

# Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism

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## I. INTRODUCTION

In the modern history of the world, the formation of the WTO has surpassed even the creation of the United Nations, in evoking a high level of enthusiasm and curiosity among global actors. In academia, notwithstanding the plethora of intra- and interdisciplinary discourses on the WTO,<sup>1</sup> there is persistent and growing interest in the existential logic underlying its institutional structure. With the WTO were born many new perceptions, on the one hand, and numerous stakeholders—and their diverse interests—on the other. But despite severe and often bitter conflicts of interests, the WTO has been the most fertile ground for concept formation, accompanied by an array of linkages with other topics (trade and . . .). Most prominent among the terrains that witnessed normative transformations in the WTO boom has been public international law (hereinafter “international law”). With the WTO as its nucleus, international law has been credited with a “thickened” normativity,<sup>2</sup> the spin-offs of which—sovereignty, command, obligations and sanctions—put it within the provenance of positivist law. This is not to assert that other spheres of law were any less influenced or not influenced at all. Rather, I would contend that the WTO (an auxiliary institution of the neoliberal scheme) is itself a consequence of the impact sustained by the world order as a result of the neoliberal wave and not the source of global transformations. If this is the case, why did international law alone

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1. See generally, JOHN H. JACKSON, *THE JURISPRUDENCE OF THE GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* (2000); BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* (1995); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (1995). For other perspectives, see P.K. RAO, *WORLD TRADE ORGANIZATION AND THE ENVIRONMENT* (2000); CONSTANTINE MICHALOPOULOS, *DEVELOPING COUNTRIES IN THE WTO* (2001).

2. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 24 (2004). Pauwelyn uses the expression “thickened normativity” to refer to the judicialness the WTO has added to international law by way of its Dispute Settlement Body (DSB). International law was often criticized as having a fragile normativity for want of a strong judicial body with compulsory jurisdiction and the power to render binding decisions.

became susceptible to the ramifications of the WTO? I argue that the transformation which occurred in the normative world of international law cannot be attributed to the unique institutional features of the WTO; rather, credit is due to the changes in the social order occasioned by the neoliberal ideology. Indeed, the establishment of the WTO and its rule-based architecture was an important project in the larger scheme of things.

The article proceeds in five parts. In part one, I review the scholarly skepticism as to how far international law is law in the “hard” sense and show that this skepticism has always permeated the discipline. In part two, I go on to examine what has prompted contemporary scholarship to credit the WTO with helping international law grow out of the “thin” normativity often attributed to it. The analysis suggests that certain features of legal positivism customarily associated with law in its strict sense, which were alleged to be lacking in international law, are found in the institutional apparatus of the WTO. To test this hypothesis, in part three, I examine that apparatus in light of the tenets of three prominent positivists—Bentham, Austin, and Hart—and enquire whether they would have sanctioned international law had the WTO existed in their day. The conclusion drawn is that, even with the WTO, their views on international law would not have been different than what they were. This finding rectifies the myths that regard the WTO as a positivist enterprise. Part four of the article undertakes to demonstrate that neoliberalism is the driving force of not only the WTO but also the normative and structural global changes all around. To this end, the analysis conceptualizes neoliberalism and then demonstrates how the WTO serves the implementation of the neoliberal agenda. As a corollary, in part five, positivism and neoliberalism are critically juxtaposed and shown to stand in harmony with one another. The conclusion highlights the extent to which the findings can restructure the outlook of international lawyers towards the WTO.

Before proceeding, however, a short note on the style and methodology used in the article is in order. Given the nature of the topic at hand, the article speaks an interdisciplinary language. Parts one and two highlight the scholarly standpoints within international law. Part three is a theoretical endeavor to dispel the myths surrounding the WTO. For this purpose, conventional wisdom is re-explored through an extensive treatment of the relevant legal philosophy. A summation of the arguments at the end of part three provides the rationale for the undertaking and links it with the broader discourse. In part four, in conceptualizing neoliberalism, the

central line of reasoning is built on certain basic notions of economics, although only in moderate detail. A substantial portion of part four is “homework” on the position of international organizations within the fields of international relations and sociology, understanding then facilitates the examination of the true legal nature of the WTO. My sole task is to provide a credible explanation for the authority of international organizations in general and the WTO in particular. In that process, neoliberalism emerges as a protagonist, albeit in its simple and general form, as conceptualized in part four. In other words, neoliberalism is not dealt with in the strict international relations sense, which is too constrained vis-à-vis the concept at large. However, care is taken to ensure that this approach does not adulterate the fundamental thesis of neoliberalism even as it appears in the international relations literature.

Throughout the article, I use the expressions “institution” and “organization” synonymously, except where these are expressly differentiated. At certain points the article has had to view the developmental process of the trading system from different perspectives; this is a natural consequence of the interdisciplinary nature of the topic. Each part and many sections are summarized to aid the reader in following the discourse.

## II. INTERNATIONAL LAW AND THE COMMON SKEPTICISM ABOUT ITS LEGALITY

The authors of virtually every treatise and textbook on international law start their exposition with the skeptical and quite often rhetorical question “Is international law real law?” They then proceed, in assorted ways and through various approaches, to demonstrate that international law is indeed law. Most scholars, at the outset, bring in its relationship with municipal law, then quickly distance themselves from the issue by stating that international law, being a legal system in its own right, cannot be compared with municipal law and that this relativism is the cause of all the misconceptions concerning international law. Having made such a caveat, scholars then fall back on finding systems and institutions similar to that of municipal law in international law. Some rely on logical deductions and philosophical assertions. In general, these exercises end up with a formulation to the effect that international law is law, albeit imperfect, but an indestructible reality; in other words, that it has some practical complexity although not an intrinsic impossibility, but . . . . However, this skeptical approach is not universal. A majority of the nineteenth century classical scholars rejected international law out of hand, albeit with rationalizations that showed true adherence to their cults. Hugo Grotius, the father of international law, had the conviction that sovereign states are bound by the law of nations. Although he

attributed this bindingness to the “consent” factor among states, he saw its roots in the law of nature, which is based on and deduced from the nature of man as a social being.<sup>3</sup> Hobbes and Pufendorf had already answered the question as to the legality, let alone bindingness, of international law in the negative.<sup>4</sup> When legal positivism established its strong hold in the jurisprudential realm, the metaphysical speculations of natural law went into oblivion. One of the doyens of this anti-natural law movement, Jeremy Bentham, refused to accept the prospect that, in his time, any form of law regulating the actions of states would exist.<sup>5</sup> He believed that anyone could divert what was then considered international law to satisfy his or her political caprices by arguing that it conferred rights bequeathed from natural law.<sup>6</sup> Bentham’s antipathy towards international law only pertained to its natural law form; he in no way was antagonistic towards it as such and in fact later devised a plan for universal and perpetual peace in his *Principles of International Law*.<sup>7</sup> In determining the province of jurisprudence, the positivist John Austin ousted international law from the very start. According to Austin, to be within the province of jurisprudence, the prospective legal system must emanate from a determinate superior and that superior shall not be in the habit of obedience to any other determinate superior.<sup>8</sup> With this bearing, international law—merely the declaration of a certain type of conduct that is in sync with the sentiments of an undefined mass—was repugnant to him.<sup>9</sup> However, the Austinian theory of sovereignty and concept of the superior sovereign’s command had a profound impact on later

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3. H. Lauterpacht, *The Grotian Tradition in International Law*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 10, 16-18 (Richard Falk et al. eds., 1985).

4. 1 OPPENHEIM’S INTERNATIONAL LAW 8-9 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

5. Jeremy Bentham, *Essay 1: Objects of International Law*, in PRINCIPLES OF INTERNATIONAL LAW available at <http://www.la.utexas.edu/research/poltheory/bentham/pil/pil.e01.html>.

6. Hart dubbed this situation “criterionlessness.” H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 82 (1982).

7. Jeremy Bentham, *Essay 4: A Plan for an Universal and Perpetual Peace*, in PRINCIPLES OF INTERNATIONAL LAW available at <http://www.la.utexas.edu/research/poltheory/bentham/pil/pil.e04.html>. See generally M.W. Janis, Comment, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AM. J. INT’L L. 405 (1984); H.B. Jacobini, Note, *Some Observations Concerning Jeremy Bentham’s Concepts of International Law*, 42 AM. J. INT’L L. 415 (1948).

8. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 166-67 (Wilfrid Rumble ed., 1995).

9. See generally *id.* Austin refused to accept international law as being a positive morality.

scholarship, so much so that the theory became the primary cause of skepticism regarding the legality of international law. The post-Austinian scholars fixed Austin's precepts of sovereignty and sanction as the systematic way to present international law in its totality, and soon lost themselves in that wilderness.<sup>10</sup> It is no surprise that later commentators focused their attention on defending these criteria by searching for a supreme legislature to command, a judiciary to punish violators, and an executive body to enforce the decisions of the legislature and the judiciary and to impose sanctions upon violators.

A considerable proportion of modern scholars have defended the Austinian checklist by pointing to the institutional features of the United Nations, although most treatments end up with the idea of there being only a possibility of international law becoming a complete system.<sup>11</sup> Indeed, reference to the United Nations, is the most unsophisticated of the defenses, for it is a refined way of going back to the old notions of self-help, retorsion and reprisals that hankered for legitimization. A somewhat different position is taken by Louis Henkin, who defended the legality of international law by highlighting the presence of a compliance culture in international law analogous to that in domestic legal systems.<sup>12</sup> This compliance culture, according to Henkin, stems from certain internal motivations and external inducements such as sanctions and remedies.<sup>13</sup> The threat of retaliation, collective actions, remedies in the form of damages or repairs—such as inter-state claims through institutional means—and recourse to “machineries” acts as an inducement to compliance.<sup>14</sup> Although constructed on a conceptual plane, Henkin's postulation is nothing more than a metaphysical description of the United Nations system itself, for his factors of inducement are illustrated with examples that closely resemble the United Nations machinery.

Another set of scholars, among them Vattel, Triepel, and Anzilotti, attributed the bindingness of international law to the fact that it is a result of agreements between sovereign states. The politico-juridical fiction of the sovereignty of states and the inference that every agreement is a fusion of the wills of such states, and thereby a “higher will,” served as

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10. Harris, in his notes to Brierly's *The Law of Nations*, addresses this situation as an “Austinian handicap.” Although this has placed international lawyers on the defensive, they would not dispute that the test has more utility than many others by which international law could be said to be “law.” D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 6 (6th ed. 2004).

11. See, e.g., OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 4, at 8-13.

12. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 48-57 (1995).

13. *Id.* at 49.

14. *Id.* at 50-60.

the logical point of departure for this thesis.<sup>15</sup> Within the school, scholars like Anzilotti, in contradistinction to his counterparts, sought the fundamental logic regarding the validity of agreements in a “basic norm” and not in a “united will.” For Anzilotti, *pacta sunt servanda* constituted this basic norm.<sup>16</sup> But the juridical construction of *pacta sunt servanda* could only put the debate into a state of vacillation, as Tunkin later illustrated:

If agreement is the sole means of creating norms of international law, say bourgeois jurists, the binding force of its norms rests upon the international legal principle or norm *pacta sunt servanda*. But on what is the legal force of this principle based? If one says that it is based on agreement, a new question arises: on what is the legal force of that agreement based? The juridical construction did not answer the question and went on *ad infinitum*.<sup>17</sup>

This vacillation gave way to the Kelsenian theory of the hierarchy of norms.<sup>18</sup> Kelsen envisaged law as a hierarchical structure, succinctly paraphrased by W.B. Stern: “[t]he constitution stands above the statute, the statute above the ordinance, and any norm-setting organ is a higher organ than one which does not set norms but merely applies them.”<sup>19</sup> According to Kelsen, it is not the legal order of the states but international law that occupies the highest stage atop the norm pyramid in the hierarchy of law,<sup>20</sup> thus making it the hypothetical basic norm of the legal order.

Kelsen, as a general rule opposed the consent theory whereby international law is a creation of only the consent of states. Then, through a regressive process, he arrived at the norm *pacta sunt servanda*.<sup>21</sup> However, *pacta sunt servanda* is a norm created by custom.<sup>22</sup> Thus, primarily international law is customary law.<sup>23</sup> Kelsen’s main aim in

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15. G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 208-09 (William E. Butler trans., 1974).

16. *Id.* at 209.

17. *Id.* at 218.

18. See HANS Kelsen, GENERAL THEORY OF LAW AND STATE 123-61 (Anders Wedberg trans., 1946).

19. W.B. Stern, *Kelsen’s Theory of International Law*, 30 AM. POL. SCI. REV. 736, (1936). For the original exposition, see Kelsen, *supra* note 18.

20. See generally HANS Kelsen, PRINCIPLES OF INTERNATIONAL LAW (The Lawbook Exchange, Ltd 2003) (1952). For a quick and focused treatment, see Stern, *supra* note 19, at 736-37. For another insightful approach, see Henry Janzen, *Kelsen’s Theory of Law*, 31 AM. POL. SCI. REV. 205 (1937).

21. Kelsen, *supra* note 18, at 369-70.

22. *Id.*

23. *Id.*

this exercise was to refute the notion of state sovereignty as the basic factor that confers bindingness on international law.

For Kelsen, international law is law like any other law, and the norms of international law share similar characteristics with municipal law. Hence, the norms of international law can be analyzed by the same method of analysis as used for the analysis of norms generally.<sup>24</sup> This analysis led Kelsen to be defensive with regard to the Austinian checklist. When defining a legal obligation by the sanction it entails, Kelsen argued that international law in fact had sanctions available to it in the form of wars and reprisals.<sup>25</sup> However, this assertion cannot be taken as definitive of his theory, for he later said that such sanctions are sanctions of a primitive decentralized legal order lacking any forms of centralized machinery.<sup>26</sup> The essence of Kelsen's arguments *inter alia*<sup>27</sup> aims at a centralized system for international law in which primary importance is attributed to an institution with compulsory jurisdiction for settling international disputes. This brings Kelsen, who himself was a staunch advocate of the United Nations system, very close to those who defended the Austinian test through the United Nations institutional structure.

As the Austinian test permeated international law scholarship and scholars succumbed to its umbral influence, H.L.A. Hart took a bold initiative to rupture the mold. What made Hart a radical philosopher of law was his innovative account of the concept of law, which he formulated in its entirety on the bricks of Austinian theory while patching up the Achilles' heel of that theory. Hart's concept of law represents a complete departure from the Austinian version by asserting that the concept of coercive sanctions and sovereignty are not essential apparatuses of law.<sup>28</sup> His conviction is that every mature legal system is a union of two kinds of rules: primary and secondary rules.<sup>29</sup> Primary rules are those under which human beings are required to do or abstain from doing certain actions whether they wish to or not. Secondary rules are those that authorize human beings to introduce, modify, or control the primary rules by doing or saying certain things.<sup>30</sup>

Hart did not dismiss international law from the world of law as such. He in fact refuted some of the routine criticisms against the discipline,

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24. Stern, *supra* note 19, at 737.

