WTO Jurisprudence

This book offers a critical examination of the jurisprudence of the World Trade Organization (WTO) as an emancipatory international social contract on trade.

The book suggests that the WTO is an international organization built and operating on member states' attribution of authority through consent with legislative, administrative, and adjudicative functions – three functions in one triune personality. With a solid constitutional continuity building on GATT experiences, the WTO has successfully made governments accountable to foreign individuals in various capacities either as traders of goods, providers of services, or holders of intellectual property rights within the global marketplace. With a triune personality, the WTO operates within the reign of state primacy – the *force* – ultimately for the benefits of individuals – the *ends* – in the global marketplace, and gains a soul of its own in the institutional evolution – the *means* – of the global trading regime. Although the tripartite dynamics between states, international institutions, and individuals in the global marketplace are unprecedentedly complex, the WTO's *ends* of benefiting individuals in the global marketplace has no end. Beyond the critical analysis of WTO's decision-making by consensus, the book critically examines GATT's "common intention" treaty interpretation, Antidumping's NME methodology, TRIPS' public health concerns, and IP-competition trade policy dynamics. A unified WTO jurisprudence looking at the WTO as an international social contract on trade is therefore proposed to allow a fresh look at the *force*, the *means*, and the *ends* of the constitutional evolution of the global trading regime.

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WTO Jurisprudence

Governments, Private Rights, and
International Trade

Wenwei Guan

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Foreword

Since China's accession to the World Trade Organization (WTO) in 2001, China has complied with most WTO rules and most WTO dispute settlement findings involving China as a complainant or defendant. Yet due to the US initiation of a "trade war" against China and of other, illegal US measures disrupting the WTO legal and dispute settlement system, justifying compliance with WTO rules and WTO dispute settlement findings has become more controversial. A breakdown of the WTO trading, legal, and dispute settlement systems will adversely affect the national interests of all 164 WTO members; it is also likely to render realization of the UN sustainable development goals (SDGs) and climate change prevention impossible. Hence, it remains an important task for governments, academics, and civil societies to explain why compliance with WTO rules and dispute settlement findings is in the reasonable self-interests of all WTO members and their citizens. This monograph by Professor Wenwei Guan offers an important contribution to defending "public reason" in the current WTO governance and dispute settlement crises.

The power-oriented system of "international law among sovereign states" since the peace treaties of Westphalia (1648) was justified by the consent of states. Since the 1945 United Nations (UN) Charter and the 1948 Universal Declaration of Human Rights, however, international law and the UN legal systems are also justified by the universal acceptance of "inalienable" and "indivisible" human rights, popular self-determination of peoples, and universally agreed SDGs. Chapter 1 of this book convincingly explains why state consent and the universal recognition of treaties, customary law, and general principles of law as "sources" of modern international law no longer suffice for explaining and justifying WTO law. For example, the "blocking" of the filling of vacancies of WTO Appellate Body members violates both WTO law (e.g. Article 17 of the Dispute Settlement Understanding, Article IX:1 WTO Agreement) and the limited, democratic mandates given by national parliaments for implementing the WTO Agreements. Chapter 1 further acknowledges that – just as the UN SDGs are defined in terms of promoting human rights and related public goods (like poverty reduction, climate change mitigation, and protection of the environment) – also the sustainable development goals of WTO law and "principles of justice" underlying the WTO dispute settlement system (e.g. violation

complaints, non-violation complaints and situation complaints pursuant to GATT Article XXIII) are ultimately aimed at protecting transnational rule of law and other public goods for the benefit of citizens and peoples in WTO member states. As WTO law admits sub-national customs territories (like Hong Kong, Macau, and Taiwan) and supra-national WTO members (like the European Union) and protects also individual rights (e.g. intellectual property rights) and remedies (e.g. of individual access to domestic judicial remedies), Chapter 1 describes the “WTO as an international social contract on trade” constituting legislative, executive, and judicial institutions deriving their limited legal powers from the consent of states and related international law principles (like good faith, *pacta sunt servanda*, limited delegation of powers), yet aiming at protecting legal and economic benefits not only for all WTO member governments, but also for their citizens and peoples. This multilevel governance system is currently confronted with illegal power politics threatening its social legitimacy and the welfare of citizens all over the world.

Chapter 2 discusses the many legal and policy problems of WTO decision-making by consensus and the political abuses of veto powers. As WTO law explicitly provides for majoritarian decision-making on administrative and judicial matters, the current WTO governance failures to protect the WTO legal and dispute settlement systems (e.g. through majoritarian filling of WTO Appellate Body vacancies) against illegal abuses of US veto powers undermine the legal, democratic, and social legitimacy and accountability of the WTO. Chapters 3 to 6 offer case studies, for instance criticizing the “common intention” approach to treaty interpretation in the Appellate Body jurisprudence (Chapter 3), adverse effects on private rights in WTO jurisprudence relating to discriminatory antidumping measures (Chapter 4), and intellectual property rights (Chapters 5 and 6). These case studies elaborate important policy recommendations for improving rule of law and non-discriminatory conditions of competition in the world trading system, for instance by mandating the WTO Working Group on Trade and Competition to elaborate more coherent WTO competition rules and “flexibilities” for protecting public health and technological innovation. Chapter 7 concludes with a critical discussion of the “state primacy paradox” undermining WTO governance for the benefit of citizens, thereby confirming the need for more coherent theories of WTO diplomacy, WTO governance, WTO jurisprudence, and their constitutional foundations.

The hegemonic US assault on the WTO legal and dispute settlement systems risks provoking a disintegration of the world trading system, for instance by inducing China to prioritize its bilateral and regional economic cooperation agreements (like China’s Belt and Road agreements with more than 60 countries, its Regional Comprehensive Economic Partnership) similar to China’s prioritization of “cyber sovereignty” in internet governance systems. Hopefully, Professor Wenwei Guan’s thought-provoking book will induce other Asian scholars to undertake similar studies on how to improve multilevel governance and limit accountability failures in the WTO. The “emancipatory evolution” of WTO governance beyond “state consent” – and the “pluralization” of legal

forms of multilevel governance of transnational public goods (like a mutually beneficial world trading system, climate change mitigation, transnational rule of law) – require going beyond “methodological nationalism” justifying power-oriented paradigms of states (e.g. China’s totalitarian communist party state) that hamper UN/WTO institutions, WTO law, and WTO governance. Modern international law and multilevel governance function not only as (1) *positive multilevel legal orders* (e.g. based on legal recognition of rules, principles, and institutions for legislative, executive, judicial, civic, economic, and social decision-making processes); they also (2) dynamically evolve as *legal practices* interacting with, clarifying, and developing past understandings of the law, which remain (3) embedded into *social and cultural infrastructures* (like agreed “principles of justice”) driven by rational and non-rational actors and their multiple discourses. The customary rules of treaty interpretation explicitly require clarifying the treaty terms not only in their context (e.g. including subsequent practices) with due regard to their object and purpose, but also “in conformity with the principles of justice” underlying international law, including also “human rights and fundamental freedoms for all” (cf. the Preamble and Article 31 VCLT). Judicial administration of justice in disputes over the meaning and application of modern international law must protect both *legal input and output legitimacy* of dispute settlement in order to promote social legitimacy of third-party adjudication and voluntary rule-compliance. Promoting the UN and WTO objectives of “sustainable development” will require far-reaching adjustments of international trade and environmental law, governance institutions, legal practices, and social agreements on “principles of justice” (e.g. justifying multilevel governance of public goods). The necessary reforms will benefit from critical analyses of the current governance, dispute settlement and legitimacy crises (e.g. in the UN and WTO), including from the critical studies of Professor Wenwei Guan. The fact that the British “(Br)exit” from the European Union and the disregard for WTO law by the US Trump administration are initiated by the two oldest “liberal democracies” reveals another lesson for protecting rules-based trading systems: not only *authoritarian state-capitalism*, but also *neo-liberalism* protecting “unequal freedoms” (like “Chicago school economics” for liberalization, deregulation and privatization of markets) lead to socially disruptive injustices that must be avoided by *ordo-liberal* limitations of “market failures” and “governance failures” in order to construct transnational “social market economics” supported by free and reasonable citizens with more equal and more equitable opportunities and social safeguards.

Prof. Ernst-Ulrich Petersmann

Geneva

World Trade Organization

December 2019

Preface and acknowledgments

This book offers a critical examination of the jurisprudence of the World Trade Organization (WTO) as an emancipatory international social contract on trade. The book suggests that the WTO is an international organization built and operating on member states' attribution of authority through consent with legislative, administrative, and adjudicative functions – three functions in one triune personality. With a solid constitutional continuity building on GATT experiences, the WTO has successfully made governments accountable to foreign individuals in various capacities either as traders of goods, providers of services, or holders of intellectual property rights within the global marketplace. With a triune personality, the WTO operates within the reign of state primacy – the *force* – ultimately for the benefits of individuals – the *ends* – in the global marketplace, and gains a soul of its own in the institutional evolution – the *means* – of the global trading regime. Although the tripartite dynamics between states, international institutions, and individuals in the global marketplace are unprecedentedly complex, the WTO's *ends* of benefiting individuals in the global marketplace has no end. Beyond the critical analysis of WTO's decision-making by consensus, the book critically examines GATT's "common intention" treaty interpretation, Antidumping's NME methodology, TRIPS' public health concerns, and IP-competition trade policy dynamics. A unified WTO jurisprudence looking at the WTO as an international social contract on trade is therefore proposed to allow a fresh look at the *force*, the *means*, and the *ends* of the constitutional evolution of the global trading regime.

I would like to take this opportunity to thank Prof. Ernst-Ulrich Petersmann, an eminent scholar in the field whose works have continuously inspired my research for so many years. Prof. Petersmann's works articulate the categorical imperative of the WTO with great philosophical depth, which to a great extent presents how beautiful the WTO could be as an emancipatory force benefiting individuals in the global marketplace. When I asked for a Foreword upon my completion of the first draft, his confirmation and enthusiastic support were invaluable to me. I am very grateful.

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1 International social contract on trade

Its force, means, and ends

During its evolution from the GATT to the WTO, the global trading regime has gradually extended its reign from goods to services, intellectual property rights, and dispute settlement. The coverage of the trade without discrimination principle under the trading regime has also been gradually extended beyond products to individuals in various capacities as traders, suppliers, and nationals with private rights. As an integral part of the international law legal order, the WTO is an international organization with an independent personality that has administrative, legislative, and judicial functions. With its three-in-one triune personality, the WTO operates upon member states' consent – the force – through rule-oriented institutionalization – the means – ultimately for the benefit of individuals – the ends – in the process of constitutionalization of the global trading regime. A unified jurisprudence looking at the WTO as an international social contract on trade would allow a fresh look at the force, the means, and the ends of the evolution of the global trading regime.

1.1 History and evolution from the GATT to the WTO

The development of the global trading regime of the World Trade Organization (WTO) can be traced back to the early multilateral efforts and practice of restoring international economic relations after World War II. In the second half of the 19th century, free trade among European countries had been essentially unfettered for a couple of decades, until World War I brought in a decline in free trade due to the shift of the political and economic environment.¹ Efforts to establish a global trade regime in the inter-war period through tariff truces and MFN-based treaty networks started to fail with the rise of agricultural protectionism and the eventual outbreak of World War II.²

To complement the Bretton Woods institutions – the World Bank and the International Monetary Fund (IMF) – after World War II, the US proposed

1 WTO, *World Trade Report 2017: Six Decades of Multilateral Trade Cooperation: What Have We Learnt?* (Geneva: WTO, 2007), 35–39.

2 Ibid., 39–43.

negotiations on the establishment of an international organization regulating trade. It was within this context that the United Nations (UN) called for the establishment of an international trade organization as a UN specialized agency.³ Alongside the efforts attempting to establish the International Trade Organization (ITO), consultations to reduce tariffs and regulatory frameworks resulted in the General Agreement on Tariffs and Trade in 1947 (GATT 1947), which was originally expected to be part of the envisaged ITO regime. Although ITO agreement could not reach an end, the GATT 1947 was agreed to be applied provisionally.⁴ While the negotiations of the ITO Charter eventually completed in 1948 in Havana, the Havana Charter, however, failed to come into force due to the US's opposition for the fear of sovereignty intrusion. Although the GATT 1947 lacked an organizational framework, contracting parties turned it into a *de facto* organization and successive trade talks continued until eventually the Uruguay Round established the WTO in 1995. As the final result of the Uruguay Round, the WTO replaced the provisional GATT with a permanent international institution regulating global trade.

Among the various significances of the transformation of the trading regime from the GATT to the WTO, there are a couple of new developments that are important to our critical examination. First of all, the coverage and reach of the trading regime have been gradually broadened throughout the years of the evolution of global trade governance which built firmly upon GATT experience with a clear jurisprudential continuity. It is particularly worth emphasizing here that the post-war negotiation aiming at ITO as a specialized UN agency had an ambitious plan to cover not only world trade disciplines but also "rules on employment, commodity agreements, restrictive business practices, international investment, and services."⁵ Although the provisional GATT focused only on tariff reduction on trade of goods at the very beginning, the trading regime's interest in other areas of trade grew broader eventually. From 1948 to 1994, the GATT was a provisional agreement and organization for 47 years, during which the GATT held eight rounds of trade talk. The first five rounds from the first round at Geneva in 1947 to the Dillon Round at Geneva between 1960–1961 focused all on tariffs. In addition to focusing on tariffs, while the Kennedy Round (the sixth, between 1964 and 1967) covered also antidumping measures, the Tokyo Round (the seventh, between 1973 and 1979) covered also subjects of non-tariff measures and "framework" agreements.⁶

The eighth and last round of the GATT, the Uruguay Round between 1986–1994, eventually created the WTO. The Uruguay Round, as a round to

3 UN Economic and Social Council (UN ECOSOC), Calling of an International Conference on Trade and Employment, UN Doc. E/13 (18 February 1946).

4 Protocol of Provisional Application of the General Agreement on Tariffs and Trade, signed at Geneva on 30 October 1947, UN Treaty Series 55, 308 (1950).

5 WTO, *Trading into the Future* (Geneva: WTO, 2001, 2nd ed.), 9.

6 *Ibid.*, 9.

end all rounds, covered a much broader range of subjects than all the previous rounds, including new subjects like services, intellectual property, dispute settlement, textiles, and agriculture, etc., making it “the largest negotiation of any kind in history.”⁷ In terms of tariff lines, the Uruguay Round increased the tariff bound percentage of developed countries from 78 to 99 percent, of developing countries from 21 to 73 percent, and of transition economies from 73 to 98 percent.⁸ As the final result of the Uruguay Round, the WTO replaced the provisional GATT with a permanent international regime, coverage of which has been extended from goods to services and intellectual property backed with a much stronger dispute settlement system, the Dispute Settlement Understanding (DSU) system.

It should nevertheless be noticed that the newborn WTO is a result of the continuity of the evolution of the global trading regime, built firmly on the provisional GATT. According to the WTO Agreement, the Secretariat and the Director-General of the WTO were designed to come from the Secretariat and Director-General of the GATT.⁹ Most importantly, except as otherwise provided, “the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.”¹⁰ In its discussion of the legal effect of GATT panel reports, the WTO Appellate Body stated:

Article XVI:1 of the WTO Agreement and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO.¹¹

Therefore, the global trading regime from the GATT to the WTO has been a process of evolutionary growth penetrating deeper into and covering a broader range of global trade, with no interruption but rather continuity firmly built on those 47 years of GATT experience.

7 Ibid., 12–13.

8 Ibid., 6.

9 Art. XVI.2, WTO Agreement.

10 Art. XVI.1, WTO Agreement.

11 *Japan – Alcoholic Beverages II*, WTO Appellate Body Report, WT/DS8/AB/R (4 October 1996), 14. See also, *India – Patents* (US), WTO Appellate Body Report, WT/DS50/AB/R (19 December 1997), 14; *EU – Poultry Meat* (China), WTO Panel Report, WT/DS492/R (28 March 2017), paras. 7.24–7.26.

Secondly, although the WTO system is a comprehensive framework with lengthy agreements and annexed schedules, there are several fundamental principles run through the whole system. According to WTO Secretariat, these principles include trade without discrimination, free trade gradually through negotiation, predictability through binding, promoting fair competition, and encouraging development and economic reform.¹² The most fundamental one among these five is the principle of trade without discrimination, which includes the most-favored-nation (MFN) treatment obligation and the national treatment obligation. While the MFN treatment ensures the same “best” treatment be equally available to *products* from all the other members beyond border,¹³ the national treatment guarantees foreign imported *products* be treated not less favorably than local *products* within border.¹⁴ Therefore, the trade without discrimination principle secures equal treatment for products in trade, within or beyond national borders, i.e. goods in the entire global market among all WTO Members.

The reading of the trade without discrimination principle should not be isolated from the operation of the subsidies and countervailing measures (SCM) and antidumping regimes. Negotiated in the Tokyo Round, the SCM Agreement builds on the Agreement on Interpretation and Application of Article VI, XVI, and XXIII of GATT. Regulating various government’s trade distorting policies, the SCM regime prohibits governments’ trade distorting action of subsidizing domestic players with advantage or more favorable terms in the marketplace, making the domestic players “better off” than they would otherwise have been. Therefore, the SCM regime targets states’ trade distorting subsidies. The Antidumping Agreement on the other hand provides detailed rules governing the application of the Article VI of the GATT, enabling contracting parties to take measures to prohibit foreign companies’ predatory dumping behaviors. The antidumping regime therefore regulates trade distorting effects of companies’ predatory pricing behaviors. Together with the trade without discrimination’s application to ensure equal treatment within and beyond borders, the SCM and antidumping regimes cover both government and companies’ market distortion behaviors. Therefore, any trade distorting actions, either within or beyond borders, be it governmental or private, are all covered and regulated to refrain from obstructing fair trade.

Moreover, the coverage of the trade without discrimination principle has been gradually extended beyond products to individuals in various capacities as suppliers, exporters, and nationals with private rights. It is important to know that the MFN and national treatments covered only products in GATT 1947 as later incorporated into the WTO as GATT 1994. According to GATT 1994, any favorite treatment granted by a WTO member “to any *product* originating in or

12 WTO, *Trading into the Future*, 5–7.

13 Art. I, GATT 1994, Art. II, GATS Agreement, and Art. 4, TRIPS Agreement.

14 Art. III, GATT 1994, Art. XVII, GATS Agreement, and Art. 3, TRIPS Agreement.

destined for any other country shall be accorded immediately and unconditionally to the *like product* originating in or destined for the territories of all other contracting parties.”¹⁵ As the national treatment requires, “[t]he *products* of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to *like products* of national origin.”¹⁶

The principle’s coverage, however, has gone beyond products to cover individuals in GATS in the capacity of “services and service suppliers,” as “nationals” in TRIPS, as well as in the capacity of “exporters affected” under the Preshipment Inspection Agreement, and “suppliers” in the Agreement on Technical Barriers to Trade. Under the TRIPS Agreement for example,

Each Member shall accord to the *nationals of other Members* treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.¹⁷

With regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a member to the *nationals* of any other country shall be accorded immediately and unconditionally to the nationals of all other members.¹⁸

Under the TRIPS Agreement, “the nationals of other Members” means “those natural or legal persons that would meet the criteria for eligibility for protection provided for” in relevant WIPO treaties.¹⁹ Going beyond GATT, GATS, and TRIPS, moreover, the trade without discrimination principle also covers individuals beyond goods in WTO Plurilateral Trade Agreements. Under the Government Procurement Agreement, for example, in relation to all laws and practices covered, “each Party shall provide immediately and unconditionally to the *products, services and suppliers* of other Parties offering products or services of the Parties, treatment no less favourable” than that accorded to domestic and any other party’s products, services, and suppliers.²⁰

Therefore, the historical development from GATT’s provisional operation to the WTO as a permanent regime has been a continuous evolution of the global trade governance with a clear constitutional continuity. Within this continuous constitutional evolution of the trading regime there is a clear path of broadening

15 Art. I.1, GATT 1994.

16 Art. III.4, GATT 1994.

17 Art. 3.1, TRIPS Agreement. Emphasis added.

18 Art. 4, TRIPS Agreement. Emphasis added.

19 Art. 1.3, TRIPS Agreement.

20 Art. III.1, Government Procurement Agreement.

the regulatory coverage from trade in goods to services and intellectual property rights, and to the facilitation of security and predictability through a dispute settlement mechanism. Alongside the process of constitutionalism of global trade, the broadening of regulatory impact has seen a tendency of expanding equal treatment beyond products to individuals in various capacities. What then is the nature of the dynamics between the WTO, states, and individuals in international law?

1.2 States, the WTO, and the individuals in international law

1.2.1 *WTO and the primacy of states*

The relation of GATT/WTO to public international law has, of course, long been one of the fundamental issues of concern, yet was only somewhat “clarified” in the more recent stages of development in the process of the constitutionalism of the global trading regime. In GATT times, there were debates as to whether GATT was a separate legal regime from public international law and thus had an independent jurisprudence and legal structure of its own. Or as McRae described, there was a contrast between a “tradition continued” model, viewing the two as having no particular implications for each other, and a “new frontier” model, “viewing the WTO within the mainstream of international law” and arguing that the WTO was an important part to be integrated into public international law.²¹ According to Jackson, it was, however, generally confirmed that “there are relatively numerous examples throughout the history of GATT that would oppose the ‘separate regime’ theory.”²² In particular in cases close to the end of the GATT where the GATT panel discussed the issue of whether general international law was relevant to GATT law, the application of general customary international law – the Vienna Convention on the Law of Treaties 1969 (1969 VCLT) in particular – was confirmed.²³

The WTO framework, unfortunately, does not explicitly clarify the relation between the WTO regime and public international law. However, the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU) clearly states that, central to WTO

21 Donald M. McRae, “The WTO in International Law: Tradition Continued or New Frontier?” 3 *Journal of International Economic Law* (2000), 27–30.

22 John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006), 164–165. See also, Joost Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?” 95 *American Journal of International Law* (2001), 538–540.

23 *US – Tuna II*, adopted GATT Panel Report, DS/29/R (16 June 1994), paras. 5.19–5.20; *EC – Cotton Yarn*, adopted GATT Panel Report, ADP/137 (30 October 1995), para. 541. See discussion at Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, 165–166.

dispute settlement system's role in "providing security and predictability to the multilateral trading system," WTO covered agreements are to be clarified "in accordance with customary rules of interpretation of public international law."²⁴ This, of course, is not necessarily limited to rules of treaty interpretation only; as the WTO Panel in *Korea – Government Procurement* suggested, there is "no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply."²⁵ The Panel indeed stated that "the relationship of the WTO Agreements to customary international law is broader" than the requirement of Article 3.2 of the DSU to interpret WTO provisions in accordance with customary rules of interpretation of public international law. According to the WTO Panel,

Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. ... [T]o the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently ... the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.²⁶

The WTO framework thus forms an integral part of the public international law legal order. Just as the WTO Appellate Body stated clearly in *US – Gasoline*, the WTO covered agreements are "not to be read in clinical isolation from public international law."²⁷ Pauwelyn, therefore, argued that "both the WTO treaty and WTO dispute settlement are integral parts of public international law," and the interaction between international law and WTO law is a "continuing process of cross-fertilization" instead of one-sided.²⁸

As an integral part of the legal order, the WTO is an international organization with legal personality under public international law. According to the WTO Agreement, the WTO "shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions."²⁹ WTO's power then comes from member states' attribution and is distinct from member states' power. On the one hand, the WTO as a sovereign creation to meet cooperation needs reflects a tension between two poles: "state sovereignty and the concept of function," in which "the finality of

24 Art. 3.2, DSU Agreement.

25 *Korea – Government Procurement*, WTO Panel Report, WT/DS163/R (1 May 2000), footnote 753.

26 *Ibid.*, para. 7.96.

27 *US – Gasoline*, WTO Appellate Body Report, WT/DS2/AB/R (29 April 1996), 17.

28 Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" 95 *American Journal of International Law* (2001), 577–578.

29 Art. VIII.1, WTO Agreement.

the state is integral (*finalité intégrée*), whereas the finality of international organizations is functional (*finalité fonctionnelle*).³⁰ As ICJ Judge Gros put it,

[i]n the absence of a “super-State”, each international organization has only the competence which has been conferred on it by the States which founded it, and its powers are strictly limited to whatever is necessary to perform the functions which its constitutive charter has defined.³¹

It therefore remains a rule of thumb that, “while states are free to act as long as this is in accordance with international law,” international organizations like WTO “are competent to act only as far as powers have been attributed to them by the member states.”³² On the other hand, within its competency, the WTO’s power is distinct from that of the member states, which means the WTO has a soul of its own. Indeed, according to Alvarez, any institution

once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.³³

Within the trading regime, WTO’s functions have been set, intentionally or unintentionally, in a separation of powers model similar to the domestic legal system, which has administrative, legislative, and judicial functions. Accordingly, the WTO has an administrative function “facilitat[ing] the implementation, administration and operation, and further the objectives” of the WTO (Art. III.1), a legislative function in “provid[ing] the forum for negotiations among its Members concerning their multilateral trade relations” under the WTO (Art. III.2), and a judicial function of administering the DSU framework (Art. III.3). For example, within the WTO framework, members should only seek the redress of a WTO violation through resorting to DSU rules and procedures, and thus shall make no determination of a WTO violation except through recourse to the dispute settlement in accordance with the DSU rules and procedures.³⁴ As a WTO Panel pointed out, “[i]t is for the WTO through the DSU process – not for an individual WTO Member – to determine that a WTO inconsistency has occurred.”³⁵ Moreover, according to the Panel, WTO

30 Henry G. Schermers and Niels. M. Blokker, *International Institutional Law* (The Hague: Martinus Nijhoff Publishers, 2011, 5th ed.), 18.

31 ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, Separate Opinion of Judge Gros, *ICJ Reports* 1980, 103.

32 Schermers and Blokker, *International Institutional Law*, 157.

33 ICJ, *Admission of a State to the United Nations (Charter, Art. 4)*, Individual Opinion by M. Alvarez, *ICJ Reports* 1948, 68.

34 Arts. 23.2, 23.2(a), DSU Agreement.

35 *US – Section 301 Trade Act*, WTO Panel Report, DS/152/R (22 December 1999), para. 7.38.

“prohibits specific instances of unilateral conduct by WTO Members when they seek redress for WTO inconsistencies in any given dispute.”³⁶ With the administrative, legislative, and judicial functions, the WTO has an independent soul of its own associated with its triune personality built on the attribution from its member states.

Being an integral part of the public international law order with its independent legal personality, however, does not change the fact that the WTO operates on sovereign consent. While the GATT history suggests a “strong tendency” of evolving in a rule oriented direction, Jackson argued, there is an inherent “tension between the role of the nation-state and the need for international institutions to facilitate cooperative mechanisms” to enhance the efficiency and justice of the increasingly globalized market.³⁷ Similarly, McRae argued, there is a tension “between claims to state authority and claims to international control” in the dispute settlement framework, and the WTO is best understood as “a regime based on the fundamental assumptions of a liberal trade order, but working within a framework of a sovereignty-based system.”³⁸ In the arena in which the WTO is operating, state is the primary subject of public international law, and “it is states and organizations which represent the normal *types* of legal person on the international law plane.”³⁹ As Jessup suggested,

The inescapable fact is that the world is today organized on the basis of the coexistence of states, and that fundamental changes will take place only through state action, whether affirmative or negative. ... It is true to say that states themselves operate by virtue of the will of individuals and that the individual is thus the ultimate source of authority. Yet so firmly rooted is the international state system that we are accustomed to think in terms of the state itself as the ultimate authority and sole actor.⁴⁰

The statement of state primacy in international law is parallel to individual's status in public international law. As Crawford argued, though “it is no longer possible to deny that individuals may have rights and duties in international law; but what rights and duties they do have depends ... not on any notion of natural personality operating with the legal system.”⁴¹ Therefore, to classify the individuals as a “subject” of international law “is unhelpful,” even if individuals might have rights *inuitu personae* that can be vindicated in particular contexts in

36 Ibid., para. 7.39.

37 John H. Jackson, “International Economic Law in Times That Are Interesting,” 3 *Journal of International Economic Law* (2000), 9.

38 McRae, “The WTO in International Law,” 41.

39 James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012, 8th ed.), 116. Emphasis original.

40 Philip C. Jessup, *A Modern Law of Nations: An Introduction* (New York: The MacMillan Company, 1948), 17–18.

41 Crawford, *Brownlie's Principles of Public International Law*, 17.

the field of human rights and investment protection.⁴² International law provides no means for the enforcement of the individual responsibilities and rights dealt with in the provisions of those human right instruments.⁴³ Indeed, although the WTO's operation is ultimately for the benefits of the individuals, its relation with individuals remains "indirect."⁴⁴

1.2.2 *The sanctity of WTO obligations*

As a constitutional principle rooted in natural law confirming the state autonomy principle that "an autonomous State has power to consent, to bind itself so as to bind another," *pacta sunt servanda* doctrine is fundamental to public international law.⁴⁵ The doctrine was incorporated in the UN Charter to oblige members to "fulfil in good faith the obligations assumed by them" in accordance with the UN Charter for "ensur[ing] to all of them the rights and benefits resulting from [UN] membership."⁴⁶ This sanctity of treaty obligations has further been clearly specified in the 1969 VCLT. According to the VCLT, "every treaty in force is binding upon the parties to it and must be performed by them in good faith," and domestic law is no good defense for treaty non-compliance.⁴⁷ Moreover, this principle is also the most important one in international economic law and the foundation of international trade and finance. According to Henkin,

The most important principle of international economic law, as of all international law, was and is *pacta sunt servanda* – agreements are to be kept. The sanctity of undertakings, in treaties as well as in commercial contracts, between Governments, between Governments and foreign nationals, or between nationals of different countries – has been the foundation of international trade and finance.⁴⁸

Indeed, the *pacta sunt servanda* doctrine as the foundation of international law has also clearly been incorporated in the GATT/WTO framework with rather similar language. Under the GATT framework, for example, each contracting party is under the obligation to take all "reasonable measures" possible to ensure its regional and local governments and authorities' observance of the GATT provisions.⁴⁹ More broadly, it is incorporated in the WTO Agreement:

42 Ibid., 121.

43 Ibid.

44 See discussion *infra*, 1.2.3, 1.3.1, and 1.3.2.

45 Louis Henkin, *International Law: Politics and Values* (The Hague: Martinus Nijhoff Publishers, 1995), 28.

46 Art. 2.2, the UN Charter.

47 Arts. 26 and 27, 1969 VCLT.

48 Henkin, *International Law: Politics and Values*, 149.

49 Art. 24.12, GATT 1994.

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.⁵⁰

Accordingly, WTO members are required to “ensure the conformity” of their laws, regulations, and administrative procedures with the WTO obligations. The “conformity” requirement covers both future legislation and actions, as well as existing laws, regulations, and administrative procedures. In discussion of the SPS Agreement compliance issue in a dispute, a WTO Panel states:

We finally note that according to Article XVI:4 of the WTO Agreement, each Member “shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements [including the SPS Agreement]”. This provision confirms that measures which already existed as of the date of entry into force of the SPS Agreement also need to be consistent with the requirements imposed by that Agreement.⁵¹

Therefore, the conformity obligation under the WTO to a certain extent expects WTO members to review existing legal and regulatory frameworks and amend them in order to conform with the new international treaty obligations when and wherever is needed. Some of the transitional arrangements in WTO covered agreements were therefore instituted for the purpose of allowing the members a sufficient period of time to comply with WTO rules.⁵² The *pacta sunt servanda* doctrine thus reflects the rigidity of the WTO framework, as any non-compliance or inconsistency will be considered as a WTO violation. According to the DSU, where an action breaches the rules of a WTO covered agreement, a WTO violation, i.e. a case of nullification or impairment, will be assumed.⁵³ This indeed reflects the rigidity of the WTO norms.

The rigidity of the WTO obligations, however, has not changed the fact that members remain sovereign, thus free, after they accede to the multilateral trading framework. Under public international law in general, the manner in which international law applies within a state is a matter governed by the law of that state. As pointed out in *Oppenheim's International Law*:

From the standpoint of international law states are generally free as to the manner in which, domestically, they put themselves in the position to meet

50 Art. 16.4, WTO Agreement.

51 *EC-Hormones* (US), WTO Panel Report, WT/DS26/R, para. 8.27. See also, *EC-Hormones*, WTO Appellate Body Report, WT/DS26/AB/R, para. 128; *US-1916 Act* (Japan), WTO Panel Report, WT/DS162/R, para. 6.287; *US-1916 Act* (EC), WT/DS136/R, para. 6.223.

52 See e.g. Arts. 65 *et seq.*, TRIPS Agreement; Arts. 28 *et seq.*, SCM Agreement.

53 Art. 3.8, DSU Agreement.

their international obligations; the choice between the direct reception and application of international law, or its transformation into national law by way of statute, is a matter of indifference, as is the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations. These are matters for each state to determine for itself according to its own constitutional practices.⁵⁴

Therefore, regarding TRIPS compliance, for example, while all TRIPS Members are required to “give effect to” the TRIPS provisions, they nevertheless remain free to choose whatever appropriate way of implementation:

Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.⁵⁵

The TRIPS Agreement further clarifies that TRIPS

does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general,

and creates no obligation with respect to “the enforcement of law in general.”⁵⁶

Indeed, GATT/WTO obligation is an “obligation of result” rather than an “obligation of means.” Under the DSU, a member may recourse to the DSU proceeding when any of their benefits under the WTO Agreements are “being impaired” by another member’s measures to the effect of “[a] nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements.”⁵⁷ The wording “being impaired” denotes a factual happening rather than a simple possibility of violation, nor a limitation on the manner fulfilling WTO obligations. It has long been an established GATT jurisprudence that members can challenge legislation independently from specific application instances, yet only non-discretionary or mandatory legislation that mandates a violation of GATT obligation can be found to be in violation of WTO obligations. In *EEC – Regulation on Imports of Parts and Components*, Japan challenged EEC’s measures taken under its anti-

54 Robert Jennings and Arthur Watts, *Oppenheim’s International Law* (London: Longman Group UK Ltd., 1992, 9th ed., vol. I), 82–83.

55 Art. 1.1, TRIPS Agreement.

56 Art. 41.5, TRIPS Agreement.

57 Arts. 3.3, 23.1, DSU Agreement.

circumvention provision to impose tax on products made in the EEC by companies related to Japanese companies. The measures taken by EEC were found in violation of EEC's obligations under GATT. However, Japan's suggestion requesting the EEC not only revoke the measures taken but also take down the provision concerned was rejected by the Panel. According to the Panel,

the mere existence of the anti-circumvention provision in the EEC's anti-dumping Regulation is not inconsistent with the EEC's obligations under the General Agreement. ... [T]he EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties.⁵⁸

This is to leave room for governments to deviate from their GATT obligations in relation to third non-GATT governments.⁵⁹

Moreover, WTO members have the ultimate freedom of withdrawing from the WTO. According to the WTO Agreement, any WTO member may withdraw from the WTO framework freely without condition with six months' written notice of withdrawal to the Director-General of the WTO.⁶⁰ It should be noticed that the GATT 1947 system also provided withdrawal provisions for specific situations in which impairment of reciprocal concessions resulted in the disadvantage of a Contracting Party.⁶¹ The binding force of the WTO regime, therefore, is paradoxical in nature. States are autonomous and free through consent to join the WTO and to be bound by its rules, yet ultimately remain free – to withdraw from the WTO – under public international law.

1.2.3 WTO's "indirect impact on individuals"

As an international organization operating in the arena where states have primacy, a tension is created between international law and domestic law that bears fundamental importance to individuals' status in international law, an issue of concern in relation to the monism and dualism dichotomy debate. The relationship between international law and domestic law, according to Henkin, was once "considered in the light of two polar conceptions [between monism and dualism]."⁶² While monists insisted that "the legal system of every state is a single system consisting of international law and the state's own domestic law, with international law supreme," dualists argued that international law and

58 EEC – *Regulation on Imports of Parts and Components*, O J. L/6657 – 37S/132, adopted GATT Panel Report (16 May 1990), para. 5.26.

59 However, according to the WTO Panel in *US – Section 301 Trade Act* (para. 7.97), even if legislation is not mandatory but discretionary in nature, it was *prima facie* inconsistent with Article 23 of the DSU.

60 Art. XV, WTO Agreement.

61 Arts. XVIII.12(c), XXIII.2, and XXX.2, GATT 1947.

62 Henkin, *International Law: Politics and Values*, 64.

domestic law are distinct legal systems and international law operates wholly between states and “does not penetrate a state’s internal legal system.”⁶³ Some prominent international law scholars, Lauterpacht for example, are forceful advocates of a version of monism emphasizing that “individuals are the ultimate subjects of international law, representing both the justification and moral limit of the legal order.”⁶⁴ However, Henkin pointed out, the differences between the two were theoretical and conceptual only, and “appear not to have inspired significant differences between states in their application of international law.”⁶⁵ “The international system today,” according to Henkin, “is essentially dualist in principle but it has slowly moved a few steps towards monism in practice.”⁶⁶

Moreover, Henkin pointed out, the statement that “only states are subjects of international law” is not true, or no longer true if it ever was.⁶⁷ While “law is made by states,” according to Henkin, states accordingly have also “created (or recognized) other entities, and have given them status, powers, rights, responsibilities, and remedies, within the international system.”⁶⁸ While the nationality of companies is “a fiction upon a fiction, deriving from the larger fiction of state sovereignty,” the wide international acceptance of a market economy might bring a change, in which the company may prove to be the essential unit of the world economy and to be considered as “a new entity in the international system.”⁶⁹

The WTO, as an international organization established by and operated among governments, is nevertheless closely related to individuals. A WTO Panel’s discussion on GATT/WTO’s relevance to individuals shed some light on the issue. According to a WTO Panel, one of WTO’s objects and purposes considered to be relevant to the strengthening of the multilateral system is the “the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system.”⁷⁰ As to the direct effect issue, the Panel agreed that neither the GATT nor the WTO has so far been considered as a legal regime producing direct effect, as “the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.”⁷¹ Yet the Panel also emphasized that,

However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the

63 Ibid., 64–65.

64 Crawford, *Browlie’s Principles of Public International Law*, 48.

65 Henkin, *International Law: Politics and Values*, 65.

66 Ibid., 66.

67 Ibid., 16–17.

68 Ibid., 17.

69 Ibid., 24.

70 *US – Section 301 Trade Act*, WT/DS152/R, para. 7.71.

71 Ibid., para. 7.72.

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 the 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.⁷²

Due to GATT/WTO regime's "indirect impact on individuals," the Panel pointed out, a domestic legislation, "independent from its application in specific instances," may constitute a GATT/WTO violation, though it might not raise state responsibility under public international law.⁷³ As different from treaties concern only the relations between states, a treaty's benefits depend partially on individuals' activity, a simple legislation inconsistency itself, even if without action, may constitute a breach due to its "appreciable 'chilling effect' on the economic activities of individuals."⁷⁴ The GATT/WTO system, according to the Panel, therefore, "is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators."⁷⁵

Indeed, to ensure the security and predictability of issues that can affect individual operators, the WTO regime provides various judicial remedy provisions in the annexed agreements. In GATT 1947 for example, as to "publication and administration of trade regulations," members are required to publish "laws, regulations, judicial decisions and administrative rulings of general application" to "enable governments and *traders* to become acquainted with them."⁷⁶ According to GATT 1947, moreover:

Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by *importers* ...⁷⁷

It is important to note that the non-discrimination treatment requirement, including the MFN and national treatment under GATT 1947, cover only

72 Ibid., para. 7.73.

73 Ibid., paras. 7.80–7.81.

74 Ibid., para. 7.81.

75 Ibid., para. 7.76.

76 Art. X.1, GATT 1947. Emphasis added.

77 Art. X.3.(b), GATT 1947. Emphasis added.

products rather than individuals.⁷⁸ The reference here to “traders” in general and to “importers” in relation to judicial remedies through judicial, arbitral or administrative tribunals or procedures domestically, are laid down as governments’ obligations to “traders” and “importers.” This indeed reveals the truth that the bearers of the international trade relation ultimately are individuals. Most importantly, this kind of judicial review remedy provision is spread out over many annexed agreements, including Sanitary and Phytosanitary Measures Agreement, Antidumping Agreement, SCM Agreement, Customs Valuation Agreement, Preshipment Inspection Agreement, Rules of Origin Agreement, GATS, TRIPS, and Government Procurement Agreement.⁷⁹ These various provisions laid down obligations on members to provide individuals in various capacities judicial review remedies via “judicial, arbitral or administrative tribunals or procedures” independent from administrative enforcement agencies. To some extent, the GATT/WTO indeed is all about the individuals. According to the WTO Agreement, WTO members recognize that:

[WTO members’] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.⁸⁰

Indeed, the WTO’s objectives of improving the living standards, employment, and income, even the expansion of trade in goods and services and optimal use of the resources and environment, are ultimately for the benefit of individuals. These objectives reconcile very well with that of the UN Charter, where the facilitation of security, human rights and dignity, and justice is for the purpose of “promot[ing] social progress and better standards of life in larger freedom.”⁸¹ Moreover, the means to achieve WTO objectives in relation to living standards, employment, and income, according to the WTO Agreement, is to establish “reciprocal and mutually advantageous arrangements” that lead to the substantial reduction of trade barriers and the elimination of discriminatory

78 Arts. I and III, GATT 1947.

79 See Art. 1, Annex C, Sanitary and Phytosanitary Measures Agreement; Art. 11, Antidumping Agreement; Art. 23, SCM Agreement; Art. 11, Customs Valuation Agreement; Art. 4, Preshipment Inspection Agreement; Art. 2 and Art.3.(f), Annex 2, Rules of Origin Agreement; Art. 6.2, GATS; Arts. 32, 41.1, 41.2, 41.4, and 49, TRIPS; and Arts. 20.1 and 20.2, Government Procurement Agreement.

80 First Recital, Preamble, the WTO Agreement.

81 Preamble, the UN Charter.

treatment.⁸² Furthermore, the purpose of improving living standards, employment, and income, as well as optimal use of resources and environment through “reciprocal and mutually advantageous arrangements,” is “to develop an integrated, more viable and durable multilateral trading system.”⁸³ Therefore, the constitutional evolution of the WTO as an integrated multilateral trading system is for the purpose of improving individuals’ living standards, employment, and income, as well as optimal use of resources and environment through reduction of trade barriers and the elimination of discriminatory treatment. Reading the recitals of the preamble to the WTO Agreement organically as a whole, the GATT/WTO global trading regime is in fact all about the welfare of individuals.

1.3 WTO as an international social contract on trade

1.3.1 Theories of the nature of WTO constitutionalism connected

Operating in the global arena where states hold primacy, WTO as an international organization with three functions (legislative, administrative, and adjudicative) in one *triune personality* raises multiple possibilities of the categorization of its nature. The description of the regime by one of the most prominent GATT/WTO scholars, Robert E. Hudec, offers a unique perspective into the issue of the nature of the GATT/WTO, which reflects to certain extent a crucial part of the triune personality of the GATT/WTO. Hudec characterized international trade law as something between law and politics. He argued that the GATT/WTO legal system is a “diplomat’s jurisprudence,” and that its law “has been designed and operated as an instrument of diplomacy,” in which the GATT/WTO diplomats “reconcile, on their own terms, the regulatory objectives of a conventional legal system with the turbulent realities of international trade affairs.”⁸⁴ For Hudec, GATT/WTO law is designed to soften conventional regulatory pressure to a “looser sort of compulsion” applied by diplomats in a style of “sophisticated and often artistic use of ambiguity” to deal with realistic concerns “not necessarily bounded by the lawyer’s rather clear cut criteria of what is and is not ‘legal’.”⁸⁵ Thus Hudec argued that the main point on which international trade law differs from a domestic legal system is “the over-riding concern for ‘flexibility’ – the insistence that the law’s coercive pressures

82 Third Recital, Preamble, the WTO Agreement.

83 Fourth Recital, Preamble, the WTO Agreement.

84 Robert E. Hudec, *Essays on the Nature of International Trade Law* (London: Cameron May, 1999), 17, 75.

85 Ibid., 33–35. He analyzed how dispute settlement process in GATT/WTO is different from conventional judicial decision-making. He argued that “the Panel decision is a far less static instrument than the conventional court decision. Rather than being a final resolution of the legal issue, the Panel decision is simply the first stage in larger decision-making process that involves the whole community.” Ibid., 66.

be applied in a controlled fashion which allows room for manoeuvre at every stage of the process,” moreover, this flexibility gives the GATT/WTO “a capacity for creative development,” some “possibility of growth.”⁸⁶ According to Hudec, although the tentative nature of GATT/WTO texts is meant to be used as “binding and dispositive authority,” they also give the community “greater claim to authority than would be the case of *ad hoc* response,” in which there is always the “possibility of growth.”⁸⁷ How would this “possibility of growth” be realized? According to Hudec, this “possibility of growth” is realized through justifying disobedience. He argued that “there are situations in which disobedience can be justified, as a matter of policy, in terms of strengthening support for the legal system in question.”⁸⁸ The state primacy certainly will be the ultimate justification of the deviation from or non-compliance of the WTO treaty obligations, a paradoxical force that supports and at the same time challenges the operations of the WTO.

Another prominent GATT/WTO scholar, John H. Jackson, recognized GATT/WTO’s inherent tension between power oriented vs. rule oriented philosophy, in particular in the early era of the trading regime. Jackson’s recognition of the power oriented approach’s impact on the inherent tension confirms, at least partially, Hudec’s categorization of GATT/WTO’s diplomat’s jurisprudence feature. According to Jackson, the overall characterization of the history of “constitutional evolution” from the provisional GATT application to the WTO framework is one that “the institutions have developed from bottom up, rather than top down.”⁸⁹ Within this process of constitutionalism, according to Jackson, there is an inherent tension between power oriented and rule oriented perspectives ever since the start of the GATT framework:

So at the very start [of the GATT] there was a tension about the goals of this [dispute settlement] procedure. On the one hand, there were those who felt it was simply an extension of the diplomatic process, what I describe as the “*power oriented*” process. Basically the hope of this approach was that the procedure would help governments settle their differences. On the other hand, in a “*rule oriented*” process the idea is to achieve

86 Ibid., 75–76.

87 Ibid., 35. He went on to argue that “[a]s the consensus on one point or another becomes more positive over time, these ambiguous sources of authority can provide the formal basis for absorbing such developments into a regular legal framework.” Ibid.

88 Ibid., 209. He described five general guidelines for justifiable disobedience: (1) is “consistent with the general objectives of the Agreement”; (2) is in a good faith to “achieve the desired legal change by negotiation”; (3) is “accompanied by an offer to continue to negotiate in good faith”; (4) must be limited to that “which is necessary to achieve a negotiated legal reform of the kind required”; and (5) must “accept the consequences imposed by law for it.” Ibid., 208.

89 John H. Jackson, “Fragmentation or Unification among International Institutions: The World Trade Organization,” 31 *International Law and Politics* (1999), 823, 826.

a result that is rule-consistent and that perhaps helps interpret and elaborate the meaning of the rules, so as to add to the longer term predictability and stability of the system.⁹⁰

Jackson's constitutionalism reading of the GATT/WTO, nevertheless, emphasizes the institutional nature of the constitutional evolution. His institutional constitutionalism appears somewhat distant from Hudec's diplomat's jurisprudence, in particular in his categorization of the basic premises, basic themes, and constituent principles of the world trading system. According to Jackson, two basic premises of the global trading system are that "economic concerns have taken center stage in foreign affairs decision making," and that the international economics problem is a "problem of 'managing' interdependence" which is constituted by international institutions.⁹¹ Jackson argued that the key issue of managing interdependence is the "allocation of decision-making authority at different levels of government."⁹²

According to Jackson, the basic theme of international trade law is 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," or simply the "dilemma of rule versus discretion."⁹³ This dilemma, along with Hudec's perception of the "possibility of growth" of the evolving international trade law, suggests that the WTO regime might just be a dynamic regulatory regime evolving with a soul of its own. Another "persistent theme" of the international trade law is the "close interaction of national and international institutions."⁹⁴ For Jackson, "the domestic and international rules and legal institutions of economic affairs are inextricably intertwined," and moreover, the world trading system is "a complex interplay of both national and international norms, institutions, and policies."⁹⁵ This indeed confirms Pauwelyn's categorization of the interplay between domestic and international trade laws and institutions as a "continuing process of cross-fertilization."⁹⁶

Different from Jackson's perspective of the WTO as a constitutionalization process of an institutional order, the approach of another prominent WTO scholar, Ernst-Ulrich Petersmann, offered a third perspective on the nature of the WTO as constitutionalization of a rights-based system.⁹⁷ Deeply rooted in

90 Ibid., 823, 826–827. Emphasis added.

91 John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1997, 2nd ed.), 4, 7–8.

92 Ibid., 346.

93 Ibid., 10, 29.

94 Jackson, *The World Trading System*, 29.

95 Ibid., 26, 341.

96 Pauwelyn, "The Role of Public International Law in the WTO," 578.

97 Deborah Z. Cass, "China and the 'Constitutionalization' of International Trade Law," in Deborah Z. Cass et al. (eds.), *China and the World Trading System* (Cambridge: Cambridge University Press, 2003), 42–48.

Kantian philosophy and encouraged by the success of the European integration, Petersmann argued that “the guarantees of freedom and non-discrimination in WTO law serve *human rights functions* by enabling individuals to enhance their personal autonomy and welfare through peaceful cooperation across frontiers.”⁹⁸ According to Petersmann, therefore,

By extending equal freedoms across frontiers and subjecting discretionary foreign policy powers to additional legal and judicial restraints ratified by domestic parliaments, the WTO rules – even if formulated in terms of rights and obligations of governments – serve “constitutional functions” for rendering human rights and the corresponding obligations of governments more effective in the trade policy area.⁹⁹

As Petersmann argued, the insight of the “functional theories” has been confirmed by the success of the European integration, in which the citizen-driven market integration provides strong incentives for transforming “market freedoms” into “fundamental rights.”¹⁰⁰ “The moral ‘categorical imperative’ of maximizing personal autonomy and equal liberties across frontiers,” for Petersmann, “corresponds with the economic objective of maximizing consumer welfare through open markets and non-discriminatory competition.”¹⁰¹ Moreover, beyond the issue of “moral legitimacy,” there is also “[an] *economic necessity* for the proper functioning of economic and ‘political markets’ and for rendering competition ‘self-enforcing’ by assignment of individual freedoms, property rights and liability rules to all economic actors and scarce resources.”¹⁰² Petersmann thus argued that

The time has come to recognize that human rights law offers WTO rules moral, constitutional and democratic legitimacy that may be more important for the parliamentary ratification of future WTO Agreements than the traditional economic and utilitarian justifications.¹⁰³

Of course, Jackson and Petersmann’s perspectives of constitutionalism, and even Hudec’s categorization of the diplomat’s jurisprudence, are not irreconcilable views, but rather highly interrelated. Dunoff, for example, categorized the WTO

98 Ernst-Ulrich Petersmann, “From ‘Negative’ to ‘Positive’ Integration in the WTO: time for ‘mainstreaming human rights’ into WTO Law?” 37.6 *Common Market Law Review* (2000), 1363–1382, 1375.

99 Ernst-Ulrich Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration,” 13.3 *European Journal of International Law* (2002), 621–650, 644.

100 *Ibid.*, 629.

101 *Ibid.*, 629–630.

102 *Ibid.*, 1376.

103 *Ibid.*, 1377.

constitutionalism discourse into three perspectives, namely, Jackson's "constitutionalism as institutional architecture," Petersmann's "constitutionalism as normative commitments," and Cass' "constitutionalism as judicial mediation."¹⁰⁴ Given that Cass depicted WTO constitutionalism through the constitutional norms generating process of the WTO as a rule-based institution, the WTO's Appellate Body in particular,¹⁰⁵ Cass' perspective reflects the process perspective of Jackson's WTO institutional constitutionalism. While Jackson and Petersmann address the (institutional) *means* and the (humanitarian) *ends* of, Hudec explains the *force*, the source of the authority and political nature of the WTO constitutionalism.

1.3.2 International social contract and WTO constitutionalism

Whether considering the diplomatic, institutional, or constitutional characterization of the nature of the WTO, each reflects its respective part of the truth of the WTO as an intergovernmental organization with triune personality, operating ultimately for the benefit of individuals in a global arena where states hold primacy. On the one hand, Hudec's diplomat's jurisprudence captures the inner truth of the background of the state primacy within which the WTO operates and from which the WTO derives its personality and authority. The early smooth functioning of the WTO, in particular the rapid growth of the DSB case law in which 20 years of the WTO solved more disputes than 47 years of the GATT,¹⁰⁶ might to some extent have been signaling the fading away of the diplomat's jurisprudence. The deadlock of the Doha negotiation, the dismantling of the Appellate Body appointments, and the ongoing China-US trade war, certainly indicated that the diplomat's jurisprudence is deeply rooted in the WTO.¹⁰⁷ On the other hand, while Jackson touches the institutional structure and process – the *means* – of WTO's constitutional process, Petersmann captures the categorical imperative – the *ends* – of WTO's constitutional evolution. The complexity of the international constitutional evolution based on market economy principles gains its energy from and constructs a soul of itself for global trade.

Although Jackson's focus was on the institutional evolution of the GATT/WTO constitutionalism, the picture of the constitutionalism Jackson presented nevertheless captures the constitutional dynamics of the *means* and the *ends*

104 Jeffrey L. Dunoff, "Constitutional Conceits: the WTO's 'Constitution' and Discipline of International Law," 17.3 *European Journal of International Law* (2006), 651–656.

105 Ibid., 655–656.

106 WTO, *20 Years of the WTO: A Retrospective* (Geneva: WTO, 2015), 78.

107 WTO Documents, *United States – Tariff Measures on Certain Goods from China III: Request for Consultation by China*, WT/DS587/1 (4 September 2019). In this consultation request, China claimed that the US's overall 15 percent tariff increase on goods from China under the US's *Notice of Modification of Section 301 Action* dated 20 August 2019 violates its GATT 1994 commitment.

within bounds described by the political *force* of state primacy in the process of the evolution of the global trading regime:

We are dealing with a process involving the global systems as we know them today, systems which, especially in recent decades, have tended to focus on market economy principles. We are dealing with the decentralized decision-making of millions and millions of entrepreneurs. So one of the goals of this system is to have a rule structure that provides a certain amount of predictability and stability, which will help shape how those millions and millions of economic decisions are and can be made.¹⁰⁸

Therefore, while Hudec captures the *force*, and Jackson captures the *means*, Petersman captures the *ends* of the constitutionalism process of the WTO. As an international organization with triune personality, an all-round WTO jurisprudence should capture the *force*, the *means*, and the *ends* of the constitutionalism process of the global trading regime, operating on the foundation of state primacy and ultimately for individuals' benefit. However, neither is the WTO constitutionalism process a linear development, nor does it proceed without any problem. Alston, for example, suggested that Petersmann's application of Kantian philosophy of international morality to international law might not have paid enough attention to the complexity of the conceptually challenging move.¹⁰⁹ However, what Petersmann tried to emphasize is human rights' constitutive function for welfare-creation – the *ends* of the WTO constitutionalism evolution as we analyzed it – and to argue for equal protection of human rights in both economic markets and political markets.¹¹⁰

The dynamics among the *force*, the *means*, and the *ends* of the evolution of the global trade, and the complexity of the WTO constitutionalism have indeed been well reflected in the controversies of the WTO constitutionalism debates in academia. As Dunoff pointed out, the WTO constitutionalism discourse, to some extent, seems to have a “self-defeating nature” and “reflects a disciplinary anxiety over international law's status and role,” which suggests that the louder the references are to the constitutional discourse, the weaker is the evidence for the constitutional features we can find in the WTO.¹¹¹ The invocation of constitutional discourse at the GATT/WTO in particular or in international law in general, may be a response utilizing a “rhetorical strategy” to deal with disciplinary anxiety through “invest[ing] international law with the power and

108 Jackson, “Fragmentation or Unification among International Institutions,” 823–831.

109 Philip Alston, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann,” 13.4 *European Journal of International Law* (2002), 815, 839.

110 Ernst-Ulrich Petersmann, “Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston,” 13.4 *European Journal of International Law* (2002), 845–851.

111 Dunoff, “Constitutional Conceits,” 647–675.

authority that domestic constitutional structures and norms possess.”¹¹² Each of these versions of WTO constitutionalism, according to Dunoff, provides “a mechanism for withdrawing an issue from the battleground of power politics and as a vehicle for resolving otherwise politically destabilizing political disputes through reference to a meta-agreement.”¹¹³ Dunoff therefore pointed out that “the turn to constitutionalism is self-defeating because constitutionalism does not and cannot generate finality on highly contested issues; it cannot deliver on its promise to remove divisive issues from the domain of politics.”¹¹⁴

The discussion of WTO’s “self-defeating” turn to constitutionalism, however, is of fundamental importance to our discussion at least in two ways. First of all, the “failure,” if any, of the quest for the means and the ends of the WTO constitutionalism as the escape from power politics actually reflects the unfortunate truth that the power politics is inherent to the roots of the GATT/WTO. Either Jackson or Petersmann’s perspective of the GATT/WTO should therefore be reconciled with, rather than distinguished from, Hudec’s diplomat’s jurisprudence perspective of the GATT/WTO. Secondly, power politics within the reign of the international law where states hold primacy remains the foundation of the GATT/WTO constitutionalism evolution. Therefore, as Dunoff acknowledged, variations of the WTO constitutionalism, not only were “made in the service of a larger turn away from politics,” but also were presented “as a corrective or replacement for unruly and potentially destructive trade politics.”¹¹⁵ Dialectically as well as practically, any *denial* of the force must at the same time be a *recognition* of the force of the power politics in the process of the GATT/WTO constitutionalism evolution. Both WTO constitutionalism’s denial and recognition of the force of the power politics indeed bring us to international law’s discussion of the “S” word – sovereignty – and the nature of the WTO as an *international social contract* on trade. Remember it was a fear of the sovereignty intrusion that made the US, the strongest trading power, bar the negotiated ITO from coming into force.

Although elements inherent in “sovereignty” might have been considered as fictions or fictions upon fictions, Henkin argued, independence, equality, autonomy, and integrity, etc., remain essential characteristics and indicia of modern statehood.¹¹⁶ As an implication of state autonomy, state consent remains the foundation of international law and that international law is binding on a state only by its consent remains “an axiom of the political system.”¹¹⁷ Accordingly, state autonomy suggests that a state has “will,” “the power to consent, to enter into relations,” through which “States have in effect created the international

112 Ibid., 649.

113 Ibid., 662.

114 Ibid., 665.

115 Ibid., 664–665.

116 Henkin, *International Law: Politics and Values*, 10.

117 Ibid., 27.

political system, by a kind of international ‘social contract’.”¹¹⁸ Therefore, “the international system has in its basic law a law of contract, known as the law of treaties.”¹¹⁹ As Henkin indicated, the state system indeed “is established by the consent of states, in effect by an inter-state social contract,” and virtually all law “is the result of contract” or rooted in consent (contract) of states.¹²⁰ The WTO Appellate Body’s discussion in *Japan – Alcoholic Beverage II* elaborated this social contract nature well:

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.¹²¹

Taking the WTO regime as a social contract on trade has mixed implications for our analysis. On the one hand, taking the WTO framework as a social contract among sovereign states for sure explains well the foundation of the global trading framework, yet at the same time plants an inherent “sovereign paradox” in it. According to Schermers and Blokker, the tension between “the formal independence (sovereignty) of states and their actual interdependence” has always been a “classic theme” of the international legal system.¹²² This classic theme, accordingly, produces “the paradox that, in order to exercise their functions and to remain as independent as possible, states are forced to cooperate due to the unavoidable reality of interdependence and globalization.”¹²³ This “paradox” derived from the classic theme is indeed deeply rooted in the social contract theory. The Rousseauian construction of the social contract starts from the moment when we as free individuals are looking for a collective association under which each individual, “while uniting himself with the others, obeys no one but himself, and remains as free as before.”¹²⁴ The solution Rousseau found is a social contract, a paradoxical imagination in which people are free to engage in a contract in order to be bound, and to be the legislators and subjects of the social contract at the same time.¹²⁵

118 Ibid., 11.

119 Ibid., 102.

120 Ibid., 103.

121 *Japan – Alcoholic Beverages II*, WTO Appellate Body Report, WT/DS8/AB/R (4 October 1996), 15.

122 Schermers and Blokker, *International Institutional Law*, 2.

123 Ibid.

124 Jean-Jacques Rousseau, *The Social Contract* (London: Penguin, 1968), 60.

125 For the critique of the Rousseauian contractarian paradox, see discussion *infra* 2.4 “Consensus’s Contractarian Deficits and WTO Legitimacy.”

On the other hand, the emphasis of the sovereign independence dialectically necessitates the interdependence among sovereign states in order to recognize and confirm each other's autonomy and to control external influences. This indeed was elaborated well in the UN's *Agenda for Peace*:

The foundation-stone of this work [of the United Nations] is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. Commerce, communications and environmental matters transcend administrative borders; but inside those borders is where individuals carry out the first order of their economic, political and social lives.¹²⁶

Therefore, if globalization is the fact or even unescapable fate, there is indeed no better choice other than participating in the evolving process of the globalizing trading framework to exercise a state's true autonomy and sovereign independence. "In committing to the WTO and its procedures and disciplines," according to the WTO 2004 *Sutherland Report*, "governments are returning to themselves a degree of 'sovereignty' lost through the process of globalization."¹²⁷ National governments' loss of their capacity to regulate at the domestic level will be, or in fact can only be, reclaimed through some control of their economic destinies at the multilateral level.¹²⁸ The WTO evolution is then an unavoidable constitutional process of international social contract on trade swallowing states, international institutions, and individuals in the global market, a process which can be made better and fairer but cannot be avoided.

1.4 Conclusion

Building on a brief examination of the historical evolution of the global trading regime from provisional GATT to the WTO, this chapter reveals the constitutional continuity of the development of the trading regime. During the process of development, while the regime's coverage has been extended from trade in goods to services, intellectual property rights, and trade facilitation through dispute resolution, the significance of the non-discrimination principle also grew

126 United Nations, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, UN Report of the Secretary-General (A/47/277-S/24,111, 31 January 1992), para. 17.

127 WTO, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (The *Sutherland Report*; Geneva: WTO, 2004), 34.

128 Ibid.

from covering products to individuals in various capacities. The WTO as an international organization with a three-in-one triune personality of administrative, legislative, and judicial functions, within the framework where states hold primacy, operates ultimately for individuals' benefit. While the WTO as an inter-governmental organization in public international law leaves no space for individuals, the WTO nevertheless penetrates domestic affairs by touching on private rights either through the trade in goods mechanism (GATT) or through the intellectual property rights (TRIPS) mechanism. International trade thus appears to be an interconnecting mechanism relating states, individuals, and the WTO through the movement of goods, services, and intellectual property rights. The critical examination of the state-WTO-individual tripartite dynamics in the process of global trade's constitutional evolution offers an in-depth understanding of the nature of the WTO as an international social contract on trade.

Building on this critical conceptualization of the tripartite dynamics in international law, Chapter 2 on WTO decision-making by consensus reveals that consensus decision-making, the soul of the WTO, faces both practical and theoretical challenges. A major practical issue is that consensus involves deference to powers and problems of disenfranchisement; yet reverse consensus challenges the institutional check-and-balance against the Appellate Body's *de facto* judicial finality. Single undertaking, as a natural extension of consensus, creates consent fragmentation. A major theoretical issue is that the legitimacy of the principle of consensus rests on a contractarian foundation. In the same way that "general will" underlies the social compact, consensus and single undertaking underlie WTO decision-making and build their legitimacy on members' consent. Unfortunately, through contractarian justification's reference to a static "original compact" as the first mover, consensus decision-making fails to take into account the evolutionary nature of consent and runs into a legitimacy issue. This book further continues the critique of the contractarian myth of WTO jurisprudence in the area of treaty interpretation in Chapter 3 on GATT's "common intention" approach of treaty interpretation. Building on a critical examination of a high profile WTO case, the analysis of the general exception jurisprudence in *China – Raw Materials*, Chapter 3 offers a critique of the "common intention" approach of treaty interpretation that asserts members' common intentions via 1969 VCLT as the customary interpretative rules. As the chapter reveals, misled by the confusion developed previously on China's trading rights commitments, the Panel and Appellate Body failed to recognize the unforeseeable nature of general exceptions. A clear judicial activist tendency carried in the WTO Panel's misinterpretation of the accession protocol reveals an "origin-seeking retrospective" mechanism that locates "common intentions" statically at the founding moment of the treaty framework. This further develops a failure to apply the contingency measures that balance the rigidity of the regime and a failure to acknowledge differences and flexibility, which further undermines WTO legitimacy. Its contractarian obsession with "common intentions" as a quest for legitimate consent fails on its own terms.

Building on the previous critical examination of WTO's jurisprudential distortion, Chapters 4 and 5 bring us back to practical cases and examine WTO's private right distortion in international movement of goods and intellectual property rights (IPRs) as private rights, as well as the implications of the private right distortion in international trade. Chapter 4 on the NME normal value determination in the antidumping regime reveals how goods and traders in "free trade" have been trapped inside an ideological divide between market vs. non-market economies. This chapter critically examines the normal value determination of NME and its implications for the purpose of contributing to Doha antidumping reform deliberation. Accompanied by significant growth of government paternalistic discretion in domestic dumping regimes and deeply rooted in an ideological divide, NME methodology's obsession with national divide turns free trade from traders' commutative exchange into nations' distributive predation. The critique suggests that when products and producers are given certain status via nationality instead of treated individually, international antidumping development becomes a process "from status to contract" and back. Beyond NME methodology's ideological distortion of trade in goods, Chapter 5 on public health and TRIPS critically examines the dynamics between public health, IPRs, and international trade in the context of the TRIPS Amendment and its theoretical implications in international law. The chapter suggests that international efforts in the TRIPS 2003 Waiver and 2005 Amendment addressing public health concerns have not been very successful due to the birth defect of TRIPS, i.e. hoping a private-rights-in-nature regime could accommodate public interests in health concerns. TRIPS' birth defect further reveals itself in post-TRIPS development and contributed to the failure of the TRIPS Waiver and Amendment due to the resulting practice fragmentation and procedural hurdles in domestic compulsory licensing administration. Moreover, the TRIPS Amendment raised a fundamental theoretical issue, i.e. how WTO as an international organization in public international law can regulate compulsory licensing of IPRs as private and negative rights – in particular the proprietary right to remuneration – while recognizing that TRIPS grants no positive rights.

Moving away from previous points of focus to distortion of goods and private right IPRs in trade, Chapter 6 on trade and policy dynamic critically examines governments' trade policy obligation as to anticompetitive practices in TRIPS. As an integral part of the WTO trading regime and in line with the international trend of antitrust control, TRIPS harmonized IP protection with competition in mind. However, diverse national FRAND enforcement practices that take either a contractual or antitrust approach challenge TRIPS integrity. While SEP's personal property recognition lends constitutional support to the contractual approach to FRAND enforcement, private property's in-built limitation warrants a balance with antitrust approach for the consideration of the needs from others. A critical examination of TRIPS' conclusion and the analytical structure of TRIPS provisions reveals that TRIPS obligation against anticompetitive practices is imperative. The imbalance of harmonized TRIPS with un-harmonized

FRAND practices reflects TRIPS' birth defect and challenges TRIPS integrity with negative consequences to be borne by individuals.

Building on theoretical and practical critiques above, Chapter 7 concludes with a brief outlook of the future prospects of the WTO framework as an international social contract on trade. Operating within the framework where states hold primacy, the WTO nevertheless has a soul of its own for the benefit of the individuals. The book concludes with a call for reconstruction of a WTO jurisprudence that can reflect the dynamics between the *force*, *means*, and *ends* of the global trading regime's constitutional evolution. Hopefully this will lead us through the ongoing trade fragmentation more smoothly.

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