has been a concern for member states and scholars alike.<sup>189</sup> The AB members, who are confined by their mandates, and the wording of DSU Article (22), have rightly declined to rule on this issue, or to allow the Panel or arbitrators to consider reparations for past losses.<sup>190</sup> Yet, reparation was feasible in two disputes involving prohibited subsidies under Article (4:7) of the WTO Agreement on Subsidies and Countervailing Measures (SCM). The first dispute related to when the amount of retaliation set by the arbitration was used to determine compensation payments made by the respondent state.<sup>191</sup>

However, the compliance Panel in the second dispute had covered this issue extensively, by ruling that that ‘withdrawal of the subsidy’ under SCM Article (4:7)

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<sup>185</sup> See Simon Lester, ‘Retroactive Law-making under GATT Article X’ (21 September 2012) <<http://worldtradelaw.typepad.com/ielpblog/2012/09/retroactive-law-making-under-gatt-article-x.html>> accessed 22 December 2015 citing as an example (United States- Countervailing and Anti-dumping Measures on Certain Product from China, DS449).

<sup>186</sup> GATT Article (X:3) is the most cited in (37 disputes), the total number of Article X provisions citations exceeds (65 disputes), see Disputes by Agreement <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A9](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A9)> accessed 22 December 2015.

<sup>187</sup> *ibid.*

<sup>188</sup> See Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2009) 220-223.

<sup>189</sup> John Jackson, ‘The Case of the World Trade Organization’ (2008) *International Affairs* 438; Hudec, ‘Review Article: Free Trade, Sovereignty, Democracy: The Future of the World Trade’ (n 179); Proposal by Mexico (n 140).

<sup>190</sup> See (Guatemala-Anti-Dumping Investigation Regarding Portland Cement from Mexico, DS60); (Brazil-Export Financing Programme for Aircraft, DS46).

<sup>191</sup> United States-Subsidies on Upland Cotton, DS267.

could entail repayment of prohibited subsidies, hence prompting ‘retrospective effects’.<sup>192</sup> Still, at the end of the report, the Panel stressed the prospective nature of WTO remedies, stating their interpretation does not diverge from previous practice that applied the DSU as simply requiring members to ‘bring a measure into conformity with the covered agreement’.<sup>193</sup> Nonetheless, some member states’ delegations have raised concerns about SCM Article (4:7) saying that the withdrawal of prohibited subsidies should be further clarified to prevent the proposal for ‘retrospective punitive remedies’.<sup>194</sup> This request indicates that members themselves are concerned that SCM Article (4:7) lacks clarity; with the result that it is usually left to the own interpretations of developed member states, to determine whether to compensate or not, thereby obstructing the principles of fair and equal treatment.

Nevertheless, in terms of legality, and viewed from the overall structure of the DSB and the number of disputes involving ‘free passes’, the prospective remedy is not the main issue impeding legality. The lack of retrospective remedies arose because of the vagueness of DSU Article (22), and the overall weakness of compliance procedures. As suggested by member states, the SCM Article (4:7) should be reformed for clarity, and the WTO should seriously consider proposals from members like Japan and Ecuador regarding amending the DSU Articles (21) and (22) to effectively enforce and shorten the period for compliance.<sup>195</sup> Implementing reformatory proposals would make the need for retrospective remedies less of an issue. Furthermore, the lack of retrospective remedies should not be viewed as the only issue impeding legality, since legality in the WTO context, should be viewed as the interactional process of law-making, application, and continuous practice of legality.<sup>196</sup> However, the responsibility of clarifying DSU rules and procedures, mainly rests with the lawmakers, the WTO, its member states, and WTO stakeholders, and not with its adjudicators. Although, in some cases this depends on

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<sup>192</sup> Panel Report, *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather*, page 13, WT/DS126/RW, adopted 21 January 2000.

<sup>193</sup> *ibid* page 5; Gavin Goh and Andreas Ziegler, ‘Retrospective Remedies in the WTO after *Automotive Leather*’ (2003) *Journal of International Economic Law* 545.

<sup>194</sup> (Negotiating Group on Rules-Working Document from the Chairman, page B-5, TN/RL/W/232) in *The WTO Documents Website* (n 132).

<sup>195</sup> *ibid*; (Proposal by Japan, TN/DS/W/32, 22 January 2003); (Proposal by Ecuador, TN/DS/W/33, 23 January 2003) in *The WTO Documents Website* (n 132).

<sup>196</sup> See Wolfe, ‘See You in Geneva? Legal (Mis)Representations of the Trading System’ (n 8).

the nature of the legal problem under examination, it does not require the lawmakers' attention. In commercial law, for example, Fuller explains that:

[...] requirements of "fairness" can take on definiteness of meaning from a body of commercial practice and from the principles of conduct shared by a community of economic traders. But it would be a mistake to conclude from this that all human conflicts can be neatly contained by rules derived, case by case, from the standard of fairness.

#### **4.5.4 Clarity:**

The essential principle of *clarity* dictates the existence of an intelligible and coherent set of rules for guiding human interaction, making legality attainable even without the force of an authoritative enforcer.<sup>197</sup> This principle is an intrinsic requirement for the attainment of other principles of legality, including generality and non-retroactivity. By looking at the DSU Articles that were cited by member states in their settlement reports, and submitted to the DSB chambers for definitive interpretations, DSU Articles (3-4) and (21-23), it appears that the rules and procedures for the pre-panel and post-rulings phases, are obscure, as they fail to guide interactions and secure an early final settlement.<sup>198</sup> Although, the citation of provisions of DSU Articles (3-4) (14 times), and Articles (21-23) (30 times) suggests a small number of disputes involving the DSU, this only holds true if the effectiveness of the DSB is solely dependent upon providing conclusive interpretations of these provisions.

The entire structure of the DSU, as explained above, does not correspond with its stated objectives of ensuring a positive settlement and prompt compliance, and this is due to the lack of clear DSU rules, and the various defects in the organization of the WTO. Ambiguous norms of the DSU and GATT have been the main reason for protracted litigation and noncompliance in consultation and high profile disputes. As explained above about the vagueness of the pre-panel procedure under DSU Article (3-4), consultation provision are not precise enough to secure a settlement. DSU Article (4:7), in particular, does not specify a course of action for member states to take to finalize a dispute as the decision to seek recourse to a Panel is left to the complaining states that might be constrained by capacity and financial limitation.

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<sup>197</sup> Fuller, *The Morality of Law* (n 1) 63; Fuller, 'Human Interaction and the Law' (n 87).

<sup>198</sup> See for example the problems associated with determining 'a reasonable period of time' for implementation under DSU Article 21.3, see MA Qian, 'Reasonable Period of Time' in the WTO Dispute Settlement System' (2012) *Journal of International Economic Law* 257; Davey, 'Compliance Problems in the WTO Dispute Settlement' (n 182).

Member states not demanding compliance or resorting to litigation does not mean full compliance with GATT/WTO rules has been firmly secured.

Once a dispute preceded to litigation phase it is the primary job of Panel and AB to force compliance, not the complainant state(s). This explains the fact that almost all disputes that reached litigation are for enforcing compliance by highlighting that the respondent state acted inconsistently with the law.<sup>199</sup> However, the vagueness of DSU rules is most apparent in the compliance procedures. DSU Articles (21) fall short of providing a clear determinant of compliance, since its ultimate solution, the compliance review under (21:5), has been misused especially by developed members to prolong the disputes reaping the benefits of delayed or non-compliance.<sup>200</sup> Ambiguity of norms is also a problematic issue for the most disputed provisions of world trade law, the GATT Articles (I) and (III), as these articles lack clarity concerning identifications of *like product* and *fair and equal treatment*.<sup>201</sup>

In light of interactionalism, compliance in the WTO should be understood as a dialectical process in 'a continuum', and this cannot be secured without intelligible rules, and more importantly corresponding on-going practices.<sup>202</sup> Despite the lack of clarity in DSU Articles on consultation and compliance procedures, but the objectives of prompt compliance and conformity (WTO Agreement Article (XVI:4); DSU Articles (3:3), (19:1), (21:1), (22:1) and (22:8)) clearly envisioned an interactional theory of compliance.<sup>203</sup> What is lacking, however, is to reform the DSU to make these objectives explicit, effectuating the WTO as an institution through its apparatus and functions, especially those concerning the TPRM and its

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<sup>199</sup> Dispute by Current Status

<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm)> accessed 6 February 2016.

<sup>200</sup> Japan Proposal for DSU Article (21*bis*) (n 195); Howse (n 141); Jason Kearns and Steve Charnovitz, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5' (2002) *Journal of International Economic Law* 331.

<sup>201</sup> William Davey, *Non-Discrimination in the World Trade Organization: The Rules and Exceptions* (Hague Academy of International Law 2012); Julia Qin, 'Defining Nondiscrimination Under the Law of the World Trade Organization' (2005) *Boston University International Law Journal* 215; Gaetan Verhoosel, *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy* (Hart Publishing 2002) 19-44.

<sup>202</sup> See Jutta Brunnée and Stephen Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) *Finnish Yearbook of International Law* 273.

<sup>203</sup> Julien Chaisse, 'Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process' (2015) *Fordham International Law Journal* 58.

accession procedures, to make these objectives effective *in practice*.<sup>204</sup> According to Fuller, the best way to achieve clarity of rules ‘is to take advantage of, and incorporate into the law, common sense standards of judgments that have grown up in the ordinary life lived outside legislative halls’.<sup>205</sup> This method should induce the WTO to make effective use of the rich history of trade relations based on reciprocal and non-discrimination standards, as a guiding principle for its institutional reforms.

#### **4.5.5 Non-contradictory:**

The principle of eliminating *incompatibility* is intended to remove confusing and repugnant provisions that would otherwise obstruct competent performance of law.<sup>206</sup> *Feasibility*, however, requires that the lawgiver seriously considers the law-subject’s capacity for obedience, as failure to do so will lead to a disregard of the rules, and the breakdown of the system of law and order.<sup>207</sup> Taken together, both principles have a positive bearing on the DSU, especially the feasibility of compliance, upon which the dispute settlement system was founded originally to facilitate and uphold, pursuant to DSU Articles (2) and (3). For example, the DSB shall ensure the feasibility of its settlement role by collaborating with other WTO Councils and Committees, to update them about its work, pursuant to DSU Articles (2:2) and (2:3).<sup>208</sup> Furthermore, regarding the need for ensuring consistency with the cited WTO agreements, DSU Article (3:5) stipulates:

All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.<sup>209</sup>

Nonetheless, the AB has played a constructive role in upholding the element of non-contradiction as bound by its mandate to ensure consistent interpretations that do not

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<sup>204</sup> Robert Maclean, ‘The Urgent Need to Reform the WTO’s Dispute Settlement Process’ (2002) *International Trade Law & Regulation* 137.

<sup>205</sup> Fuller, *The Morality of Law* (n 1) 64. See Mathias Risse, ‘Fairness in Trade I: Obligations from Trading and the Pauper-Labor Argument’ (2007) *Politics, Philosophy & Economics* 355.

<sup>206</sup> Fuller, *The Morality of Law* (n 1) 69.

<sup>207</sup> *ibid* 36, 73.

<sup>208</sup> They stipulate: ‘2:2) The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements. 3) The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.’ *The WTO legal Texts* (n 150) 355.

<sup>209</sup> *ibid* 355.



infringe on the rights and obligations of member states, or contradict the customary rules of interpretation.<sup>210</sup> To ensure *consistency*, the AB has adopted a contextual analysis pursuant to the VCLT Article (31:2), by taking into account “‘agreement relating to the treaty’ between the parties, or of their accept[ance by the parties] as an instrument related to the treaty’<sup>211</sup>.

However, it is worth noting that some specialised WTO Agreements have facilitated a consistency of interpretation and implementation through ‘regulatory transparency’, thus contributing to the positive development of interactional world trade law.<sup>212</sup> For example, Articles (12:2) of the SPS, and Articles (12:8) and (13) of the TBT, which provide for informal ad hoc consultations, have greatly contributed to an understanding of those agreements and optimal ways of implementing their provisions.<sup>213</sup> By comparison with other WTO agreements, the role of formal adjudication for enforcing the SPS and TBT is very limited, and very few cases have reached the AB for clarifying issues of law.<sup>214</sup> *Consistency* cannot be ensured by adjudication alone, especially in the context of the world trading regime, where member states require sufficient time for adjustment to the new laws. However, *consistency* as highlighted by the constructive role of SPS/TBT committees also relates to the double roles performed by these committees in ensuring conformity with agreed upon standards of food, safety or technical barriers, and conformity with the GATT/WTO rules; thus, preventing evasive modes of trade protectionism.

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<sup>210</sup> See (Appellate Body Report, United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, paras. 176, 178, WT/DS285/AB/R, adopted 7 April 2005); (Appellate Body Report, China Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products, paras. 387-388, WT/DS363/AB/R, adopted 21 December 2009); (Appellate Body Report, United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, paras. 307-308, and footnote 222, WT/DS379/AB/R, adopted 11 March 2011).

<sup>211</sup> *ibid* (US-Gambling, para 175); (China-Measures Affecting Imports of Automobile Parts, para. 151, WT/DS339/AB/R, adopted 15 December 200).

<sup>212</sup> Wolfe ‘See You in Geneva? Legal (Mis)Representations of the Trading System’ (n 8); Joost Pauwelyn, ‘Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties’ (2014) *Journal of International Economic Law* 739.

<sup>213</sup> *ibid*; the SPS committee role in improving compliance see Lang and Scott (116).

<sup>214</sup> Noting that some of the issues for appeal are non SPS/TPT related, but the SPS Agreement was cited in (44 disputes and 5 disputes appealed), see Disputes by Agreement <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A19](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A19)> accessed 26 December 2015; the TBT Agreement in (52 disputes and 11 disputes appealed), see Disputes by Agreement <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A22](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A22)> accessed 26 December 2015.

#### 4.5.6 Feasibility:

With regard to *feasibility*, the WTO law facilitates compliance through its various stages of implementation, regulated derogations, and special and differential treatment for developing countries constrained by capacity limitations. It is difficult however to designate a set of GATT/WTO rules as *requiring the impossible* while member states have voluntarily accepted and internalized compliance of these rules. Aside from the unpopular WTO Agreement on Government Procurement, almost all of (163) members have agreed to be bound by the WTO law as specified under various agreements subject to certain reservations and waivers of rights.<sup>215</sup> In practice, the WTO committees, working parties on accession, and working groups, have facilitated compliance for both developed and developing countries.<sup>216</sup> The Advisory Centre on WTO Law, the ACWL, in particular, has been instrumental in helping developing countries that are faced with financial or human resources constraints to participate in the trading system effectively, by providing them with legal advice and training on compliance with the GATT/WTO rules.<sup>217</sup>

With regard to the *feasibility* of DSB rules and procedures, again as highlighted above, the DSB can only require members to bring measures into conformity with the covered agreements pursuant to DSU Articles (19:1), (22:1) and (22:8). In terms of procedural fairness, the DSB has upheld members' rights to seek unilateral action under domestic trade remedies under GATT Articles (VI) and (XIX).<sup>218</sup> The DSB has also upheld members' rights to derogate from the GATT/WTO by invoking general and security exceptions under GATT Articles (XX) and (XXI), which respect the impossibility of a performance factor, or fundamental change of circumstances.<sup>219</sup> Although, in the case of trade remedies, the procedures followed refers to the notifications of a need for unilateral action to protect domestic industries from the adverse effect of subsidization or dumping, the DSB has

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<sup>215</sup> See Members and Observer < [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) > accessed 26 December 2015.

<sup>216</sup> See WTO Institutional Structure [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/organigram\\_e.pdf](https://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf) accessed 26 December 2015; Shaffer, 'How the World Trade Organization Shapes Regulatory Governance' (n 169).

<sup>217</sup> See the ACWL Report on Operations 2014 <[http://www.acwl.ch/download/dd/reports\\_ops/Oper\\_2014.pdf](http://www.acwl.ch/download/dd/reports_ops/Oper_2014.pdf)> accessed 4 February 2016

<sup>218</sup> Disputes by Agreement <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A9](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A9)> accessed 27 December 2015.

<sup>219</sup> *ibid.*

performed a complementary if not an essential role in elucidating these remedies, especially in its interpretation of the SCM and Agreement on Safeguards.<sup>220</sup> Therefore, despite being confined by its weak rules and procedures, but the DSB has to a limited extent been able to facilitate *compliance* with WTO law. However, if viewed from the overall perspective of the DSU adherence with the principles of legality, feasibility becomes problematic, as the DSU's lack of clarity and congruence between formulation and implementation issues testifies.

#### **4.5.7 Constancy:**

Much of what has been said already about the principles of *non-retroactivity* and *non-contradictory* apply to the principle of constancy. This principle requires that amendments to the law should be kept to a minimum, to give the law-subjects sufficient time for 'adjustment to the new state of the law'.<sup>221</sup> The interdependency between the legality principles show how constancy is only attainable through compliance with the principles of *generality*, *clarity*, and the *promulgation* of rules that specify and publicise the rights and obligations of the law-subjects. The WTO Agreement, and its annexes, the multilateral trading agreements that include legal instruments such as the DSU are designed to ensure constancy and predictability within the multilateral trading system. The amendments according to consensus procedure are stipulated under WTO Agreement Article (X), whilst Articles (XV) and (XVI) contain provisions on withdrawal procedures and miscellaneous provisions on compliance and reservation. According to DSU Article (3:2), 'the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'.<sup>222</sup>

As evidenced by the above references to the work of the DSB, especially the AB, the dispute settlement system has played a fundamental role in providing stability and predictability to the trading system, by ensuring *consistency* and *clarity* of rules. However, as highlighted above, constancy cannot be fully achieved, while the WTO law is still in need of essential reforms to cater for institutional, economic, and

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<sup>220</sup> The Agreement on Safeguards, Disputes by Agreement  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A18](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A18)> accessed 27 December 2015.

<sup>221</sup> Fuller, *The Morality of Law* (n 1) 37, 80.

<sup>222</sup> *The WTO Legal Texts* (n 150) 355.

political changes.<sup>223</sup> This rule applies to the DSU, as it applies to every WTO agreements, especially those that contain the most disputed provisions, the GATT and the SCM. Nevertheless, the fundamental overarching principle of congruence has many characteristics, which include providing a stable and predictable system of law by ensuring a continuous practice of legality.<sup>224</sup> Additional legality elements are also essential for guaranteeing *consistency between formulation and implementation of law*.<sup>225</sup> According to Fuller, *the congruence between official action and the law*:

May be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system (...) There are serious disadvantages in any system that looks solely to the courts as the bulwark against the lawless administration of the law [because] it makes the correction of abuses dependent on the willingness and financial ability of the affected party to take his case to litigation.<sup>226</sup>

Hence, adjudication of a law that lacks legality is a mistaken strategy for enforcement, instead the law should be effectively administered, and when required, amended in accordance with the principles of legality.