25. See Kelsen, *supra* note 18, at 330. For a comprehensive treatment, see Kelsen, *supra* note 20, at 20-89.

26. Kelsen, *supra* note 18, at 339-41.

27. For the other facets of Kelsinian theory that have been overlooked by international law scholarship, see Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EUR. J. INT'L L. 287 (1998).

28. H.L.A. HART, CONCEPT OF LAW 215-21 (1961).

29. See *id.* at 77-96.

30. *Id.* at 78-79.



which he believed were on shaky ground. However, his main objection to international law's legality was that instead of being a union of primary and secondary rules, international law was simply a set of primary rules.<sup>31</sup> Since international law is made up only of primary rules, it suffers from three deficiencies—inefficiency, uncertainty, and a static character. It is *inefficient* because there is no organized way to settle disputes or enforce sanctions; it is *uncertain* because there is no established procedure for determining whether or not a particular rule belongs to the set; and it is *static* because there is no way to deliberately introduce new rules into the set. Hart believed that only secondary rules of adjudication, change, and recognition could overcome these defects. Thus, it was the absence of secondary rules that made international law unacceptable as law to Hart, as he was quite convinced that the routine shortcomings associated with it could be surmounted.

From this brief evaluation, it appears that none of the post-nineteenth century scholars were free from the influence of the skepticism as to the “hardness” of international law, whereas the pre-nineteenth century scholarship, mainly continued a superstitious adherence to natural law and hence remained free of the skeptical penumbra. Early positivists, like Bentham, were so preoccupied with their annihilation of natural law notions that their entire focus was on building a new architecture in keeping with their own faith and convictions. With Austin's imperative theory of law, the skepticism “Is international law a real law?” became a nagging question, upsetting international lawyers and placing them on the defensive. Since Austin, scholars have in one way or another desperately sought systems and a mechanism to satisfy the Austinian test, Hart being an exception.<sup>32</sup> Post World War II scholars, while they have found consolation in the institutional features of the United Nations, have failed to produce a compelling case for international law.

However, with the establishment of the WTO, international lawyers found the missing elements of real law in the organization's institutional apparatus. The next part of the article articulates the response of international law scholars to the institutional features of the WTO.

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31. *Id.* at 209.

32. Even before Hart many other commentators expressed their dissatisfaction with the Austinian test in strong rhetoric but none could frame a theory as credible as Hart's. See, e.g., Payson S. Wild, *What is the Trouble with International Law?*, 32 AM. POL. SCI. REV. 478 (1938).

### III. THE WTO IN INTERNATIONAL LAW: THE ASCENSION OF NORMATIVE VALUES

It has been opined that the establishment of the WTO was a “watershed innovation” for international law.<sup>33</sup> While enthusiasts considered the WTO to be the rise of constitutionalism in international law in general (constitutionalism is not a positive phenomenon for all), and the quasi-judicialization of international trade law in particular, critics found a new authoritarianism and judicial activism in the basic process of international law.<sup>34</sup> Accolades, as well as accusations, tacitly acknowledge that the WTO has substantially changed the normative terrain of international law. As one commentator noted in the context of the WTO and its organizational allies: “The usual lament that international laws lack enforcement mechanisms does not apply to these institutions. They do not merely bark, they also bite.”<sup>35</sup>

Scholarly perceptions on the might of the WTO vary. It is difficult to give a strict taxonomical base for the views, because the perceptions overlap and most rely on others. But, it is possible to deduce one common factor from these views: despite minor differences in their approaches, they all converge at the dispute settlement mechanism of the WTO.<sup>36</sup> Considering this fact, this paper will bring together these views and make some generalizations, although not within any watertight compartments.

First, there is a group of scholars who optimistically view the regulatory shift in international trade from the General Agreement on Tariffs and Trade (GATT) to the WTO. Let us call them relativists.

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33. This expression was first used by Jackson in conceptualizing the WTO. See John H. Jackson, *The World Trade Organisation: Watershed Innovation or Cautious Small Step Forward?*, 18 *WORLD ECON.*, Autumn 1995, at 11 (1995).

34. JACKSON, *supra* note 1, at 6. On the criticism regarding authoritarianism, see Anupam Chander, *Globalization and Distrust*, 114 *YALE L. J.* 1193, 1195 (2005). Chander's criticisms are directed towards all post-cold war institutions. On the pros and cons of constitutionalism, see Jan Klabbers, *Constitutionalism Lite*, 1 *INT'L ORG. L. REV.* 31 (2004).

35. B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 *EUR. J. INT'L L.* 1, 7 (2004).

36. What is unique in dispute settlement in the WTO is the automatic accession to the common Dispute Settlement Body. Pursuant to Article 23 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), all members are obliged to submit their disputes to the WTO and abide by the rules and procedures laid down by the Understanding. According to Article 21 “Prompt compliance with the recommendations or rulings of the DSB is essential . . .” and the DSB monitors the matter until compliance has occurred. Where a recommendation or ruling is not implemented within a reasonable time, the WTO prescribes compensation for the aggrieved party or suspension of concessions for the violator. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 *I.L.M.* 1125 (1994) [hereinafter DSU].

They evaluate the WTO and derive its positive features by comparing it with GATT.<sup>37</sup> Their main argument is that GATT, despite being an international agreement and even having its own jurisprudence, was never an effective mechanism for international law.<sup>38</sup> This was because of GATT's inability to secure compliance, mainly owing to a weak dispute settlement system that lacked a "beyond doubt" legitimacy to issue a command or enforce it.<sup>39</sup> This argument of the relativists seems credible, for none of the commentators of international law, to this author's knowledge, have relied on the GATT system for advancing their argument regarding the bindingness of international law. Unlike in GATT, in the WTO the relativists quite obviously find a quasi-automatic, legalized, and rule-based dispute settlement body with enforcement powers—the Dispute Settlement Body (DSB). The DSB not only decides on breaches of WTO rules but makes suggestions on how to bring measures into conformity with those rules; it also monitors and induces compliance.<sup>40</sup> This comparative advantage over GATT in securing compliance makes the WTO an important apparatus for international law.

A second group of scholars sees the might of the WTO in its rule-based system and rule-oriented approach. Jackson is the most prominent among the "rule activists," although he cannot be strictly assigned to this school alone. His convictions are predicated on the role of ensuring predictability that the WTO has to fulfill in the multilateral trading system.<sup>41</sup> He argues that the existence of rules enables the members to have an awareness of the expectations that the trading system has of them and that this in turn will lead parties to focus on the rules of the system.<sup>42</sup> Correspondingly, in dispute settlement, as the settlement progresses, the rule-oriented approach reveals to the participants the

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37. See, e.g., JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 81-100 (1998).

38. Thomas Cottier, *Preparing for Structural Reform within the WTO*, 10 J. INT'L ECON. L. 497, 498 (2007) (suggesting structural and functional reform).

39. See generally JACKSON, *supra* note 1.

40. For more information on the advantages of the WTO's dispute settlement mechanism over that of other international organizations, including GATT, see Joost Pauwelyn, Comment, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 338-39 (2000). For details on the international law effects of the GATT dispute settlement panel report, see JACKSON, *supra* note 1, at 124-29.

41. *Id.* at 121.

42. *Id.* at 120-22.

likely outcome of the case, prompting compliance with the rules.<sup>43</sup> Thus, the rule-based and rule-oriented system enhances compliance in a decentralized international legal system.

A third group of scholars—the largest—comprises those who rely on the sanctioning arm of the WTO. They believe in the range of the sanctioning power of the dispute settlement mechanism and that it is this range that has been material in hardening the normativity of international law.<sup>44</sup> They generally find three key features in the WTO that are absent in the dispute settlement systems of most other international treaties: (1) (the presence of) panels with compulsory jurisdiction to examine complaints about violations of the WTO Agreements; (2) (the provision for an) appellate review of the decisions of the panels with compulsory jurisdiction; and (3) the ability to issue binding decisions.<sup>45</sup> Should these mechanisms fail, there will be authorized retaliatory sanctions, which will induce the violator to comply with the obligation that it has violated.<sup>46</sup> The sanctions available under the WTO's dispute settlement system are compensation and suspension of concessions.<sup>47</sup> "If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance . . . such Member shall . . . enter into negotiations with [the member] having invoked the dispute settlement procedures."<sup>48</sup> If no satisfactory compensation has been reached, the complaining member may seek authorization to suspend the application to the member concerned of concessions or other obligations under the covered agreements from the DSB.<sup>49</sup> The vitality of these sanctions rests on the fact that all the decisions—establishing of panels, referring the matter for appellate review and suspending of concessions—are taken by *negative consensus*,<sup>50</sup> making sanctions virtually automatic and unavoidable. This guarantees greater compliance with the rules.

The sanction group repeatedly prefixes the expression "binding" when speaking of the decisions of the DSB; to rationalize this, they repeatedly rely on the relative advantage that the WTO dispute settlement system has over that of the GATT.

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43. John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 J. INT'L ECON. L. 329 (1998), reprinted in JACKSON, *supra* note 1, at 168-92, 179-80.

44. See, e.g., Brendan P. McGivern, *Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives*, 36 INT'L LAW. 141 (2002).

45. *Id.* at 142.

46. *Id.* at 144.

47. DSU art. 22(1).

48. DSU art. 22(2).

49. DSU art. 22. For an appraisal of the WTO sanctions, see Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001).

50. See *infra* Part IV.C.2.

A fourth group of scholars hold the view that the WTO's power derives from certain non-legal factors. Robert Howse articulates the argument of this group: "[t]he WTO has no power independent of the rules agreed to by consensus of the member states;" its power lies in the fact that it is based on "domestic political procedures that have the legitimacy prescribed by domestic constitutional arrangements."<sup>51</sup> Jackson attributed the bindingness of the decisions of the WTO to the "credibility of the judgment that is rendered and the potential of that judgment to raise diplomatic hurdles for a nation that tries to ignore it."<sup>52</sup> Even with the most tactful diplomacy, powerful trading entities cannot break away from the dispute settlement system.<sup>53</sup>

As mentioned earlier, regardless of the variations in approaches, the scholarly views regarding the bindingness of WTO rules and decisions converge at the institutional features of the dispute settlement mechanism. While the first group—the relativists—is content with the regulatory shift in the legal controls from GATT to the WTO, the second finds the emphasis on "rules" to be effective in securing compliance. The third group focuses on showing that the WTO has teeth to bite, while the fourth, remaining within the enthusiast camp, seeks justifications for the bindingness of the decisions in the non-legal realm. The cumulative effect of these views is to say that WTO rules are binding. Yet binding in what sense? Jackson says they are binding "in the traditional international law sense" but adds, although "not always in a 'statute like' sense."<sup>54</sup> Jackson's conviction and the pessimism attached to it, as well as the views considered above, reveal that what the scholars have found in the WTO is exactly what post-Austinian scholars were desperately searching for in international law. With the might of the WTO established by stressing its sentencing power, the enthusiasts demonstrated that the WTO is a new manifestation of legal positivism centered on states: its commands are the commands of a sovereign because it is generally obeyed and, if disobeyed, it punishes the disobedience.

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51. Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trade Regime*, 96 AM. J. INT'L L. 94, 106 (2002).

52. John H. Jackson, *Appraising the Launch and Functioning of WTO*, 39 GERMAN Y.B. INT'L L. 20, 33 (1996).

53. *Id.*

54. John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 63 (1997) (emphasis omitted).

### III. THE WTO AND CLASSICAL POSITIVISM: BENTHAM, AUSTIN, AND HART

The formation of the WTO was a consolation for the Austinian international lawyers, as many of them saw their as well as their predecessors' unfulfilled expectations being realized in the organization. They might have then slept peacefully having liberated international law from the criticisms of Austinian positivism. But were they successful in their endeavor? Were they "shadow boxing" all those years with their own misunderstandings as the adversaries? Was Austin not properly understood as a philosopher of his time? Was he the victim of an over-simplistic interpretation? If he were given the benefit of the doubt, would it open the doors to conceptual fallacies meaning that the international lawyers of a century had a "hangover?" These questions should probably be answered in the affirmative.

This assertion might make at least some readers skeptical about this approach. Will this paper re-explore Austinian wisdom and provide him with a defense? Why are Bentham and Hart included in this analysis? How is "revisiting" the positivist trio going to help in this paper's central assertion that the WTO is a neoliberal project?

The discussion presented in part one reveals that there was skepticism as to the legality of international law, which mainly owed to a reliance on the Austinian test of a sovereign and its sanctions as the sole test to determine "real law." The impact created by Austin's theory was so profound that it became not only the acid test of real law but also the hallmark of legal positivism. Although positivism was later painted in different shades by Kelsen and Hart, Austin continued to be its icon and his test remained the only applicable test for law. Since the early nineteenth century and throughout a good part of the twentieth, international law was subject to the Austinian test and hence remained outside the realm of real law. With the establishment of the WTO, as it began to display Austinian elements, the law that housed the organization—international law—was admitted into the realm of positivism. Contemporary international lawyers treat the WTO as a positivist bank, refuting any argument disparaging the legality of international law by pointing to the organization.

It is true that scholars found international law in a new and relatively better environment after the WTO and called it "positivism in international law." However, this relatively better environment is neither a result of the WTO, nor Austinian positivism as it is generally understood. To support my contention, I will demonstrate that even with the WTO the positivists would not have accepted international law into their domain. To this end, I refer to the teachings of Bentham, Austin and Hart. The criteria for choosing and confining the analysis to this trio are the

following: first, they represent three varying schools of thought within legal positivism; second, each built his theory on his predecessor's teachings, albeit without blind adherence; and third, a chronological tracking of positivism helps to determine the common tenet that all of them were following. This process also dispels the scholarly misconceptions of Austin and reveals that he was only acting in accordance with the central positivist tenet, but in its then current form, and that he was a man of his time and his positivism was a positivism of the age.

If it is neither Austinian positivism, nor the WTO, that has brought international law into a relatively better environment, what then has been the force behind the change? I assert in the subsequent sections that it is neoliberalism, and contend that the WTO is a passive neoliberal structure—an important project in the larger scheme of things—and that it is the corollaries of the neoliberal wave which scholars have mistaken for Austinian positivism. Prior to substantiating these claims, I summarize the views of the three positivists, showing that positivism never changed its core but only its form.

Before I proceed with the three scholars, let me explain in brief the positive theory of law. Legal positivism is a school of thought that arose under the long-term influence of the scientific discoveries that started in the seventeenth century and the eighteenth century philosophy of enlightenment rationalism.<sup>55</sup> Its primary objective was “the exclusion of every trace of [m]etaphysics from investigations of natural phenomena. . . .”<sup>56</sup> Positivists held that everything must be first observed experimentally and then understood in terms of facts independent of any subjective evaluation of the factual matter. In sum, the positive theory opposed any attempt to link observable and empirically deducible facts with moral values and judgments.<sup>57</sup> This sentiment gave birth to the fundamental tenets of positivism: 1) the *separability thesis* that there is no necessary connection between law and morality; and 2) the *source thesis*, or *social thesis*, that legal validity is determined ultimately by reference to certain basic social facts.<sup>58</sup> All later positivists based their postulations on these two tenets.<sup>59</sup>

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55. MARK TEBBIT, *PHILOSOPHY OF LAW: AN INTRODUCTION* 17 (2000).

56. *Id.* at 16-17.

57. *Id.* at 17.

58. *Id.*

59. For an introduction to legal positivism, see LORD LLOYD & M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* (5th ed. 1985). For its different versions, see HART, *supra* note 28; JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF*

### A. Bentham and Utilitarianism

In this sub-section, I first briefly introduce Bentham's utilitarianism and what makes him a positivist and then make an evaluation of Bentham's views and conclude that he would have had the same position had the WTO existed in his day.

Until the late eighteenth century, positivism was in an embryonic state and focused on the annihilation of natural law notions. At that time, it was mainly discussed and debated as a political philosophy: its full elaboration came only with Jeremy Bentham and his utilitarianism.<sup>60</sup> Bentham's utilitarianism<sup>61</sup>—based on the principle “general happiness is the *right* and proper *end* of human action” (utility)—did not offer a strong logical foundation for positivism but nevertheless created a favorable climate for the move towards it. Bentham's entry into the limelight coincided with the escalating anti-natural law movement, and he played the role of perpetuating “utility,” which was looked upon as the then rational and scientific standard; as noted by a commentator: “[t]owards the end of eighteenth century, it is not only the thinkers, it is all the English who are speaking the language of utility.”<sup>62</sup>

Bentham's antipathy for natural law made him repudiate concepts like natural rights and state of nature, which he considered a mere fiction, a phantom, and a formidable entity used by a great multitude of people to support their false claims.<sup>63</sup> He believed that the law of nature provided no force by any means and hence advocated the strict separation of law

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MORALS AND LEGISLATION (Batoche Books 2000) (1781); AUSTIN, *supra* note 8. For support, see JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); W. J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994). For a critical appraisal, see *POSITIVISM TODAY* (Stephen Guest ed., 1996). On the separation of law and morals, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958).

60. DENNIS LLOYD, *THE IDEA OF LAW* 100 (1981). Utilitarianism is a theory proposed by David Hume in the eighteenth century. It is a political philosophy advancing the idea that explanation of moral principles is to be sought in the utility they tend to promote. Bentham was so influenced by Hume that he adhered completely to the concept of utility. Based on the aphorism “the greatest happiness of the greatest number,” Bentham formulated his theory of utility as every action should be judged right or wrong on the basis of the extent to which that action promotes or damages the happiness of the community. He recognized the fundamental role of pain and pleasure in human conduct and believed that human behavior was motivated by a desire to obtain pleasure and avoid pain. Since pleasure is equated with good, human beings must seek pleasure, and that must be the ultimate end of human life. To measure the net-value of pain and pleasures in a given action, Bentham devised an “emotional machine” called felicific calculus. BENTHAM, *supra* note 59, at 31-32.

61. For an overview of Bentham's utilitarianism, see GEOFFREY SCARRE, *UTILITARIANISM* 72-81 (1996).

62. Wesley C. Mitchell, *Bentham's Felicific Calculus*, 33 *POL. SCI. Q.* 161, 163 (1918) (quoting ELIE HALEVY, *LA FORMATION DU RADICALISME PHILOSOPHIQUE* 231 (1901)).

63. See generally BENTHAM, *supra* note 59.



from morals.<sup>64</sup> He then outlined a general theory of legal duty and obligation.<sup>65</sup> At this juncture, he found the principle of utility to be the best way to greater reforms.<sup>66</sup>

In advocating utility, Bentham developed such a penchant for it that in all his subsequent works he made it a point to advocate this principle as the basis of every action and concept.<sup>67</sup> One sees the principle of utility throughout Bentham's works—be it constitutional reforms, the criminal code, or international law. The sway this principle had over Bentham is reflected in this excerpt from *The Principles of Morals and Legislation*:

*Intense, long, certain, speedy, fruitful, pure—Such marks in pleasures and in pains endure. Such pleasures seek if private be thy end: If it be public, wide let them extend. Such pains avoid, whichever be thy view: If pains must come, let them extend to few.*<sup>68</sup>

Bentham believed that the means should be determined by the end, and the end he envisioned was utility. However, Bentham was aware that men do not all spontaneously desire utility—"the greatest happiness of the greatest number"—because of the self-interested nature of human beings;<sup>69</sup> this interest must be created in the minds of individuals for the principle of utility to work. The interest must be created by contriving devices, in the form of coercive sanctions, by which selfish individuals must serve the pleasure of others to get pleasure for themselves.<sup>70</sup> Bentham brought together individual interests and interests of the community through the imposition of sanctions by the legislator and society.<sup>71</sup> Here, Bentham argued that law is the command expressing the will of a sovereign.<sup>72</sup>

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64. See HART, *supra* note 6, at 82-94.

65. See *Id.* at 127-143.

66. ROSS HARRISON, BENTHAM: THE ARGUMENTS OF THE PHILOSOPHIES 169 (1999).

67. *Id.*

68. BENTHAM, *supra* note 59, at 29. (This verse is quoted from the 1948 edition of *Introduction to the Principles of Morals and Legislation* and is absent in the 2000 edition published by Batoche Books).

69. The self-interested nature of individuals is explained by Ayer as the reason why, for a particular action, individuals find that the greatest happiness of the community stemming from that action is also that which is causative to their own greatest happiness. See PHILIP SCHOFIELD, JEREMY BENTHAM, THE PRINCIPLE OF UTILITY, AND LEGAL POSITIVISM 7 (2003), available at [http://www.ucl.ac.uk/laws/academics/profiles/docs/schofield\\_inaug\\_060203.pdf](http://www.ucl.ac.uk/laws/academics/profiles/docs/schofield_inaug_060203.pdf).

70. Mitchell, *supra* note 62, at 177-78.

71. SCHOFIELD, *supra* note 50, at 7 (drawing on Ayer's defense against the critics of Bentham).

72. This line of reasoning is continued in HART, *supra* note 6, at 105-26.

In postulating the powers of a sovereign, Bentham was influenced by the Hobbesian view that the command of a sovereign constituted law because it was given to subjects already under a prior obligation stemming from their contract with each other to obey the sovereign.<sup>73</sup> Later, the influence of Hume's version of the social contract caused Bentham to flout the Hobbesian version of sovereignty. Bentham persisted in the conviction that the obligation to obey a sovereign is attributable to the sovereign if there is a reason for doing so, which "in part is natural and in part man-made artefact."<sup>74</sup> At the same time, he held that the legislative powers of a sovereign are not bestowed by law because law manifests only from the will of the sovereign.<sup>75</sup> However, the power of a sovereign that is not bestowed by law is a result of a "social situation," the account of which needs no "normative terms;" this social situation constitutes "the disposition of the people."<sup>76</sup> At this juncture, Benthamite theory touches the social thesis of legal positivism whereby the validity of law is determined ultimately by reference to certain basic social facts.

The question of import is to what extent Bentham would have found the WTO agreeable. Quite obviously, the utilitarian in him would have tested the utility that an institution like the WTO produces. Whatever his stance as a utilitarian might have been is less relevant in this context, however, for the concerns of this paper relates to the sovereignty and sanction aspect of the WTO. Hence, the focus is limited to two points: 1) would Bentham have accepted the sovereign power that is said to be present in the WTO?; and 2) would he have found the logic of sanctions in the WTO consistent with his theory of sanctions?

First, to debate the sovereign status of the WTO, one should understand that Bentham separated the powers of a sovereign from the powers of its subordinates. The subordinates' powers are conferred by law, which is a command of the sovereign, whereas the sovereign gains its law-conferring power from the social situation, which is a non-legal situation. The WTO is the result of an agreement between states and has powers from the rules agreed to by the states. Therefore, it cannot meet the Benthamite requirement that a sovereign's power must come from a non-legal force.<sup>77</sup> Yet, it

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73. *Id.* at 221. See also THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., 1991).

74. HART, *supra* note 6, at 221.

75. *Id.* at 224.

76. *Id.* at 221.

77. The basic statute that establishes the WTO is the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) negotiated by the contracting parties in the Uruguay Round of the General Agreement on Tariffs and Trade (1986-1993). Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) [hereinafter WTO Agreement]. The WTO Agreement has an appendix consisting twenty-nine individual legal texts that deal with various substantive rights, twenty-eight additional

could be argued that the social situation that preceded the creation of the WTO and gave rise to certain “forces”—the emergence of a network society that had fetched the interdependence among states and necessitated some kind of institutional coordination—made the WTO a sovereign power. Regrettably, this situation only makes the forces that created the WTO the sovereign. It is the command of this sovereign that created the WTO. Nonetheless, the WTO fits reasonably well into the Benthamite scheme as a subordinate to the sovereign, which exercises the powers conferred by the latter.

Second, the complementarity of the WTO’s sanctions with Bentham’s sanction theory requires examination. For Bentham, sanctions mean punishments, “a suffering which befalls a man . . . if it be supposed to befall him through any imprudence of his . . . if inflicted by the law.”<sup>78</sup> In other words, a sanction is an evil inflicted on an offender by the law, which has the authority to do so. Bentham’s theory of punishment was basically a progressive one that aimed to prevent crimes and ensure public safety, not a “backward-looking” practice that aimed at “retribution based on desert.”<sup>79</sup> Now the relevant query is whether this theory is complementary to the trade sanctions under WTO. Nowhere in the WTO agreements does the word “sanctions” appear. However, supporters of the sanction part of the WTO rely on Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which embodies the provision for compensation and suspension of concessions.<sup>80</sup> General WTO scholarship considers these two measures as the consequence of disobeying the rules and decisions of the WTO. Lamentably, this is a misconstruction. What Article 22 imposes is not a punishment for noncompliance but the means to secure compliance.<sup>81</sup>

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ministerial declarations, decisions, and understandings that provide further obligations and commitments, as well as 26000 pages of computer printouts detailing each member’s tariff concessions and service commitments. For details, see JACKSON, *supra* note 1; Anne O. Krueger, *Introduction to WTO AS AN INTERNATIONAL ORGANIZATION* 1 (Anne O. Krueger ed., 1998); HOEKMAN & KOSTECKI, *supra* note 1.

78. BENTHAM, *supra* note 59, at 28.

79. See generally Hugo Bedau, *Bentham’s Theory of Punishment: Origin and Content*, 7 J. BENTHAM STUD. (2004).

80. See generally YENKONG NGANGJOH HODU, *WTO DISPUTE SETTLEMENT SYSTEM AND THE ISSUE OF COMPLIANCE: PERSPECTIVES IN THE REMEDIES AGAINST NON-COMPLIANCE* (2006).

81. Charnovitz, *supra* note 49, at 804.

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.<sup>82</sup>

Thus, the so-called sanction measures in the WTO have the “externally directed” purpose of encouraging compliance.<sup>83</sup> This is not what Bentham intended by his punitive theory, which aimed at deterrence and reformation.

If the WTO had been a case in Bentham’s time, he likely would not have taken a different stance; there is nothing extraordinary in the WTO that would have appealed to a reformist like Bentham. He never was antagonistic towards international law as such but did object to its natural law form. The presence of the WTO would not have changed Bentham’s perceptions on international law in any way, for what he required was a supreme sovereign that is bestowed with power by a social situation and a system of punishment based on deterrence and reformation. The WTO proved to have neither of these features.

### *B. Austin and the Imperative Theory of Law*

Austin’s analytical jurisprudence sought a definition of law in connection with a sovereign, where sovereignty is employed to define law in its proper sense.<sup>84</sup> To Austin every law implies a command of a sovereign, which is habitually obeyed by the bulk of society and which is not in habitual obedience to anyone. If the sovereign’s will is not complied with, it inflicts punishments.<sup>85</sup> In sum, Austin’s theory of law comprises a supreme sovereign, habitual obedience, commands, and punishments—the purported requirements of *real* law.

In jurisprudence whatever Austin said was prejudicially branded as sterile verbalism, caricaturizations, metaphysical formulations, “ill-informed dialectic,” and irrational. However, one cannot ignore the irony here, as the conferrers of these accusatory labels had built their theories on Austin’s tomb.<sup>86</sup> The critics were aware that the best way to be successful was to be Austinian, yet they desired to be known as those who revived jurisprudence from Austinian sophistries. This hypocrisy owes much to the straightforwardness and minimalism involved in Austin’s command

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82. DSU art. 22.

83. Chamovitz, *supra* note 49, at 803.

84. See AUSTIN, *supra* note 8.

85. See generally *id.*

86. Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 VA. L. REV. 1, 6-14 (2005) (articulating the jurisprudential mood in the academia after Austin).

theory because it takes a scholar directly to the central concerns of jurisprudence. This does not mean that Austin's theory is flawless, but a mistaken perception of any theory will beget a mistaken result, particularly when it is applied to make judgments on concepts and institutions of modern relevance such as the WTO. Austin's theory is no exception.

The first set of arguments in this section provide more justifications for this assertion and show that Austin's views on jurisprudence are the work of a staunch positivist, inspired by Bentham breathing the air of positivism that permeated his own age. As Austin went on determining the province of jurisprudence and thereby rejecting candidates one after another, scholars observed the process with a fine sense of naiveté and made judgments on the basis of Austinian terms; they failed to see the positivist orientation of Austin, whose undertaking obviously coupled with other reasons. Once this is shown, the "true Austin" emerges to judge the WTO and excludes the organization from the province of jurisprudence.

Austin had the vision to construct a science of jurisprudence free from the cobwebs of moral considerations. While igniting his passion to frame a science of jurisprudence, life in the neighborhood of Bentham, James, and John Stuart Mill put Austin in the prevailing philosophical radicalism—utilitarianism.<sup>87</sup> Austin joined Bentham in the revolt against the nebulous conception of natural law and sought to expel it altogether from the parlance of political philosophy. The main focus of their scheme was to demarcate law from morals, law being the will of a supreme sovereign. As it was the will of a sovereign they called this law positive law.<sup>88</sup> At this juncture, the much criticized Austinian version of sovereignty was born.

The initial impression of the Austinian theory of sovereignty is that it is power-oriented. However, there is no such power orientation at the core of Austinian sovereignty. Back in the late nineteenth century, John Dewey had expressed skepticism with regard to the power-orientation in Austin's theory.<sup>89</sup> For example, Dewey termed the Austinian conception of sovereignty as understood by the scholarship "Austinian myth."<sup>90</sup> It was mythical for two reasons: first, sovereignty was confused with the

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87. For a biographical sketch of Austin, see JOSEPH HAMBURGER & LOTTE HAMBURGER, *TROUBLED LIVES: JOHN AND SARAH AUSTIN* (1985).

88. See HART, *supra* note 6, at 223-26.

89. See generally John Dewey, *Austin's Theory of Sovereignty*, 9 POL. SCI. Q. 31 (1894).

90. *Id.* at 31.

“organs of its exercise;”<sup>91</sup> and second, a sovereign was understood as a determinate and common superior receiving habitual obedience and not in habitual obedience to a determinate superior.<sup>92</sup>

Dewey subjected the second reason to a detailed analysis. Austin’s sovereign, although receiving habitual obedience, was not in the habit of obedience to any determinate superior. Later, Austin conceded that sovereigns habitually deferred to the sentiments of the masses. Why then, asked Dewey, did those masses become sovereign? Dewey provisionally dismissed his skepticism by saying that since the masses were an *indeterminate* body, they could not become the sovereign.<sup>93</sup> However, this whole exercise confirmed that Austin’s theory of sovereignty had a social dimension and; if the question of determinateness was absent, a mass social movement would have become the sovereign because politically determinate sovereigns defer to the sentiments of the masses.<sup>94</sup> If so, as it was subject to the sentiments of the masses, no political organ could become a sovereign. What then did Austin intend by “sovereign?” Here it should be conceded that all that Austin required was a source from which a command could emanate so that it constituted “law in the strict sense,” and he fulfilled this requirement by postulating a sovereign.<sup>95</sup> In this task he might have been inspired by Bentham during their joint-venture days on the separation of law and morals. Bentham’s conception of a sovereign acquiring powers from a social situation appeared to be the rationale behind Austin’s social dimension.<sup>96</sup> Lest the symmetrical construction appear a bit artificial, one should consider that the social thesis—law as originating from a social construction—has been the core of legal positivism and Austin and Bentham its staunch adherents. In sum, the Austinian sovereign could be construed as a social force—a determinate superior—from which emanates the commands and organizational forms through which the sovereign exercises its power. This sovereign force receives habitual obedience through the organizations and systems that it has created; the moment another social force takes its place, it loses its habitual obedience, and the new force and the institutions and systems it creates become the sovereign.

For the forces to qualify as a sovereign, however, they must be *determinate*. According to Dewey, this was the core test of Austinian sovereignty,

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91. *Id.* at 34.

92. *Id.* at 36.

93. Susan Minot Woody, *The Theory of Sovereignty: Dewey Versus Austin*, 78 ETHICS 313, 314 (1968). *See also* Dewey *supra* note 89.

94. *See* Dewey, *supra* note 89, at 37.

95. Woody, *supra* note 93, at 317.

96. *See generally* Neil Duxbury, *Why English Jurisprudence is Analytical*, in CURRENT LEGAL PROBLEMS 2004 1 (Jane Holder et.al. eds., 2005).

although, he maintained that what constitutes determinate must not be subject to any kind of numerical evaluations, e.g., sovereignty as vested in a government.<sup>97</sup> Dewey's contention was that what is determinate

is a matter lying quite outside the range of Austin's theory; [determinate sovereigns] exist precisely because large social forces, working through extensive periods of time, have fixed [them] as organs of expression. It is these forces, gradually crystallizing, which have determined governments and given them all specific (determinate) character which they now possess.<sup>98</sup>

D. Gerber offered a methodological defense for Austin's definitions. Commenting on Dewey, as well as the reply to Dewey by Susan Woody,<sup>99</sup> Gerber maintained that Austin's definitions cannot be viewed as mirroring ordinary language.<sup>100</sup> Austin was working on "general jurisprudence" so as to provide a vocabulary for describing a legal system.<sup>101</sup> In the context of a sovereign "[Austin] was systematizing, and, for that, ordinary language just will not do; with the introduction of each of his definitions is a further indication of a constructive inclination."<sup>102</sup>

The issue of determinateness and the ensuing "unverifiableness" of the sovereign is a result of another mythical interpretation, for nowhere does Austin stress the notion of determinateness as requiring sovereignty to inhere in a specific number of persons. It is a mistake to consider Austin's definitional statements as "empirical generalizations" or as entailing normative units. They are only definitions, yet they lay down uses.<sup>103</sup>

The cumulative effect of these arguments is to bring more coherence to Austinian wisdom, as they dispel the myth and justify the social dimension of his concept of a sovereign. Austin was a positivist sprouted and grown in the shade of Benthamite philosophy, although he was not to remain in that shade forever.

97. Dewey, *supra* note 89, at 37-38.

98. *Id.* at 41.

99. Woody, *supra* note 93.

100. D. Gerber, *A Note on Woody on Dewey on Austin*, 79 ETHICS 303, 306 (1969). Gerber's central contention is reflected in the following passage: "Austin's terms are introduced by the use of the ordinary terms with which we are all already familiar. They are picked and chosen from the rather inchoate, or at the very least 'open,' texture of ordinary language, selected in hopes of developing a clearer language for the domain of jurisprudence. They are not quite stipulative, since the uses which they lay down are not arbitrary or capricious; but they do *lay down* uses. The truth of what they assert is independent of any facts about the nonlinguistic world. They are, obviously, true by the definition." *Id.* at 304-05.

101. *Id.* at 305.

102. *Id.* at 304.

103. *Id.* at 305.

Once he had established a link with Bentham, Austin proceeded to “depoliticise” Benthamite jurisprudence.<sup>104</sup> Austin’s pre-professorship days in Germany had a substantial impact on him;<sup>105</sup> “his exposure to German jurisprudence reinforced his drive for the systematization and classification of law.”<sup>106</sup> The subsequent lectures he delivered on jurisprudence that later became *Province of Jurisprudence Determined* (1832) came with a large dose of his German influence and essentially appeared as a taxonomy for law.<sup>107</sup> It is true that Austin could not attract a large audience to his lectures and critics normally ascribe this to the weaknesses in Austin’s theory. However, it was not the failure of Austin but rather a failure on the part of scholars to reconcile Austin’s farsightedness with the epistemic culture present in the Victorian universities in the first half of the nineteenth century.<sup>108</sup>

As knowledge “hardened” towards the late nineteenth century, university culture also underwent changes. In jurisprudence, among other disciplines, it became essential to present clear and precise definitions for “leading terms” and explanations for “fundamental conceptions.” The solution to meeting this need was obvious—Austinian jurisprudence.<sup>109</sup>

On January 1, 1995, the date on which the WTO was established, international lawyers, in particular international trade lawyers, “apparently told Austin’s ghost to haunt other areas of the international realm.”<sup>110</sup> At least for the WTO, though not for all of international law, Austin had gone to rest in peace, and there would no longer be any need to be defensive with regard to the Austinian test. In one sense, this should be a source of solace for contemporary international lawyers, for unlike their predecessors they have a case to put forward in their “debates” on the legality of international law with municipal lawyers. The situation attracts attention in as much as a dramatic utterly unprecedented event has in international law. This point begs further justifications. Hence, revisiting Austinian perceptions on international law becomes inevitable.

In the context of international law, Austin opined that:

The so called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called. But one supreme government may doubtless command another to forbear from a kind of conduct which the law of nations condemns. And, though it is fashioned on law which

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104. See generally Duxbury, *supra* note 96, at 43.

105. John Stuart Mill, *Autobiography* (1873), available at <http://www.utilitarianism.com/millauto/five.html>.

106. See Wilfred E. Rumble, *Introduction* to JOHN AUSTIN, *supra* note 8, at ix.

107. See Duxbury, *supra* note 96, at 44.

108. *Id.* at 45–47.

109. *Id.* at 46.

110. Raj Bhala & Lucienne Attard, *Austin’s Ghost and DSU Reform*, 37 INT’L LAW. 651, 653 (2003).



is improperly so called, this *command* is law in the proper significations of the term. Speaking precisely, the command is a rule of positive morality set by a *determinate* author.<sup>111</sup>

Here, Austin ascribed the element of command to international law but did not dispute the determinateness of the sovereign. He specifically excluded international law from the category of law proper because “[t]he government commanding does not command in its character of political superior. If the government receiving the command were in a state of subjection to the other, the command though fashioned on the law of nations, would amount to a positive law.”<sup>112</sup>

The absence of sanctions is another major lacuna in international law that Austin pointed out. Since no evil is attached to its command, international law cannot be a law in the proper signification of the term.<sup>113</sup> In sum, the two elements of his theory that Austin could not find in international law were a sovereign in the nature of a political superior and sanctions attached to the sovereign’s command.

In his Whewell lectures, Sir Henry Sumner Maine accused Austin of showing an eagerness to diminish the imperative force of international law.<sup>114</sup> If this accusation is accepted, it is because something branded a naturalist credo of the time like international law could only fall outside the realm of law in Austin’s scientific rearrangement. However, there is a point in Austin’s theory that is favorable to international law; namely, considering the social dimension in his theory, if the social forces become the sovereign then Austin should concede that behind every international law formation there is a sovereign power that functions through political superiors. Given the fact that international law formation in Austin’s day was on a strikingly low level, he cannot be indicted for a serious misrepresentation of the facts.

In the WTO, what would have evoked the curiosity of Austin is the so-called sanctioning power of the DSB—compensation and suspensions of concession—and to some extent the sovereignty claimed to be present in the organization.

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111. AUSTIN, *supra* note 8, at 124 (emphasis added).

112. *Id.* at 124-25.

113. *Id.*

114. See HENRY SUMNER MAINE, THE WHEWELL LECTURES: INTERNATIONAL LAW A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE (1887), available at <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/main/intlaw.htm>, in particular Lectures I and II.

Austin conceptualized a command as follows:

A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and purpose of the party commanding to inflict an evil or pain in case the desire is disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request.<sup>115</sup>

Austin thus required two components in a command—power, i.e., physical capacity or authority,<sup>116</sup> and the ability to cause injury to the non-complying party.

The following two clauses of the DSU may meet Austin's requirements:

1. *Prompt compliance* with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members (Art. 21(1))<sup>117</sup>
2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time . . . such member shall . . . enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable *compensation*. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures *may request authorization* from the DSB to *suspend the application to the Member concerned of concessions or other obligations* under the covered agreements (Art.22.2).<sup>118</sup>

The first clause (Art.21.2) has imperative language but the second, which speaks of compensation, sounds like a bit of a cliché.<sup>119</sup> Certainly, Austin was least concerned about the imperativeness in the language of the command; he only required the ability to inflict harm. Where a member fails to compensate another member it has aggrieved, the DSU authorizes the aggrieved party to retaliate by suspending concessions or obligations. Although the offending member is required to seek authorization for taking such an action, the negative consensus involved in decision-making results in that request being automatically granted. Would this be more in keeping with Austin's "harm?" Powers akin to this are also vested in the United Nations Security Council (UNSC), where sanctions are still a collective action; under the DSB it is a bilateral state-to-state affair. Now, what if the member to suspend a concession is an economically weak country and the one against whom the sanction is sought is an economically

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115. AUSTIN, *supra* note 8, at 21.

116. See generally Colin Tapper, *Austin on Sanctions*, 24 CAMBRIDGE L.J. 271 (1965).

117. DSU 21(1).

118. *Id.* art. 22(2) (emphasis added).

119. See Bhala & Attard, *supra* note 110, at 663.

powerful one? Such a measure might have some side effects on the weaker state.<sup>120</sup> What is more, according to one commentator, even the remedy of compensation under the WTO lacks the “traditional sense of compensation for damages.”<sup>121</sup> Another author lamented: “[T]here is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.”<sup>122</sup> Clearly, measures available in the WTO are incongruous with Austin’s theory of command and punishment.<sup>123</sup>

The second factor that ousted international law from the province of jurisprudence is the absence of a sovereign in the form of a political superior. Would Austin have found such a political superior in the WTO?

A sovereign for Austin was a person or body that is politically superior, i.e., that possessed *supreme* power; “this power is infinite in number and kind,” partly activated and partly lying “dormant” in the sovereign.<sup>124</sup> The sovereign delegates these powers to political subordinates or immediate partakers in those very powers.<sup>125</sup> These powers are called *subordinate* powers.<sup>126</sup> In Austin’s scheme of things (it should be conjectured) international law has neither of these attributes. What then would be the case with the WTO? Regrettably, Austin made any determination complex by not making explicit the nature of the supreme powers that a sovereign should have, although he did provide examples of various legal systems to illustrate a sovereign. He also did not clarify how sovereigns happen to acquire these powers; he essentially dismissed the question by saying

120. For more information, see Pauwelyn, *supra* note 40, at 345.

121. *Id.* at 339. However, considering the drawbacks present in the compensation system, the Consultative Board’s Report on the Future of the WTO (Sutherland Report) has highlighted the importance of monetary compensation to replace the compensatory market access measures currently granted to the winning aggrieved disputant. Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, (2004) available at, [www.wto.org/English/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/English/thewto_e/10anniv_e/future_wto_e.pdf). For an evaluation of the Sutherland Report, see Mitsuo Matsushita, *The Sutherland Report and its Discussion of Dispute Settlement Reforms*, 8 J. INT’L ECON. L. 623 (2005).

122. Judith Hippler Bello, Editorial Comment, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT’L L. 416, 417 (1996).

123. A further effort to raise the quality standard of the WTO’s enforcement mechanism to meet Austin’s requirements is articulated in Bhala & Attard, *supra* note 110, at 661-67. *But see* Raj Bhala, *WTO Dispute Settlement and Austin’s Positivism: A Primer on the Intersection*, 9 INT’L TRADE L. REG., 14-25 (2003).

124. AUSTIN, *supra* note 8, at 199.

125. *Id.*

126. *Id.*

that those powers are partly dormant and partly activated.<sup>127</sup> At this juncture, a focus on the social dimension of Austinian sovereignty, as discussed earlier, appears to be a more reasonable course. If Austinian sovereignty is to be construed as a social force that exercises its sovereign powers through various agencies such as government and other organizations, the WTO will fit into the category of a subordinate to the sovereign. Not surprisingly, this is tantamount to the Benthamite position that a subordinate's powers are conferred by the sovereign.<sup>128</sup> This situation will only make the political and social forces that created the WTO a political superior and the organization its subordinate.

Ultimately, like Bentham, Austin would also have maintained an unfavorable view of the WTO in regard to its inclusion in the realm of positive law. None of the institutional features or the so called "hard" mechanisms of the WTO could fulfill Austin's requirements. Any reproach that Austin imposed unfeasible requirements would not hold water, for Austin was only acting as a positivist of his time, however radical.

### *C. Hart and his Rule Theory*

In this section, the same method of analysis, as applied earlier for Bentham and Austin, is followed by portraying Hart's version of rule-based positive theory and then viewing the WTO through the prism of rule theory.

Hart was the first scholar to undertake the study of legal positivism in a philosophical perspective.<sup>129</sup> His concept of law was firmly rooted in the two basic tenets of positivism—the separability thesis and the social thesis.<sup>130</sup> In regard to the separability thesis, Hart did not adhere to the Austinian view that it is the coercive nature of law that differentiates it from morals; according to Hart, attributing coercive nature was a mischaracterization of the purpose and function of law.<sup>131</sup> He rejected the contentions that law is a coercive order and that law is a moral command. Hart's adherence to the separability thesis came in the form of his "rule theory," according to which every mature legal system is a combination of two sets of rules—primary and secondary—with primary

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127. *See id.*

128. *See supra* at 24.

129. Frederick Schauer, Book Review, *(Re)Taking Hart*, 119 HARV. L. REV. 852, 856 (2006). Although Hart's predecessors, e.g., Bentham and Austin, philosophized law, their postulations were based more on political theories and other wide-ranging thinking. *See AUSTIN, supra* note 8, at 858-59.

130. *See generally* Hart, *supra* note 59.

131. *See generally* HART, *supra* note 28, at 18-25.

rules laying down ways of conduct and secondary rules validating the primary rules.<sup>132</sup>

Although a passing reference was made to primary and secondary rules while describing Hart's position on the skepticism of the legality of international law, it only served that context and a more detailed treatment of Hart's rule theory is in order to set up an analysis of the existential logic of an institution like the WTO.

Primary rules are rather mundane in human society, for they are verbal prescriptions that aim to guide the behavior of actors. A society with only rules of this type is likely to face three problems: 1) *uncertainty* as to the determination of valid rules; 2) a *static* character resulting in decay, as there is no means to eliminate old rules and introduce new ones; and 3) *inefficiency* in settling disputes and imposing sanctions in an organized way.<sup>133</sup> These problems can be remedied through secondary rules. For each defect, there are different types of secondary rules: the problem of uncertainty can be remedied by means of the *rule of recognition*, which determines the criteria that govern the validity of the rules of the system; the problem of static character is resolved by *rules of change*, which regulate the process of change by conferring the power to enact legislation in accordance with specified procedures; and the problem of inefficiency can be solved by way of *rules of adjudication*, which confer competence on officials to decide on alleged wrongs and to impose sanctions.<sup>134</sup> All three secondary rules are required to convert a society having primary rules alone into a complete legal system. In other words, no society that lacks one or all of these features can constitute a legal system, and the *laws* of any so-called legal system that lacks these features are not laws.

Hart's rule theory is by no means a crude formulation that easily flexes for any application. The two-tier system of primary and secondary rules that Hart demanded in a legal system involves certain intricacies in its application to the WTO. The cause of this difficulty is largely that the rules in the WTO resemble a complete legal system in having both primary and secondary rules existing in tandem. At first sight, this may seem to be an encouraging picture of the WTO, but it is a misconception. In the next section, this paper will first attempt to dispel the misconception by exposing the true nature of the WTO rules and will argue that the system of primary rules in the WTO is a covering closer in character to secondary

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132. *See id.*

133. *Id.* at 89-91.

134. *Id.* at 91-96.

rules. Then the paper will reveal that there is nothing in the WTO that Hart did not include in international law.

International law, according to Hart, lacks an international legislature, courts with compulsory jurisdiction, centrally organized sanctions and, above all, a unifying rule of recognition specifying the “sources” of law and a general criterion for the identification of its rules.<sup>135</sup> The absence of these features means that international law resembles a simple form of social structure consisting only of primary rules.<sup>136</sup> In other words, international law suffers from the deficiencies of uncertainty, static character, and inefficiency. If the WTO should bring with it rules of recognition, change, and adjudication, it could remedy the deficiencies and thus fit into Hartian rule theory.

However, before moving in this line, a certain question must be resolved. Should the WTO be considered as a possible remedy that solves the problem of the absence of secondary rules in international law? In that case, it must be presupposed that the WTO constitutes a system of secondary rules only. In the alternative, if the WTO is a separate legal system comprising primary and secondary rules, the WTO must be a self-contained regime distinct from international law and, consequently, not an instance of thickened normativity in international law. The question regarding the self-contained nature of the WTO has been of recent concern,<sup>137</sup> although the organization’s kinship with international law has been positively asserted much earlier.<sup>138</sup>

Recent studies conducted in connection with the International Law Commission’s Special Study Group on the Fragmentation of International Law revealed that the WTO does not have the status of a self-contained regime independent of international law.<sup>139</sup> Although this is reassuring, one point regarding the nature of WTO agreements begs clarification: Do all WTO agreements confer power, and are thus secondary rules in character? If not, are there any rules that impose duties making them in effect primary rules? If this doubt is not clarified, Hart’s rule theory

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135. *Id.* at 209.

136. *Id.*

137. This question has mainly come to light in the wake of the alleged fragmentation of international law. In response to the allegation, the International Law Commission established a Special Group on the Fragmentation of International Law in 2002, chaired by Martti Koskenniemi. See Gen. Assembly [GAOR], Int’l Law Comm’n, *Report of the Study Group on Fragmentation of International Law*, U.N. Doc.A/CN.4/L.628 (Aug. 1, 2002). See also Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT’L L. 27 (2005).

138. See generally Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535 (2001).

139. For a discourse on why the WTO is not a self-contained regime, see Anja Lindroos & Michael Mehling, *Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO*, 16 EUR. J. INT’L L. 857 (2005).

could be used as a ground to invoke the self-contained regime nature of the WTO all over again, for the presence of primary rules in tandem with secondary rules presupposes the existence of a complete legal system. To answer this, the types of agreements in the WTO must be considered.

The whole WTO architecture is based on one agreement—the Agreement Establishing the World Trade Organization (WTO Agreement). This agreement has various annexes and sub-annexes, e.g., various agreements on trade in goods, agreements on trade in services (GATS) intellectual property (TRIPs), and dispute settlement (DSU).<sup>140</sup> These agreements spell out a variety of substantive rights and obligations of members. The decisive question is: If these agreements impose rights and obligations on members, are they not primary rules? The importance of this question is heightened by the presence of definitive judicial power (that generally follows these kinds of rights and obligations) in the DSB, and it is substantiated by the fact that under GATT, which lacked a dispute settlement body of judicial character, the prescriptions of its legal text were seen only as “standards” prescribing tariff quotas for the contracting parties. The situation urges further clarification.

Although there was a “system transposition” from GATT to the WTO, a new context and an altogether different mood awaited the WTO: it was a transformation of the legal framework towards multilateral trade liberalization. At the outset of this process, the WTO had to confront a set of practices in the form of domestic policies, which, although not discriminatory in any specific sense, nevertheless undermined trade liberalization measures.<sup>141</sup> Subsidies, dumping, and technical “barriers” were just some of these practices. This situation generated normative ambiguity, which was addressed by a set of new rules on subsidies, anti-dumping, intellectual property, technical barriers, and the like.<sup>142</sup> However, the new rules were in many respects different from those in GATT. To quote Robert Howse: “[T]hese rules cannot easily be seen as general ‘standards’ . . . . They often have the character of detailed legal

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140. For full text of the agreements, see World Trade Organization, Legal Texts—The WTO Agreements, [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (last visited Oct. 16, 2007).

141. Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 355, 357-59 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

142. *Id.*

code, embodying trade-offs between regulatory autonomy and trade liberalization explicitly negotiated *ex ante*.”<sup>143</sup>

To innocent eyes, this external character of WTO rules resembles a set of codes imposing obligations and duties, followed by punishments. This view is rather naïve, and erroneous as well, as becomes apparent upon a retake of the transformation process from GATT to the WTO. The transformation was not merely a change in the vocabulary of trade; it was a cultural and structural change that *inter alia* changed trading patterns as well as the “socio-economic framework” for trade.<sup>144</sup> Trade transformed to become more “homogenous” among states.<sup>145</sup> At the objective level, traders turned more inter-reliant.<sup>146</sup> Under such conditions any kind of trade-impeding domestic policies or protectionist measures—a “race to the bottom”—could wreck the give-and-take arrangements between the interdependent states.

To avoid such a situation, predictability in trade behavior became a crucial need of the time. Here lies the logic of the rule-oriented approach of the WTO, which established principles of tremendous scope upon which states, non-state entities, and other global actors could rely.<sup>147</sup> The operational strategy of this rule-oriented system is positive harmonization—the creation of uniform global regulatory standards. Agreements like TRIPs, the Agreement on Technical Barriers to Trade (TBT), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), to name a few, reflect this regulatory philosophy.<sup>148</sup> These agreements address the member countries and require them to adopt certain minimum standards in their domestic regulations. Although the agreements speak the language of duties and obligations, their philosophical base lies in “positive harmonization.”<sup>149</sup> Even in Hart’s scheme of rules, the secondary rules, although power-conferring in nature, are in the form of addresses to officials. The nature of the scheme is determined not by the terminology, but by its connection with the primary rules in ascertaining, introducing, eliminating, and determining violations of it.<sup>150</sup> This view emphasizes

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143. *Id.* at 358.

144. JANE FORD, A SOCIAL THEORY OF THE WTO: TRADING CULTURES 42 (2003). Ford has provided a systematic presentation of the social and economic dimension of the transformation process from GATT to the WTO. *Id.* at 41-64.

145. *Id.* at 56.

146. *Id.*

147. See JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 88-89 (2006).

148. Each of these agreements is analyzed in the light of positive harmonization philosophy in Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law*, 38 J. WORLD TRADE 1 (2004).

149. *Id.* at 34.

150. HART, *supra* note 28, at 91-92.



that the nature of WTO rules is akin to that of secondary rules and is far beyond the scope of primary rules.

Another question is whether the *punishment* attached to the WTO rules brings them close to primary rules. This issue is related to the nature of dispute settlement in the WTO. The DSU declares that its role is a central element in ensuring predictability and security to the multilateral trading system.<sup>151</sup> In emphasizing the role of the DSU, the panel in *US-Section 301 Trade Act* ruled: "Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators."<sup>152</sup> In this task, the DSB facilitates the WTO in carrying out its objectives by grappling with the infringement of the harmonization obligations contained in the covered agreements. Moreover, there is no aspect of a trial in DSB proceedings and its rulings are not sentences; instead, it facilitates compliance with the standards that have been infringed. The DSU leaves no ambiguity in this regard: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute" and the preferred solution is one mutually acceptable to the parties.<sup>153</sup> Obviously, in the case of a failure to obtain a mutually acceptable solution, the WTO authorizes retaliatory measures. These measures are occasionally referred to as those "inducing compliance"<sup>154</sup> and are thus reformatory in nature. However, WTO practice on retaliation reveals that this point of view is incorrect.<sup>155</sup> Although retaliation under the WTO dispute settlement system is far from the restoration of the "balance of concessions" policy of GATT, it is essentially like a measure for the "maintenance" of equilibrium in the multilateral trading system and in all probability is incompatible with the notion of a punishment.

The WTO now must face the test of providing the missing elements of secondary rules for international law—the rules of adjudication, change, and recognition.

Can one find the characteristics of rules of adjudication in the DSB? The answer requires a specification of the relevant characteristics of

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151. DSU art. 3(2).

152. Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds152\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm).

153. DSU art. 3(7).

154. See Arbitral Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/ARB (Aug. 28, 2000).

155. McGivern, *supra* note 44, at 145-53.

rules of adjudication. The most simplistic form of such rules should empower individuals to make “authoritative determinations” as to whether a primary rule has been broken or not.<sup>156</sup> In addition, the rules should identify the individuals who are to adjudicate and the procedures for such adjudication.<sup>157</sup> In short, rules of adjudication define a group of important legal concepts such as judge or court, jurisdiction and judgment.<sup>158</sup> These criteria, in effect, require the WTO to tender evidence as to its judicial character. Generally, the judicial nature of the WTO is undisputed; the only contentious issue is its judicial activism.<sup>159</sup> The WTO’s reliance on the rules of interpretation laid down in the Vienna Convention on the Law of Treaties, 1969, and its occasional resort to the principles of public international law are good examples of its judicial character.<sup>160</sup> Even the Appellate Body of the DSB has emphasized the “precedential value” of its decisions.<sup>161</sup> The judicial nature of the WTO is also reflected in its jurisprudence and in how it fills gaps and clarifies ambiguities.<sup>162</sup>

If a rule of adjudication entails no more than a minimalist requirement, as stated above, then the dispute settlement mechanism of the WTO meets the criterion. This acceptance would, however, question Hart’s wisdom in rejecting international law, which was not devoid of an adjudicative organ. Indeed, Hart in all probability was aware of the adjudicatory role of the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ). Hart’s rejection of international law has more credible grounds than merely the absence of a rule of adjudication; besides requiring a set of rules for empowering individuals to make authoritative decisions, Hart sought the reason for such an authoritative decision-making power being vested in a court or individual. Such a power, according to Hart, comes from a rule of recognition.<sup>163</sup> In other words, the WTO’s candidacy for the Hartian world of law depends

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156. HART, *supra* note 28, at 94.

157. *Id.*

158. *Id.*

159. In this connection, see Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT’L & COMP. L.Q. 861 (2004).

160. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 250 (2004).

161. *Id.* at 254. For a detailed study of the application of precedents in WTO decision-making, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. U. J. TRANSNAT’L L. & POL’Y 1 (1999); Raj Bhala, *The Power of the Past: Towards de Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT’L L. REV. 873 (2001).

162. Steinberg, *supra* note 160, at 52-53.

163. HART, *supra* note 28, at 95.

on the existence of a rule of recognition that validates the dispute settlement system under it.

Before attending to this issue, the second requirement of rule theory must be examined and the extent to which the WTO is receptive to change must be determined. In other words, are there any rules of change in the WTO? The identification of such rules, according to Hart, lies in the form of a rule that “empowers an individual or body of persons to introduce new primary rules . . . and eliminate old rules.”<sup>164</sup> In plain terms, Hart required a legislative act.

The first provision of interest is Article III of the WTO Agreement, which is generally presented as the one that upholds the traditional theory of *separation of powers*, albeit within an organization.<sup>165</sup> Article III.2 appears to be the clause on legislative power:

The WTO shall provide the *forum for negotiations* among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a *forum for further negotiations* among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.<sup>166</sup>

This power exists in addition to the lawmaking power vested in the autonomous judicial body of the WTO.<sup>167</sup> Such a coexistence of legislative and judicial functions throws the aura of a constitutional system around the WTO. Yet, there is room for skepticism: Can the so-called lawmaking power of the WTO as manifested in Article III.2 be equated with a legislative process? Does not the “forum for negotiation,” as characterized by Armin von Bogdandy, sound more like the international exercise of public functions than a legislative act?<sup>168</sup> First, a survey of the Agreements reveals that no rule exists that speaks clearly of the legislative competency of the WTO. Second, it has been argued that WTO rules are mere standards of good behavior in macro-economic policy and international trade that states want to follow as a “seal of good house-keeping.”<sup>169</sup>

164. *Id.* at 93.

165. Armin von Bogdandy, *Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. U.N. L. 609, 617 (2001).

166. WTO Agreement, art. III.2 (emphasis added).

167. *Id.* art. III.3.

168. Bogdandy, *supra* note 165, at 618.

169. Nicholas Bayne, *International Economic Organizations: More Policy Making Less Autonomy*, in AUTONOMOUS POLICY MAKING BY INTERNATIONAL ORGANIZATIONS 195, 199 (Bob Reinalda & Bertjan Verbeek eds., 1998). However, Bayne opines that no government wants to defy the WTO.

Such views do not attribute any substantial legal value to WTO rules; they reflect global trends. Third, it has been alleged that WTO rulemaking undermines democratic values, as the lawmaking system in the organization does not allow the state to intervene in the body of law and transform it.<sup>170</sup> Von Bogdandy is even more critical: “The WTO undermines the positivity of law in this sense. Once a treaty is set up, the political grasp on its rules is severely restricted—not normatively but in all practical terms.”<sup>171</sup> This deficiency renders the so-called legislative act in Article III.2 “anti-legislative” in a constitutional sense. Weak resistance to the third view appears in the form of the amending power of the WTO rules vested in the members.<sup>172</sup> However, this only makes the powers in Article III.2 a legislative power in the traditional international law sense such as, where Article 108 of the U.N. Charter invests amending power in the U.N. members.<sup>173</sup>

Proponents of the WTO’s lawmaking power might have considered it futile to hunt for a legislature hiding behind its clauses, much as was the case with elevating the WTO’s procedures to constitutional legislative actions. Hence, they focused their efforts on highlighting the judicial lawmaking in the WTO.

The WTO’s judicial lawmaking is evident from the frenetic activity of the Panels and the Appellate Body,<sup>174</sup> and it finds endorsement in scholarly writings.<sup>175</sup> However, what would enthuse Hart is the dynamism of the DSB, i.e., the transformative role it plays by providing rules of change to the system. One example of the transformative role of the DSB is the standard of review, although the practice is not *transformative* in a municipal law sense.<sup>176</sup> However, in an international context, the standard of review represents dynamism and is, to some extent, transformative in nature. This is because in an international forum like the WTO, lawmaking is more of a diplomatic process—a manifestation of the policies and interests of various sovereign states. Moreover, a review,

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170. Bogdandy, *supra* note 165, at 620.

171. *Id.*

172. WTO Agreement, art. X.

173. Bogdandy, *supra* note 165, at 623.

174. For a statistical account of the work of the DSB, see WTO Dispute Settlement Statistics, [http://www.wto.org/English/tratop\\_e/dispu\\_e/stats\\_e.htm](http://www.wto.org/English/tratop_e/dispu_e/stats_e.htm). To make a comparison with GATT dispute settlement, see Robert Hudec, Daniel Kennedy, & Mark Sgarbossa, *A Statistical Profile of GATT Dispute Settlement Cases 1948-1989*, 2 MINN. J. GLOBAL TRADE 4 (1993).

175. See, e.g., Steinberg, *supra* note 160.

176. Generally, standard of review is a procedure meant to analyze the level of deference given to the decision reviewed. The reviewing authority normally focuses on whether 1) there is a discretionary ruling, 2) there is abuse of discretion, and 3) there is an error in the decision. See generally Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11 (1994).

rather than being an appraisal of the panel reports, takes the form of a relative assessment of the state policies and the judicial application of such policies.<sup>177</sup> The difference vis-à-vis the standard of review of a municipal court is that while an appellate municipal court assesses the discretion, abuse of discretion, or errors involved in the judgment of a subordinate court and thereby shows deference to the will of one single entity—the national legislature—in an international body like WTO, the standard of review by the Appellate Body not only defers to the sentiments of sovereign states but, in effect, puts to the test the “judiciability”<sup>178</sup> of state interests. Lack of judiciability is an indication of the inadequacy of the organization’s rules, which are designed to ensure security and predictability in a multilateral trading system. To put it simply, if a rule leads to arbitrariness or discretionary use by the Panels, it means that, despite the rule, state interests are divergent on the area of the multilateral trading system addressed by the rule, and that the rule requires transformation. This view is supported by the fact that the very objective of the standard of review in WTO law is to facilitate the organization in accomplishing the ultimate objective of ensuring security and predictability in a multilateral trading system.<sup>179</sup> At this point, the standard of review acts as an agent of change. All these assertions are notwithstanding the accusations regarding intrusion into national sovereignty by an international court, which is manifested to a high degree in the WTO’s case.<sup>180</sup>

Apart from the standard of review, there is no strong case for likening the WTO’s rules to Hart’s rules of change. The robust activity of the Panels and Appellate Body, although it constitutes a weak case, can at best be equated with the work of the ICJ and other international adjudicative bodies that have been dynamic in their respective roles.

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177. For details on the standard of review in the WTO, see Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT’L ECON. L. 491, 494-498 (2004). For a conceptual approach, see Stefan Zleptnig, *The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority*, 6 EUR. INTEGRATION ONLINE PAPERS (2002), <http://eiop.or.at/eiop/pdf/2002-017.pdf>. See also Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193 (1996).

178. The expression “judiciability” denotes wider judicial criteria and is not limited to “courtworthiness.” It includes the validity, content, objectivity, relevance/contextual significance of a law for being invoked in a dispute, as well as other features that make a law a rule to be relied on for dispute settlement.

179. Ehlermann & Lockhart, *supra* note 177.

180. See, e.g., Chander, *supra* note 34.

Even assuming that the WTO gains credit here, Hart would have pitied those making this claim, just as he pitied those scholars who asserted the existence of a legislative act in international law by pointing to its institutional apparatus.<sup>181</sup> The source of Hart's sympathy was his conviction that the mere existence of rules without a rule of recognition was illogical.<sup>182</sup> In other words, both rules of adjudication and rules of change must be validated by a rule of recognition.

In his *Concept of Law*, Hart presented the rule of recognition in a dual role. It made its first appearance as a remedy to overcome the uncertainty permeating the regime of primary rules; this uncertainty stemmed from the lack of established procedure for determining whether a particular rule belongs to the set of primary rules. A rule of recognition in the form of a rule stating that all valid laws are inscribed in an existing text solves the problem of uncertainty.<sup>183</sup> In this context, the rule of recognition is of the same genre as rules of adjudication and change.

The rule of recognition makes a reappearance when Hart criticizes the notion of a legally unlimited sovereign.<sup>184</sup> There he uses it as a concept to validate a legal system. However, Hart is heedful in not letting the concept of the rule of recognition fall into the Kelsenian "Grundnorm" or become a mere meta-legal abstraction.<sup>185</sup> He criticizes the general conception that the legal validity of rules of recognition cannot be demonstrated, and asserts that although the rule of recognition is not expressly stated anywhere, it can be identified from the practice of courts and other legal authorities. According to Hart, statements made about a particular statute in the day-to-day life of a legal system by judges, lawyers, or ordinary citizens carry with them certain presuppositions.<sup>186</sup> These presuppositions are of two types: one is that the statements made about the validity of a given rule are "internal statements of law," which express the point of view of those who make the statement; the other is that the person making the statement not only accepts the validity of the law but also accepts the fact that there is a rule of recognition actually

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181. HART, *supra* note 28, at 227.

182. *Id.* at 93. ("There will be a very close connexion between the rules of change and the rules of recognition: for where the former exist the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules . . .").

183. Although this form of rule of recognition fits only into a simple form of legal system, it brings with it many elements distinctive of law. In the case of a developed legal system, instead of being identified exclusively by reference to a text, rules of recognition are marked by some general characteristic possessed by the primary rules. Generally, rules of recognition may take the form of a legislative enactment, customary practice, general declarations of specified persons, or past judicial decisions. For details, see HART, *supra* note 28, at 92-93, 97.

184. *Id.* at 97-120.

185. *Id.* at 108.

186. *Id.* at 109.

accepted and employed in the general operation of the system, this being the rule's *external* aspect.<sup>187</sup>

This account of the rule of recognition in terms of an internal and external aspect complicates the concept. On the whole, the rule of recognition in its second manifestation sounds like an abstraction that is arrived at inductively from observations, but is not itself observable.<sup>188</sup> Yet, the dual role is not confusing, except for the use of the same terminology for qualitatively different concepts—one a type of secondary rule to determine the valid rules in a system and the other a concept validating the legal system. Hart suitably engineered a connection between the two concepts: “[I]n the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.”<sup>189</sup>

A rule of recognition having the quality to validate a legal system is referred to as an “ultimate rule.” The rules of adjudication, rules of change, and rules of recognition need to be validated by the existence of an ultimate rule of recognition.

This picture of Hartian rule theory is doubtless a bit disappointing to scholars who cherish the institutional features of the WTO as the *hard* part of international law. The assorted evidence for the hard nature of WTO in tangible form, e.g., judicial characteristics, legislative features and well-inscribed procedures, still falls short of Hart’s requirements, which demand validations for that evidence at higher abstract levels. However, a final effort is made here to see whether the WTO could meet this requirement.

To make a complete legal system requires secondary rules of recognition, change, and adjudication validated by an ultimate rule. The above assessment of the WTO’s institutional machinery revealed only the existence of adjudicatory, legislative, and procedural rules. The common approach for ascertaining the existence of an ultimate rule is the chain of legal reasoning of validating one rule by pointing to another rule, as endorsed by Hart. However, having worked thus far on an assumption that the WTO is a system of secondary rules, there is no further validating rule substantiating the criteria for those rules. What is present are only facts—social and political. For Bentham and Austin this situation would

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187. For the discussion, see *id.* at 105-07.

188. Here, too, Hart has objections to saying that the validity of a rule of recognition cannot be demonstrated. See *id.*

189. *Id.* at 93.

have been acceptable. However, Hart would not have looked upon this situation favorably, for it takes the question of the validity of law back to metaphysics and the Grundnorm.

Accordingly, while making his assertions regarding international law, Hart felt that there was something comic in the search for a rule of recognition,<sup>190</sup> inasmuch as no such rule exists for international law. Yet, he considered the question of multilateral treaties only to dismiss it by saying that treaties do not have universal acceptance and compliance with them is coincidental, as in a primitive society. Notwithstanding this conviction, Hart was optimistic:

It is sometimes argued that [multilateral treaties] may bind states that are not parties. If this were generally recognized, such treaties would in fact be legislative enactments. And international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states.<sup>191</sup>

One question remains, however: Why did Hart not try to seek the rule of recognition in international law through the practice of the ICJ, the PCIJ, and other quasi-adjudicative bodies, or through the statements made by international lawyers, diplomats, and other officials? In other words, why did Hart not apply the internal and external aspect, which are vital for the identification of a rule of recognition? What made him prejudicial in his approach towards international law?

These are things which are best known only to Hart. However, if prejudice is his stance, then the WTO has nothing special to offer him. The WTO has the obvious selling point of the automatic jurisdiction of its DSB, but this has so far served only as a technique to bring disputes to the table. This automaticity cannot command automatic compliance.<sup>192</sup> Regrettably, there is no feature to be found in the WTO that Hart overlooked in international law that might have prompted him to analyze that legal order in terms of an internal and external aspect. Yet, the increasing number of accessions to the WTO, the enhanced compliance with the rulings of Panels and Appellate Body, the growing harmonization of trade standards and other post-cold war developments make a rather good case for international law. However, the WTO as an institution cannot claim any credit for these developments.

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190. *Id.* at 230.

191. *Id.* at 231.

192. McGivern, *supra* note 44, at 157.



### D. Summary

The arguments made thus far in this part have sought to demonstrate that the institutional characteristics of the WTO, if taken in isolation, have nothing in them that would melt the positivists' age-old coldness towards international law.<sup>193</sup> However, this is in no way meant to suggest to the reader that the WTO is ineffective. It does not imply that there has not been structural or normative transformation. The three positivists and their likely rejection of the WTO only reveal that the normative power which contemporary scholars have witnessed in the WTO and subsequently designated as Austinian positivism is only a mirage. Moreover, what contemporary scholars have seen is positivism only in its fundamental form.

Bentham, Austin, and Hart were all staunch adherents to the fundamental positive tenet that the validity of law depends on certain basic social facts.<sup>194</sup> Bentham and Austin adhered to this view by postulating a sovereign, whereas Hart proposed a rule of recognition. Yet, positivism took on diverse forms in the works of these scholars as a reflection of their times. Bentham, who breathed the air of utilitarianism, was prepared to go to any extent of theorizing to achieve utility, even to devise a sanction theory of law where a sovereign imposes punishment. However, when it came to the powers of this sovereign, Bentham attributed it to a social situation and thereby remained faithful to the fundamental positive theory. Austin's antipathy towards natural law and Benthamite influence prompted him to postulate a sovereign that formed the source of law; its commands were law. However, Austin's sovereign, as generally perceived, is not a power-oriented concept but a social force that receives habitual obedience through the organizations and systems that it creates. Thus, Austin, too, arrived at the fundamental positive theory. Hart, unlike his predecessors, took a different approach towards fundamental positivism. His rule theory was a result of the alienation of law from morals and a dissatisfaction with the conception of a legally unlimited sovereign. Accordingly, he replaced a sovereign with a rule of recognition which validated the legal system. However, Hart nowhere explicitly equated the rule of recognition with a social force. In its place, he relied on a "presupposition"

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193. The metaphor of coldness in the positivist approach towards international law finds mention in Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269, 271 (2001). Hall borrows the analogy from LON L. FULLER, *THE MORALITY OF LAW* 232 (rev. ed. 1969).

194. For more on the basic nature of positivism, see RAZ, *supra* note 59.

thesis, whereby the existence of a rule of recognition is based on a presupposition—"there is a valid rule"—regarding the statements made by the *persons* in a legal system about a rule. This presupposition (internal and external aspect) constituted the validity of law. Hart avoided any reference to social forces in this regard; yet if he were asked what made a *rule* so special that it could validate a legal system by means of a presupposition, he would have had to confess that the rule is in one way or another conditioned by social forces. Otherwise, rule theory would remain devoid of a foundation.

Thus, positivism was practiced by these scholars by remaining truly faithful to its fundamental form. Utilitarianism, command theory, and rule theory are various formulations of this fundamental form, each appropriate to its time. Among these, Austin's account, for the reasons discussed earlier, developed into the essential representation of positivism with command theory as its hallmark. It continued to exert its sway, notwithstanding the changes in positivism, in essentially every branch of law. If what contemporary scholars have discovered in the WTO is Austinian positivism, the analysis of Austin's theory ought to have shown an inclination on his part towards the WTO, but it did not. This failure means that what scholars have discovered is not Austin's positivism as it is commonly understood.

On balance, the transformations and the subsequent global changes—normative and structural—can be attributed to positivism, but only in its fundamental form, i.e., the social thesis. The impetus for transformations and the validity of the resultant norms are determined by certain social forces. That social force was neoliberalism in the present context.

## V. THE WTO AND NEOLIBERALISM

### *A. Neoliberalism: The Landscape*

There is no representative definition of the term neoliberalism, although there are many unofficial ones. Most are predicated on activism, however, the term is generally used in a pejorative sense and to oppose the market liberalism that has emerged as a result of globalization. Activists prefix "neo" because the old liberal idea of free markets is performed through the compression of the world and the strengthening of the consciousness of the peoples all over the world.<sup>195</sup> But the term finds more rational application in the "globalization debates" within academia, where neoliberalism is considered the ideology of the process of

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195. Cf. ROLAND ROBERTSON, *GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE* 8-31 (1992).

globalization.<sup>196</sup> Such a view generally provides an economic logic which justifies the emergence of a single global market and upholds the principle of global competition.<sup>197</sup> This, in effect, evokes an impression that the world will act in accordance with economics textbooks. Does this mean that market forces are going to make every other choice irrelevant? Yes, but only to a certain extent. This view will be dealt with in the following paragraphs. For the time being, for tractability's sake, this paper will proceed with the definition that neoliberalism is a "global policy regime that comprises free trade and the free flow of resources via market mechanisms."<sup>198</sup>

In order to conceptualize neoliberalism, one must first define its purpose. Is mere attainment of market expansion all that has been meant by neoliberalism? To answer this question, one must start with the assumption that neoliberalism aims at the expansion of markets only. An "expanded market" or, say, a "global market" does not mean solely a meeting place of supply and demand as in the conventional sense. Rather, it is a social organization.<sup>199</sup> In such a market, there are two major participants—

196. Held, McGrew, Goldblatt, and Perraton have classified the academic debate on globalization into three broad schools of thought: the *hyperglobalist thesis*, the *sceptical thesis*, and the *transformationalist thesis*. Hyperglobalizers are those who believe that contemporary globalization defines a new era in which peoples everywhere are increasingly subject to the disciplines of the global market place; sceptics argue that globalization is a myth which conceals the reality of an international economy increasingly segmented into three major regional blocks in which national governments remain very powerful; and transformationalists view contemporary patterns of globalization as historically unprecedented, whereby states and societies across the globe are experiencing a process of profound change as they try to build a more interconnected but highly certain world. It is within the Hyperglobalist School that the neoliberalism finds its place. In this camp, an orthodox liberal account of globalization can be found alongside Marxist accounts. The other two theses—the sceptics and transformationalists—rather than basing their view on any ideology identify themselves with the position of a myth and a new architecture of the world order, respectively. For a detailed discussion, see DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999).

197. In this context, globalization is defined as "a politically contested process in which different state-market models of interaction come into conflict locally, nationally, and transnationally." Seán Ó Riain, *States and Markets in an Era of Globalization*, 26 ANN. REV. SOC. 187, 188 (2000).

198. GEORGE DEMARTINO, *GLOBAL ECONOMY, GLOBAL JUSTICE: THEORETICAL OBJECTIONS AND POLICY ALTERNATIVES TO NEOLIBERALISM* 125 (2000).

199. See generally NEIL FLIGSTEIN, *THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST-CENTURY CAPITALIST SOCIETIES* (2001). The basis of such markets is the existence of certain institutions. Institutions refer to shared rules, which can be laws or collective understandings, held in place by custom, explicit agreements, or tacit agreements. These institutions—which can be called property rights, governance structures, conceptions of control, and rules of exchange—enable actors in markets to

incumbent and challenger firms—which know one another and take one another's behavior into account in their actions.<sup>200</sup> The stability<sup>201</sup> of this market depends on the production of a conception of control. Conceptions of control

refer to understandings that structure perceptions of how a market works and that allow actors to interpret their world and act to control situations. A conception of control is simultaneously a worldview that allows actors to interpret the actions of others and a reflection of how the market is structured.<sup>202</sup>

The formation of such a market culture is driven both by exogenous factors, such as resource dependence, and endogenous factors, such as with whom one wants to build interdependencies.<sup>203</sup> The stability of the market will be upset when new entrants break through it with new conceptions of control.<sup>204</sup> The existing players on the market look upon the state to intervene to protect a local market that is threatened.<sup>205</sup> However, any state that has been acting according to a determined strategy<sup>206</sup> regarding markets and society finds itself in an alien element and rushes to learn the lessons of the new environment.<sup>207</sup>

The state has two options with regard to the new entrants: to strengthen the old conception of control or to accept a new one. If the state opts to

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organize themselves, to compete and cooperate, and to exchange. For a detailed account, see Neil Fligstein, *Markets as Politics: A Political-Cultural Approach to Market Institutions*, 61 AM. SOC. REV. 656, 658 (1996).

200. NEIL FLIGSTEIN, MARKETS, POLITICS, AND GLOBALIZATION 36 (1997). "Incumbents" are the principal players of the market, who determine the rules of the game. "Challengers" are the outsiders. They must accept the rules of the game or risk a "war."

201. Stability here refers to a situation where the identities and the status hierarchy of the incumbent and challenger firms are well known. Fligstein, *supra* note 199, at 663.

202. *Id.* at 658.

203. For an empirical study on the structuring of and the criteria for organizational networks in a globalized society, see Ranjay Gulati & Martin Gargiulo, *Where do Interorganizational Networks Come From?*, 104 AM. J. SOC. 1439 (1999).

204. Entry into the market can be made in various ways, e.g., through imports, acquisition of an old established firm, or a "management shake-up." P.A. GEROSKI, MARKET DYNAMICS AND ENTRY 10 (1991).

205. FLIGSTEIN, *supra* note 199, at 73.

206. On the basis of their relationship with markets, Ó Riain has classified states into four categories: liberal states, social rights states, developmental states, and socialist states. *Liberal states* are those where the state promotes the markets in every sphere of society and ultimately even in the state itself. This is done by securing favorable conditions for the reproduction of the markets. In *social rights states*, the state limits the range of feasible market strategies by strengthening society and setting social limits on market action. Here there is an alliance between the state and society, which sets limits on the ways in which markets can be organized. In *developmental states*, the state never undertakes any tasks by itself but shapes the capabilities of society and markets to undertake the tasks. *Socialist states* endeavor to subsume society and the market within the state. Ó Riain, *supra* note 197, at 193-200.

207. A detailed empirical study on the predicament of states in the wake of these global changes appears in HELD ET AL., *supra* note 196.

strengthen the old conception of control, it needs to take steps to block entry to the local market, either by raising prices (tariffs) above costs or by increasing the efficiency of operations. Raising prices above the costs will result in immediate entry to the market by other agents, whereas increasing efficiency will certainly be a bonus, as efficiency and the resulting dividends will materialize without all the ruckus of actual entry.<sup>208</sup> But with a horde of potential entrants surrounding the market neither raising prices nor improved efficiency seems to be easily realizable. In this predicament, the state is left with only one option, to adopt the new conception of control.<sup>209</sup> This requires changing the local market to fit the diverse set of global actors that have invaded it with new conceptions of control and integrating the markets into one whole. There are a variety of ways to integrate the national markets into the global whole. As it is increasingly difficult for states to function detached from the market or isolated from transnational capital,<sup>210</sup> they carry out integration mainly through free trade and free capital mobility.<sup>211</sup> This is facilitated by establishing rules for economic actors in the market in areas like property rights, governance structures, and rules of exchange.<sup>212</sup> For newly expanding markets, however, creating stable conceptions of control is difficult because property rights, governance structures, and rules of exchange are vaguely specified.<sup>213</sup> Moreover, the various inconsistencies in the world of competitive business such as continuing discrepancies in the comparative prices, wages, profits, and interest rates of different countries, sectors, trades and industries, impose practical limitations upon capital mobility.<sup>214</sup> Cultural disparities, divergence in legal systems, and a lack of communication facilities compound the problem. To heighten the mobility of capital, a state must also increase the porosity of its international borders. Achieving these capacities requires states to interact with firms, political

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208. GEROSKI, *supra* note 204, at 10.

209. Here, too, firms follow the same strategies and criteria that they followed in adapting to earlier conceptions of control. To understand how they do so, see Gulati & Gargiulo, *supra* note 203.

210. John Roemer, *Market Socialism: A Blueprint*, 38 DISSENT 562 (1991).

211. For different perspectives on this aspect, see Jagdish Bhagwati, *The Capital Myth: The Difference between Trade in Widgets and Dollars*, 77 FOREIGN AFF. 7 (1999); Jeff Faux, *Without Consent: Global Capital Mobility and Democracy*, 51 DISSENT 43 (2004).

212. Fligstein, *supra* note 199, at 660.

213. *Id.* at 661.

214. Lawrence Seltzer, *The Mobility of Capital*, 46 Q.J. ECON. 496 (1932).

parties, international institutions, and newly invented conceptions of regulation.<sup>215</sup>

The neoliberal requirements for states include political correction, cultural adaptation, optimization of resources, spatial allocation of economic activity (urbanization), decentralization, and harmonization of laws and legal systems. These are met by allocating tasks to sub-state enterprises such as international organizations, companies, non-governmental organizations (NGOs) and other pertinent actors. The sole task of the state in this project is the coordination of the various actors involved in the globalization process, who work together to ensure free mobility of capital and goods. The state retains its essential role but takes on the function of a critical enterprise in promoting economic competition and mobility; its role as a "civil association" diminishes.<sup>216</sup>

Earlier, neoliberalism was mentioned as working to create a global whole; that is, one unity into which the relevant parts are integrated. However, this requires a de-integration of national units—ripping them apart and integrating them into the global whole. This process could be perceived as a "shift from a two-dimensional Euclidian space with its centers and peripheries and sharp boundaries, to a multidimensional global space with unbounded, often discontinuous and interpenetrating sub-spaces."<sup>217</sup> "The functional integration of this space depends less upon horizontal relations of spatial integration emphasized by concentric [] zone[s] and more upon hierarchically structured linkages to global system processes, such as capital accumulation and the [] international division of labor."<sup>218</sup> This character of "integration" that connects any point to any other point, the structuring of diversities by ramifying into states, societies, and many other social bodies and spaces are what make neoliberalism a matrix of all global changes.

The changes that neoliberalism has brought about in the global order are noticeable in all aspects of human interaction. Neoliberalism has ionized every facet of social life in its ethical domain, regardless of the facet's internal values or exterior texture. It has secularized the world but wrought a newly organized order with liberal values and attitudes. The reason for this transformation is the fundamental logic of globalization. It is probably among the simplest of all the ideologies that the world has ever seen but the one with the most consequential outcome. It has perhaps nothing more

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215. Fligstein, *supra* note 199, at 661.

216. Philip G. Cerny, *Globalization and the Changing Logic of Collective Action*, 49 INT'L ORG. 595, 597 (1995).

217. M. Kearney, *The Local and the Global: The Anthropology of Globalization and Transnationalism*, 24 ANN. REV. ANTHROPOLOGY 547, 549 (1995).

218. *Id.* at 552 (quoting M. GOTTDIENER, *THE SOCIAL PRODUCTION OF URBAN SPACE* 76 (1985) (internal quotations omitted)).

substantial to call its own than the free market ideology had during the liberal revolution of the nineteenth century, with the exception of the international exchange of foreign capital.<sup>219</sup> States in the twentieth century liberal revolution have only one motivation and target: the creation of conditions that facilitate the accumulation of foreign capital so that they can compete in an “extended market.” In endeavoring to attract foreign capital, states tamper with their legal systems, ideologies, monetary exchange rates, environment, and cultural values—everything which hampers the free flow of capital—in “a neoliberal race to the bottom.”<sup>220</sup> What ensue are ideological de-construction, perestroika, and the standardization of legal systems. Every branch of knowledge, descriptive as well as abstract, has rewritten its assumptions, concepts, values, and practices so that the neoliberal agenda can effectively be implanted in their respective fields.

Among all the changes, the most perceptible change was the appearance and exponential increase of new actors in the global amphitheater—multinational corporations, NGOs, and other agents of change—a forum built on the principles of universalism, individualism, rational voluntaristic authority, progress, and world citizenship.<sup>221</sup> These institutions are imbued with neoliberal culture, concerns, content, norms, and shape. Although they cannot claim to have totally taken over the baton from the states, they lobby and criticize states, mobilize around and elaborate global cultural principles, and convince states to act on those principles.<sup>222</sup> Amid this proliferation of neoliberal institutions, the existing non-neoliberal institutions began to face functional crises resulting in institutional gaps

219. Deepak Nayyar, *Towards Global Governance*, in GOVERNING GLOBALIZATION 3, 8 (Deepak Nayyar ed., 2002).

220. How this tampering has resulted in a nascent global state is well articulated in Chimni, *supra* note 35, at 7-10.

221. John Boli & George M. Thomas, *World Culture in the World Polity: A Century of International Non-Governmental Organization*, 62 AM. SOC. REV. 171, 187 (1997).

222. *Id.* For a discussion of multinational corporations in the contemporary international political economy in various perspectives, see Richard E. Caves, *The Multinational Enterprise as an Economic Organization*, Walter B. Wriston, *Agents of Change are Rarely Welcome*, Stephen D. Krasner, *Multinational Corporations*, Sayre P. Schatz, *Assertive Pragmatism and the Multinational Enterprise*, and Richard S. Newfarmer, *Multinationals and Marketplace Magic the 1980's*, in JEFFREY A. FRIEDEN & DAVID LAKE INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH 146-207 (2d ed. 1991). For a review of the literature on the role of nongovernmental organizations in international politics, see William F. Fisher, *Doing Good? The Politics and Antipolitics of NGO Practices*, 26 ANN. REV. ANTHROPOLOGY 439 (1997).

and were reconstituted with a rich dose of the neoliberal mandate.<sup>223</sup> They now function with a dual agenda: 1) to guarantee that the neoliberal mandate is effectively enforced by laying down uniform standards to enforce economic sanctions, to attach conditionalities, and to ensure that member states do not pursue excessive protectionism and hence a “race to the bottom;” and 2) to shape the future neoliberal manifesto by creating linkages across issues and to serve as agents who create as well as diffuse ideas, norms, and expectations.<sup>224</sup>

The “trickle down economics” of neoliberalism is a maturing process, with more fields of applications, more facets of culture, more growth expectation and probably more neoliberalism,<sup>225</sup> which builds a progression in itself. Progression may be described as a series of occurrences involving the same or varied intensity for each occurrence, appearing every time in new and different spheres *ad infinitum*. It is akin to a progression as a mathematical abstraction with a series of numbers and the same relation between each number, although the terms vary. The operation of neoliberalism may be demonstrated through the following arithmetic progression of squares.

$$1 \diamond 4 \diamond 9 \diamond 16 \diamond 25 \diamond 36 \diamond 49 \diamond 64 \diamond 89 \dots$$

Every space between the numbers ( $\diamond$ ) is an occurrence. The basic unit of the intensity of these occurrences is  $x$ , which remains the same or varies throughout the progression and depends on the intensity of the occurrence; it could be  $x1$ ,  $x7$ ,  $x8$ , etc. The numbers or the squares are the various spheres of activities, which vary in value, quality, quantity, properties, and performance. Yet, the basic operation of the progression is squaring. In the context of the world order, neoliberalism stands as the basic operation. It produces a set of waves that occur with either the same or different intensity engulfing one sphere after another that once stood independent, with its own values and identities. This recurs then

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223. This reconstitution, says Chimni in the context of United Nations, “is a cumulative result of (a) assigning a greater role to the corporate actors within the UN; (b) redefining the principle of non-use of force by the Western power-bloc against the third world states and; (c) adopting the neo-liberal state as a model for its member states, manifested in particular in its peace-building efforts in post-conflict societies.” See Chimni, *supra* note 35, at 14. For support, see U.N. Secretary General, *Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, available at <http://www.centerforunreform.org/node/206>. See also Richard Falk, *The United Nations System: Prospects for Renewal*, Jong-Il You, *The Bretton Woods Institutions: Evolution, Reform and Change*, and S.P. Shukla, *From GATT to the WTO and Beyond*, in GOVERNING GLOBALIZATION (Deepak Nayyar ed., 2002).

224. Devesh Kapur, *Processes of Change in International Organizations*, in GOVERNING GLOBALIZATION 335 (Deepak Nayyar ed., 2002).

225. Cf. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).



with the same or different intensity and consistency in other spheres. Even though the progression grows, its *basic* neoliberal character remains invariable.

### *B. The WTO and Neoliberalism: Juxtapositions*

The conceptualization of neoliberalism shows that the concept primarily necessitates a horizontal allocation of power and functions among various global actors and that international organizations (IO) constitute significant actors. The neoliberal functions of IOs in general include sustaining long-term cooperation among self-interested states, harmonizing global standards, perpetuating decentralization, and promoting global networking for cross-national interaction.<sup>226</sup> They carry out these functions in ways compatible with [neo]liberalism and the global order.<sup>227</sup> A simple analysis in neoliberal terms reveals that IOs function under a principal-agent relationship in which IOs derive authority from the state. A complex neoliberal approach says that the authority of IOs derive from social relations.<sup>228</sup> However, both views of IOs have their own reasoning and stand in a symbiotic relation.<sup>229</sup> The wisdom of both views is required to illustrate the correlation between the WTO and neoliberalism.

In the section to follow, the role and authority of IOs in the neoliberal state of affairs will be described in general. Drawing on that understanding, the WTO will be examined in the same terms. The process reveals that neoliberalism is the source of the WTO's normative power.

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226. For an analysis of horizontal power allocations in the context of sovereignty, see John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782 (2003).

227. Michael Barnett & Martha Finnemore, *The Power of Liberal International Organizations*, in POWER IN GLOBAL GOVERNANCE 161, 162 (Michael Barnett & Raymond Duvall eds., 2005).

228. *Id.* For a more detailed treatment on the complex neoliberal approach, see Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 707-15 (1999).

229. A seminal approach to the concept of IOs is that taken by Jan Klabbers. He conceptualizes IOs firstly as endowed with a managerial task, whereby they perform specialized tasks delegated by states and secondly in terms of an *agora* where IOs are public realms in which international issues can be discussed. He then threads the two concepts together despite their inherent and functional drawbacks. See Jan Klabbers, *Two Concepts of International Organization*, 2 INT'L ORG. L. REV. 277 (2005).

## 1. International Organizations in the New World Order

### a. International Organizations Situated

At the core of the general idea of IOs lies a synthesis of aspirations for an orderly world community and the positive creative influence such aspirations might derive from the policy and action of states.<sup>230</sup> In this scheme, states view IOs as instruments through which they might further the cause of an orderly world while retaining their national policies and interests, what Pitman B. Potter called “a very complex and delicate computation of costs and benefits.”<sup>231</sup> The simple impression is that international cooperation can be carried out more effectively through IOs, because IOs can accommodate differences of policy where everyone shows a high tolerance for disagreements. Inter-nation collaboration is the subatomic property of IOs.<sup>232</sup> However, neoliberalism requires IOs to be much more functional and demands their increased participation as sub-state actors in helping the state fulfill its neoliberal roles.<sup>233</sup> Theoretically, within neoliberalism, the sub-atomic property of inter-nation collaboration remains unharmed, as without mutuality transnational networks for the free mobility of capital and goods cannot be built. This shifts the pendulum towards the simple neoliberal (to some extent realist) view that the power of IOs is a cumulative product of state power. This is certainly a true assertion, although not a complete one. Barnett and Finnemore endorsed it, albeit under a different concern: “Certainly there are occasions when [] states do drive IO behavior, but there are also times when other forces are at work that eclipse or significantly dampen the effect of states on IOs.”<sup>234</sup>

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230. Charles E. Rothwell, *International Organization and World Politics*, 3 INT'L ORG. 605, 607 (1949).

231. Pitman B. Potter, *The Logic of International Relations and Organization*, 44 AM. POL. SCI. REV. 661, 664 (1950).

232. This “sub-atomic” property has been present throughout the various conceptualizations of IOs—functionalist integration theory, neo-functionalist regional integration theory, and interdependence theory. On functionalism, see DAVID MITRANY, *A WORKING PEACE SYSTEM* (1966); on neo-functionalist, see ERNST B. HASS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950-1957* (1958); on interdependence theory, see ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977). All three theories assert that international institutions can help states cooperate.

233. See *supra*, Part IV.A.

234. Barnett & Finnemore, *supra* note 228, at 714-15. This assertion is preceded by a suspicion that an IO's power is derived from state power. The skepticism is substantiated with the cases of the World Bank, NATO, The European Bank for Reconstruction and Development, and the OSCE, which perform the job of “norm diffusion” for powerful states. The authors are concerned that the realist [and neoliberal] theories that sustain these practices provide no “ontological independence” for IOs.

They then continued with a progressive plan: "Which causal mechanisms produce which effects under which conditions is a set of relationships that can be understood only by intensive empirical study of how these organizations actually do their business."<sup>235</sup>

The complex neoliberal approach, which maintains that the authority of IOs is generated from certain social relations, helps in understanding this relationship. This approach is called complex because it cannot be shown with a definitional ease, but rather requires a step-by-step presentation. By positioning IOs in the neoliberal scheme and by providing a concise clarification, the authority of IOs to a great extent can be attributed to their social position.

While conceptualizing neoliberalism, it was established that neoliberalism requires accumulation of capital by states and, accordingly, the removal of all barriers to the free mobility of capital and goods. In order to accomplish these objectives, states need interactions with various global actors. These interactions in their entirety typify "social relations." In other words, social relations mean the sum of exchanges through which global actors manage their commonized affairs across the world.<sup>236</sup> The management of common affairs—fashionably known as "global governance"—is not an easy task, given the diversity of national self interests. In addition, a lack of authoritative governmental institutions at the international level creates pervasive uncertainty. This structural anarchy results in the formation of regimes, which are "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations."<sup>237</sup>

235. *Id.*

236. *Cf.* CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS 109 (2001). Generally it is presumed that in the intensifying interactions between various global actors, states are likely to adopt protective barriers and re-create the conditions for enduring conflict, which prompt a need for governance and rule-making at the global level. For a treatment on the various facets of global governance, see Michael Barnett & Raymond Duvall, *Power in Global Governance*, in POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2005).

237. This definition of "regime" provided by Stephen D. Krasner is the most widely accepted. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983), originally published in Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185 (1982). For more on the regime literature, see for example ORAN YOUNG, GOVERNANCE IN WORLD AFFAIRS 189-93 (1999); Stephan Haggard & Beth Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491 (1987). For a review of studies on and approaches to regimes, see ANDRAES HASENCLEVER ET AL., THEORIES OF INTERNATIONAL REGIMES (1997). For a

Regimes are managed by classifying them on the basis of various "issues," e.g., international crime, security and conflict, environmental degradation, and migration. Regimes are "tool-kits" for the management of common affairs; norms, rules, and decision-making procedures are the tools.<sup>238</sup> The formation of a regime is *inter alia* a process of institutionalization,<sup>239</sup> and IOs are concrete institutions with formal structures and sets of rules. IOs can serve the needs of a regime in implementing and administering the provisions of the governance systems.<sup>240</sup> They help to create substantive agreements "by providing a framework of rules, norms, principles, and procedures for negotiation."<sup>241</sup>

Before going into detail, a caveat regarding the approach is in order. In the explanation to follow, the *formation* of regimes is viewed as a social action, the result of a particular social situation.<sup>242</sup> It follows that the formation of a regime is not a part of a state's general "governance" scheme, which is a strategy of sorts. Governance of common interests begins only with the institutionalization of issues. Regimes, however, provide a framework for this; regimes are *maintained* by human actions.

To describe effectively the position of IOs, an explanation is necessary starting with *governance* or, more specifically, one step back, with the formation of regimes. What necessitates the formation of regimes? In outlining the argument, the situation preceding the formation of new regimes is characterized as anarchical and uncertain. Despite the variations in formulations among the three streams of thought on regimes—the

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detailed treatment on how regimes are formed and what the creation of international regimes requires, see Robert Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325 (1982). For a case study, see THOMAS GEHRING, DYNAMIC INTERNATIONAL REGIMES: INSTITUTIONS FOR INTERNATIONAL ENVIRONMENTAL REGIMES (1994).

238. ARCHER, *supra* note 236, at 109.

239. James Bohman, *International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions*, 75 INT'L AFF. 499, 500 (1999). When regime formation is discussed as a process of institutionalization, "international organization" as a concept is strictly differentiated from "international institution." International relations are considered orderly and institutions are one form of that orderliness. "Institutions" can be defined more systematically as "the collective forms of basic structures of social organization as established by law or human tradition." An "international organization" in this context represents a form of institution that comprises "a formal system of rules and objectives and a rationalized administrative instrument, which has a formal technical and material organization: constitutions, local chapters, physical equipment, machines, emblems, letterhead stationery, a staff, an administrative hierarchy and so forth." See M. DUVERGER, *THE STUDY OF POLITICS* 68 (1972); P. SELZNICK, *LEADERSHIP IN ADMINISTRATION* 8 (1957). Both definitions are as quoted in ARCHER, *supra* note 236, at 2.

240. ORAN YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY* 164 (1994).

241. Keohane, *supra* note 237, at 337.

242. See Oran Young, *Regime Dynamics: The Rise and Fall of Regimes*, 36 INT'L ORG. 277, 279 (1982). As a footnote to this view, Young emphasizes its similarity to the philosophical tenets of legal positivism.

realists,<sup>243</sup> the neoliberals,<sup>244</sup> and the cognitivists,<sup>245</sup>—there is some level of unanimity as to the prevalence of anarchy and uncertainty before the formation of a regime.<sup>246</sup> Anarchy is generally defined as a system where both central authority and collective security are absent—a system of self-help and power politics.<sup>247</sup>

The paper will assert that anarchy is a social construction, akin to the Benthamite social situation. In other words, anarchy is not a moribund concept; it is, as Alexander Wendt premised, “what states make of it.”<sup>248</sup> States do not resort to self-help and power politics in all circumstances

243. The realist view on regimes is a power-oriented one. It works on the basis of a presumption that “states care not only for relative, but for absolute gain as well.” HASENCLEVER ET AL., *supra* note 237, at 3. Hence realists are skeptical about the effectiveness of institutions; they nevertheless realize the significance of regimes. Realists believe that the presence of a hegemon that has the resources and power to support the regime can ensure its continuity. See *id.* at 83-135 (providing general account of the realist position on regimes). See Charles P. Kindleberger, *Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides*, 25 INT’L STUD. Q. 242 (1981) (providing general account of hegemonic stability). For a general account of the realist position on regimes, see HASENCLEVER ET AL., *supra* note 237, at 83-135. On hegemonic stability see Kindleberger, *supra*.

244. Neoliberalist theories on regimes are interest-oriented ones. They posit that states are atomistic actors that seek to maximize their absolute gains and are indifferent to relative gains. “Cheating . . . is the greatest impediment to cooperation among rationally egotistic [nations].” Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT’L ORG. 485, 487 (1988) (providing an understanding of neoliberalist view on institutionalism in relation to realism). However, neoliberals believe that regimes can help states overcome this barrier to joint action by facilitating cooperation, providing information, lowering transaction costs, promoting linkages, and so on. For details, see HASENCLEVER ET AL., *supra* note 237, at 23-82.

245. The Cognitivist concept of regimes is knowledge based. There are two approaches to cognitivism—weak cognitivism and strong cognitivism. Weak cognitivists believe that ideas help to reduce uncertainty in international affairs. “[C]onsensual knowledge and epistemic communities facilitate policy innovation, diffusion, selection, and persistence.” Eric Brahm, *International Regimes, Beyond Intractability* (2005), [http://www.beyondintractability.org/essay/international\\_regimes/?nid=6584](http://www.beyondintractability.org/essay/international_regimes/?nid=6584). The advantage of this view is that regimes are seen as the result of dynamic ideas. Strong cognitivists consider the international system as a social structure. They emphasize the sense of obligation that exists and reasons for the varied pull of compliance. Thus regimes can act as a “source of self-understandings of the world.” *Id.* For a detailed account, see HASENCLEVER ET AL., *supra* note 237, at 136-210.

246. This version, however, is a refinement of a more crude formulation whereby anarchy is a perpetual phenomenon that is generally overcome by cooperation among states; anarchy then remains suppressed or hidden. For a discussion, see Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypothesis and Strategies*, 38 WORLD POL. 1 (1985).

247. