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The WTO practice of legality is ensuring transparency forself-enforcing trade

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The WTO Practice of Legality is Ensuring Transparency for Self-Enforcing Trade

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Abstract

This article reviews the World Trade Organization (WTO) compliance procedures, by invoking the interactional international law concept of a community of legal practice. One of the core objectives of the WTO is to maintain a practice of legality, including guaranteeing state and non-state actors interact based on world trade norms. In seeking to achieve this objective, the WTO aims to uphold the trade rule of law by emphasizing compliance with specified rules and procedures during the accession process, dispute settlement, and trade policy review. When examining these procedures in depth, evidence emerges of a strong link between transparency and enforcement in WTO law. This article investigates these three procedures for effecting compliance, to assess whether the WTO is sustaining a practice of legality. Second, it briefly illuminates Chad Bown's proposal to establish an Institute for Assessing WTO Commitments to improve member states' remit to detect, challenge, and deter noncompliance.

Keywords: Interactional International Law; WTO Accession; WTO Dispute Settlement; WTO Trade Policy Review; Transparency.

1. Introduction:

The World Trade Organization (WTO) was founded to uphold and maintain a practice of legality aligned with the purpose of world trade norms for reciprocal and non-discriminatory interaction. The WTO was principally influenced by the laws and practices set out in the 1948 General Agreement on Tariffs and Trade (GATT). In particular, the GATT principle of non-discrimination was considered the most important general principle of the trade rule of law, and it sustained legal practice under multilateral trade agreements.[1] Nonetheless, legal practice under WTO law cannot be fully deconstructed without invoking the interactional theory of international law (hereinafter *interactionalism*), which underpins the formation, interpretation, and implementation of the law. The three elements of interactionalism are best understood as a circular model of law-making, which starts with 'shared legal and political understandings' that correspond with Lon Fuller's 'eight constitutive principles of legality'; these then become enmeshed in a 'practice of legality' that revolves around the ideal of 'fidelity to law'.[2]

[1] Wilfred Ethier, 'Political Externalities, Nondiscrimination, and a Multilateral World' (2004) Review of International Economics 303.

[2] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 123 (hereinafter *An Interactional Account*).

According to Fuller, to encourage fidelity, a social norm must satisfy the following eight principles of legality: *generality, promulgation, prospectivity, clarity, non-contradictory, not asking the impossible, constancy, and congruence between official action and the law*.[3] If these principles are substantially met by law-makers, any interaction between parties will be legal.[4] The eighth principle, of congruence between official actions and declared rules, is the most salient to achieve legality, as its primary focus is on legal practices that conform with the intended purpose and process of law. Interactionalism assumes that transparency and enforcement are interlinked and mutually reinforcing. The following application of interactionalism, using the element of 'practice of legality', will demonstrate its suitability for illuminating the often-distorted notion of legal obligation under WTO law. The primary task of the WTO is to improve the transparency of trade-related practices, with the primary intent of effectively enforcing the law. The future of the WTO is thus intrinsically linked to sustaining ongoing practices of legality that correspond with international trade norms. To this end, the efficacy of WTO law depends not only on its role in adjudication, but also on facilitating interactional legal practices.

To fully address the practice of legality under the WTO, this article will first, provide a brief overview of the concept of a community of legal practice in interactionalism, and second, examine, in light of the interactional approach, those WTO procedures that are primarily concerned with building and sustaining compliance, namely, the accession process, dispute settlement system, and Trade Policy Review Mechanism (TPRM). Third, it will consider Chad Bown's original proposal for establishing the Institute for Assessing WTO Commitments (IAWC) as a forum for fostering a continuous practice of legality.[5] The reasons and objectives for establishing the IAWC, which include facilitating legal interactions between member states to ensure compliance with WTO commitments, will be explicated.

[3] Lon Fuller, *The Morality of Law* (revised edn. New Haven: Yale University Press, 1969) 39.
[4] ibid 197-200.
[5] Chad Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institute Press 2010) 208-237 (hereinafter *Self-Enforcing Trade*).

2. The Community of Legal Practice in Interactional International Law Theory

State practice plays a key role in agreements to adopt customary international law, and the interpretation and amendment of treaties. The notion of 'a community of practice' implies that institutional rules, and the behaviour of states within an international institutional framework, are largely formed through discourse.[6] However, interactionalism maintains that the practice of legality in this community of state practice is founded on the ideal of 'fidelity to law', which all legal orders were founded in order to uphold.[7] Legal norms are derived from the shared commitments of actors, and must comply with the Fullerian principles of legality in order to inspire fidelity.[8] According to Brunnée and Toope, 'fidelity is generated, and in our terminology obligation is felt, because adherence to the eight criteria of legality (a 'practice of legality') produces law that is legitimate in the eyes of the persons to whom it is addressed'.[9] However, for law to exert such a distinctive influence, it is essential 'to cultivate spaces and opportunities for engagement with and around legal norms'.[10] Interactionalism focuses on legal practices designed to appreciate the roles and limitations of the sources and enforcement mechanisms of international law, and to demonstrate how best to cultivate constructive interactions related to the idea of law.[11]

Brunnée and Toope further argue the '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'.[12] Moreover, law should be practised to allow political expressions and actions to be pursued within open, interactive legal channels.[13] According to Fuller, one of the primary aims of law 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.[14]

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[6] Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Routledge 2005) 15.

[7] Brunnée and Toope, *An Interactional Account* (n 2) 44-45.

[8] ibid 27.

[9] ibid.

[10] ibid 100.

[11] 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.

[12] Brunnée and Toope, 'The Practice of Legality' (n 11) 116.

[13] Brunnée and Toope, *An Interactional Account* (n 2) 72.

[14] Fuller, *The Morality of Law* (n 3) 186.

Brunnée and Toope also maintain that, 'it is the fulfilment of [the principles of legality], supported by a continuous practice of legality, that amount to what Adler and Pouliot call "competent performances" of the practice of international law'.[15] According to Adler and Pouliot, 'practices are competent performances (…) socially meaningful patterns of action which (…) simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world'.[16]

As alluded to above, the eighth principle of legality, the congruence between official actions and declared rules, is the most salient to achieving a practice of legality. Without the principle of congruence, the central aim of law to provide stability and predictability in the community of law-subjects, will be impossible to achieve. Such an effect would also be the result of violating other principles of legality, however, it is the violation of principles of law not demanding the impossible, and being congruent with official action, which would have the most destructive effect on the reciprocal relationship between law-maker and law-subject.[17] On this point, Brunnée and Toope maintain that the principle of congruence,

> [I]s 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 [practised] 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.[18]

Observance of the principles of legality will have the effect of sustaining legality over time. Legal practices are often shaped by shared commitments to legal norms regarding association and interaction. For example, the elementary relationship between law and economics based

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[15] Brunnée and Toope, 'The Practice of Legality' (n 11) 108.