#### **4.5.8 Congruence:**

The principle of *congruence between official action and the law*, in particular, is highly illuminating for the DSU for several reasons. Firstly, it is assumed wrongly that the existence of the DSB, especially the AB, makes it the sole arbiter of legality, and not the WTO as an institution, since it only comprises political organs for decision-making. This caricature of legality, with its reductionist views of how and where to improve compliance miss the crucial point that the DSB is only one element in the interactional-law process. There are bodies and organs that jointly exceeds the DSB in importance; for instance, the TPRM, various committees, working parties on accession, and working groups, all play a pivotal role in maintaining compliance. Secondly, the lack of direct effect hinders optimal observance of WTO rules, and the rights of third parties to challenge WTO law.<sup>227</sup>

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<sup>223</sup> See VanGrasstek (n 6); Cottier (n 180).

<sup>224</sup> Brunnée and Toope, *An Interactional Account* (n 8) 95-97.

<sup>225</sup> Fuller, *The Morality of Law* (n 1) 81.

<sup>226</sup> *ibid* (emphasis added).

<sup>227</sup> See Hélène Ruiz Fabri, 'Is there a Case –Legally and Politically–For Direct Effect of WTO Obligations?' (2014) *European Journal of International Law* 151.

Therefore, there has to be a practice that involves the direct interplay between the WTO and domestic law, because the lack of direct effect ‘seriously affects the pull to compliance with obligations under the WTO law’.<sup>228</sup>

Thirdly, developing and least-developing member states, that constitute the bulk of the WTO membership, are still constrained by capacity limitations, unable to challenge the legality of the disputed measure(s) or procedures.<sup>229</sup> It would be a very long and costly pursuit for these countries to challenge the legality of the DSB rules or procedures before the AB; hence, living with what they deem illegal is better than trying to amend it. Especially, it is noted that a WTO member cannot only initiate a dispute against the DSU, as its only impossible option for reform is to convince all member states to amend the DSU by *consensus*.<sup>230</sup> All of these crucial points represent enduring concerns that the WTO seems unable to address, while its DSB is continuously encountering the growing challenges of deciding on WTO-inconsistent domestic laws, and reviewing legislative history.<sup>231</sup> Ideally, consistency with WTO law should have been firmly secured during the accession process, and maintained by the continuous practice of legality within and outside the WTO, not only in the DSB.<sup>232</sup> It is commendable, however, that the AB, has invoked the principle of good faith, *pacta sunt servanda*, by relying on the VCLT Articles (26) and (31).<sup>233</sup> Nonetheless, there are many issues relating to incongruence in the WTO law that

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<sup>228</sup> Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press 2013) 271. See Ernst-Ulrich Petersmann ‘Prevention and Settlement of Transatlantic Economic Disputes: Legal Strategies for EU/US Leadership’ in Ernst-Ulrich Petersmann and Mark Pollack, *Transatlantic Economic Disputes: the EU, the US, and the WTO* (reprint edn, Oxford University Press 2005) 36.

<sup>229</sup> See Busch and others, ‘Does Legal Capacity Matter? A Survey of WTO Members’ (n 111); Bown, *Self-Enforcing Trade* (n 112).

<sup>230</sup> Mainly the US and EU challenge and change the interpretations of DSU Articles (21-23) on compliance. See Disputes by Agreement <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A5#](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A5#)> accessed 29 December 2015.

<sup>231</sup> See Appellate Body Report, US- FSC, para. 150, WT/DS108/AB/RW, adopted 14 January 2002; The Nature of Domestic Legislation as an Object of a Dispute <[https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c10s8p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s8p1_e.htm)> accessed 27 December 2015.

<sup>232</sup> See Bown’s proposal for establishing the Institute for Assessing WTO Commitments to provide member states with objective information on compliance with WTO law, Bown, *Self-Enforcing Trade* (n 112) 208-237.

<sup>233</sup> Appellate Body Report, US-Definitive Anti-dumping and Countervailing Duties on Certain Products from China, para. 326-327, WT/DS479/AB/R, adopted 11 March 2011; Appellate Body Report, EC- Trade Description of Sardines, para.278, WT/DS231/AB/R, adopted 26 September 2002. See Eric De Bradandere and Isabelle Van Damme, ‘Good Faith in Treaty Interpretation’ in Andrew Mitchell and others, *Good Faith in International Economic Law* (Oxford University Press 2015) 60-85.

merit a thorough separate analysis in the next chapter under the practice of legality heading.

#### **4.6 Conclusion:**

The main findings of the above analysis are: The Fullerian conceptions of legality and adjudication are pertinent to deconstructing the DSB, and the DSU lacks legality. However, the defects of DSU partially highlight the WTO's limited success to secure solid shared understandings regarding compliance, reform the DSU, and foster a practice of legality. Reforming the DSU is an urgent requirement, but of a greater importance is the need to acknowledge the continued existence of the weak settlement rules and compliance problems that the WTO was originally intended to resolve. The current progress toward a compliance deficit, reminiscent of the 1980s period of GATT, should alert WTO experts to the need to adopt a newer concept of legality, akin to that developed by interactionalism. Without cultivating the urge to reform the DSU, and inserting 'prompt and effective compliance' in the strategy for improving the WTO mechanisms, the WTO is jeopardising its primary aim of securing early effective compliance with the trade rule of law.

Unlike other international compliance regimes reviewed above, the DSB has no rules on the finality of dispute or award of compensation to affected trading parties. The DSU stands in contrast to other international instruments on the right of redress for an injury caused by a breach of the treaty. For these reasons, the DSU is rightly regarded as having weak settlement rules and procedures for forcing compliance and deterring future violations of foreign traders' rights. The first step in redressing this institutional defects, is recognition that a compliance deficit is real, and that (re)structuring is urgently needed. The WTO must not only rely on adjudication, but also on providing effective modes of legal governance to facilitate resolving member states disputes *informally*.<sup>234</sup> The WTO experts should forsake the current caricature of legality by reducing the operability of the trading regime to the supposedly effective work of the DSB chambers, instead adopting the all-encompassing notion of interactional law.<sup>235</sup> The WTO rules concerning decision-

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<sup>234</sup> Davis's thesis is incomplete because it focuses on the influence of democratic institutions of member states to pursue adjudication, focusing only on the non-compliant WTO member of the US, see Christina Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton University Press 2012).

<sup>235</sup> See Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (n 8).

making and dispute resolution must instantiate the Fullerian principles of legality to ensure predictability and stability in international trade.

It is noteworthy that the AB has made effective use of procedural principles, as applied in public international law to compensate for ‘the procedurally-bare DSU’, for example, when invoking the principles of *standing* in *EC-Bananas III*.<sup>236</sup> However, this does not fully compensate for the lack of generality and clarity in the DSU pre-panel and post-ruling procedures, as out of (508) disputes, only a very limited number have reached the AB to address issues of *procedural fairness*.<sup>237</sup> It is important to stress here that the enforcement function of the DSB is only one element in the interactional law-making process that the WTO responsible for administering. The DSU lack of legality does not lend support to the anti-legalists’ claims that it permits noncompliance ‘as a practical matter regardless of its legality’.<sup>238</sup> This is because, as extensively argued in the previous chapter, the negotiation history of the GATT/WTO strongly supports *the shared political understandings* on compliance. Moreover, the *shared legal understandings* concerning compliance is elaborated on in *the obligation of conformity* under the GATT Article (XXIV:12), WTO Agreement Article (XVI:4), and the DSU Articles (19:1), (22:1) and (22:8).

Nonetheless, the DSU’s lack of legality partly supports the anti-legalists’ narrowly-focused narrative on this issue: The lack of clear rules and procedures on compliance. However, this does not mean that there is a ‘legality of breach’ simply because member states ‘in practice’ can choose between compliance, compensation or retaliation.<sup>239</sup> In truth, this simplistic account of member states’ freedom of choice, speaks directly to the need to reform the DSU in accordance with the aforementioned principles of legality. By comparing the legalists and anti-legalists

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<sup>236</sup> Jacques Bourgeois and Ravi Soopramanien, ‘The World Trade Organization Dispute Settlement System: Embedded in Public International Law?’ in Carl Baudenbacher (ed), *Dispute Resolution* (German Law Publishers 2009) 346-348 citing (Appellate Body Report, EC- Bananas III, WT/DS27/AB/R, adopted September 25 1997).

<sup>237</sup> To date, the AB has issued (136) settlement reports, noting that some high profile disputes have required more than one report see Appellate Body Reports <[https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_reports\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm)> accessed 29 April 2016. However, to deal with the heavy workload and delay, the AB communicated in 2015 to all Members a guideline documents on the appeal submissions see (Executive Summaries of Written Submission in Appellate Proceedings, WT/AB/23, 11 March 2015); (Communication from the Appellate Body- Limits on the Length of Written Submissions, Job/AB/2, 23 October 2015).

<sup>238</sup> Alan Sykes, ‘The Dispute Settlement Mechanism: Ensuring Compliance?’ in Amrita Narlikar and others, *The Oxford Handbook on the WTO* (n 23) 563-566.

<sup>239</sup> *ibid.*

accounts, it emerges that both sides have failed to make efforts to conceptualize or contextualize the concept of legality in the WTO law including the DSU. However, the application of interactionalism legality-centred elements, especially the principles of legality represent an attempt to go beyond the current anti-legalist/legalist dichotomy.

As we conclude, it is important to note that evaluation of legality should not be limited to the DSU, or the limited number of disputes in which the AB was able to display *judicial creativity*. The focus on the fundamental principle of *congruence between official action and the law*, which has given rise to an element of interactionalism, ‘a practice of legality’, would complement an analysis of the legality of WTO law. Therefore, the next chapter would mainly focus on applying the congruence principle as found in Fuller’s jurisprudence, and developed in interactionalism, to the WTO compliance regime(s). These regimes that perform a critical role in ensuring observance of rules include the DSB, TPRM, WTO committees, working parties on accession, working parties on domestic regulations and trade in services rules, and different working groups. The dynamism of these various bodies and organs has to be assessed to determine whether they are collectively supporting a practice of legality that would contribute to the development and maintenance of *an interactional world trade law*. The efficacy of any such law would not only be drawn from its adjudicative role, but also from states interactions on the idea of law.



## Chapter 5: Compliance in the WTO Practice of Legality.

### 5.1 Introduction:

State practice performs a key role in the making of customary international law, and in the interpretation and amendment of treaties. The notion of ‘community of practice’ describes the fact that institutional rules, and the behaviour of states within an international institutional framework, are largely formed by discourse.<sup>1</sup> However, the theory of interactional international law (hereinafter *interactionalism*), as developed by Brunnée and Toope, which endorse the ‘community of practice’ notion, maintains that the practice of legality in this community, centres on the idea of ‘fidelity to law’, which all international legal orders were founded to uphold.<sup>2</sup> Legal norms are derived from the shared commitments of actors, and must comply with the Fullerian principles of legality to ensure compliance.<sup>3</sup> If the law is to exert such a distinctive influence, it is essential ‘to cultivate spaces and opportunities for engagement with and around legal norms’.<sup>4</sup> Interactionalism focuses on the ‘international legal practices’ that are needed in order to appreciate the roles and limitations of the sources of international law and its enforcement mechanisms, and to show how to cultivate constructive legal interactions.<sup>5</sup>

According to interactionalism, ‘law is not a fixed artifact, a product to be consumed by actors in a system. It is a mutually constituting process of interaction involving a diversity of actors and structures in overlapping communities of legal practice’.<sup>6</sup> Interactionalism also maintains that ‘it is the fulfilment of [Fuller’s principles],

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<sup>1</sup> Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Routledge 2005) 15.

<sup>2</sup> Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 65-70 (hereinafter, *An Interactional Account*) 33-42.

<sup>3</sup> *ibid* 65-70. To recall, Fuller’s eight constitutive elements/principles of legality are ‘generality, promulgation, prospectivity, clarity, non-contradictory, not asking the impossible, constancy, and congruence between official action and the law’ see Lon Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969) 39.

<sup>4</sup> Brunnée and Toope, *An Interactional Account* (n 2) 100.

<sup>5</sup> Jutta Brunnée and Stephen J. Toope, ‘Interactional International Law and the Practice of Legality’ in Emanuel Adler and Vicent Pouliot (eds), *International Practices* (Cambridge University Press 2011) 110 (hereinafter *The Practice of Legality*). See Lon Fuller, ‘Human Interaction and the Law’ (1969) *The American Journal of Jurisprudence* 1.

<sup>6</sup> Brunnée and Toope, ‘The Practice of Legality’ (n 5) 116.

supported by a continuous practice of legality, that amount to what Adler and Pouliot call “competent performances” of the practice of international law’.<sup>7</sup> According to Adler and Pouliot, ‘practices are competent performances (...) practices are socially meaningful patterns of action which (...) simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world’.<sup>8</sup> Practices are often shaped by shared commitments to social and legal norms for association and interaction. For example, the elementary relationship between law and economics centres on ‘the legal guaranty’, which gives a higher degree of certainty to traders who contract, and accordingly interact with each other.<sup>9</sup> The institutional setting of the World Trade Organization (WTO) was founded to uphold and maintain a practice of legality that corresponds with the purpose of world trade norms for reciprocal association and non-discriminatory interaction. However, the WTO quasi-judicial legal system was largely influenced by the (1948) organization of the General Agreement on Tariffs and Trade (GATT), particularly its dispute settlement system.

Nonetheless, legal practice under world trade law cannot be fully deconstructed without invoking the encompassing concept of interactional law, which accounts for the formation, interpretation, and implementation of laws. The application of interactionalism has thus far, shown that GATT/WTO rules lack shared understandings, and adherence to the legality principles, especially the afore-examined Dispute Settlement Body (DSB) rules, the Dispute Settlement Understanding (DSU). If participants in the world trading regime have not been successful in cultivating shared procedural understandings on key principles, such as non-discrimination and fostering procedural legality, in terms of their attention to the principles of legality in rule-making and application, then this will ultimately affect the WTO intended practice of legality. However, in order to comprehensively address the practice of legality under the WTO, a brief analysis is presented here of the WTO bodies and mechanisms that are concerned with norms enforcement, and promoting and maintaining legal practices, such as DSB, WTO accession, and the

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<sup>7</sup> *ibid* 108.

<sup>8</sup> Emanuel Adler and Vicent Pouliot, ‘International Practices: Introduction and Framework’ in Adler and Pouliot (eds), *International Practices* (n 5) 6.

<sup>9</sup> Edward Shils and Max Rheinstein (trans), *Max Weber on Law in Economy and Society* (3rd printing, Harvard University Press 1969) 98-99. See Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale University Press 2016).

Trade Policy and Review Mechanism (TPRM). But before this analysis, a brief comparison between the enforcement processes' of the WTO and climate change, will be presented. The reason for this comparison is to understand the climate change compliance regime deeply interactional legal practice which has been conducive to enforcement.

Furthermore, it is worthy considering the proposal for establishing the Institute for Assessing WTO Commitments (IAWC) as a forum for fostering a continuous practice of legality.<sup>10</sup> The reasons and objectives for establishing IAWC, which include facilitating member states' interactions in order to collectively ensure compliance with WTO commitments, will be assessed. This chapter therefore comprises five parts: Part one addresses issues relating to the DSB in terms of the lack of congruence between official action and the law. Part two assesses WTO accession, which is a key starting point for establishing compliance with WTO law. Part three examines the performance of the TPRM in assuring transparency and compliance of member states' trade policies and practices with WTO law. Part four evaluates the proposal for establishing IAWC as an ideal forum for solving compliance issues, and upholding a practice of legality. Finally, part five provides a conclusion.

## **5.2 The WTO DSB and the Principle of Congruence:**

The eighth Fullerian principle of legality, the *congruence between official actions and declared rules*, is most salient to the achievement of legality. Its primary focus is on legal practices that conform to the intended law's purpose and processes. Without the principle of congruence, the law's central aim of providing stability and predictability in the community of law-abiding subjects would be destroyed. Whilst such effect would also be the result of violating other principles of legality, it is the violation of principles of law *not demanding the impossible*, and *being congruent with official action*, that would have the most destructive effect on the reciprocal relationship between lawgiver and subject.<sup>11</sup> Observance of the principles of legality

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<sup>10</sup> Chad Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institute Press 2010) 9, 208-237 (hereinafter, *Self-Enforcing Trade*).

<sup>11</sup> This is derived from Fuller's proposition that violating these principles, in particular, will lead to a *revolution*. Fuller, *The Morality of Law* (n 3) 36-38.

will have the special effect of sustaining legality over time. According to interactionalism:

The criterion of congruence is where the need for analysis of practice becomes most apparent (...) congruence is nothing other than a continuous practice of legality that upholds the other criteria of legality (...) the criteria of legality are crucial in shaping the patterns of a practice of legality. *If a practice consists of a “socially meaningful pattern of action,” the criteria of legality provide the meaningful content of legal interaction; they allow for interpretation along similar standards (...)* Interactional obligation must be practiced to maintain its influence. Because obligation depends in large part upon the reciprocity or mutuality of expectations among participants in a legal system- a reciprocity that is collectively built and maintained- *it exists only when a society’s legal practices are “congruent” with existing norms and the requirements of legality.*<sup>12</sup>

The principle of reciprocity, which is at the heart of world trade law, derives its significance from its status as an effective method of trading and association. Consenting states have reciprocally traded with each other since the inception of the world trading system in 1948, and the GATT and the WTO were founded based on the principles of *reciprocity* and *non-discrimination*. It is widely acknowledged by world trade’s experts that the ‘progressive legalization’ of their field started with the making of *interactional trade obligations*, dispute settlement Panels, and the gradual legalistic nature of treaty practices under the GATT.<sup>13</sup>

The dispute settlement system occupies a central stage in the analysis of legal rules and practices in the world trading system. However, in light of interactionalism, enforcement mechanisms such as those of the WTO, are only one element in the interactional law-making process.<sup>14</sup> The focus on the work of the DSB in terms of its ‘limited’ role in promoting and complying with the congruence principle does not overlook the importance of the interlinked elements of interactionalism that should

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<sup>12</sup> Brunnée and Toope, ‘The Practice of Legality’ (n 5) 114, 116-117 (emphasis added) citing Gerald Postema, ‘Implicit Law’ in Willem Witteveen and Wibern Van der Burg, *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press 1999), and Adler and Pouliot, ‘International Practices: Introduction and Framework’ in Adler and Pouliot (eds), *International Practices* (n 5) 6 (emphasis added).

<sup>13</sup> See Ernst-Ulrich Petersmann, ‘The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public Reason’ in the GATT/WTO Dispute Settlement System’ in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in The Multilateral Trading System* (Cambridge University Press 2015) 182 (hereinafter, The GATT Legal Office).

<sup>14</sup> See Robert Wolfe, ‘See You in Geneva? Legal (Mis)Representations of the Trading System’ (2005) *European Journal of International Relations* 339.

be founded and maintained in rule-making and administration. As noted in the two previous chapters, in order to inspire fidelity, WTO law must continue to cultivate *shared understandings* especially on the most disputed GATT/WTO rules. Furthermore, these rules and the DSB's rulings and recommendations must satisfy all principles of legality to inspire the intended effect of adherence. Once rules are founded on substantive shared understandings and satisfy principles of legality, then they have to be performed in an interactive community of law. However, in relation to compliance with the congruence principle under the DSB, the following issues were highlighted in the previous chapter:

1. Performing legality in the WTO is not the sole responsibility of the DSB, but rather the organization as a whole.
2. The lack of direct effect of WTO law has affected compliance.
3. Legality is beyond the comprehension and reach of developing and least-developing WTO member states.

These issues are pertinent to the DSB because they emanate from an inaccurate perception of WTO law, and the structural and textual defects of the DSB. These defects include the consultation phase's lack of effectiveness, and the vagueness of the compliance procedure under DSU Articles (21-23).<sup>15</sup> However, what needs to be briefly addressed here is the mistaken perception of WTO law. Along the lines of legal positivism, international law is wrongly perceived as deriving its legitimacy only from the authority of the court that interprets and applies the law.

To demonstrate, the WTO DSB is ineffective, precisely because of the WTO overreliance on the DSB mechanism which is the main reason for its unsuccessful performance. Contrary to the DSB's core mission, almost all consultation-related and high profile disputes are not settled in a timely and effective manner; some have not been settled since the founding of the WTO in 1995.<sup>16</sup> Litigated disputes suffer from violations of legality, as evidenced by the use by the Panel and Appellate Body (AB) of judicial economy and activism, and the misuses of the compliance review procedure under DSU Article (21:5) by the offending member states, which have

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<sup>15</sup> Jason Kearns and Steve Charnovitz, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5' (2002) *Journal of International Economic Law* 331; Gary Horlick and Judith Coleman, 'The Compliance Problems of the WTO' (2007) *Arizona Journal of International and Comparative Law* 141; William Davey, 'Compliance Problems in the WTO Dispute Settlement' (2009) *Cornell International Law Journal* 119.

<sup>16</sup> Current Status of Disputes  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm)> accessed 16 March 2016; Gregory Shaffer and others, 'The Law and Politics of WTO Dispute Settlement' (2016) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2748883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748883)> accessed 22 March 2016.

prolonged the dispute to reap the trade benefits resulting from delayed settlement.<sup>17</sup> Furthermore, in relation to procedural fairness, and in response to the judicial activism challenge, the AB appointment process is becoming deeply politicized, for example, diplomats rather than international law experts were appointed as AB members to decide on ‘issues of law’.<sup>18</sup>

In brief, the DSB has become the victim of its own success, as the overworked DSB has upset the balance between the political and judicial branches of the WTO. Thus, legality under WTO law should not be perceived as the sole responsibility of the DSB. Rather, WTO legality has to be built and cultivated in every space and opportunity for member states’ interactions, whether in the form of the work of committees, general councils, or ministerial conferences, and these interactions have to conform with legality principles. Socially constructed legal obligations, including those of the WTO, ‘cannot be reduced to the existence of fixed rules, it is made real in the continuing practice of communities that reason with and communicate through norms’.<sup>19</sup> The emphasis on legalization within the remit of DSB and lack of cooperation are concerning for critics of WTO legitimacy. For instance, describing the WTO, Elsig stated that, ‘in the past we might have overemphasized the study of the effects of legalizations to the detriment of focusing on the challenges posed by the distributional effect of cooperation’.<sup>20</sup>

However, legalization based on the practice of legality cannot be separated from cooperation, as the former informs and refines cooperative practices. Hence, it is imperative to highlight the historical instances in which practices of legality under world trade law were successful, and to assess existing WTO structures intended to substantiate and refine such practices for the purpose of enhancing compliance. Two examples of such successful interactions on the basis of legality stand out in the history of the world trading system. The first manifested in ‘the progressive legalization’ of the world trading regime during the GATT era, especially in the

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<sup>17</sup> See Chapter Four subheadings (4.5.1-4.5.3) on generality and clarity, and non-contradictory.

<sup>18</sup> Manfred Elsig and Mark Pollack, ‘Agents, Trustee, and International Courts: The Politics of Judicial Appointment at the World Trade Organization’ (2012) *European Journal of International Relations* 1. See Joost Pauwelyn, ‘The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus’ (2015) *American Journal of International Law* 761.

<sup>19</sup> Brunnée and Toope, ‘The Practice of Legality’ (n 5) 131.

<sup>20</sup> Manfred Elsig, ‘The World Trade Organization’s Legitimacy Crisis: What Does the Beast Look Like?’ (2007) *Journal of World Trade* 75.

1980s where a community of practice was strengthened by a gradual increase in legal practices involving participants from both developed and developing contracting parties. Those parties who later become members of the WTO had participated in wider communities of international legal practice. They draw the following into the trading regime: Most of the principles of legality, such as *clarity, feasibility, and consistency*; and background knowledge on procedural rules and practices of the United Nations system, and of the design and implementation of other economic agreements.<sup>21</sup>

Since 1980, contracting parties' submissions to the committees of specialized agreements of 'Information on Implementation and Administration of the Agreement', have promoted the practice of legality under the GATT.<sup>22</sup> The GATT Office of Legal Affairs, which was established in 1982, performed a crucial role in promoting legal practices by assisting GATT's Panels on interpretations, and the Uruguay Round negotiators on the judicial design of the WTO.<sup>23</sup> It was mainly these GATT initiatives that built 'a resilient community of legal practice' which led to the legalization of the world trading system. For these reasons, the GATT community gradually matured into a community of law, making the organization ready for the introduction of legal bodies such as a Panel dispute settlement system in 1966, the Office of Legal Affairs, and Rule Division in 1992.<sup>24</sup>

Although these initiatives did not withstand the test of time, and encountered resistance from developed contracting states, as shown by the compliance deficit in the 1980s, they initiated and cultivated the practice of legality under the GATT,

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<sup>21</sup> See GATT documents on international law and the UN in Stanford GATT Digital Library, for example, (Dispute Settlement in International Agreements, Factual Study by the Secretariat, MTN/SG/W/8, 6 April 1976) <<https://gatt.stanford.edu/bin/search/simple>> accessed 7 February 2016 (hereinafter The Stanford GATT Digital Library).

<sup>22</sup> For the period of (1980-1994), there are (510) recorded documents from different contracting parties, containing questions about the legal challenges they faced when interpreting and implementing GATT rules. See The Stanford GATT Digital Library (n 21).

<sup>23</sup> See Frieder Roessler, 'The Role of Law in International Trade Relations and the Establishment of the Legal Affairs Division of the GATT', and Petersmann, 'The GATT Legal Office' in Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (n 13) 161,182.

<sup>24</sup> See 'Decision of 5 April 1966 on Procedures under Article XXIII' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/a2s1p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/a2s1p1_e.htm)> accessed 22 March 2016; Robert Hudec, 'The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure' in Jagdish Bhagwati and Mathias Hirsch (eds), *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Springer 1998) 101-120; Gabrielle Marceau and Daniel Baker, 'A Short History of the Rules Division' in Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (n 13) 112-128.

augmenting the legalistic discourse. For example, the agreement to introduce the WTO with its legalistic structure was the result of an agreement made between Japan and the then European Communities (EC) on the one hand, and the United States (US) on the other, with the former accepting to be bound by a judicial system in return for the latter forswearing its unilateral actions.<sup>25</sup>

Even if this historical agreement had not been struck, the GATT community of legal practice would have continued to grow, and would have ultimately forced developed contracting parties into compliance because of the external and internal strength it gained from engagement in, and cultivation of, a practice of legality. In short, the legalistic design of the WTO was not the result of fate, or the willingness of the US Congress, but rather of a rich history of legal interactions of GATT contracting parties. Nevertheless, the practice of legality under the WTO has assumed more developed and comprehensive forms as stipulated in the five functions of the organization. These functions include facilitating ‘the implementation, administration, and operation’ and furthering the objectives of the WTO and Multilateral Trading Agreements, through negotiations, effective administration, and cooperation with relevant international organizations.<sup>26</sup> The WTO DSB, TPRM, the Legal Affairs Division, Rules Division, committees, working parties, and working groups, are all working to ensure the effective and prompt observance of GATT/WTO rules.

The second example of successful legal interactions in the history of world trade is found in the work of the WTO Technical Barriers to Trade (TBT), and the Sanitary and Phyto-Sanitary Measures (SPS) committees, where TBT/SPS rules are (re)interpreted for consistency, and even disputes effectively settled without DSB help.<sup>27</sup> Legal interaction in these committees have significantly contributed to the effective performance of their respective agreements, and interpretation of

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<sup>25</sup> Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization 2013) 235-236.

<sup>26</sup> World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (20th printing, Cambridge University Press 2013) 5 (hereinafter *The WTO Legal Texts*).

<sup>27</sup> Work on SPS in the WTO, and Official Documents, <[https://www.wto.org/english/tratop\\_e/sps\\_e/work\\_and\\_doc\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/work_and_doc_e.htm)>; TBT Official Documents <[https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_work\\_docs\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_work_docs_e.htm)> accessed 16 March 2016; Andrew Lang and Joanne Scott, ‘The Hidden World of WTO Governance’ (2009) *European Journal of International Law* 575; and arguing further on the positive effect of these committees in improving compliance see Andrew Lang and Joanne Scott, ‘The Hidden World of WTO Governance: A Rejoinder to Richard H. Steinberg’ (2009) *European Journal of International Law* 1073.



discriminatory treatment.<sup>28</sup> Mutual understandings of TBT/SPS rules have been generated and maintained by member states' interactions on the basis of sound legality. Such a basis has been maintained by states ensuring, for example, that members' rules concerning SPS are clear, promulgated, feasible, and mutually developed by concerned states, to improve food safety.<sup>29</sup> The outcome of disagreements between states, namely disputes, usually ends up in an early positive settlement, which is shared with other members to ensure coherence and the harmonization of standards.<sup>30</sup> Such sharing of information is a more effective tool for learning than engaging in official disputes under the DSB, since information on most of these official disputes is often limited and difficult to comprehend, thus, putting off any observing states who wish to learn about a particular field of trade. For example, the current (151) consultation disputes have very limited information, and even once these disputes have been litigated, interested third parties cannot have access to the deliberations of the disputing parties, or adjudicators, without their discretion.

Although, in accordance with DSU Article (10), third parties can participate in official disputes by being afforded the right to be heard and make written submissions to the Panel, such participation on a voluntary basis has been found to 'lower the prospect for early settlement'.<sup>31</sup> Interaction in active committee settings such as the SPS/TBT is more effective for learning and resolving disputes than interactions in the DSB. The two most disputed WTO agreements after the GATT are the Anti-Dumping Agreement, and the Agreement on Subsidies and

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<sup>28</sup> See Federico Ortino, 'Form 'Non-Discrimination' to 'Reasonableness': A Paradigm Shift in International Economic Law' (2005) Jean Monnet Working Paper  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=922524](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922524)> accessed 19 March 2016.

<sup>29</sup> Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (n 14). See the TBT committee 2000 decision on the Principles for the Development of International Standards, which was considered by the AB in US-Tuna II (Mexico) as a 'subsequent agreement' under VCLT Article 31(3)(a) to inform the application and interpretation of the TBT provision under investigation. (Appellate Body Report, United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, para. 372, WT/DS381/AB/R, adopted 16 May 2012). See Joost Pauwelyn, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties' (2014) *Journal of International Economic Law* 739.

<sup>30</sup> Andrew Stoler, 'TBT and SPS Measures in Practice' in Jean-Pierre Chauffour and Jean-Christopher Maur, *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank Publications 2011) 217-233; Lang and Scott (27); Peter Van den Bossche and Werner Zdouc, *The Law and Policy of World Trade Organization: Text, Cases and Materials* (3rd edn, Cambridge University Press 2013) 888, 941 (hereinafter *The Law and Policy of WTO*).

<sup>31</sup> Marc Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) *World Politics* 446.

Countervailing Measures (SCM). So Instead of relying on an ineffective notification schemes, these agreements need active committees similar to the SPS/TBT's to enable members to ensure consistency within and optimal compliance with the law. In social and legal practices, interactions on the basis of shared understandings, are preferable to seeking the help of adjudicators.<sup>32</sup> The effective customary and contract law bodies that play an integral part in human life originated from the establishment and maintenance of 'a stable interactional expectances'.<sup>33</sup>

Legality, as pioneered by Fuller's eight constitutive elements, must be applied to WTO law and practice. This can be achieved by addressing the WTO member states concerns about the basis of the legal regime of world trade, subjecting decision-making, GATT/WTO rules, and dispute resolutions to the eight tests of excellence in legality. The WTO has different communities of practice, such as the working parties on accession, and various committees of specialised agreements, which have developed around a given issue or norm(s). However, interactionalism maintains that 'only when [these communities] are engaged in a practice of legality rooted in the specific "Background" criteria of legality can shared legal understandings, be they procedural or substantive, modest or ambitious, be produced, maintained, or altered'.<sup>34</sup> Hence, legality is not measured by the institution's edicts, or court's verdicts, but rather by 'sufficiently dense interactions', and participation of the members of communities of practice, to develop 'posited' laws by establishing a common continuous legal practice.<sup>35</sup>

With regard to the lack of direct effects of the WTO law, this particular issue has a detrimental impact on the WTO practice of legality.<sup>36</sup> First, the terminology of direct effect needs to be clarified. According to Bossche and Zdouc:

In many jurisdictions, the issue of direct effect, i.e. the issue of *direct invocability*, is to be distinguished from the issue of *direct applicability*, i.e. the issue whether a national act of transformation is necessary for an international agreement to become part of national law. On the latter

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<sup>32</sup> Fuller, 'Human Interaction and the Law' (n 5).

<sup>33</sup> *ibid.*

<sup>34</sup> Brunnée and Toope, 'The Practice of Legality' (n 5) 117 (emphasis added).

<sup>35</sup> *ibid.* 118; Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (n 14).

<sup>36</sup> For an overview of the academic debate on this issue see Bossche and Zdouc, *The Law and Policy of WTO* (n 30) 66-70 citing Thomas Cottier and Krista Schefer, 'The Relationship between World Trade Organization Law, National Law and Regional Law' (1998) *Journal of International Economic Law* 83.

issue, it should be noted that WTO law is directly applicable in the EU legal order. It became part of EU law without any act of transformation.<sup>37</sup>

It may be argued that in this sense, direct applicability is dependent on states providing direct invocability to WTO law provisions. However, the WTO's silence on the issue of direct invocability has a negative impact on member states' enforcement of WTO obligations, because, 'if provisions of WTO law were to have direct effect and could be invoked to challenge the legality of national measures, this would significantly increase the enforceability and effectiveness of these provisions'.<sup>38</sup> Herdegen argues that the freedom of choice for member states, especially developed ones such as the US or European Union (EU) countries, to limit the direct effect of WTO law, 'seriously affects the pull to compliance with obligations under WTO law'.<sup>39</sup> Herdegen explains the direct effect conundrum as follows:

Courts of WTO Members are willing to give effect to WTO law, if provisions of domestic law refer to WTO standards and if these provisions confer a specific right which individuals can invoke in judicial proceedings. Such provisions, which can be found in EU law as well as in the law of the United States, often allow affected domestic industries to seek relief against the violation of WTO rules by other States. A famous example is section 301 of the US Trade Act of 1974 which enables US enterprises to claim governmental action in response to foreign trade measures.<sup>40</sup>

It is a conundrum for two reasons: First, such relief in this US case is provided by a capable member state for its own enterprises for the continued violations of WTO commitments. Second, without having a direct effect stipulated in WTO law, and supported by the organization, developing and least-developing members will not be able to independently provide direct effect. Multinational corporations operating in member states will always take advantage of the limited effect of WTO law. Although liberated trade is legally guaranteed, national courts and authorities are often constrained by capacity and financial limitations. National constituencies cannot challenge GATT/WTO rules, and multinational corporations work with

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<sup>37</sup> Bossche and Zdouc, *The Law and Policy of WTO* (n 30) 66 (emphasis added).

<sup>38</sup> *ibid* 66-67.

<sup>39</sup> Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press 2013) 271.

<sup>40</sup> *ibid* 272.

limited or no scrutiny, namely impunity.<sup>41</sup> Thus, contrary to Fabri's argument that the WTO law is not 'politically ready' for direct effect, if the WTO wants an effective *interactional law* that is supportive of its obligations, as envisioned in its law, it should facilitate the interplay between the WTO and domestic law.<sup>42</sup>

Moreover, the argument that allowing or facilitating direct effect is dangerous to democracy, as it might conflict with the legitimate will of the legislatures, is unfounded.<sup>43</sup> Democracies with monist legal systems that allow for the direct applicability of international laws are unharmed by the monist effect; in fact, this applicability strengthens national laws and effectively promotes consistency with international law.<sup>44</sup> If national courts and authorities in member states are required to observe GATT/WTO obligations (GATT Articles (II) and (X)), national constituencies of consumer groups and civil societies should be allowed to have a seat in the WTO, and to challenge the legality of the obligations holding their governments as well as traders to account.<sup>45</sup> The argument that member states' 'democratic institutions for accountability' prefer to adjudicate in the WTO to appear responsive to domestic interests might be valid.<sup>46</sup> However, not all WTO members are democratic, and the question of whose interests the governments of democratic member states are defending-traders only, or the wider public interest-remains.<sup>47</sup>

The lack of direct effect underlies most of the misinterpretations of WTO law and practice. National constituencies often regard the WTO as being riddled with bureaucracy, lacking democracy, and with laws that are devoid of any sense of just and fair causes, mainly because they are denied the opportunity of interacting with

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<sup>41</sup> See David Korten, *When Corporations Rule the World* (3rd edn, Berrett-Koehler Publishers 2015).

<sup>42</sup> See Helen Fabri, 'Is There a Case-Legally and Politically- for Direct Effect of WTO Obligations?' (2014) *European Journal of International Law* 151.

<sup>43</sup> John Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) *American Journal of International Law* 310.

<sup>44</sup> This is the case in the democratic monist civil law systems of Germany and the Netherlands see James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 89, 100-102.

<sup>45</sup> See Petersmann, 'The GATT Legal Office' (n 13).

<sup>46</sup> See Christina Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton University Press 2012).

<sup>47</sup> See Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing 2012); Korten, *When Corporations Rule the World* (n 41).

and within the organization's law and settings.<sup>48</sup> If the WTO is politically unable to take on the responsibility of direct effect for fear of political deadlocks or unwanted responsibility, it should further explain its ineptness in terms of negotiation and enforcement, despite the absence of direct effect. The WTO can improve the direct applicability of its law by assisting developing countries to have competent state empowered entities similar to the US or Canadian trade law commission to detect and challenge noncompliance. A citizen of a WTO member state should be recognised as being an 'agent of justice, democratic principal, and economic actor' and afforded the right to challenge the legality of GATT/WTO rules and to seek redress from their violations.<sup>49</sup> It is essential to cultivate the belief in the justice of WTO law for the sake of the legal legitimacy and democratic governance of the WTO mission, and the intended influence of this mission on improving member states' governance of trade regulations.<sup>50</sup>

The lack of direct effect can be linked to the thorny issue of the lack of monetary remedies for violating WTO commitments. If direct effect is legally guaranteed by allowing affected stakeholders of WTO law to seek redress, offending governments and corporations would be compelled to pay reparations, effectively remedying their WTO violations, and more importantly, finalizing official dispute(s). The need for monetary remedies will become less of an issue if official disputes are resolved in a timely manner, and WTO law facilitates effective ongoing interactions based on legality, by permitting direct effect of GATT/WTO provisions. Again, going back to the point that the lack of direct effect affects the pull to comply with WTO obligations, it should be stressed that *interactional law* depends on the actors' ability to communicate and reason with legal norms.

Enforcement of WTO commitments should not only be in the DSB, but also in every setting for states and non-state actors' interactions.<sup>51</sup> For example, the proliferation

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<sup>48</sup> See Debra Steger, 'The Future of the WTO: The Case for Institutional Reform' (2009) *Journal of International Economic Law* 803.

<sup>49</sup> Ernst-Ulrich Petersmann, 'Fragmentation' and 'Judicialization' of International Law as Dialectic Strategies for Reforming International Economic Law' (2013) *Trade Law and Development* 209.

<sup>50</sup> Aaronson and Abouharb said that it is difficult to answer the question 'does the WTO help Member States improve governance?', however, they agree that 'improved governance is a spillover of membership in the WTO' see Susan Aaronson and M. Abouharb, 'Does the WTO Help Member States Improve Governance?' (2013) *World Trade Review* 1.

<sup>51</sup> See Yves Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge University Press 2014).

of Preferential Trade Agreements (PTAs) that are not effectively examined by either the Committee on Regional Trade Agreements (CRTA) or DSB for upholding the non-discrimination principle is a concern for WTO experts.<sup>52</sup> If, as in the case of WTO, rules are made operative in limited instances and settings, *interactional world trade law* will cease to exist, and the practice of legality will be frustrated. Frustration of this practice is a pertinent issue to the challenges faced by developing and least-developed member states when trying to comprehend and perform legality. The active participation of those members (who form the majority of WTO membership) in the system depends on GATT/WTO exemptions, the assistance provided by the Committee on Trade and Development, and the WTO Secretariat.

However, despite the widely held view that the DSB is the main engine for making WTO law effective, DSB is ineffective in assisting developing and least-developing members, especially if they challenge the measure(s) of offending members. For example, the language of the DSU briefly requires the DSB and disputing parties to consider developing countries' economic vulnerability (DSU Article 21:7-8), and provides poorly defined procedures to help 'least-developed member states' who are involved in the dispute as a complainant or respondent (DSU Article 24). Understandably, if those members are to effectively exercise their WTO memberships, and reap the benefits of world trade, they would only go to the DSB as a last resort.<sup>53</sup> The challenges facing those members in the DSB is explained further in the sixth section, since the reason for proposing the establishment of IAWC is to help those members to engage fully in an interactive inclusive practice of legality to enhance compliance.

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<sup>52</sup> PTAs must be compliant with GATT as stipulated under GATT Article (XXIV). However, since (1995) the CRTA has not adopted an examination report of PTA because of lack of consensus, and the DSB has only ruled on one directly related PTA case [Turkey-Restrictions on Imports of Textiles and Clothing Products, DS34]. See Michael Trebilcock, *Advanced Introduction to International Trade Law* (revised edn, Edward Elgar Publishing 2015) 45-48.

<sup>53</sup> Although a few developing member states have been heavy users of the dispute settlement system (e.g. Brazil), the majority have not used it (not even as a third party), and the system is primarily for settling disputes between developed members (as of 2010 the US and EU, between them, have been complainants/respondents in (41%) of all cases), see Gregory Shaffer and Ricardo Melendez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press) 2.

### **5.3 The Interactional Legal Practice under the Climate Change Regime:**

After the analysis of the WTO enforcement process under the DSB which showed that the compliance system is lacking in terms of clarity and effectiveness in law and practice, a brief comparison of this system to that of climate change regime shall ensue. There are two reasons for this section, first Brunnée and Toope applied interactionalism to the climate change law and practice. The second is to reveal the novel features of the climate change compliance system, which has been designated as an exemplary interactional law with relatively successful enforcement system.<sup>54</sup> These features will be listed under two points, namely the foundations of compliance, and the design of compliance systems under the climate change and WTO laws. The foundations of compliance of the climate change law has been built in an interactional legal process for State parties under the 1994 United Nations Framework Convention on Climate Change (UNFCCC), and the 2005 Kyoto Protocol to the UNFCCC. Established and facilitated by these instruments are supplementary activities and documents that have performed a constructive role in building shared understandings that collectively led to the success of the 2015 Paris Agreement.

These activities include the annual Conferences of the Parties (COP), and the reports of the Intergovernmental Panel on Climate Change (IPCC). The COP has improved parties' understandings of their shared responsibilities toward climate change with major decisions such as the 1995 Berlin Mandate, the 2001 Marrakech Ministerial Declaration, the 2007 Bali Action Plan, and the 2012 Doha Amendment to the Kyoto Protocol.<sup>55</sup> These decisions have helped parties to comply with their emission reductions commitments. The parties and scientists support the objective of the climate change regime, namely achieving a 'stabilization of greenhouse gas concentrations in the atmosphere at a level that prevents dangerous climate change' (Article 2 UNFCCC).<sup>56</sup> The Paris Agreement (ratified by 141 parties) says that the

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<sup>54</sup> See Jutta Brunnée, 'Multilateral Environmental Agreements and the Compliance Continuum' in Gerd Winter eds, *Multilevel Governance of Global Environmental Change* (Cambridge University Press 2006); Dietrich Earnhart and Robert Glickman, 'Coercive vs. Cooperative Enforcement: Effect of Enforcement Approach on Environmental Management' (2015) *International Review of Law and Economics* 135.

<sup>55</sup> Brunnée and Toope, *An Interactional Account* (n 2) 141-177; A Brief Overview of Decisions <<http://unfccc.int/documentation/decisions/items/2964.php>> accessed 31 December 2016.

<sup>56</sup> The UNFCCC Convention < [http://unfccc.int/essential\\_background/convention/items/6036.php](http://unfccc.int/essential_background/convention/items/6036.php)> accessed 03 January 2017.

regime aims to limit ‘the increase in the global average temperature to well below 2° C above pre-industrial levels’ and pursue ‘efforts to limit the temperature increase to 1.5° above pre-industrial levels’ (Article 2:1(a)).<sup>57</sup> Central to the good performance of the climate change regime is the principle of Common but Differentiated Responsibilities (CBDR) which puts the onus on developed countries as the major emitters to uphold their obligations, and exempt developing countries.

Although the CBDR has a shared ground, that different states have to be treated differently, and contested meaning on what constitutes a responsibility, but it has been ‘a crucial factor in stabilizing and directing the regime’.<sup>58</sup> This is despite the United States objection and its subsequent withdrawal from the Kyoto Protocol in 2001 (it re-entered the negotiations in 2007 with a position supportive of CBDR). The Protocol encourages parties to rely on emission trading schemes to control their factories and other installations emission by requiring them to trade their allowances with other emitters to comply with the emission cap, avoiding fines.<sup>59</sup> Hence, the Protocol’s aim, that developed countries and countries with economies in transition listed in Annex I to the UNFCCC have to uphold their emission reduction commitments, remains undeterred due to the cultivation of shared understandings on compliance in the COP with IPCC assessment reports. These climate change law foundations of compliance are distinctly different from those of the WTO in three respects.

Firstly, the WTO negotiation function, as represented by the Doha Development Round (DDR)’s fiasco, is largely dysfunctional. The WTO Ministerial Conference, which meets every two years, is constrained by the consensus rule, whereas the COP’s decisions and resolutions which have improved compliance have been adopted by a simple decision. Secondly, the Special and Differential Treatment (SDT) principle under the WTO lacks clarity, and has not been a determining factor in forcing compliance. As will be explained below, the CBDR and the Kyoto Protocol have been instrumental in securing compliance from developed countries by reminding them of their shared but differentiated responsibility toward climate

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<sup>57</sup> The Paris Agreement  
<[http://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf)  
> accessed 27 December 2017.

<sup>58</sup> Brunnée and Toope, *An Interactional Account* (n 2) 162-163.

<sup>59</sup> Kyoto Protocol 10<sup>th</sup> Anniversary: Timely Reminder Climate Agreements Work (press released 13 February 2015) <<http://newsroom.unfccc.int/unfccc-newsroom/kyoto-protocol-10th-anniversary-timely-reminder-climate-agreements-work/>> accessed 31 December 2016.



change.<sup>60</sup> Even though the SDT and the CBDT are different in terms of their application, the SDT should be perceived as focusing on the developed members who have significant share of global trade. Those members have a larger responsibility in complying with their trade policies and practices. Sections 5 and 6 below present a rethinking of the SDT by putting the onus on developed WTO members to honour their treaty commitments by effective compliance reviews and reliable notifications of their subsidies. Thirdly, the climate change regime principle of emission reduction target is more precise than the WTO principle of non-discrimination. GATT Articles I and III have been perplexing in law and practice, especially when one considers whether WTO member states have complied with these Articles in their PTAs.<sup>61</sup>

Now the discussion should turn to the compliance systems of the climate change and WTO laws. Brunnée and Toope said in 2010 that despite the UNFCCC failing to meet the congruence principle by Annex I parties not fully adhering to their commitments, this has not undermined the legality of the regime as it rests on solid procedural legality and has become an interactional law mainly because of its compliance review mechanism.<sup>62</sup> Pursuant to Article 18 of the Kyoto Protocol, the COP ‘shall at its first session, approve appropriate and effective procedures and mechanism’ on compliance, and the last sentence stipulates that ‘any procedures and mechanisms (...) entailing binding consequences shall be adopted by means of an amendment to the Protocol’.<sup>63</sup> Thus, the COP in 2005 approved and adopted the Procedures and Mechanisms relating to Compliance under the Kyoto Protocol (hereinafter the Procedures and Mechanisms) which aims to ‘facilitate, promote and enforce compliance’.<sup>64</sup> The legally non-binding nature and flexibility permitted under Article 18 to adopt the Procedures and Mechanisms by amendment allowing parties to opt out of compliance, was recognised as an innovative procedure

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<sup>60</sup> See Andrew Mitchell, ‘A Legal Principle of Special and Differential Treatment for WTO Disputes’ (2006) *World Trade Review* 445.

<sup>61</sup> See Julia Qin, ‘Defining Nondiscrimination Under the Law of the World Trade Organization’ (2005) *Boston University International Law Journal* 215.

<sup>62</sup> Brunnée and Toope, *An Interactional Account* (n 2) 183-184.

<sup>63</sup> The Kyoto Protocol < <http://unfccc.int/resource/docs/convkp/kpeng.pdf> > accessed 28 December 2016.

<sup>64</sup> Decision 27/CMP.1 Procedures and Mechanisms relating to Compliance under the Kyoto Protocol < [http://unfccc.int/files/kyoto\\_protocol/compliance/application/pdf/dec.27\\_cmp.1.pdf](http://unfccc.int/files/kyoto_protocol/compliance/application/pdf/dec.27_cmp.1.pdf) > accessed 28 December 2017.

contributing to the success of the climate change regime.<sup>65</sup> Brunnée argues that the non-binding form of compliance with multilateral environmental agreements, which includes the UNFCCC, is best framed in a ‘compliance continuum’.<sup>66</sup> The regime is best illuminated by a compliance continuum because law application, interpretation and enforcement should be ‘part of a continuum that either supports or undermines legal norms’.<sup>67</sup> When the interactional framework was applied to climate change it revealed that it is inaccurate to describe the regime as weak because it does not have explicitly binding rules or dispute settlement body.<sup>68</sup> The regime has proven resilient with the Procedures and Mechanisms’ facilitative and enforcement branches, and the Rules of Procedure of the Compliance Committee of the Kyoto Protocol.

The Rules of Procedure as per Article 18 of the Kyoto Protocol that permits revision, has been amended twice by the parties.<sup>69</sup> The Compliance Committee consists of twenty members elected by the COP to serve in the facilitative or enforcement branches (ten each), and the amendments to the Rule of Procedure have been made to enhance members’ role in facilitating and forcing compliance. According to Article IV:4 of the Procedures and Mechanisms the facilitative branch is ‘responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments under the Protocol’.<sup>70</sup> Article VI postulates that the facilitative branch ‘shall decide on the application of one or more of the following consequences (...) advice and facilitation of assistance to individual parties regarding implementation of the Protocol, facilitation of financial and technical assistance [and] recommendations to the Party concerned’.<sup>71</sup>

However, Article V:4 maintains that the enforcement branch ‘shall be responsible for determining whether a Party included in Annex I’ is not in compliance with its reduction, inventory or reporting commitments under the Protocol, or eligibility

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<sup>65</sup> Jutta Brunnée, ‘Multilateral Environmental Agreements and the Compliance Continuum’ (n 54) 400, 407.

<sup>66</sup> *ibid* 390. See Earnhart and Glickman, ‘Coercive vs. Cooperative Enforcement: Effect of Enforcement Approach on Environmental Management’ (n 54).

<sup>67</sup> Jutta Brunnée, ‘The Sources of International Environmental Law: Interactional Law’ (2017) <<https://ssrn.com/abstract=2784731>> accessed 03 January 2017.

<sup>68</sup> Brunnée, ‘Multilateral Environmental Agreements and the Compliance Continuum’ (n 54) 401.

<sup>69</sup> Compliance under the Kyoto Protocol <[http://unfccc.int/kyoto\\_protocol/compliance/items/2875.php](http://unfccc.int/kyoto_protocol/compliance/items/2875.php)> accessed 29 December 2016.

<sup>70</sup> The Procedures and Mechanisms (n 64).

<sup>71</sup> *ibid*.

requirements under the Kyoto Mechanisms.<sup>72</sup> The consequences applied by the enforcement branch differ depends on the underlying commitments, and take the forms of ‘declaration of non-compliance [and] development of a plan’.<sup>73</sup> For example, a party failing to honour its reduction commitments shall be declared non-compliant, and prepare ‘a compliance action plan’ detailing the causes of non-compliance and how it plans to uphold its commitment within three years.<sup>74</sup> The non-compliant party shall suffer the deduction in its allowable emission for the next commitment period and the suspension from eligibility to sell emission rights.<sup>75</sup> The second sentence of Article V:6 says that ‘the consequences of non-compliance (...) applied by the enforcement branch shall be aimed at the restoration of compliance to ensure environmental integrity, and shall provide for an incentive to comply’,<sup>76</sup> This shows that the enforcement branch should not be viewed as punitive or coercive, but supporting the facilitation branch in enhancing the parties’ compliance.<sup>77</sup>

Finally, concerning the Paris Agreement, its purpose will be achieved through the novel procedure of nationally determined contributions which requires all Parties, developed and developing, to put forward their best efforts to avert dangerous climate change. This procedure will be conducive to the Agreement’s transparency goals under Article 13, which aims to make the international review of implementation an open, collaborative, and instructive process. The non-adversarial and non-punitive nature of the implementation and compliance process under Paris Agreement borrows from the previous climate change procedures of compliance that have relied on cooperative rather than coercive enforcement mechanisms. Two points should be noted concerning the compliance systems of the climate change and WTO regimes. First, in terms of law, the climate change compliance system is remarkable in its interactive nature with the facilitative and enforcement branches performing an indispensable roles. The Rules of Procedure and the Kyoto Protocol have been successfully amended to ensure full and effective compliance with the UNFCCC. The WTO compliance system, however, as represented by the DSU, which relies on the seemingly coercive power of the DSB, has been ineffective in

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<sup>72</sup> *ibid.*

<sup>73</sup> *ibid* Article XV.

<sup>74</sup> *ibid* Article XV:5-6.

<sup>75</sup> *ibid* Article XV:5 (a), (c).

<sup>76</sup> *ibid.*

<sup>77</sup> Brunnée, ‘Multilateral Environmental Agreements and the Compliance Continuum’ (n 54) 403.

ensuring timely compliance with the DSB rulings and recommendations. The DSU should instruct the DSB to collaborate with the TPRM to enforce compliance, since the TPRM has an enforcement effect and can ideally preform the role of a facilitative branch. However, amendments of the DSU is dependent on the successful conclusion of the DDR, which seems improbable. Still, interactions to force compliance as argued throughout this thesis can be achieved within and outside the DSB. Second, in terms of practice, the first period of Kyoto Protocol enforcement (2008-2013) has achieved emission reductions targets.<sup>78</sup> During this period the enforcement branch considered nine cases of non-compliance concerning eight parties (with Ukraine having two cases). The enforcement branch advised parties on questions of implementation and resolving their cases by accepting compliance with their implementation plans, and reinstating their eligibility for trading emissions.<sup>79</sup> In the second ongoing case concerning Ukraine's reporting and emission reduction target, the branch accepted Ukraine compliance plan in its 21 December 2016 decision on *the review and assessment of plan* saying 'if implemented, [it] is expected to remedy the non-compliance'.<sup>80</sup>

In addition, the five rounds of the Implementation Assessments, the so-called 'multilateral assessments', where 18 developed countries present their achievements in implementing climate policies, have been constructive in increasing transparency and improving compliance.<sup>81</sup> In short, the Procedures and Mechanism usefulness is attributed to the Kyoto Protocol's dependence on emission trading mechanisms, and its 'facilitative normative-discursive, and enforcement-oriented approaches', making the climate change regime an exemplary interactional law.<sup>82</sup> However, because of the institutional imbalance between the political and judicial branches, and the DSU defects, the WTO practice of forcing compliance has been ineffective. As this thesis testifies and the fifth section on TPRM, the DSB is not legally interactional, and the

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<sup>78</sup> Kyoto Protocol 10<sup>th</sup> Anniversary (n 59).

<sup>79</sup> Compliance under the Kyoto Protocol  
<[http://unfccc.int/kyoto\\_protocol/compliance/items/2875.php](http://unfccc.int/kyoto_protocol/compliance/items/2875.php)> accessed 01 January 2017.

<sup>80</sup> Final Decision, Party Concerned: Ukraine  
<[http://unfccc.int/files/kyoto\\_protocol/compliance/questions\\_of\\_implementation/application/pdf/cc-2016-1-6\\_ukraine\\_eb\\_final\\_decision.pdf](http://unfccc.int/files/kyoto_protocol/compliance/questions_of_implementation/application/pdf/cc-2016-1-6_ukraine_eb_final_decision.pdf)> accessed 01 January 2017.

<sup>81</sup> Countries Show How they Are Implementing Climate Policies: New Round of Implementation Assessments in 2017 (13 February 2017) <<http://newsroom.unfccc.int/unfccc-newsroom/new-round-of-implementation-assessments-in-2017/>> accessed 13 January 2017.

<sup>82</sup> Brunnée, 'Multilateral Environmental Agreements and the Compliance Continuum' (n 54) 405.

WTO Agreement has not been matched with a strong enforcement mechanism. The WTO should draw on the successful experience of climate change law to make the law effective and interactive in practice to inspire fidelity.

#### **5.4 An Interactional World Trade Law from the Point of Accession:**

The best way of construing the interactional world trade law is to always see it as one conveys and creates information, and facilitates credible commitments.<sup>83</sup> The point of accepting to be bound by law is just the beginning of an interactional process, one that involves using the law as a medium for communication, shaping behaviour, and sanctioning deviation. These facts are true of the purposes of national as well as international law-making, such as WTO law, where ‘a community of law’ has been formed to ensure conformity with legal practices.<sup>84</sup> The process of acceding to the WTO is legally critical because of the role of the agency in facilitating the acceptance of the acceding states, and the entry into force, of interactional world trade law. Once a state becomes a WTO member it has to participate in a number of settings to make and maintain WTO law, primarily for the purpose of ensuring its own compliance. This critical role of interactions for maintaining legality sheds new light on the nature of WTO contractual agreement that lacks force despite state consent and mandatory rules.<sup>85</sup>

Nevertheless, the key point of accepting WTO law, by forming substantive understandings, is relevant during the accession negotiations. These negotiations to make accession commitments have important implications for helping acceding states to make their trade policies and practices compliant with WTO law. From the outset, *legalisation* has been the main attraction of the world trading system. For example, developing and least-developing members were drawing into the system because of their belief in its legalistic structure in terms of providing equality and just treatment.<sup>86</sup> However, the first point of entry into law- the accession to the rule-based multilateral trading system- is worthy of legal analysis. During the GATT era,

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<sup>83</sup> See Beth Simmons, ‘Treaty Compliance and Violation’ (2010) *Annual Review of Political Science* 273.

<sup>84</sup> See Sungjoon Cho, *The Social Foundations of World Trade: Norms, Community, and Constitution* (Cambridge University Press 2014) 25.

<sup>85</sup> See Omar Dajani, ‘Contractualism in the Law of Treaties’ (2012) *Michigan Journal of International Law* 1.

<sup>86</sup> See VanGrasstek, *The History and Future of the World Trade Organization* (n 25) 201.

accession was openly fraught with political calculations, rather than legal considerations for making credible commitments to the GATT community.<sup>87</sup> The WTO, however, imposes a contractual condition on the acceding state. According to the brief WTO Article (XII:1) on *Accession*, ‘any states or separate custom territory (...) may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement, and the Multilateral Trade Agreements annexed thereto’.<sup>88</sup> These annexed Agreements include the GATT and the DSU on dispute settlement, and are ‘binding on all Members’ (WTO Agreement Article (II:2)).<sup>89</sup> However, Article (XII) is extremely brief and poorly defines the standards required for accession. This suggests that it might have been intentionally drafted in this way to highlight the role of WTO and non-WTO agencies in making this accession process possible and fair within the WTO legal boundaries.<sup>90</sup> Hence, to fully deconstruct WTO accession, there needs to be an analytical framework that accounts for the role of states and non-states actors in nurturing shared understandings and the practice of legality. Nonetheless, in terms of compliance purposes, the accession process under the WTO is too fraught with political rather than legal considerations. Toohey rightly stated that WTO accession is ‘under-theorised’, especially when viewed as a process of cataloguing in the accession protocols, with provisions that have no clear basis in the WTO agreements (namely WTO-plus), or that fall short of these agreements (WTO-minus, for example preclusion of the provision on special and differentiated treatment (SDT)).<sup>91</sup>

Toohey attempts to address this issue ‘to explain the important, but generally overlooked, role of epistemic communities in creating and perpetuating discourse about the appropriate terms of accession’.<sup>92</sup> Toohey notes that her attempt to single out the role of the epistemic community of experts, who perform a constructive role

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<sup>87</sup> Lebanon and Syria were among the (23) founding parties of the GATT, not because of their political or legal considerations but due to the influence of France. Japan accession to GATT was ‘pushed through’ by the US, as it feared that if Japan would not become a contracting party it would join the rival communist club of countries, see Lisa Toohey, ‘Accession as a Dialogue: Epistemic Communities and the World Trade Organization’ (2014) *Leiden Journal of International Law* 397.

<sup>88</sup> *The WTO Legal Texts* (n 26) 12.

<sup>89</sup> *ibid* 4.

<sup>90</sup> Toohey, ‘Accession as a Dialogue: Epistemic Communities and the World Trade Organization’ (n 87).

<sup>91</sup> *ibid*.

<sup>92</sup> *ibid* citing Peter Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’ (1992) *International Organization* 1.

in helping acceding states, is burdened with difficulties. This is mainly because of the political rather than legalistic nature of the accession dialogue, and its negative influence on compliance. For example, the accession of Vietnam was heavily influenced by technical assistance provided by industry groups, and US and European consulting companies, who made up the accession ‘project’. Toohey described the project as:

financed by a government [the Vietnamese] that, within the accession negotiations, is pushing for the broadest market commitments possible and the greatest extent of liberalization, *regardless of whether those commitments are contained in the WTO Agreements or are WTO plus* (...) the information provided by industry groups such as the US-Vietnam Chamber of Commerce to the US Government during the negotiations (...) reflects an interest in maximally protecting their interests in the country, *rather than any concern of an inconsistency with the WTO Agreements as such.*<sup>93</sup>

As the Vietnamese example, and other examples of WTO accession clearly show, Toohey was right in concluding that ‘WTO accession remains the subject of power politics rather than subject to the rule of law, and perhaps more acutely so than other aspects of the WTO activity’.<sup>94</sup> Although Toohey was challenged to place the constructivism concept of *epistemic communities* within the confines of legal discourse, her article is a balanced detailed analysis of a key point of contractual agreement. The above analysis is relevant to the topic of this chapter because of the detrimental impact of the defects of WTO accession on the practice of legality. To a limited extent, the WTO Secretariat appears to be the only accession actor performing a constructive legal role by ensuring compliance with the trade rule of law through upholding principles of *promulgation* and the *clarity* of legal commitments made by acceding states.<sup>95</sup>

Whilst independent technical assistance can perform the task of assuring conformity with WTO law, it is not as effective as the Secretariat role, and does not have dedicated sufficient legal expertise for this task.<sup>96</sup> Interactionalism can enrich this analysis of accession by considering the components of shared understandings

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<sup>93</sup> *ibid* citing (United Nations Economic and Social Council Secretariat, Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, UN Doc. E/CN.4/Sub.2/2004/17, at 11, 9 June 2004) (emphasis added).

<sup>94</sup> *ibid*; Aaronson and Abouharb, ‘Does the WTO Help Member States Improve Governance?’ (n 50).

<sup>95</sup> *ibid*.

<sup>96</sup> *ibid*.

(which include epistemic communities), and the theoretical and practical elements of legality. As described in Chapter Three, shared political and legal understandings are formed through the three sub-elements of ‘norm-cycle, an epistemic community, and a community of practice’.<sup>97</sup> Contrary to the view that WTO accession should be solely dependent on the work of ‘epistemic communities’, interactional world trade law maintains that shared understandings must be inclusive, and continuously refined in the community of legal practice.

The Fullerian principles, particularly *the congruence between official action and the law*, define legal rules and practices that should conform to both the law’s intended purpose and processes. The existing WTO accession process falls short of being effectively conducted within clearly defined legal forms and limits. Despite its inclusion in the report of the working parties on the accession of the acceding state’s ‘framework for making and enforcing policies’, it remains questionable whether this is a mere formality, or to shows credible enforceable commitments to facilitating compliance with WTO obligations.<sup>98</sup> Because of the lack of *promulgation* during the accession process, the WTO function of adjudication will come into conflict with the practice of legality, leading member states that did not make enforceable promises, to deviate from (namely breach) the GATT/WTO rules.<sup>99</sup> A high-profile case that shows the limits of the WTO accession is China’s accession protocol. It is noteworthy that China is the only country ‘whose accession agreement required policymakers to improve the rule of law’.<sup>100</sup>

However, China defiantly violate this agreement, as of the (28) disputes involving protocols of accession, (22) complaints were brought against China’s protocol’s, followed by four disputes against US’s, and two against the EU’s.<sup>101</sup> Although the

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<sup>97</sup> Brunnée and Toope, *An Interactional Account* (n 2) 56-65.

<sup>98</sup> Protocols of Accession for New Members Since 1995, Including Commitments in Goods and Services <[https://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm#sau](https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#sau)> accessed 10 of March 2016.

<sup>99</sup> See China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, DS431, DS432, DS433. By the number of interested third parties (18 states including the EU entity), and the history of China as it once withdrew from the GATT, these disputes are exemplary. There are 22 countries that collectively and individually challenged China on its accession protocol, which indicates that the lack of promulgating and understanding the GATT/WTO rules continue to impede China’s compliance.

<sup>100</sup> Aaronson and Abouharb, ‘Does the WTO Help Member States Improve Governance?’ (n 50).

<sup>101</sup> Disputes by Agreement <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A30](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A30)> accessed 9 of March 2016.



majority of the complainants are developed members, developing members also complained about the lack of conformity between China accession commitments and its trade conduct, and its misconception of the accession protocol status. Though accession protocols have a legal status, and have been described as ‘an integral part of the WTO Agreement’, their interpretation has proven problematic.<sup>102</sup> This is largely because of the misinterpretation by member states, such as China, of the accession protocol status and entitlements, and the lack of transparency during the accession negotiations.<sup>103</sup> The AB bears some responsibility for misinterpretation, as it has mistakenly separated the accession protocol from the WTO Agreement.<sup>104</sup> If accession is not founded on credible legal commitments, this will badly affect the state’s practice, and the WTO’s administrative ability. China was challenged on its accession protocol because of its noncompliance, and its contested WTO classification as a developing member.<sup>105</sup>

However, the same issues relating to China’s accession could arise with any WTO member, once it flexes its economic muscles, and takes a deviant path of noncompliance. This risk is real because WTO accession is from the outset largely founded on flexible political rather than strict clear legal constraints. The following three interactionism-based suggestions should be considered for reforming WTO accession:

1. The working party on accession should facilitate a legalistic discourse founded on building a shared understanding of the legal nature of GATT/WTO rules. Member states’ trade policies and practices should be inspected when authenticating accession documents. The party report should focus on the acceding member’s efforts to develop a culture of transparency

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<sup>102</sup> Jingdong Liu, ‘Accession Protocols: Legal Status in the WTO Legal System’ (2014) *Journal of World Trade* 751.

<sup>103</sup> Qingjiang Kong, *China and the World Trade Organization: A Legal Perspective* (World Scientific 2002) 92, 109-112; Timothy Webster, ‘Paper Compliance: How China Implements WTO Decisions’ (2014) *Michigan Journal of International Law* 525. See Andrew Mitchell and Joanne Wallis, ‘Pacific Countries in the WTO: Accession and Accommodation, the Reality of WTO Accession’ in Yong-Shik Lee and others (eds), *Law and Development Perspective on International Trade Law* (Cambridge University Press 2011) 179-222.

<sup>104</sup> (Appellate Body Report, *China Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products*, paras 417, WT/DS363/AB/R, adopted 21 December 2009); (Appellate Body Report, *China- Measures Related to the Exportation of Various Raw Materials*, para 363, WT/DS394/AB/R, adopted 30 January 2012). See Matthew Kennedy, ‘The Integration of Accession Protocols into the WTO Agreement’ (2013) *Journal of World Trade* 45.

<sup>105</sup> Russia too has the same contested *developing country* status that entitled it to SDT exemptions, see Sonia Rolland, *Development at the WTO* (Oxford University Press 2012) 84.

and accountability for implementing accession commitments. The report ‘needs to emphasize that conformity with the trading rules is an essential element of a market-oriented development strategy, and this is the key to accession to the WTO’.<sup>106</sup>

2. The WTO must establish ‘a community of legal practice’ for accession purposes to provide acceding states with technical assistance and legal expertise. Instead of relying on the conditional help of developed member states, acceding states should independently seek assistance for accession purposes. The WTO Secretariat should provide effective legal aid to working parties and acceding states to ensure their observance of rule of law principles. The trade rule of law that involves considerations of principles such as non-discrimination should be enshrined in the working parties’ draft reports, and states’ accession protocols. Every accession, not just the Chinese, should require policymakers to improve the rule of law.<sup>107</sup>
3. Accession defects should be subject to legal scrutiny by WTO bodies, other than the DSB. The TPRM can be an ideal setting for remedying accession defects, and maintaining a practice of legality. For example, the TPRM has to complement WTO accession by reviewing the trade policies and practices of newly acceding or unruly members to ensure transparency and compliance with GATT/WTO rules. The TPRM or another competent WTO body should be allowed to review accession documents to ensure observance of trade rule of law as a trade conduct, and principle of economic development.<sup>108</sup>

Following on the point about the effective means of remedying accession defects, and maintaining legal interactions, the next section provides an assessment of one of the overlooked mechanisms of the WTO, the TPRM.

### **5.5 The TPRM: A Mechanism for Interaction on WTO Law?**

The TPRM (including its governing body, The Trade Policy Review Body (TPRB)) is seldom discussed in the literature on WTO law, as its reputation is superseded by

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<sup>106</sup> Murray Smith ‘Accession to the WTO: Key Strategic Issues’ in Jeffrey Schott (ed), *The World Trading System: Challenges Ahead* (Peterson Institute 1996) 180.

<sup>107</sup> On the difference between ‘rule of law’ and ‘rule by law’ see Kenneth Winston, ‘The Internal Morality of Chinese Legalism’ (2005) *Singapore Journal of Legal Studies* 313.

<sup>108</sup> See Michael Trebilcock and Ronald Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing 2013); The Economist, ‘Economics and the Rule of Law: Order in the Jungle’ *The Economist* (London, 13 March 2008).

the DSB.<sup>109</sup> This lack of discussion or neglect of the important role of the TPRM is surprising, but given the textual and institutional limitations of this mechanism, it might deserve its peripheral role. However, it has an important history; it was first introduced into GATT in 1989, and then reviewed and annexed to the WTO texts. According to WTO TPRM paragraph (A), the objectives of the review are as follows:

1. Improved adherence by all members to the WTO rules, disciplines and commitments.
2. Greater transparency in, and understanding of, trade policies and practices of members.
3. The enabling of collective appreciation and evaluation in the framework of the WTO, and individual trade policies and practices and their impact on the functioning of the multilateral trading system.<sup>110</sup>

Between its inception in 1989 and 2015, the TPRB conducted (429) reviews, covering (151) of the then 162 WTO member states.<sup>111</sup> The TPRB consists of representatives from all member states who undertake the review process, under the leadership of an elected Chairperson (from the membership), and a discussant (chosen from the membership to stimulate debate).<sup>112</sup> It has been argued that the TPRM was originally intended to ensure compliance and promote transparency under GATT.<sup>113</sup> According to paragraph A(i), the WTO TPRM is *not* intended to be a mechanism to enforce obligations; however, its likely highly-needed effect is ‘to ‘shame’ Members into compliance and to support domestic opposition to trade policy and practices inconsistent with WTO law’.<sup>114</sup>

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<sup>109</sup> It was briefly explained in three pages in the leading textbooks on WTO Law see Bossche and Zdouc, *The Law and Policy of WTO* (n 30) 49, 95-96; Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice* (3rd edn, LexisNexis 2008) 37-38, 41; mentioned once in a small paragraph in Simon Lester and others, *World Trade Law: Text, Materials and Commentary* (2nd edn, Hart Publishing 2012) 73; and not mentioned in Andreas Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press 2008).

<sup>110</sup> *The WTO Legal Texts* (n 26) 380.

<sup>111</sup> (Report of the Trade Policy Review Body for 2015, 23 October 2015, WT/TPR/361) in WTO Documents Website <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S001.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx)> accessed 18 February 2016.

<sup>112</sup> See the TPRB <[https://www.wto.org/english/tratop\\_e/tpr\\_e/tprbdy\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tprbdy_e.htm)> accessed 17 February 2015.

<sup>113</sup> Asif Qureshi, ‘The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or ‘Enforcement’?’ (1990) *Journal of World Trade* 140; Asif Qureshi, ‘Some Lessons from Developing Countries’ Trade Policy Reviews in the GATT Framework: An Enforcement Perspective’ (1995) *The World Economy* 489.

<sup>114</sup> Bossche and Zdouc, *The Law and Policy of WTO* (n 30) 96.

In this sense, it has an *enforcement effect*, in terms of the reputational cost following the outcome of the review, especially if the member is found to be noncompliant. The TPRM is best regarded as ‘an implementation review mechanism’ performing an enforcement role that complements the work of the WTO compliance body of dispute settlement.<sup>115</sup> Nonetheless, it may be argued that because of its enforcement characteristics, the TPRM to a limited extent, is sustaining an interactional world trade law. According to Qureshi and Ziegler, the reasons for construing the TPRM as an enforcement device include:

First, it is a compulsory exercise (...) Secondly, the whole process of the review comprises of approbation and disapprobation in terms of a normative framework comprising of legal as well as economic criteria (...) Thus, a facet of the TPRM is that it can be “*corrective*”. The “*corrective*” process derives from the fact that the TPRM is an invitation for the collective membership of the WTO to evaluate and appreciate the respective member’s trade policies and practices (...) This process, albeit lacking in coercion, is disposed to having an impact on the course of State behaviour, even if in a given case it may not in fact have such an impact (...) The TPRM affects State behaviour *ex ante*. It is a “*conditioning*” mechanism. It inculcates at the earliest possible moment a “WTO” approved pattern of behaviour- both through the impregnation of the national policy framework by substantive WTO trade prescriptions, as well as through the provision of conditions, including institutional, necessary for the evolution of WTO approved trade policies.<sup>116</sup>

Nonetheless, the TPRM is constrained by the adoption of the wrong periodicity for reviews, and the lack of effective thorough reporting. The frequency of TPRB reviews depends on ‘the impact of individual Members on the functioning of the multilateral trading system, defined in terms of their share of world trade’.<sup>117</sup> For this economic reason, in particular, the TPRM has been criticised for adopting the wrong periodicity, thus failing to meet its objectives of assuring compliance and transparency, especially from developing countries which are reviewed less frequently.<sup>118</sup> According to Hoekman and Mavroidis:

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<sup>115</sup> See Jutta Brunnée, ‘Compliance Control’ in Geir Ulfstein and others (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press 2007) 382.

<sup>116</sup> Asif Qureshi and Andreas Ziegler, *International Economic Law* (3rd edn, Sweet & Maxwell 2011) 475-476 citing P. Van Dijk (ed), *Supervisory Mechanism in International Economic Organizations* (Kluwer Law International 1984) 11.

<sup>117</sup> *The WTO Legal Texts* (n 26) 380.

<sup>118</sup> Bernard Hoekman and Petros Mavroidis, ‘WTO Dispute Settlement, Transparency and Surveillance’ (2000) *The World Economy* 527; Bown, *Self-Enforcing Trade* (n 10) 220.

The TPRM process is arguably too infrequent to be very useful for enforcement, as most countries are reviewed only once every six years or more. (...) A major limitation of the TPRM is that WTO staff do not have a mandate to identify whether policies violate the WTO. Nor does the process centre on specific cases of issues that are of concern to the private sector and might become the subject of further negotiations or disputes.<sup>119</sup>

The lack of utility for enforcement will negatively affect the intended objective of promoting transparency. The point about the lack of effective inclusive reporting was reiterated by Laird and Valdes, who argues that the review reports are ‘insufficiently analytical’, recommending ‘that they need to sharpen their focus (...) be tougher in identifying the cost of protection, who pays and who gains, if they are to meet their *public choice objectives*’.<sup>120</sup> The shortage of exhaustive reporting affects the enforcement ideal of the TPRM, because review reports are ‘not thorough enough to identify all deviant behaviour’.<sup>121</sup> Reform of the TPRM should be conducted through the lens of interactionalism, by making the process more interactive in order to build shared understandings on compliance, and to ensure compliance with the legality principles.

The TPRM is ideal for maintaining interactional world trade law, mainly because of its objectives and enforcement effect. First, the shared political and legal understandings of WTO law, and of member states’ trade laws and regulations, will be scrutinized for conformity during the collective review process. Second, throughout the review process, member states should be guided by the principles of legality to uphold the primary objective of ensuring adherence and transparency. During all of the three stages of the TPRM, namely ‘the procedures for review’, ‘reporting’, and ‘appraisal’, member states should be guided by the legality principles, such as *promulgation, clarity, feasibility, constancy, and congruence*. Finally, and more importantly, the TPRB is an ideal setting for a continuous practice of legality pursuant to the background knowledge already fostered from the work of refining shared understandings, and observing the legality principles. For its primary interactive purpose, the TPRB can sustain an interactional world trade law, by

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<sup>119</sup> *ibid.*

<sup>120</sup> Sam Laird and Raymundo Valdes, ‘The Trade Policy Review Mechanism’ in Amrita Narlikar and others, *The Oxford Handbook on the World Trade Organization* (Oxford University Press 2014) 482 (hereinafter *The Oxford WTO Handbook*) (emphasis added)

<sup>121</sup> Qureshi and Ziegler (n 116) 477. See Bown, *Self-Enforcing Trade* (n 10) 219-220.

performing the task of the progressive acculturation to and education about WTO legality.<sup>122</sup>

The review process, which has the effect of helping members to acquire substantive knowledge, and ensure the conformity of reviewed member's trade policies and practices with WTO law, will refine legal practices and policies of members. Still, if competent practices are to take place, they need to be supported by operative socially constructed legal norms, and continuous interactions on the basis of legality.<sup>123</sup> Qureshi and Ziegler's recommendations for reform should be considered primarily for their emphasis on facilitating effective interactions through comprehensive communication with and within the TPRB, and a form of domestic follow-up of the review to assure its corrective and transparent features.<sup>124</sup> State officials and non-state actors should be allowed to debate the review 'to support domestic opposition to trade policy and practices inconsistent with WTO law', and to learn about the harmful cost of trade protectionism.<sup>125</sup> The TPRM should become effective at being instrumental in promoting compliance with WTO law by fostering a continuous inclusive transparent practice of legality. The previously described shortcomings of the DSB, WTO accession, and TPRM, in terms of their legality and practical use, show their lack of effectiveness at making and sustaining compliance. The following section considers a promising remedy for compliance related-defects, the establishment of the Institute for Assessing the WTO Commitments.

### **5.6 The Institute for Assessing WTO Commitments (IAWC):**

The participation of developing and least-developed WTO members (hereinafter developing members) in the WTO has been very problematic.<sup>126</sup> The vast majority of the WTO membership of (163) is made of developing members, (newly acceding countries with vulnerable economies including Vanuatu and Yemen), and all (21)

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<sup>122</sup> See Ryan Goodman and Derek Jinks, 'Incomplete Internationalization and Compliance with Human Rights Law' (2008) *European Journal of International Law* 725.

<sup>123</sup> See Brunnée and Toope, 'The Practice of Legality' (n 5); Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (n 14).

<sup>124</sup> Qureshi and Ziegler (n 87) 484-486. See Julien Chaisse and Debashis Chakraborty, 'Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System' (2007) *University of Pennsylvania Journal of International Law* 153.

<sup>125</sup> Bossche and Zdouc, *The Law and Policy of WTO* (n 30) 96.

<sup>126</sup> Rorden Wilkinson, *What's Wrong with the WTO and How to Fix it* (Polity Press 2014); Shaffer and Melendez-Ortiz, *Dispute Settlement at the WTO* (n 53) 342.

countries with an observing status for accession purposes are ‘developing’.<sup>127</sup> The effectiveness of the WTO practice of legality depends on ensuring that trade policies and practices of those members are compliant with WTO law through their active well-informed participation. However, developed members, especially the most litigious group (the QUAD: Canada, the EU, Japan, and the US) have been very influential in WTO administration.<sup>128</sup> This influence, which tends to be inconsiderate of developing members’ needs, runs contrary to the WTO’s principle of non-discrimination, and overlooks its founding legal philosophy of facilitating full participation within the confines of binding legal rules.<sup>129</sup> The thorny issue of participation in WTO administration and enforcement has been the subject of ongoing academic debate. For example, Pauwelyn argues that WTO system needs less discipline (law) and more politics (voice) ‘participation, contestation’ and to ‘maintain and clarify, not eliminate, certain escape clauses and exit options, especially those tailored to consumer welfare’.<sup>130</sup>

Nevertheless, according to interactionalism, law should be conceived and practised to allow political expressions and actions to be made within an open interactive legal channels.<sup>131</sup> According to Fuller, one of the law’s main aims is to ‘open up, maintain, and preserve the integrity of the channels’ through which actors can communicate ‘across the boundaries and through the barriers that separate’ them.<sup>132</sup> Additionally, as in the historical relationship between *law and economics*, *law and politics* are not separable from each other but instead are interdependent in terms of the existence and strength needed to make and maintain an orderly society.<sup>133</sup>

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<sup>127</sup> There are (150) developing WTO members, and (34) Least-developed members see The WTO Members and Observers <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> accessed 10 March 2016.

<sup>128</sup> Wilkinson, *What’s Wrong with the WTO and How to Fix it* (n 126) 45; VanGrasstek, *The History and Future of the World Trade Organization* (n 25) 49, 99.

<sup>129</sup> This is best exemplified by the politics surrounding the fiasco of (2001) Doha Development Round (DDR), see Wilkinson, *What’s Wrong with the WTO and How to Fix it* (n 126); R. Rajesh Babu, *Remedies under the WTO Legal System* (Martinus Nijhoff Publishers 2012) 333-342.

<sup>130</sup> Joost Pauwelyn, ‘The Transformation of World Trade’ (2005) *Michigan Law Review* 1

<sup>131</sup> Brunnée and Toope, *An Interactional Account* (n 2) 72.

<sup>132</sup> Fuller, *The Morality of Law* (n 3) 186. See Winston, ‘The Internal Morality of Chinese Legalism’ (n 107).

<sup>133</sup> Lon Fuller, ‘Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale’s “Freedom through Law”’ (1954) *Columbia Law Review* 70; Joel Trachtman (ed), *International Law and Politics* (Routledge 2008). On law and political freedom, and the notion of *nomocracy*, the rule of *nomos* (the law) see Philip Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press 2002) 150-152.

Pauwelyn's argument for more politics runs contrary to the history of the 'progressive legalization' of GATT from unregulated politics to a legal order, and does not account for the common unfounded justification for breaching WTO law based on welfare associated objectives (namely unregulated political expression and action), or the continued relegation of developing members despite the existence of an order intended to be inclusive and fair.<sup>134</sup> However, because individually they are faced with political, financial, and legal constraints that hinder their participation, developing members have understandably joined alliances with other members (for example Brazil, India, and China (BIC)) in order to use collective bargaining to influence rule-making and enforcement.<sup>135</sup> Although forming an alliance has been instrumental in helping developing member states reap the benefits of their memberships, the lack of effective WTO means for participation has a detrimental effect on the practice of legality.

The most challenging issue is the difficulty encountered by developing members when initiating an official dispute, usually against a developed member, which has more leverage to sustain the violation, unharmed, and may even influence the interpretation of the treaty for its own interests.<sup>136</sup> It was a historical achievement for developing members to secure the inclusion of *the special and differentiated treatment* principle into the GATT, which afforded them more preferential treatment catering for their economic and developmental needs. However, developing members still face a number of hurdles in terms of WTO policy-settings, negotiation, and adjudication. For example, the fact that the influential Green Room policy-setting meetings are only open to a handful of 'selected' developed and

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<sup>134</sup> See Eric Posner and Alan Sykes, *Economic Foundations of International Law* (Harvard University Press 2013).

<sup>135</sup> Amrita Narlikar, 'Collective Agency, Systemic Consequences: Bargaining Coalitions in the WTO' in *the Oxford WTO Handbook* (n 120) 184.

<sup>136</sup> Shaffer said that *it does matter* which state participates before the panel and the AB, because they will be systemically able to affect the interpretation of WTO law to further their own interests. For example, from January 1995 until December 2007, the US as a party or third party before the panel had a participation rate of (99%), and the EC had the rate of (85%). Official disputes involving challenges to the interpretations of DSU Articles (21-23) took place between developed member states, mainly the US and EU, and involve developing members as complainant or third parties e.g. (US-Shrimp II (Viet Nam), DS429). See Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed' in James Hartigan (ed), *Trade Disputes and the Disputes Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing Limited 2009) 167.



developing members, shows that the WTO's lack of transparency inhibits its intended practice of legality.<sup>137</sup>

Under international law, especially WTO law, power politics can influence the work of communities of practice, because of the capacity of powerful states to dominate decision-making, and interpretation.<sup>138</sup> However, interactional world trade law constrains the negative effect of power-politics, when the majority of actors uphold the principles of legality, stressing the fact that 'asserting control in the absence of shared understandings and a practice of legality is abusive'.<sup>139</sup> Developed members cannot extract themselves from the procedural legality of the WTO regime, or avoid the normative implications of violating its core principle of non-discrimination.<sup>140</sup> If diplomacy is to play a constructive role in enhancing compliance, for instance, by naming and shaming deviant behaviour, it needs to be performed within structures founded on the basis of legal rules and practices. The WTO community of legal practice has to recognise the economic vulnerability of developing members, and empower those members to become active rather than passive trade actors. The establishment and maintenance of sound legality for member states interactions is precisely the main challenge for the WTO.

A number of WTO scholars have argued that the WTO's structure urgently needs substantive reforms to cement the trade rule of law.<sup>141</sup> However, it is beyond the scope of this thesis to discuss these reform proposals, since their primary focus is on the overall institutional design of the WTO, rather than the topic of compliance. However, Bown's proposal for enhancing compliance with WTO law, namely the Institute for Assessing WTO Commitments (IAWC), is worthy of consideration.<sup>142</sup> The thesis has already considered proposals for enhancing compliance through

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<sup>137</sup> VanGrasstek, *The History and Future of the World Trade Organization* (n 25) 204-207.

<sup>138</sup> For example, mainly the US and EC challenge the DSB legal interpretations of DSU Articles (21-23) on compliance, see Disputes by Agreement

<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A5#](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A5#)> accessed 29 December 2015; Robert Wolfe, 'Decision-Making and Transparency in the "Medieval" WTO: Does the Sutherland Report have the Right Prescription?' (2005) *Journal of International Economic Law* 631; Jan Klabbers, 'Constitutionalism and the Making of International Law: Fuller's Procedural Natural Law' (2008) *No Foundations: Journal of Extreme Legal Positivism* 48.

<sup>139</sup> Brunnée and Toope, 'The Practice of Legality' (n 5) 119 (emphasis added).

<sup>140</sup> Brunnée and Toope, *An Interactional Account* (n 2) 85.

<sup>141</sup> See Paul Blustein, *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambition, and the Great Shambles of the World Trading System* (Public Affairs 2009); Wilkinson, *What's Wrong with the WTO and How to Fix it* (n 126).

<sup>142</sup> Bown, *Self-Enforcing Trade* (n 10) 208-237.

fostering ‘shared understandings’, and assurance of the fulfilment of the principles of legality in order to inspire *fidelity to the law*. To be more specific, some of the proposals, particularly concerning the non-discrimination principle and the DSU rules, are aimed at reforming the GATT/WTO rules along Fullerian lines, and providing active interactive committees for maintaining legality. Nonetheless, the reasons and objectives for proposing the establishment of the IAWC are as follows:

1. Developing members face substantial hurdles in their efforts to assure compliance with the ‘trade rule of law’ when trying to challenge developed members in the DSB (for compliance with rulings), and self-enforcing their rights by liberating their economies, and securing effective access to foreign markets (i.e. compliance with rules).<sup>143</sup> To show the difference between compliance with *rules*, and *rulings*, and the economic importance of securing the former, Bown with Hoekman developed a workable chart of what they call, *The Six Steps of the WTO Extended Litigation Process (ELP)*.<sup>144</sup> The chart has three phases, the first of which is *the Prelitigation*: (1. *Identify the foreign WTO-inconsistent policy*, 2. *Estimate the economic benefits of removing the WTO-inconsistent policy*, 3. *Convince the domestic government to pursue the case at the WTO*).<sup>145</sup> Phase Two which concerns *the Litigation* aims to: (4. *Develop and prosecute the legal case (including legal briefs and economic evidence) in Geneva*, 5. *Calculate the WTO-sanctioned economic retaliation threats for arbitration*).<sup>146</sup> Finally, Phase Three, *the Postlitigation*, has the fifth step of calculation of sanctions, and step (6: generate public and political foreign support for policy removal).<sup>147</sup>
2. The most critical step in this ELP, especially for exporting firms in developing members, is step (1). Bown argues that there should be a focus on ‘ways to increase information generation in support of exporting firms that themselves lack adequate knowledge of the economic, legal, and political causes of a WTO-inconsistent loss of foreign market access’.<sup>148</sup> Bown explains that failure to generate such information will make firms ‘unable to initiate the ELP or to organize affected firms in their own country, let alone organize exporting firms in other countries over the same foreign market access issue. The result is the inability to self-enforce foreign market access’.<sup>149</sup> Moreover, the Advisory Centre on WTO Law (ACWL), which

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<sup>143</sup> Bown, *Self-Enforcing Trade* (n 10) 208.

<sup>144</sup> Chad Bown, and Bernard Hoekman, ‘WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector’ (2005) *Journal of International Economic Law* 861.

<sup>145</sup> *ibid.*

<sup>146</sup> *ibid.*

<sup>147</sup> *ibid.*

<sup>148</sup> Bown, *Self-Enforcing Trade* (n 10) 212.

<sup>149</sup> *ibid.*

was established to help developing members, is constrained by its mandate which is limited to step (4) of the ELP, namely litigation. Because of this limit, Bown argues that, ‘ACWL itself cannot fill the gap of generating step 1 information on potential disputes for developing countries to pursue’, hence, there is a need for an entity ‘to increase public support of the step 1 information generation process’.<sup>150</sup> Similarly, because of its limited mandate, the TPRM cannot help exporters engage in step (1) of the ELP.<sup>151</sup>

3. There is a lack of efforts in the WTO ‘to increase transparency, information generation, and monitoring’ for the purpose of helping exporting firms in developing members.<sup>152</sup> Bown argues that developed countries have active memberships in the WTO, including DSB, to provide ‘information on foreign market access violations to their exporters’.<sup>153</sup> Finally, he argues that the above analysis ‘culminates with a proposal to establish a new institution- the Institute for Assessing WTO Commitments- with the mandate, resources, and capacity to provide the information generation services that developing countries require to self-enforce their foreign market access’.<sup>154</sup> Although the problem of inadequate WTO surveillance and monitoring remains a hindrance to effective participation, Bown correctly noted that any proposal to resolve this issue should not jeopardise the benefits of the WTO administration of negotiation, adjudication, and providing a forum for self-enforcement (namely amicable informal resolution of disputes).<sup>155</sup> Nevertheless, the WTO falls short of providing effective surveillance and detailed information for ‘exporting firms and their advocates in potential self-enforcement actions’ to fulfil the requirement of step (1) of the ELP.<sup>156</sup> There have been successful initiatives in this regard from ‘the extra-WTO community’ of Non-governmental Organization (NGOs), such as the Global Subsidies Initiative, and the Global Antidumping Database ‘to bring increased transparency to WTO members use of trade-distorting subsidies’ or anti-dumping measures.<sup>157</sup> Although, the data from these initiatives’ may be useful to exporting firms in developing countries seeking to self-enforce foreign market access rights, this help is limited because of the WTO’s lack of monitoring its own procedure of allowing members to self-report subsidies or anti-dumping measures, which are usually inaccurate.<sup>158</sup>

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<sup>150</sup> *ibid* 213.

<sup>151</sup> *ibid* 219.

<sup>152</sup> *ibid* 214.

<sup>153</sup> See the US Market Access and Compliance in the Trade and Compliance Centre, and Japan Market Access Database provided by the Ministry of Economic, Trade, and Industry. *ibid* 214, 221.

<sup>154</sup> *ibid* 214-215.

<sup>155</sup> *ibid* 221.

<sup>156</sup> *ibid* 222.

<sup>157</sup> *ibid* 222-229.

<sup>158</sup> *ibid* 224.

Finally, Bown explains the basic mandate of his institute by arguing that:

the fundamental purpose of the IAWC is to provide a continually updated database of current WTO violations, with special focus on violations of potential interest to exporters in developing countries (...) The purpose and mandate of the IAWC is to reduce the informational costs associated with getting exporting firms and policymakers in developing countries (and those interested in assisting them) over the hurdles to triggering potential use of the ELP [i.e. 1. Identify the foreign WTO-inconsistent policy, and 2. Estimate the economic benefits of removing the WTO-inconsistent policy].<sup>159</sup>

Following this setting out of the mandate, Bown stresses that the IAWC must be politically independent, relying for its funding on ‘private foundations [and] larger-budget NGOs’ with ‘a governance structure that ensures transparency and accountability’ and ‘staffed by economists, lawyers, and experts in political science’ to supply the technical knowledge required to initiate an ELP.<sup>160</sup> Additionally, the IAWC should adopt strict a non-discrimination policy in its work, emphasising that ‘no country’s WTO violations are off-limits for identification and dissemination’.<sup>161</sup> Bown concluded his chapter on ‘Monitoring and the IAWC’, with this hopeful paragraph, providing the definition of trade self-enforcement:

The biggest benefit from additional monitoring and transparency may be a long-run reduction in the need for actual enforcement actions. Increased availability of information about WTO violations will improve the likelihood that the violations will stop before countries have to resort to the ELP (...) Over time, enhancing developing countries’ access to the ELP will further enhance the reputation of their ability to self-enforce. This may also result in a feedback effect, encouraging government policymakers among all WTO members to refrain at the start from imposing policies that violate WTO rules.<sup>162</sup>

A number of reflections originate from the above summary of the IAWC proposal. At its core, the WTO is a trade institution immensely influenced by power-politics. Even some of its official disputes, especially the high-profile ones that exhausted the DSB, have been politically motivated, namely the tit-for-tat complaints.<sup>163</sup> This

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<sup>159</sup> *ibid* 230, 232 (emphasis added).

<sup>160</sup> *ibid* 233.

<sup>161</sup> *ibid* 234.

<sup>162</sup> *ibid* 237.

<sup>163</sup> VanGrasstek, *The History and Future of the World Trade Organization* (n 25) 247; Jennifer Freedman, ‘China Floods the WTO with Tit-for-Tat’ (2012) <<http://www.bloomberg.com/news/articles/2012-06-07/china-floods-the-wto-with-tit-for-tat>> accessed 31 of March 2016.

partly explains the WTO law self-enforcement challenge, as its legal subjects are afforded with ineffective transparent means for participation, or the self-pursuit of costly enforcement action under the DSB. However, as demonstrated by Bown and Hoekman's ELP's chart, the reality is that the lack of effective 'transparency' mechanism (the TPRM) will ultimately affect 'enforcement' under (the DSB), since there is a relationship between the two mechanisms. Thus, the WTO needs to expand its mission to provide an effective means for participation and surveillance to enable developing members to detect, challenge, and deter noncompliance. However, in light of interactionalism, the above summary of IAWC shows, first, Bown's note about the inherent difficulty of redesigning the WTO to enhance surveillance is reflected in Fuller's point of achieving the right balance of 'norms of aspiration' and 'norms of duty' in institutional design.<sup>164</sup> This point was endorsed by the WTO expert, Jackson, when he wrote about the danger of having trade agreements that upset the balance between the two kinds of norms at the expense of effective performance.<sup>165</sup>

Nevertheless, the WTO cannot fulfil its mission without tackling compliance-related issues that emanate from textual and structural defects. The WTO is not effectively upholding the *trade rule of law's* vital aspect of *compliance with rules*, which has harmful economic implications for developing members. Because shared understanding on compliance with trade rules is lacking, especially in relation to the non-discrimination principle, the principles of legality will always be difficult to satisfy when aiming to ensure effective adherence to WTO law. Furthermore, the above summary of the IAWC shows the multifaceted community of legal practice, which includes the extra-WTO community of exporting firms. It appears (with the exception of some corporations who drafted some world trade law instruments), that the law is not designed to cater to the self-enforcement interests of every exporting firm.<sup>166</sup> In summary, the lack of effectiveness in the TPRM and DSB, which subsequently affects transparency and enforcement, also affects the WTO practice of legality, and the IAWC proposal is the only possible means for ensuring the effective well-informed enforcement of GATT/WTO rules.

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<sup>164</sup> See Fuller, *The Morality of Law* (n 3) 5.

<sup>165</sup> Wibren Van der Burg, 'The Morality of Aspiration: A Neglected Dimension of Law and Morality' in Witteveen and Van der Burg, *Rediscovering Fuller* (n 12) citing John Jackson, *World Trade and the Law of GATT* (Bobbs Merrill, 1969) 761-762.

<sup>166</sup> Korten, *When Corporations Rule the World* (n 41) 165; Bown, *Self-Enforcing Trade* (n 10).

## 5.7 Conclusion:

The view of WTO law as merely a contractual agreement that does not allow member states to improve shared legal understandings and the practice of legality is very reductionist. The WTO is assigned with making and sustaining ‘interactional legal obligations’, which has its historical origin in trade law and practice. It is also worth remembering that the WTO has the key mission of providing ‘transparency, consensual knowledge, and legitimation for the regime’.<sup>167</sup> Practices that conform with the principles of legality perform an essential role in maintaining interactional world trade law and facilitating optimal compliance, namely self-enforcement without demanding DSB involvement. The view that understanding and performing legality should be confined to the DSB is mistaken, as it overlooks the critical tasks of making, refining, and performing legality outside the DSB, which have a bigger influence on sustaining compliance overtime. The accession process reliance on political rather than legal discourse is illustrative of the need to establish legal practice at the point of accession.

Accession defects have to be dealt with more vigorously in the WTO, especially in the TPRM, which is concerned with reviewing members’ trade policies and practices for transparency and compliance purposes. To complement WTO accession and the DSB work, the TPRM needs to adopt a new review policy by reviewing accession documents, particularly of those members who are non-compliant with WTO commitments. It is unfortunate that WTO members, whether developed or developing, provide inaccurate information in their accession commitments, notifications to the WTO, and review documents. It is thus the responsibility of the WTO *community of legal practice* to play a constructive role in holding members accountable to the trade rule of law. Nevertheless, the use of the IAWC to generate information on potential WTO violations is a promising proposal to bridge the gap between transparency and enforcement, and ultimately enhance the practice of legality. In brief, the above interactionalism-based reform proposals, and the IAWC should be considered for the sake of the founding principle of world trade law: timely and effective compliance with the trade rule of law.

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<sup>167</sup> Wolfe, ‘See You in Geneva? Legal (Mis)Representations of the Trading System’ (n 14). See Gregory Shaffer and others, ‘Can Informal Law Discipline Subsidies?’ (2015) *Journal of International Economic Law* 711.

## Chapter 6: Conclusions

This thesis was set out to investigate the World Trade Organization (WTO) compliance regime, by analysing the reasons, forms, and limits of adjudication under the Dispute Settlement Body (DSB). To accomplish this task, it sought to: A) clarify the evolution of legal obligations under the General Agreement on Tariffs and Trade (GATT) and the WTO; and, b) find out whether the DSB is effectively upholding the trade rule of law's two vital aspects of compliance with *rules* and *rulings*, in a timely and effective manner. The general literature on this subject is inconclusive with regard to answering several fundamental questions addressed by compliance studies that focus either on the 'demand-side' (i.e. pressuring WTO member states to comply), and, much less frequently, on the 'supply-side' (i.e. domestic factors for improving compliance), or that justify 'noncompliance'.<sup>1</sup> The thesis aimed to answer three of these questions, namely:

1. What does legality mean in the WTO context?
2. What are the elements of compliance with the trade rule of law?
3. How can DSB defects be identified and remedied?

Uncovering answers to the above questions has been a very rewarding experience. It is worth mentioning two criticisms levied against this thesis: The first concerning its main claim, that is, that the DSB is ineffective; the second regarding its analytical framework, that is, the interactional international law theory or *interactionalism*. The claim that the DSB is not successful or, at best, had qualified-success is unfounded. So much so that, speaking about the DSB, a former judge said, 'the WTO DSB has the best record of compliance of any international tribunal'.<sup>2</sup> In addition to their objections to the thesis's main claim, some journal editors have opposed the idea of an interactionalism-based critique of the DSB, claiming that interactionalism's framework is unsuited for deconstructing compliance with WTO

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<sup>1</sup> See Gregory Shaffer and others, 'The Law and Politics of WTO Dispute Settlement' (2016) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2748883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748883)> accessed 22 March 2016; Rachel Brewster and Adam Chilton, 'Supplying Compliance: Why and When the United States Complies with WTO Rulings' (2014) *Yale Journal of International Law* 201; Eric Posner and Alan Sykes, *Economic Foundations of International Law* (Harvard University Press 2013).

<sup>2</sup> In a conversation at Manchester International Law Centre, University of Manchester (15 of November 2014).

law. Despite liking the paper, which was based on the first element of interactionalism ‘the shared understandings’, a particular editor-in-chief intervened to tip the balance in favour of rejection, suggesting rewriting the paper based on the international relations’ theory of *institutionalism*. The counterargument that, because of the increasing judicialisation of WTO practices, institutionalists have forsaken their endorsement of the legalisation of world trade, so a new framework is needed, was deemed not persuasive.<sup>3</sup> A similar objection against interactionalism was reiterated by another journal editor who said that the interactional legal theory of Lon Fuller is inapplicable to the contractual legal system of the WTO, which relies on member states consenting to apply the rules at issue, namely the Dispute Settlement Understandings (DSU).

This thesis sought to address these views, first, by refuting common presumptions of WTO legality and, second, by justifying the incorporation of interactionalism by demonstrating the comprehensive account of WTO compliance offered in the three interlinked phases of rulemaking, interpretation, and enforcement. Understandably, when presented or published separately, the findings of this thesis are not as clear as when they are presented within the thesis. Additionally, it is the first time interactionalism is applied to the WTO law, which shows this thesis’ claim of originality. Therefore, this concluding chapter will present the findings and recommendations as follows:

- Part One will explicate the evolution of the world trading system from the influence of power-politics to legal practice. This transformation references the subject of the anti-legalism versus legalism debate on world trade compliance rules. This ongoing debate constitutes the first hurdle for any researcher of compliance with WTO law, and can only be contained by adopting a well-founded international legal theory of compliance.
- Part Two will outline the reasons for choosing interactionalism as the compliance theory by invoking its first element of ‘shared understandings’ in the context of WTO law. Shared political understandings on trade norms have been solidified by states placing them in legal forms to augment the focus on legal obligations. The voluntary process of legalisation for effective

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<sup>3</sup> Judith Goldstein and others, *Legalization and World Politics* (MIT Press 2001); cf Martha Finnemore and Judith Goldstein (eds), *Back to Basics: State Power in a Contemporary World* (Oxford University Press 2013).



performance of trade norms is most illustrative in the codification of the non-discrimination principle, and WTO DSB rules and procedures.

- Part Three will provide an account of the evaluation of the DSU, based on interactionalism's second and main component of Fuller's eight constitutive elements of legality.
- Part Four will elaborate on the WTO practice of legality, widening the concept of the WTO *compliance regime* to include the WTO accession, and trade policy reviews, highlighting their vital roles in making and maintaining transparent legal practices of WTO law.

### **6.1 The World Trading System: From Power-Politics to Legal Practice:**

Under the GATT, the world trading system has evolved into a legal system, which amplifies the focus on *interactional legal obligations*.<sup>4</sup> A clear feature of these obligations is the gradual increase and development of legal practices under the GATT, and their codification under the WTO order. However, in between collective obligations intended to be maintained by all consenting states, and effective ongoing legal practices corresponding with these obligations, exists a long process of law-making which is intended as inclusive, legal, and continually interactive. It was the primary objective of the Uruguay Round negotiators to remedy the GATT textual and structural defects that were revealed during the compliance deficit of the 1980s. GATT legal bodies including the Legal Affairs Office and the Dispute Settlement Panel were overwhelmed by the large number of rulings that contracting parties, especially developed parties, defiantly refused to comply with.<sup>5</sup> GATT contracting parties' mediation, and prolonged litigation could not remedy this deadlock in the legal rulings.

It could be argued that it was unwise for the GATT contracting parties, especially the then European Communities (EC), Japan, and the United States (US), to create the WTO by joining other parties in order to solve this deadlock. Yet, this is exactly what happened in the 1980s and early 1990s when those contracting states agreed among themselves, for various geo-political and diplomatic reasons, to continue

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<sup>4</sup> See Raja Bhala, *Modern GATT Law: A Treaties on the Law and Political Economy of the General Agreement on Trade and Tariffs and World Trade Organization Agreements* (2nd edn, Sweet and Maxwell 2013).

<sup>5</sup> Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Kluwer Law International 1997) 90.

legally interacting in the GATT while helping to devise stricter legal instruments for the WTO.<sup>6</sup> Understanding the history of the GATT is instrumental to understanding the WTO law and practice, and can be achieved in two distinctive ways. First, it is important to understand that the evolution from *the rule of power-politics* to *the trade rule of law* was accomplished by shifting the focus onto legal obligations and the corresponding legal practices. Second, one must keep in mind that the GATT progressive legalisation was primarily challenged and then grounded to a halt by the non-compliance problem.<sup>7</sup> However, the legal evolution of the world trading system during the GATT era should not be underestimated, as it helped shape the WTO.

The anti-legalist scholars' objections to the legality of the WTO system, and their subsequent justifications for noncompliance are highly unwarranted. Although anti-legalists base their critique on a law and economics theory, their writings indicate that they are oblivious to a number of fundamental values pertaining to the law and economics, such as the values of *legal certainty*, *stability* and *predictability* of the trading system.<sup>8</sup> The legalists regard these values highly, arguing that trade sanctions were originally designed to induce compliance and that the DSB needs to go through legal reforms to continue upholding the trade rule of law.<sup>9</sup> It is further worth noting, that the law and politics of the WTO dispute settlement will always be a contested subject especially on the following fronts: 'the process of those who interpret the GATT/WTO rules, the contexts and politics of rule interpretation', and more importantly, the challenge of 'compliance with WTO dispute settlement rulings'.<sup>10</sup>

However, the legality debate continues and the fact that it comprises a third strand, the quasi-legalist who argues for less disciplines and more emphasis on politics, such as facilitating escape clauses and temporary noncompliance, clearly shows the

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<sup>6</sup> Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization 2013) 236.

<sup>7</sup> Petersmann, *The GATT/WTO Dispute Settlement System* (n 5).

<sup>8</sup> Eric Posner and Alan Sykes, 'Efficient Breach of International Law: Optimal Remedies, 'Legalized Noncompliance', and Related Issues' (2011) *Michigan Law Review* 243; Warren Schwartz and Alan Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization' (2002) *Journal of Legal Studies* 179.

<sup>9</sup> See John Jackson, 'Comment on Chapter 2' in Chad Bown and Joost Pauwelyn, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2013); Michael Trebilcock, *Advanced Introduction to International Trade Law* (Edward Elgar Publishing 2015) 29-30.

<sup>10</sup> Shaffer and others, 'The Law and Politics of WTO Dispute Settlement' (n 1).

growing complexity of this debate.<sup>11</sup> This thesis claims that this prolonged debate is producing distorted views of WTO law and practice of compliance. A parallel debate along similar lines in the field of political economy, between those who support and those who oppose the anti-legalists' point of view, could not settle the debate.<sup>12</sup> This thesis dealt with the anti-legalist/legalist dichotomy by explaining the historical origins of trade legal obligations and adjudication based on the interactionalism element of 'shared understandings'. The main finding is that states that consented to the GATT and WTO engaged in an interactional law-making processes to cultivate the shared understandings on compliance. Hence, the procedures for dispute settlement that include trade sanctions were not designed to allow states to unilaterally calculate their compliance, but to induce the effective compliance of all consenting states with world trade law. The evolution of world trade has centred on the objective of curbing power-politics by upholding the 'fidelity to law' ideal. Overall, states' engagement in legal practices to foster trade norms and legally express their policies has effectively secured the transformation to the trade rule of law.

## **6.2 An Interactional World Trade Law (the Shared Understandings):**

The evolution from the influence of power-politics to respecting the trade rule of law was safeguarded by the cultivation of shared commitments on compliance with world trade principles, particularly reciprocity and non-discrimination (GATT Articles (XXVIII *bis*), (I) and (III)). Reciprocal and non-discriminatory interactions between consenting states have sustained the multilateral trading system since the creation of the GATT in 1948. The system has largely satisfied the three sub-elements of shared understandings as trade rules were created through the norm-cycle (norm emergence, norm cascade, and norm internalisation), supported by an epistemic community of experts, and endorsed by a community of practice of state and non-state actors, mainly traders.<sup>13</sup> Additionally, to a large extent, trade norms under the GATT and WTO agreements satisfy the Fullerian eight constitutive

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<sup>11</sup> Joost Pauwelyn, 'The Transformation of World Trade' (2005) Michigan Law Review 1.

<sup>12</sup> Thomas Sattler and others, 'Does WTO Dispute Settlement Enforce or Inform?' (2014) British Journal of Political Science 877; cf Benjamin Liebman and Kasaundra Tomlin, 'World Trade Organization Sanctions, Implementation, and Retaliation' (2015) Empirical Economics 715.

<sup>13</sup> Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 56-65.

elements of legality, creating a base of shared legal understandings on compliance.<sup>14</sup> However, there are three problems concerning ‘shared understandings’ that threaten the legal legitimacy of the world trading system. First, the lack of non-state actors’ interaction in the making and maintenance of trade norms continues to be a hindrance to the effective performance of WTO law. Institutional discriminatory behaviour between the more economically powerful and the weaker states, and the slow public participation in the WTO, inhibit inclusive effective legal interactions.<sup>15</sup> The two main reasons for these issues are textual and structural shortcomings, as the WTO law does not allow for bottom-up interactions on the basis of legality, nor are WTO settings open and accountable to public scrutiny.

To be specific, non-governmental organisations (NGOs), and affected civil societies are prevented from in-sit input to trade negotiations, and their limited participation in the DSB is largely ineffective.<sup>16</sup> This issue is the main impediment to cultivation of shared understandings on compliance because trade protectionism is partly promoted by national constituencies who are denied the right of expression and participation in the WTO. However, the main beneficiaries of such protectionism are multinational firms who violate the GATT/WTO rules with impunity.<sup>17</sup> The main recommendation in this regard is to open up the WTO to public scrutiny, affording every affected stockholder of WTO law, namely firms, NGOs, and civil societies from developed and developing states, the right to be heard by having a permanent seat in the WTO similar to the status given to the NGOs in the work of the United Nations Human Rights Council.<sup>18</sup> Article 2 of the 2011 ILC Draft Articles on the Responsibility of International Organizations supports such recognition of non-state actors as ‘an international organization may include as members, in addition to States, other entities’ and ‘person or entity, other than an organ’ can be regarded as

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<sup>14</sup> See section (3.4.5) in Chapter Three.

<sup>15</sup> Robert Wolfe, ‘Decision-Making and Transparency in the “Medieval” WTO: Does the Sutherland Report have the Right Prescription?’ (2005) *Journal of International Economic Law* 631.

<sup>16</sup> Jens Steffek, ‘Awkward Partners: NGOs and Social Movements at the WTO’ in Amrita Narlikar and others (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press 2012) 315.

<sup>17</sup> Dominick Salvatore, *International Economics: Trade and Finance* (11th edn, John Wiley and Sons Ltd 2014) 211.

<sup>18</sup> Debra Steger, ‘The Future of the WTO: The Case for Institutional Reform’ (2009) *Journal of International Economic Law* 803.

an ‘agent of an international organization’.<sup>19</sup> The WTO as the subject of international law should recognise non-state actors’ right to membership and agency to empower them to hold member states and corporations accountable to the trade rule of law. The second issue concerning the shared understandings, is that the commitment to the fundamental principle of non-discrimination is fading away primarily because of lack of amendments, and an effective institutional design to uphold it. The key GATT Articles (I) and (III) are the most disputed rules of the WTO law as evidenced by their citation in almost all of the (508) recorded official disputes.<sup>20</sup> Different states’ misinterpretation of these norms directly suggest misunderstanding of the intrinsic elements of discriminatory treatment.<sup>21</sup>

These misinterpretations reveal the weaknesses of the accession process, and an overreliance on the DSB as the ultimate arbiter of non-discrimination. It is true that the DSB, as an impartial compliance body, should be responsible for interpreting the non-discrimination principle. However, this principle has not been subjected by the WTO to legal scrutiny for clarification and improvement. It appears that WTO resources and legal bodies, including the Rules Division, are entirely devoted to helping the already overworked DSB, and not to facilitating amendments to the existing rules. This narrow approach to remedial action emanates from the fact that any revisions of GATT/WTO rules have to be agreed to by every WTO member. A primary example of the grave implications of a lack of consensus on rules revision is the 2001 Doha Development Round (DDR), which has a negotiating group on rules. The mandate of this group does not cover the entire body of GATT rules, but is limited to clarifying and improving disciplines under the anti-dumping agreement, subsidies and countervailing measures (SCM), and regional trade agreements.<sup>22</sup> Additionally, the DSU are separately the subject of DDR negotiation for improvement and clarification.<sup>23</sup> Nonetheless, amendment of the most disputed

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<sup>19</sup> ICL Draft Articles on International Organizations  
<[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_11\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf)> accessed 24 July 2016.

<sup>20</sup> Disputes by Agreement  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A9](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A9)> accessed 3 April 2016.

<sup>21</sup> Julia Qin, ‘Defining Nondiscrimination Under the Law of the World Trade Organization’ (2005) Boston University International Law Journal 215.

<sup>22</sup> Doha Round: What are They Negotiating?  
<[https://www.wto.org/english/tratop\\_e/dda\\_e/update\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/update_e.htm)> accessed 21 July 2016.

<sup>23</sup> *ibid.*

GATT/WTO rules that include the non-discrimination principle, should not only be accomplished through the single undertaking mechanism. According to a number of experts, the DDR is dead and the WTO is adopting the new strategy of having small negotiation packages to secure prompt consensus.<sup>24</sup> However, the GATT and other disputed agreements, such as SCM, lack open effective settings for legal interactions. Clarification and improvement of these rules can be accomplished in committee settings for informal law-making and dispute resolution, similar to the fruitful legal interactions in committees dealing with Sanitary and Phyto-Sanitary, and Technical Barriers to Trade.<sup>25</sup> The WTO has to realise that interpretation and application of the non-discrimination principle is increasingly problematic. This is true in the DSB practice, and the Preferential Trade Agreements (PTAs), which the WTO is failing to examine to ascertain that they are upholding the non-discrimination standard.<sup>26</sup>

The WTO should issue separate ‘understandings’ texts on the GATT Articles (I) and (III) to clarify the meaning of discriminatory treatment especially under the Most Favoured Nation clause (I:1), and National Treatment clause (III:4) that prohibit discrimination between *like* products. Member states should be encouraged to submit proposals to amend the GATT, especially the norms that they believe are inhibiting their practice, such as Articles (I) and (III). However, even if these proposals were not adopted, member states could still openly interact in a committee setting to refine their understandings of non-discrimination. In brief, the DSB should not be the only arbiter of these problematic GATT Articles, and the WTO, including all of its member states, should cultivate shared understandings on compliance with the GATT rules. Following this point regarding the limited role of the DSB, the third issue affecting shared understandings is the misunderstanding that the WTO law derives its authority only from the DSB. The DSB has been hailed as an icon of success of the multilateral trading system.<sup>27</sup> Although this might have been the case

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<sup>24</sup> Shawn Donnan, ‘Trade Talks Lead to ‘Death of Doha and Birth of New WTO’ *Financial Times* (London, 20 December 2015).

<sup>25</sup> Robert Wolfe, ‘See You in Geneva? Legal (Mis)Representations of the Trading System’ (2005) *European Journal of International Relations* 339; Gregory Shaffer and others, ‘Can Informal Law Discipline Subsidies?’ (2015) *Journal of International Economic Law* 711.

<sup>26</sup> Petros Mavroidis, and Bernard Hoekman, ‘WTO ‘a la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements’ (2015) *European Journal of International Law* 319.

<sup>27</sup> WTO Disputes Reach 400 Mark <[https://www.wto.org/english/news\\_e/pres09\\_e/pr578\\_e.htm](https://www.wto.org/english/news_e/pres09_e/pr578_e.htm)> accessed 4 April 2014.

in the early years of the WTO, evidence from several studies, including Davey 2009, and this thesis, points to the fact that *the DSB has become the victim of its own success*.<sup>28</sup> According to Bossche and Zdouc, ‘this success has created an unwelcome institutional imbalance in the WTO between its ‘judicial’ branch and its political, ‘rule-making’ branch’.<sup>29</sup> This thesis has used publicly available WTO evidence to show that the current DSB is not making the anticipated impact, nor effectively upholding the trade rule of law.<sup>30</sup>

The DSB does not settle disputes in a timely and effective manner, for example, the current (151) consultation disputes represent a stalemate in unresolved cases, while the Appellate Body (AB) rulings relating to high profile disputes have failed to deter noncompliance. In fact, it has become a fashion for unruly members to exhaust the resources of the AB review, appealing more than once in the course of the same dispute, taking advantage of the legal loophole of ‘free pass’, namely the fact that there is no monetary compensation for affected firms and also no interim measures or punishment for delayed-compliance.<sup>31</sup> Therefore, the DSB cannot perform the task of ensuring compliance with WTO law, and the longer the problem of non-compliance persists, the shared understandings on the legality of WTO law will be eroded.

Furthermore, the WTO including its Committee on Regional Trade Agreements, need to effectively examine the PTAs to ensure their compliance with GATT principles. Because of these reasons, compliance with WTO law should be perceived as an ongoing interactional process under the compliance body of the DSB, and the implementation review instrument of the Trade Policy Review Mechanism (TPRM). WTO accession, if performed using legal forms, would play a constructive role in creating shared legal understandings on compliance. In short, the interactional framework stresses that WTO legality has to be cultivated by

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<sup>28</sup> See William Davey, ‘Compliance Problems in the WTO Dispute Settlement’ (2009) Cornell International Law Journal 119. See Shaffer and others, ‘The Law and Politics of WTO Dispute Settlement’ (n 1).

<sup>29</sup> Peter Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Texts, Cases and Materials* (3rd edn, Cambridge University Press 2013) 304 citing Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (American Enterprise Institute Press 2001).

<sup>30</sup> Disputes by Agreement, and Current Status  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)> accessed 4 April 2016.

<sup>31</sup> John Jackson, ‘The Case for the World Trade Organization’ (2009) International Affairs 437.

commitments made and maintained by states and interested non-state actors. The *obligation of conformity* with WTO agreements, which is stipulated in the DSU, should be emphasized in every WTO setting concerned with norms' interpretation and enforcement. The cultivation of shared understandings must be embedded in the WTO purpose and process, and this can only be accomplished by reforming the legal texts along Fullerian lines.

### **6.3 The WTO Law and the Principles of Legality:**

When applying the theory of interactionalism, we require that the GATT/WTO rules have to satisfy the Fullerian principles of legality to encourage adherence by member states. In doing so, the compliance with trade rule of law will not be the sole responsibility of the court system, but every actor concerned with formulation and implementation of norms, such as law-makers and subjects who interact in committee settings. The GATT/WTO rules, that include the DSU, must be *general, publicised, clear, consistent, and prospective, must not demand the impossible, and must also be constant*. Lastly, *official actions under these rules must be congruent with the law*.<sup>32</sup> These principles, which are analogous with common principles pertaining to the rule of law, such as equality before the law, were regarded by Fuller as being the eight standards against which excellence in legality could be tested.<sup>33</sup>

The WTO, should adopt these principles as a mark of excellence. These principles should be invoked in the interlinked processes of rule-making and administration. Apart from the non-discrimination principle, which lacks clarity, the rules of the GATT and WTO founding agreements largely satisfy these principles of legality; for example, they are *not contradictory* and they *do not demand the impossible* of states. The eighth criterion, that is *congruence between official action and the law*, has a bigger institutional role under the subheading of practice of legality, which will be addressed below. However, the DSU lacks legality, as revealed in the evaluation of its legal character in Chapter Four which focuses on the pre-panel and post-ruling procedural rules.

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<sup>32</sup> Lon Fuller, *The Morality of Law* (revised edn, Yale University Press 1969) 39.

<sup>33</sup> *ibid* 42. See Tom Bingham, *The Rule of Law* (reprint edn, Penguin 2011).



Reforming the DSU has been a concern of the member states, particularly for the ones submitted revision proposals for the DDR, which express their dissatisfaction with the surveillance and monitoring of compliance procedures. The entire DSU should be reformed, starting with the pre-panel rules under Articles (4-5) which need to be revised for clarity and consistency. DSU Article (4:7) on consultation, for example, should be amended to set a precise timeline for finalizing the dispute, rather than leaving it to the discretion of the complaining party which often fails to do so. It is true that the system has fairly functioned well despite the loophole of DSU Article (21:5) compliance review which opens the doors for re-litigation with no prospect for settlement. Nevertheless, DSU Articles (21-22) are ineffective in ensuring compliance between developed members, and the influence of those members, in particular, on the interpretation of these articles poses a serious problem.<sup>34</sup> The principles of legality are the appropriate standards for amending the DSU as they provide a comprehensive assessment for regulative quality and procedural fairness.

The DSB was originally founded to uphold procedural fairness by settling disputes promptly and effectively. The DSB is, however, failing in this regard under the current out-dated textual and structural arrangements. Hence, legal revision of DSU rules is urgently needed. In terms of structure, the three phases of consultation, Panel and AB reviews, and implementation can remain as they are. However, DSU Article (25) on arbitration has to be revised, as it was only invoked once, and was not even effective in finalizing the dispute.<sup>35</sup> From the number of disputes involving DSU Article (22:6) on arbitration of retaliation level (13 in total), and the large number of disputes that are stuck in the middle of the system between consultation and AB, arbitration rules need to be revised to facilitate timely and effective settlements.<sup>36</sup> Revision of the DSU has to be conducted in accordance with the best international rules and practices of compliance as founded in investor-state arbitration and international court of justice.

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<sup>34</sup> See Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed' in James Hartigan (ed), *Trade Disputes and the Disputes Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing limited 2009) 167.

<sup>35</sup> See United States- Section 110(5) of US Copyright Act, DS160.

<sup>36</sup> See Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2015 – A Statistical Analysis' (2016) *Journal of International Economic Law* 289.

The DSU must stress the finality of judgement, and the right of injured foreign traders to seek redress. The current ‘free pass’ issue, i.e. no finality of dispute and no compensation, is very detrimental to the trade rule of law. The DSB has to have the power to prescribe *interim measures* to protect firms of disputing states, especially developing states, which lack the resources to survive three years of litigation. However, after amending the legal texts, the WTO needs to adopt the Fullerian *interactional view of law* to handle legality not as the sole responsibility of the DSB, but the organisation as a whole. Therefore, in terms of priority, the WTO should first reform the texts of the DSU, then focus on improving the practices of legality within and outside its settings.

#### **6.4 Compliance in the WTO’s Practice of Legality:**

The future of the WTO is linked to sustaining ongoing practices of legality that correspond with trade norms, which should be socially constructed, and meet the principles of legality. Interactionalism assumes that transparency and enforcement are interlinked and mutually reinforcing. The primary task of the WTO is to improve the transparency of trade-related legal practices, with a view to effectively enforcing the law. The findings of this thesis imply that there is a need to build a community of legal practice that comprises state and non-state actors, such as exporting firms, to detect, challenge, and deter noncompliance effectively. Application of the principle of *congruence between official action and the law* reveals a different set of WTO legal practices that satisfy the term compliance regime, namely every body, committee, and process for state interaction, particularly the accession process and Trade Policy Review Body.

Once the term *interactional law* is adopted to highlight the role of state interaction as the basis of legality, the difference between the judicial and political branches of the WTO becomes minimal. This is because the evolution of the world trading system suggests that the process of transitioning to the trade rule of law has been accomplished through legal expression via politics. As emphasized in Chapter Five, developed member states cannot extricate themselves from the legality of the system, as rules are enforced through the shared commitments of states, and the majority of which satisfy the principles of legality. The WTO law enjoys a substantive degree of legality, which has sustained its legitimacy since 1995; the essential component of this legality trait is legal practice. Nonetheless, the

aforementioned shortcomings relating to shared understandings and principles of legality obstruct practice within the WTO. There is a lack of sufficiently dense interactions between participants in the WTO, and the DSB rules and procedures do not satisfy the principle of *congruence between official action and the law*, as evidenced by the compliance deficit. Ultimately, the accession process, and TPRM, fall short of fulfilling a legal practice conducive to the trade rule of law. Therefore, Chad Bown's proposal to establish the Institute for Assessing WTO Commitments (IAWC), which relies on exporting firms' involvement, should be recognised as a promising remedy for non-compliance, and an effective strategy for maintaining legal practice.<sup>37</sup> In short, legality must be embedded in the WTO strategy for reform, and the WTO-extra community of exporting firms should be acknowledged as important actors in sustaining legal practices, in order to fulfil the ideal of self-enforcement of trade. Nonetheless, the main actionable policy recommendations derived from this thesis are as follows:

1. Member states and non-state actors cherish the moral ideal of the rule of law, knowing that the alternative is the unlimited rule of man, which is not conducive to social and political stability. This ideal is enshrined in the constitutive elements of accountability to, and equality before, the law. However, this ideal of the rule of law is concealed in the WTO because of actors' lack of interaction with the WTO policy-making and dispute resolution. The WTO has to provide open, interactive settings for the legal expression of politics, and facilitate shared political and legal understandings on compliance with WTO law. Recommendations for textual and structural reforms of the WTO should be received from non-state actors. It should be noted here that foreign trade existed prior to the WTO, and continues to exist outside its parameters in the form of PTAs. The purpose of the WTO is to provide transparency, and consensual knowledge, which will improve compliance with the trade rule of law. The Green room politics, limited public participation in the WTO, lack of third party access to the DSB, the DSU and other concerned agreements such as SCM's silence on monetary compensation, all damage the ideal of trade rule of law. Hence, the WTO

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<sup>37</sup> Chad Bown, *Self-Enforcing Trade: Developing Countries and Dispute Settlement* (The Brookings Institution 2009) 208-237.

should open up interactional legal practices to all stakeholders; from small firms in developing countries to civil societies and NGOs worldwide.

2. However, WTO legal practices cannot be improved without textual reform. Over 20 years have passed without amendment to the WTO Agreement or DSU rules, so this call for reform is necessary, but until such a change occurs, the authority of the WTO will remain in question. The DSU needs to be amended to *substantially* satisfy the constitutive elements of legality, emphasise the finality of judgment, and the right of firms to redress for losses they have suffered due to procedural delay, or delayed-compliance. The recent saga concerning the appointment and reappointment of AB members is a clear indication of a worsening judicial activism problem. It is necessary now to amend the loophole in DSU Article (21:5) on compliance review, which has caused interpretation problems and has led to judicial activism and delayed compliance, as it is often invoked to prolong rather than finalize disputes. The DSU should be revised to render the DSB fair and equitable in recognizing the private rights of traders. Despite the interstate nature of WTO disputes, the DSU should adopt a language comparable to that of ICSID in acknowledging the damage suffered by traders and nationals of other trading countries.<sup>38</sup> The citizens of WTO member states are contributors to and beneficiaries of economic cooperation; hence, their trade rights should be recognized in *law* and respected in *practice*, especially in the case of a dispute. As such, the amendment to the DSU should include an article on *interim measures* to protect the interests and rights of trading firms, and effectively finalize disputes. This article should follow the one in ITLOS by giving the DSB the full authority to *prescribe, modify and revoke* provisional measures.<sup>39</sup> Overall, the guiding principle for reforming the DSU should be utmost respect for *procedural fairness* and *the trade rule of law*.<sup>40</sup>

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<sup>38</sup> See ICSID Convention, Regulations and Rules  
<[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR_English-final.pdf)> accessed 10 June 2016.

<sup>39</sup> See Article (290) of the United Nations Convention on the Law of the Sea  
<[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)> accessed 27 July 2016.

<sup>40</sup> See Arman Sarvarian, 'Procedural Fairness in International Courts and Tribunals' in Arman Sarvarian and others, *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law 2015) 1-14.

3. Finally, this thesis has presented and defended *an interactional theory of compliance*, which claims that enforcement does not depend on the authority of the DSB, but on facilitating interactional legal practices. These practices should stress the goal of self-enforced trade through not only dispute resolution, but also effective administration of WTO law. The sole responsibility of the WTO *community of legal practice* is to improve transparency, which will be conducive to effective enforcement of WTO law. Lastly, it is recommended that the WTO revive all, or at least some elements, of the DDR, as it contains proposals for making WTO law and practice more interactive and legally effective. For example, the DDR's plan to revise the DSU is very important.

Overall, the arguments on compliance with WTO law, both those presented in anti-legalist/legalist narratives, and those focusing on the most apt assessment measure, are extensive and multifaceted. This thesis argues that the ongoing historically-deficient and narrowly-focused debate on legality overlooks the constitutive elements of compliance with the trade rule of law. There is thus a need for further studies to explore the different dimensions of WTO compliance in greater depth. Suggestions for future research studies, which could provide further clarification and facilitate full compliance with trade rule of law, include the following:

1. There is the need for a legal examination of the reasons behind the misinterpretation of the GATT Articles, especially (I) and (III), the SCM, and the Anti-Dumping Agreement, and to identify whether the disputed provisions of these agreements fall into the categories of being *ambiguous norms*, or norms that member states are *incapable of performing*.
2. Research is required to establish what standards should be adopted to amend the non-discrimination principle. In addition to the rules satisfying the principles of legality, can the international investment law principle of *fair and equitable treatment* be adopted to this end?
3. The practical viability of the IAWC proposal should be assessed. Should the IAWC be incorporated into the WTO Secretariat to benefit from its legal expertise, and still receive independent funding from private foundations, as envisioned by Bown? Or, can amendments to the TPRM

text to include the objectives of the IAWC, stressing transparency and sharing of information on potential WTO violations, be enough to fulfil the ideal of self-enforcement of trade?

To conclude, in spite of what is often reported about the WTO in theoretical and practice-oriented accounts, the comprehensive interactional law framework sought to offer some original explanations of, and solutions to the compliance defects. These interactionalism-based solutions should be considered for the sake of preserving and promoting the international trade rule of law. The main contribution to world trade law literature made by this thesis is the interactional theory of compliance, which is manifest in the argument that compliance should be regarded as *a dialectal process on a continuum*, and one that depends on the active legal interactions of states and non-states actors. The legal obligations of the WTO are best deconstructed interactionally.

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