[16] Adler and Pouliot, 'International Practices: Introduction and Framework' in Adler and Pouliot (eds), *International Practices* (n 11) 6.

[17] This is derived from Fuller's references that violating these principles, in particular, will lead to a revolution. Fuller, *The Morality of Law* (n 3) 36-38.

[18] Brunnée and Toope, 'The Practice of Legality' (n 11) 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 11) 6 (emphasis added).

on 'the legal guarantee', which gives a higher degree of certainty to traders who contract, and accordingly interact, legally with each other.[19]

The standard view of the association between law and economics in the context of the world trading system maintains that at the national level 'law makes the economy',[20] while at the international level 'international law has always had considerable 'economic content''.[21] The evolution from the dominance of power-politics to respecting the international 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. For the WTO, and for the GATT during its early years of structuring, 'reciprocity and non-discrimination have been both the ends and the means (…) they have been its purpose as well as its process'.[22] 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 of a system of 'law' that arises from and provides a framework for self-directed human interaction.[23]

Furthermore, the legitimacy of the WTO has been largely sustained by the facilitation of interactive means to support regular meetings and discussions, argumentation and compromise, to create binding agreements and standards supported by all member states.[24]

For example, after examining the development of the WTO Agreement on Sanitary and Phyto-sanitary Measures (SPS) through member states' continual interactions, within which standards were set and even disputes were settled amicably, Wolfe said:

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[19] Edward Shils and Max Rheinstein (trans), *Max Weber on Law in Economy and Society* (3rd printing, Harvard University Press 1969) 98-99.

[20] Philip Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press 2002) 86.

[21] John Jackson, 'International Economic Law: Complexity and Puzzles', (2007) Journal of International Economic Law 3.

[22] Robert Wolfe, 'Kaleidoscopic Multilateralism: Lon Fuller, Rod Macdonald and the WTO' Richard Janda and others (eds), *The Unbounded Level of the Mind: Rob Macdonald's Legal Imagination* (McGill-Queen's University Press 2015) 88.

[23] Robert Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System' (2005) European Journal of International Relations 339.

[24] Sungjoon Cho, 'How the World Trade Community Operates: Norms and Discourse' (2014) World Trade Review 685.

> 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.[25]

The deeply interactional underpinnings of international trade law highlight the importance of transparency to both the purpose and processes of WTO law, especially the accession process, committee system, and trade policy review.[26] These three vital and continuous processes exceed the role of the WTO Dispute Settlement Body (DSB) in affecting compliance, because of their multifaceted enforcement roles. As a general rule, any analysis of compliance must consider the enforcement process, or, in the WTO context, *processes*, as enforcement is 'the action or process of enforcing' compliance, whereas compliance is 'the action, practice, or fact of complying'.[27]

Moreover, the WTO as an institutional setting for rule-making and administration must achieve two important aims in order to realise the benefits of free trade. First, it guides 'the reciprocal bargaining' process by establishing a level playing field as a policy goal for competing trade interests.[28] Second, it corrects the market distortions created by the disruption to foreign market access via the WTO DSB's binding decisions on the status of the respondent state's distorting measure, and, if needed, recommending an accordant adjustment to this measure.[29] These essentially administrative functions of the WTO raise three interrelated points of inquiry concerning: a) the role of the WTO accession process in building the foundations of compliance with WTO law; b) the instrumentality of the DSB in the efficacy of WTO law; and, c) the enforcement role of the TPRM.

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[25] Wolfe, (n 23); 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.

[26] 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> accessed 23 December 2015.

[27] See Enforcement and Compliance Entries, Oxford English Dictionary <http://www.oed.com/view/Entry/62166?redirectedFrom=enforcement#eid> accessed 27 December 2016.

[28] John Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, MIT Press) 19-21, Jagdish Bhagwati, *Free Trade Today* (Princeton University Press) 95-120

[29] ibid.

3. An Interactional World Trade Law from the Point of Accession

The most appropriate conception of an international law is to view it as conveying and creating information, and facilitating credible commitments.[30] The point of accepting the bindings of the law is merely the beginning of an interactional process that involves using the law as medium for communication, shaping behaviour, and sanctioning deviation. This is 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.[31] The process of acceding to the WTO is legally critical because of the role of agency in facilitating the acceding states' acceptance of world trade law and its coming into force. Once a state becomes a WTO member it must participate in a number of processes and activities for making and maintaining WTO law, primarily for the purpose of ensuring its own compliance. This critical role of participation sheds light on the nature of the evolving WTO legal arrangements.

From the outset, 'legalisation' has been the primary attraction of the world trading system; for example, developing and least-developing members were drawn to the system because of their belief in its legalistic structure for providing fair and equal interaction.[32] The key point of accepting and forming substantive understanding of WTO law is during the accession negotiations. These negotiations of accession commitments have important implications in helping acceding states ensure their trade policies and practices are compliant with WTO law. Thus, this first point of entry into law, the accession to the rule-based multilateral trading system, is worthy of critical legal analysis. During the GATT era, accession was openly fraught, characterised by political calculations rather than legal considerations with regard to making credible commitments to the GATT community.[33]

The WTO, however, provides a contractual condition upon the states acceding to become WTO members. 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

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[30] See Beth Simmons, 'Treaty Compliance and Violation' (2010) Annual Review of Political Science 273.

[31] See Sungjoon Cho, *The Social Foundations of World Trade: Norms, Community, and Constitution* (Cambridge University Press 2014) 25.

[32] See Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization 2013) 201.

[33] For example, it was because of the influence of France, rather than political or legal sovereignty, that Lebanon and Syria were among the original (23) founding parties of the GATT. Similarly, Japan accession to GATT was 'pushed through' by the US, as it feared that if Japan did 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.

annexed thereto'.[34] These annexed Agreements include the GATT and the Dispute Settlement Understanding (DSU), and they are 'binding on all Members' (WTO Agreement Article (II:2).[35] However, Article (XII) is brief and poorly defines the standard required for accession, which raises the point that it might have been intentionally drafted as such in order to highlight the role of WTO and non-WTO agencies in making the accession process possible, and within the WTO legal boundaries.[36] However, the accession process under the WTO is characterised by political rather than legal considerations in regard to compliance purposes.

According to Toohey, WTO accession is under-theorised, especially when viewed as a process of cataloguing in the accession protocols, provisions that have no clear basis in WTO agreements (i.e. WTO-plus), or fall short of these agreements (i.e. WTO-minus, e.g. preclusion of the provision on special and differentiated treatment (SDT)).[37] However, Toohey has attempted to address this issue in order 'to explain the important, but generally overlooked, role of epistemic communities in creating and perpetuating discourse about the appropriate terms of accession'.[38] However, Toohey's attempt to single out the role of an epistemic community of experts who performed a constructive role in helping acceding states was burdened by various difficulties, primarily because of the political rather than legalistic nature of the accession discourse, and its negative influence on compliance. Toohey explained this issue by using the example of Vietnam's accession, which was heavily influenced by technical assistance provided by industry groups, and the United States (US) and European consulting companies, who made up the accession 'project'. Toohey explained that the project was,

> 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.[39]

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[34] World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (20th printing, Cambridge University Press 2013) 12 (hereinafter, *The WTO Legal Texts*).

[35] ibid 302.

[36] Toohey (n 33).

[37] ibid.

[38] ibid citing Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) International Organization 1.

[39] 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).

As the Vietnamese example shows, Toohey was right to conclude 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'.[40] Toohey's article provides a balanced and rich analysis of a key point of legal interaction, and highlights the detrimental impact of the defects in the WTO accession process 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 clarity of legal commitments made by the acceding state.[41] Independent technical assistance can perform the task of assuring conformity with WTO law, but it is not as effective as the role of the Secretariat, and does not have dedicated and sufficient legal expertise to perform this task.[42]

The WTO accession process must consider the role of shared political and legal understandings of compliance in regard to the three sub-elements of 'norm-cycle, an epistemic community, and a community of practice'.[43] Contrary to the view that the WTO accession process should be solely dependent on the work of 'epistemic communities', and end when the state becomes a member, the process must be continuously refined in the WTO community of legal practice. The existing WTO accession process fails relative to the measure of being effectively conducted within a clearly defined legal limits and forms. Despite the inclusion in the report by the working parties on accession of the acceding state's 'framework for making and enforcing policies', it remains questionable whether this is a mere formality, or intended to show credible, enforceable commitments to facilitating compliance with WTO obligations.[44] Because of the lack of promulgation during the accession process, the WTO function of adjudication will come into conflict with the practice of legality, causing a member state that has not made enforceable promises, to deviate from (i.e. breach) the GATT/WTO rules. A high-profile case that illustrates the limits of the WTO accession procedure is China's membership.

[40] Toohey (n 33).
[41] ibid.
[42] ibid.
[43] Brunnée and Toope, *An Interactional Account* (n 2) 56-65.
[44] 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> accessed 10 of March 2016.

Despite being the only country 'whose accession agreement required policymakers to improve the rule of law',[45] China arguably made the most disputed commitments found in any accession protocol of a WTO member. Of the (35) recorded WTO disputes concerning protocol of accession, (25) complaints were brought against China; this is a clear indication that China is failing to keep its promises.[46] For example, complainants cited different paragraphs of China's accession protocol and the Working Party Report on the Accession of China, which detail China's assurances that it would fully comply with WTO law.[47] In most of these cases the panel and Appellate Body (AB) agree with the complainants; for instance, in two cases brought by the US and Canada against China's measures affecting imports of automobile parts, the panel concluded that China acted inconsistently with its commitments under its protocol of accession and the Working Party Report.[48]

The majority of the complainants in disputes involving China's accession protocol were made by developed members, but developing members have also complained about the lack of conformity between China's accession commitments, its trade conduct, and the status of its accession protocol. Although accession protocols have a legal status, as, once concluded, they become 'an integral part of the WTO Agreement', their interpretation has proven problematic.[49] This is largely because of misinterpretation by a member state of the accession protocol status and entitlements, as in the case of China, and the lack of transparency during the accession process.[50] The AB bears some responsibility for misinterpretation, as it has twice erroneously separated the protocol of accession from the WTO Agreement.[51] When accession is not based

[45] Susan Aaronson and M. Abouharb, 'Does the WTO Help Member States Improve Governance?' (2013) World Trade Review 1.

[46] Disputes by Agreement <https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A30> accessed 9 of March 2016.

[47] See DS508: China-Export Duties on Certain Raw Materials; DS340: China-Measures Affecting Imports of Automobile Parts; DS517: China: Tariff Rate Quotas for Certain Agricultural Products.

[48] Panel Report, China-Measures Affecting Imports of Automobile Parts, pages 357-359, WT/DS340/R, adopted 18 July 2008.

[49] Jingdong Liu, 'Accession Protocols: Legal Status in the WTO Legal System' (2014) Journal of World Trade 751.

[50] Qingjiang Kong, *China and the World Trade Organization: A Legal Perspective* (World Scientific 2002) 92, 109-112. 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.

[51] Matthew Kennedy, 'The Integration of Accession Protocols into the WTO Agreement' (2013) Journal of World Trade 45, citing Appellate Body Report, China-Measures Related to the Exportation of Various Raw Materials, para. 363, WT/DS394/AB/R, adopted 30 January 2012; Appellate Body Report, China-Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products, para. 417, WT/DS363/AB/R, adopted 21 December 2009.

on credible legal commitments, the state's practice, will be negatively affected, as well as the WTO's ability to administer trade relations. China was challenged on its accession protocol on the basis of its contested WTO classification as a developing member despite its increasing economic power.[52]

However, the same issues relating to the accession of China could arise with any WTO member once it flexes its economic muscles and takes a deviant path of noncompliance. This risk is real because, from the outset, WTO accession has been largely founded on flexible political rather than strict clear legal constraints. Thus, the following three interactionalism-based suggestions should be considered for reforming the WTO accession process:

1. The Working Party on Accession should facilitate a legalistic discourse based on building shared understandings of the legal nature of GATT/WTO rules, and inspect member states' trade policies and practices in order to authenticate accession documents. The Working Party report should focus on the acceding member's efforts to develop a culture of transparency 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'.[53]
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 be independent in seeking assistance for accession purposes. The WTO Secretariat should provide effective legal aid to working parties and acceding states to assure their observance of rule of law principles. The trade rule of law, which involves consideration of principles such as non-discrimination, should be enshrined in the working parties' draft reports and member states' accession protocols. Every WTO accession process, not only that of China, should require policymakers to improve the rule of law.
3. Accession defects should be subject to legal scrutiny by the WTO Trade Policy Review Body (TPRB). The TPRB is an ideal setting for remedying accession defects and maintaining a practice of legality. For example, the TPRB can complement the WTO accession process by reviewing the trade policies and practices of newly acceding or

[52] Russia too has the same contested developing country status that entitled it to special and differentiated treatment exemptions, see Sonia Rolland, *Development at the WTO* (Oxford University Press 2012) 84.

[53] Murray Smith 'Accession to the WTO: Key Strategic Issues' in Jeffrey Schott (ed), *The World Trading System: Challenges Ahead* (Peterson Institute 1996) 180.

offending members states in order to ensure transparency and compliance with GATT/WTO rules. The TPRB should be permitted to review accession documents and implementation plans to ensure observance of the trade rule of law for a fairer multilateral trading system.

In brief, the defects in the WTO accession process cannot be remedied by the DSB. The high-profile cases concerning accession highlight a concern regarding the role of legal practice in the WTO, especially the congruence between official action and the law. If the acceding states are at liberty to circumvent the principles of legality, especially those of promulgation and clarity, during the accession process, then they will feel at liberty to evade the law once they become WTO members, and, even where the DSB is notified of a breach, it will be unable to correct this misconduct. The following section will elaborate further on the DSB's role in upholding WTO obligations.

4. The WTO DSB and the Congruence Between Official Action and the Law:

The DSB is a key component of the analysis of legal rules and practices in the world trading system. However, according to interactionalism, an enforcement mechanism such as the DSB is only one element of the interactional law process.[54] 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 interactional legal practice. In order to inspire fidelity, WTO law must continue to cultivate 'shared understandings', especially of the most disputed WTO rules, namely the GATT Articles (I) and (III) on the principle of non-discrimination.[55] Moreover, these rules, in addition to DSB rulings and recommendations, must satisfy all of the principles of legality in order to inspire the intended effect, that of compliance. Once these rules are founded on substantive understandings and satisfy the principles of legality, they must then be performed within an interactive community of legal practice. In relation to the congruence principle and the DSB, the following issues will be discussed:

1. Performing legality in the WTO is not the sole responsibility of the DSB, but of the organization as a whole.
2. The lack of direct effect of WTO law has a negative effect on compliance.
3. Legality is beyond the comprehension and reach of developing and least-developing WTO member states.

[54] See Wolfe, (n 23).

[55] See WTO Disputes by Agreement: <https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm> accessed 6 June 2018.

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. According to legal positivism, international law is incorrectly perceived as deriving its legitimacy primarily from the authority of the court that interprets and applies the law. For example, the DSB has been hailed as a symbol of the success of the multilateral trading system.[56] Although this might have been the case in the early years of the WTO, evidence from several studies shows that the DSB, in reality, has become the victim of its own success by creating two issues: institutional imbalance, and delayed settlement.[57] 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' which has forced the former to add new rules because of the weaknesses of the latter.[58] In brief, the DSB has become ineffective precisely because of the WTO overreliance on its quasi-judicial branch. Moreover, contrary to the core mission of the DSB, almost all consultation 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).[59] Litigated disputes suffer from misuses of the compliance review procedure under DSU Article (21.5) by the offending state, intended to prolong the dispute in order to reap the trade benefits resulting from delayed settlement.[60]

The legality of the WTO must be built and cultivated in every space and opportunity for member states' interactions, be those in the work of committees, general councils, or ministerial conferences, and these interactions must conform with the principles of legality. Socially constructed legal obligations, including those of the WTO, 'cannot be reduced to the existence of fixed rules, [they are] made real in the continuing practice of communities that reason with and communicate through norms'.[61] The emphasis on legalization and lack of legal

[56] WTO Disputes Reach 400 Mark <https://www.wto.org/english/news_e/pres09_e/pr578_e.htm> accessed 4 April 2014.

[57] William Davey, 'Compliance Problems in the 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> accessed 22 March 2016.

[58] Peter Van den 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).

[59] Current Status of Disputes <https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm> accessed 16 March 2016.

[60] See Jason Kearns and Steve Charnovitz, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5' (2002) Journal of International Economic Law 331.

[61] Brunnée and Toope, 'The Practice of Legality' (n 11) 131.

cooperation is worrisome for the critics of WTO legitimacy. For instance, Elsig stated about the WTO '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'.[62]

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 where practices of legality under world trade law have been successful. Two examples of successful interactions on the basis of legality stand out in the history of the world trading system. The first manifests in 'the progressive legalization' of the world trading regime during the GATT era, especially in the (1980s), when a community of practice was strengthened by a gradual increase in the number of legal practices involving participants from both developed and developing contracting parties.[63] For example, those parties drew the following into the trading regime: most of the principles of legality, such as clarity, feasibility, and consistency; background knowledge on procedural rules and practices of the United Nations (UN) system, and on the design and implementation of other economic agreements.[64] Since the (1980), the submissions of contracting parties to the committees of specialized agreements of 'Information on Implementation and Administration of the Agreement' had promoted a practice of legality under the GATT.[65]

It was primarily these GATT activities that had built a resilient community of legal practice that led to the progressive legalization of the world trading system.[66] As a result, the GATT community had gradually matured into a community of law, making the organization ready to introduce legal bodies such as the GATT Office of Legal Affairs, and a panel dispute settlement

[62] Manfred Elsig, 'The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?' (2007) Journal of World Trade 75.

[63] See Ernst-Ulrich Petersmann, 'The GATT Legal Office' in Gabrielle Marcau (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) 161.

[64] See GATT documents on international law and the United Nation 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 GATT Digital Library).

[65] 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 GATT Digital Library (n 64).

[66] Petersmann, 'The GATT Legal Office' in Marcau (n 63) 161,182.

system.[67] The GATT Office of Legal Affairs, which was established in (1982), played a crucial role in promoting legal practices by assisting the GATT panels with interpretation, and the Uruguay Round negotiators with the judicial design of the WTO.[68] Although, these GATT initiatives did not stand the test of time, or resistance from developed contracting parties, as evidenced by the compliance deficit in the (1980s), they initiated and cultivated the practice of legality under the GATT, augmenting the legalistic nature of discourse.

For example, the agreement to introduce a legalistic structure to the WTO was the result of an agreement made between Japan and the European Communities (EC) on the one hand, and the US on the other, with the former agreeing to be bound by a judicial system, in return for the latter foreswearing its unilateral actions.[69] Even if this historical agreement had not been struck, the GATT community of legal practice would have continued to grow and ultimately force developed contracting parties into compliance, because of the external and internal strength it gained from engagement in, and cultivation of, a practice of legality. The contracting parties who later became members of the WTO had participated in a wider communities of international legal practice. Hence, the legalistic design of the WTO was not the result of fate, nor the willingness of the US Congress, but of a rich history of legal interactions between GATT contracting parties.

Nevertheless, the practice of legality under the WTO has taken on a more developed and comprehensive form, as encapsulated in the five functions of the organization. These functions include 'facilitating the implementation, administration, and operation, and further the objectives of' the WTO establishing Agreement and the Multilateral Trading Agreements, through negotiations, effective administration, and cooperation with relevant international organizations.[70] The WTO DSB, TPRM, Legal Affairs Division, various WTO committees, working parties, and working groups, are working to ensure effective and prompt observance of GATT/WTO rules. The second example of successful legal interactions in the history of world trade law is found in the work of the WTO Technical Barriers to Trade (TBT), and Sanitary and Phyto-sanitary Measures (SPS) committees, where TPT/SPS rules are

[67] See 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.

[68] 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 Marcau (n 63) 161,182.

[69] VanGrasstek (n 32) 235-236.

[70] *The WTO Legal Texts* (n 34) 5.

(re)interpreted for consistency, and disputes are effectively settled without the help of the DSB.[71]

Interactions in these committees have contributed significantly to the effective performance of their respective agreements. Mutual understandings of TPT/SPS rules have been arrived at and maintained through member states' interactions on the basis of sound legality. In turn, this basis has been maintained by states ensuring, for example, that members' rules concerning SPS are clear, promulgated, feasible, and mutually developed, to improve the safety of food supply.[72] The outcome of a disagreement between states, i.e. a dispute, which is usually settled early, is shared with other members for coherence and harmonization of standards.[73] Such sharing of information is a more effective tool for learning than engaging in official disputes under the DSB, since information relating to most of these official disputes is often limited and difficult to comprehend, thus discouraging any observing states from learning about a particular field of trade.

For example, there is very limited information available regarding the (178) current consultation disputes, and even once these disputes had been litigated, the effect of the participation of interested third parties is indeterminate.[74] 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 has been found to 'lower the prospect for early settlement and increase the likelihood that a case will go to a ruling, as opposed to be withdrawn'.[75] Another current status of disputes that demonstrates the tendency toward long delays is (panel established, but not yet composed) with (28) disputes, some of them dating back to the (1990s).[76] Overall, interacting in active committee settings such as the SPS/TPT is more beneficial for learning and effective in resolving disputes amicably than interacting via the DSB.

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[71] Work on SPS in the WTO, and Official Documents, <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> accessed 16 March 2016.

[72] Wolfe, (n 23).

[73] 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; Bossche and Zdouc, (n 58) 888, 941.

[74] Marc Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) World Politics 446.

[75] ibid.

[76] Current Status of Disputes < https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm> accessed 25 February 2018.

It is worth noting that the lack of information-sharing between member states in the committees on the Anti-Dumping Agreement, and the Agreement on Subsidies and Countervailing Measures makes the existing WTO notification schemes for state subsidies and anti-dumping duties ineffective.[77] Without effective schemes, WTO member states cannot ensure consistency within, and optimal compliance with, the law, especially considering that the aforementioned agreements are the most disputed, after the GATT. It is a fact of social and legal practices that interactions on the basis of shared commitments are preferable to seeking the help of judges.[78] From the establishment and maintenance of 'stable interactional expectancies' originated effective bodies of customary and contract law, which play an integral role in human commercial life.[79] The legality of the WTO should not only be assessed in reference to the institution's edicts, or the DSB's verdicts, but also by 'sufficiently dense interactions', and participation of the members of community of legal practice.[80]

With regard to the lack of direct effect of WTO law, this particular issue has a detrimental impact on the WTO practice of legality.[81] 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 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.[82]

It can be argued that, in this sense, direct applicability is dependent on states providing direct invocability to WTO law provisions. However, the silence of the WTO 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'.[83] According to Herdegen, the ability of member states, especially the developed states, such as the US or those in the European Union (EU), to limit

[77] Bown, *Self-Enforcing Trade* (n 5) 216-218.
[78] Fuller, 'Human Interaction and the Law' (n 11).
[79] ibid.
[80] Brunnée and Toope, 'The Practice of Legality' (n 11) 118; Wolfe (n 23).
[81] See Bossche and Zdouc (n 58) 66-70.
[82] ibid 66.
[83] ibid 66-67.

the direct effect of WTO law, 'seriously affects the pull to compliance with obligations under WTO law'.[84] Herdegen explains the WTO law 'direct effect conundrum', below:

> 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.[85]

This is a dilemma for two reasons; first relief, in this case, is provided by a capable member state to its own enterprises to redress for the continued violations of WTO commitments. Second, without direct effect being 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 free trade is legally guaranteed, national courts and authorities are often constrained by capacity and financial limitations; furthermore, national constituencies cannot challenge WTO rules, and multinational corporations work with limited or no scrutiny, i.e. impunity.[86] Thus, contrary to the argument that WTO law is not 'politically ready' for direct effect, if the WTO aims to achieve an effective interactional law that is supportive of its obligations, as envisioned in its law, then it should facilitate the interplay between WTO and domestic law.[87]

Furthermore, the argument that allowing direct effect represents a danger to democracy, as it might conflict with the legitimate will of the legislatures, is unsubstantiated.[88] Democracies with monist legal systems that allow for the direct applicability of international laws are unharmed by the monist effect; rather this applicability in fact strengthens national laws and effectively promotes consistency with international law.[89] If the national courts and authorities of member states are required to observe GATT/WTO obligations (as per GATT Articles (II)

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[84] Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press 2013) 271.

[85] ibid 272.

[86] See David Korten, *When Corporations Rule the World* (3rd edn, Berrett-Koehler Publishers 2015).

[87] See Helen Fabri, 'Is There a Case-Legally and Politically- for Direct Effect of WTO Obligations?' (2014) European Journal of International Law 151.

[88] John Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) American Journal of International Law 310.

[89] 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* (8th end, Oxford University Press 2012) 89, 100-102.

and (X)), then national constituencies of consumer groups and civil societies should be allowed to have a seat at the WTO and challenge the legality of these obligations holding their governments and traders accountable to them.[90] The argument that because of their democratic institutions for accountability, member states' prefer to adjudicate in the WTO in order to appear responsive to domestic interests, might be valid.[91] However, not all WTO members are democratic, and governments of democratic member states typically defend traders' interests, not the interests of the public at large.[92]

The lack of direct effect drives misinterpretations of WTO law and practice. National constituencies often view the WTO as riddled with bureaucracy, lacking in democracy, and its law devoid of any sense of just and fair causes, primarily because these constituencies are denied the opportunity to interact with and within the organization's law and settings.[93] Citizens of WTO members states should be recognised as 'agent of justice (...) democratic principles [and] economic actors' and afforded the right to challenge the legality of WTO rules and seek redress for their violations.[94] It is essential to cultivate 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.[95] Furthermore, the lack of direct effect can be linked to the controversial issue of lack of monetary penalties for violating WTO commitments.

If direct effect is legally guaranteed by allowing the affected stakeholders in WTO law to seek redress, then offending governments and corporations would be compelled to pay reparations, effectively remedying their WTO violations, and, more importantly, resolving dispute(s) early. The need for monetary remedies will become less pertinent if official disputes are resolved in a timely manner, and WTO law facilitates effective ongoing interactions on the basis of legality, by permitting direct effect of GATT/WTO provisions. Returning to Herdegen's argument that the lack of direct effect is affecting the pull to compliance with WTO obligations, it should be emphasised that interactional law depends on the actors' ability to communicate

[90] See Petersmann, 'The GATT Legal Office' in Marcau (ed) (n 63).

[91] See Christina Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (Princeton University Press 2012).

[92] See Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing 2012).

[93] See Debra Steger, 'The Future of the WTO: The Case for Institutional Reform' (2009) Journal of International Economic Law 803.

[94] Petersmann, 'The GATT Legal Office' in Marcau (ed) (n 63) 203.

[95] See Aaronson and Abouharb (n 45).

and understand legal norms. Enforcement of WTO commitments should not occur only in the DSB, but in every setting, for both state and non-state actors' interactions.[96] Thus, if, as in the case of the WTO, rules are made operative in limited instances and settings, then interactional law will cease to exist, and the practice of legality will be frustrated. Frustration of this practice is an issue relevant to the challenges faced by the developing and least-developed member states (i.e. developing members) when seeking to comprehend and enact legality.

The active participation of developing members (who form the majority of WTO membership) in the system largely depends on WTO exemptions, and 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 primary engine for making the WTO operational, the DSB is not assisting developing members effectively. The language of the DSU briefly requires the DSB and disputing parties to be considerate of developing countries' economic vulnerability (DSU Article 21:7-8), and provides a poorly defined procedure to help 'least-developed member states' who are involved in a dispute as a complainant or respondent (DSU Article 24).

Understandably, if developing 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. Although a few developing members have been heavy users of the dispute settlement system, the majority have not used it (even as a third party), and the system is primarily used for settling disputes between developed members (as of (2010) the US and the EU, between them, have been complainants and respondents in (41%) of all cases).[97] The challenges facing developing members in the DSB will be further explained in the sixth section of this article, since the reasons for proposing the establishment of IAWC include to help those members to fully engage in an interactive inclusive practice of legality. Following on from the point about effective means of remedying accession defects and maintaining legal interactions outside the DSB, the next section will provide an assessment of one of the overlooked WTO enforcement mechanisms, the TPRM.

[96] See Yves Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge University Press 2014).

[97] See Gregory Shaffer and Ricardo Melendez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) 2.

5. The TPRM: A Mechanism for Interaction on WTO Law?

The TPRM (including its governing body, the TPRB) is seldom discussed in the WTO law literature, as its reputation is superseded by the DSB.[98] The brief discussion, or total neglect, of the important role of the TPRM is surprising, but given the textual and institutional limitations of the TPRB, it may deserve this peripheral role. However, the TPRM has an important history, as it was first introduced into the GATT in (1989), and then reviewed and annexed to the WTO texts. According to WTO TPRM paragraph (A), the objectives of reviewing the trade policies and practices of members are:

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, of individual trade policies and practices and their impact on the functioning of the multilateral trading system.[99]

Since its inception in (1989) until (2015), the TPRB has conducted (429) reviews, covering (151) of the then (161) WTO members.[100] 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).[101] It has been argued that the TPRM was originally intended, under GATT, to ensure compliance and promote transparency.[102] Although, according to paragraph A(i), the WTO TPRM is *not* intended to be a mechanism for enforcing obligations, its effect is 'to 'shame' Members into compliance and to support domestic opposition to trade policy and practices inconsistent with WTO law'.[103] In this sense, it has an *enforcement effect*, in terms of the

[98] It was briefly explained in few pages in the following textbooks on WTO law: Bossche and Zdouc (n 58) 49, 95-96, and Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice* (3rd edn, LexisNexis 2008) 37-38, 41. And it was 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).

[99] *The WTO Legal Texts* (n 34) 380.

[100] (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> accessed 18 February 2016.

[101] See the TPRB <https://www.wto.org/english/tratop_e/tpr_e/tprbdy_e.htm> accessed 17 February 2015.

[102] 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.

[103] Bossche and Zdouc (n 58) 96.

reputational cost following the outcome of the review of member's trade policies and practices, especially if the member is found to be noncompliant.

The TPRM is best regarded as an implementation peer review mechanism that performs an essential enforcement role complementary to the work of the WTO DSB.[104] Nonetheless, it can be argued that because of its enforcement characteristics, to a limited extent the TPRM is sustaining an interactional world trade law. According to Qureshi and Ziegler, the reasons for construing the TPRM as an enforcement device include:

> 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 (…) 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.[105]

Nonetheless, the TPRM is constrained by the adoption of incorrect periodicity for reviews, and the lack of effective and 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'.[106] It is for this economic reason, in particular, that the TPRM had been criticised, for adopting the incorrect periodicity, and for failing in its objectives of assuring compliance and transparency, especially from developing countries, which are reviewed less frequently.[107] According to Hoekman and Mavroidis,

> 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

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[104] Mathias Kende, *The Trade Policy Review Mechanism: A Critical Analysis* (Oxford University Press 2018) 42. 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.

[105] 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.

[106] *The WTO Legal Texts* (n 34) 380.

[107] Bernard Hoekman and Petros Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) The World Economy 527; Bown, *Self-Enforcing Trade* (n 5) 220.

> that are of concern to the private sector and might become the subject of further negotiations or disputes.[108]

The lack of utility for enforcement will have a significant negative effect on the intended objective of promoting transparency. The point about the lack of effective inclusive reporting was reiterated by Laird and Valdes, who highlighted 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'.[109] The shortage of exhaustive reporting is affecting the enforcement goal of the TPRM, because review reports are 'not thorough enough to identify all deviant behaviour'.[110] The TPRB is an ideal setting in which to maintain an interactional world trade law, because of its objectives and enforcement effect.

This is epitomised by the TPRB review process where, first, member states' trade laws and regulations are scrutinized for conformity with WTO law, and, second, member states are guided by the principles of legality to uphold the primary objective of the TPRM of ensuring transparency and compliance. In the TPRM three stages of the procedures for review, reporting, and appraisal, member states are guided by, inter alia, the principles of promulgation, clarity, feasibility, constancy, and congruence. Third, the TPRB provides a continuous practice of legality pursuant to the already fostered background knowledge from the work of refining shared understandings and observing the legality principles. Finally, the TPRB can sustain an interactional world trade law by performing the task of progressive acculturation and education of WTO legality.[111] The review process has the effect of helping members to acquire substantive knowledge, ensuring the conformity of reviewed member's trade policies and practices with WTO law, and refining the legal practices of WTO members. However, for competent practices to take place, they need to be supported by continuous interactions on the basis of legality.[112]

In brief, Qureshi and Ziegler's recommendations should be considered for their emphasis on facilitating effective interactions through comprehensive communications with, and within, the

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[108] ibid.

[109] 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).

[110] Qureshi and Ziegler (n 105) 477. See Bown, *Self-Enforcing Trade* (n 5) 219-220.

[111] See Ryan Goodman and Derek Jinks, 'Incomplete Internationalization and Compliance with Human Rights Law' (2008) European Journal of International Law 725.

[112] See Brunnée and Toope, 'The Practice of Legality' (n 11); Wolfe, (n 23).

TPRB, and a form of domestic follow-up of the review to ensure its corrective and transparent features.[113] State officials and non-states actors should be permitted to debate the review in order 'to support domestic opposition to trade policy and practices inconsistent with WTO law', and learn about the harmful cost of trade protectionism.[114] The primary aim of the TPRM should thus be fostering WTO member states' continuous inclusive, transparent practices of legality. However, the aforementioned analyses of the WTO accession process, the DSB, and the TPRM, have highlighted their weaknesses in effectively fulfilling their compliance purpose. For example, delayed-or-non-compliance that stem from textual and structural defects continue to hamper the DSB. Thus, the following section will consider one promising solution to the WTO compliance defects, the establishment of the Institute for Assessing WTO Commitments.

6. The Institute for Assessing WTO Commitments:

The effectiveness of the WTO practice of legality depends on ensuring that the trade policies and practices of member states are compliant with WTO law through their active and well-informed participation. However, the participation of developing countries in the WTO has been highly problematic thus far.[115] The vast majority of WTO membership of (164) is made up of developing members, (newly acceding countries with vulnerable economies include Vanuatu and Yemen), and all (23) countries with an observing status for accession purposes are developing.[116] Yet, developed members, especially the most litigious group (the QUAD: Canada, EU, Japan, and the US) have been very influential in WTO administration.[117] This influence, which tends to be inconsiderate of developing members' needs, runs contrary to the WTO principle of fair and equal treatment, and overlooks the founding legal philosophy of facilitating full participation within the confines of the WTO's legal rules.[118]

The issue of participation for the administration and enforcement of WTO law is the subject of an old and ongoing academic debate. For example, Pauwelyn argues that the WTO system needs less discipline (law) and more politics (voice) 'participation, contestation (…) and

[113] Qureshi and Ziegler (n 105) 484-486.

[114] Bossche and Zdouc (n 58) 96.

[115] Rorden Wilkinson, *What's Wrong with the WTO and How to Fix it* (Polity Press 2014); Shaffer and Melendez-Ortiz (n 104) 342.

[116] 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> accessed 10 March 2016.

[117] Wilkinson, (n 115) 45; VanGrasstek, (n 32) 49, 99.

[118] This is best exemplified by the politics surrounding the fiasco of (2001) Doha Development Round (DDR), see Wilkinson, (n 115).

maintain and clarify, not eliminate, certain escape clauses and exit options, especially those tailored to consumer welfare'.[119] However, the argument for more politics in the WTO runs contrary to the history of the 'progressive legalization' of GATT from unregulated politics to a legal order, does not account for the common yet unfounded justification for breaching WTO law based on welfaristic objectives (i.e. unregulated political expression and action), or the continued relegation of developing WTO members despite the existence of a legal order that is intended to be fair and inclusive.[120] Additionally, according to the historical relationship between law and economics, 'law and politics' are inseparable from each other as their existence and strength are interdependent and essential for the creation and maintaining of an orderly society.[121] However, because, individually, they are faced with political, financial, and legal constraints that hinder their participation, developing members have understandably formed alliances with other members for collective bargaining in order to influence rule-making and enforcement.[122]

Although forming an alliance has been instrumental in helping developing members states to reap the benefits of their memberships, the lack of an effective means of WTO 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, that has more leverage and so is able to sustain the violation, unharmed, and even influence treaty interpretation in its own interests.[123] It was a historical achievement for developing members to secure the inclusion of the SDT principle in the GATT, which afforded them preferential treatment that catered for their economic and developmental needs. However, the developing WTO members still face a number of barriers in terms of policy

[119] Joost Pauwelyn, 'The Transformation of World Trade' (2005) Michigan Law Review 1.

[120] See Eric Posner and Alan Sykes, *Economic Foundations of International Law* (Harvard University Press 2013).

[121] Lon Fuller, 'Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom through Law"' (1954) Columbia Law Review 70.

[122] Amrita Narlikar, 'Collective Agency, Systemic Consequences: Bargaining Coalitions in the WTO' *in the Oxford WTO Handbook* (n 109) 184.

[123] Shaffer said that it *does* matter which state participates before the panel and AB because they will be systemically able to affect the interpretation of the WTO law for their own interests. For example, from January (1995) until December (2007), the US as a party or third party before the panel had the participation rate of (99%), and the EC had the rate of (85%). Official disputes involving challenges to the interpretations of DSU Articles (21-23) were 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 Let 2009) 167.

settings, negotiation, and adjudication. For example, the Green Room meetings for policy settings which are open to a handful of selected developed and developing members, highlights the WTO's lack of transparency, which will inhibit its intended practice of legality.[124]

Under international law, and especially WTO law, power politics can influence the work of communities of practice, because of the capacity of powerful states to dominate decision-makings, and interpretation.[125] However, interactional world trade law limits the negative effects of power-politics, through the majority of actors upholding the principles of legality, emphasising the principle that 'asserting control in the absence of shared understandings and a practice of legality is abusive'.[126] 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.[127] If diplomacy is to play a constructive role in enhancing compliance, by, for instance, naming and shaming the perpetrators of deviant behaviour, then it needs to be performed within structures founded on the basis of binding legal rules and practices.[128] It is precisely this that is the WTO's main challenge: building and maintaining sound legality for interaction between states. A number of WTO scholars have argued that the WTO structure is in urgent need of substantive reforms to cater for the members states changing political, economic, and social circumstances, and more importantly, solidify the trade rule of law.[129]

Nonetheless, it is beyond the scope of this article to discuss these reform proposals, since their primary focus is on the overall institutional design of the WTO, rather than the particular topic of compliance. However, specific proposals for enhancing compliance with WTO law, such as Bown's proposal for establishing the Institute for Assessing WTO Commitments (IAWC), are worthy of consideration.[130] The reasons and objectives for proposing the establishment of the IAWC were as follows: first, developing members faces substantial hurdles in their efforts to

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[124] VanGrasstek (n 32) 204-207.

[125] 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#> accessed 29 December 2015.

[126] Brunnée and Toope, 'The Practice of Legality' (n 11) 119 (emphasis added).

[127] Brunnée and Toope, *An Interactional Account* (n 2) 85.

[128] See 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.

[129] 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, (n 115).

[130] Bown, *Self-Enforcing Trade* (n 5) 208-237.

demonstrate compliance with the 'trade rule of law' when trying to self-enforce their rights by liberating their economies, secure effective access to foreign markets (i.e. compliance with rules), and challenge developed members in the DSB (i.e. compliance with rulings).[131] To highlight the difference between compliance with 'rules' and 'rulings', and the economic importance of securing the former, Bown and Hoekman developed a workable chart of what they call, 'the Six Steps of the WTO Extended Litigation Process (ELP)'.[132]

The chart has three phases; phase one is *the Prelitigation*, consisting of the first three steps: 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).[133] Phase two, the *Litigation* includes: 4. *Develop and prosecute the legal case (including legal briefs and economic evidence) in Geneva*; and 5. Calculate the WTO-sanctioned economic retaliation threats for arbitration.[134] Finally, phase three, *the Post-litigation*, has the fifth step on calculation of sanctions, and step 6. Generate public and political foreign support for policy removal).[135] The most critical step in this ELP, especially for exporting firms in developing members, is step (1) identifying the foreign WTO-inconsistent policy.

The second reason Bown rightly argues is 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'.[136] Bown explains that failure to provide such information will lead to firms being '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'.[137] Moreover, the Advisory Centre on WTO Law (ACWL), which was established in 2001 to help developing members improve their legal capacity, is constrained by its mandate, which is limited to step (4) of the ELP, i.e. litigation. Bown states that, because of this limit 'ACWL itself cannot fill the gap of generating step 1 information on potential disputes for developing countries to pursue', and, hence, there is a

[131] ibid 208.
[132] 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.
[133] ibid.
[134] ibid.
[135] ibid.
[136] Bown, *Self-Enforcing Trade* (n 5) 212.
[137] ibid.

need for an entity 'to increase public support of the step 1 information generation process'.[138] Similarly, because of its limited mandate, the TPRM also cannot help exporters engage in step (1) of the ELP.[139]

The third reason is the lack of efforts in the WTO 'to increase transparency, information generation, and monitoring' for the purpose of helping exporting firms in developing members.[140] Expanding on this point, Bown explains that developed countries are having active memberships in the WTO because they provide 'information on foreign market access violations to their exporters'.[141] Finally, Bown states that the above reasons 'culminate 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'.[142] Bown goes on to explain the basic mandate of this institute, as follows:

> 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]'.[143]

Although the problem of inadequate surveillance and monitoring in the WTO remains a hindrance to effective participation, Bown was correct in noting that any proposal to solve this issue should not jeopardise the WTO administration benefits of negotiation, adjudication, and providing a forum for amicable informal resolution of disputes.[144] 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 requirements of step (1) of

[138] ibid 213.
[139] ibid 219.
[140] ibid 214.
[141] For example, 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.
[142] ibid 214-215.
[143] ibid 230, 232 (emphasis added).
[144] ibid 221.

the ELP.[145] In this regard, there have been successful initiatives from 'the extra-WTO community' of 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.[146] Although the data of these initiatives can 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 weakness in monitoring its own procedure of allowing members to self-report subsidies or anti-dumping measures, which have been found to be inaccurate.[147]

Finally, Bown emphasises that the IAWC must be politically independent, relying for funding on 'private foundations [and] larger-budget NGOs', have 'a governance structure that ensures transparency and accountability', and be staffed by economists, lawyers, and experts in political science' that can supply the technical knowledge required to engage in the ELP.[148] Additionally, the IAWC should adopt a strict non-discrimination policy in its work, with Bown emphasising that 'no country's WTO violations are off limits for identification and dissemination'.[149] Bown concludes the chapter on 'Monitoring and the IAWC', by elaborating on the important term 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.[150]

A number of reflections follow from the above summary of the IAWC proposal. At its core, the WTO is a political institution, and even some of its official disputes, especially the high profile ones, that were handled by the quasi-judicial DSB, were politically motivated, i.e. 'tit-for-tat' complaints.[151] This partly explains the self-enforcement nature of WTO law, as its law-

[145] ibid 222.
[146] ibid 222-229.
[147] ibid 224.
[148] ibid 233.
[149] ibid 234.
[150] ibid 237.
[151] VanGrasstek (n 32) 247.

subjects are afforded 'transparent means for participation', or self-pursuit of costly enforcement action under the DSB.

However, as demonstrated by Bown and Hoekman's ELP chart, the reality is that the lack of effective transparency will ultimately affect the coercive enforcement mechanism, i.e. the DSB. Thus, the WTO should expand its mission to provide an effective means for public participation and surveillance by undertaking textual and structural reforms in order to be able to cater for the changing political, economic, and legal circumstances of members. However, Bown's note about the inherent difficulty of redesigning the WTO to enhance surveillance is reflected in Fuller's point regarding achieving the right balance between 'norms of aspiration' and 'norms of duty' in institutional design.[152] This point was supported by Jackson, who wrote about the danger of having trade agreements that upset the balance between the two kinds of norms at the expense of effective performance.[153] However, the WTO cannot fulfil its mission without tackling the compliance-related issues that emanate from textual and structural defects and lack of continuous transparent legal practices.

It can thus be said that the WTO is not fully upholding the trade rule of law aspect of 'compliance with rules', because there is a lack of 'shared understandings on compliance' with WTO law. This is demonstrated by the non-discrimination principle, which is continually breached (GATT Articles I and III are by far the most cited articles in the (555) WTO disputes), and undermined by the proliferation of preferential trade agreements that are not subject to effective legal scrutiny by the WTO.[154] Hence, the principles of legality required for effective adherence to the WTO law will always be difficult to satisfy. Furthermore, the above summary of the IAWC highlights the multifaceted practice of legality that includes the extra-WTO community of exporting firms. It appears (with the exception of some corporations that have drafted various world trade law instruments), that the law is not designed to cater to every exporting firm's interests.[155] Overall, the weaknesses of the TRPM and DSB, which in turn affect transparency and enforcement, are affecting the WTO practice of legality. Thus, the IAWC proposal is relevant for effective self-enforcement of WTO law.

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[152] See Fuller, *The Morality of Law* (n 3) 5.

[153] Wibren van der Burg, 'The Morality of Aspiration: A Neglected Dimension of Law and Morality' in Witteveen and Van der Burg, *Rediscovering Fuller* (n 18) citing John Jackson, *World Trade and the Law of GATT* (Bobbs Merrill, 1969) 761-762.

[154] Michael Trebilcock, *Advanced Introduction to International Trade Law* (revised edn, Edward Elgar Publishing 2015) 45-52.

[155] Korten, *When Corporations Rule the World* (n 86) 165.

7. Conclusion

It can be seen that the WTO is tasked with making and sustaining interactional law that has a historical origin in trade law. Practices that conform with the principles of legality play an essential role in maintaining interactional world trade law and promoting compliance. 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 practising legality outside of the DSB, which have a greater influence on sustaining compliance over time. The reliance of the accession process on political rather than legal discourse to ensure conformity with the trade rule of law is illustrative of the need to establish state legal practice at the time of accession. Accession defects must be dealt with more vigorously in the TPRB, which is concerned with reviewing members trade policies and practices for transparency and compliance purposes.

To complement the WTO accession and DSB work, the TPRM should adopt a new review policy, reviewing, in particular, the accession documents of offending members. The unfortunate truth is that WTO members, developing or developed, provide inaccurate information in their accession commitments, notifications to the WTO, and review documents; therefore, it is the responsibility of the WTO community of state and non-state actors i.e. exporting firms, to play a constructive role in holding member states accountable to the law. Hence, the IAWC for information generation on potential WTO violations is a promising proposal for bridging the gap between transparency and enforcement, and enhancing the WTO's practice of legality. In brief, the above interactionalism-based recommendations and the IAWC proposal should be considered for the sake of protecting and adhering to the founding principle of world trade law: compliance with the trade rule of law.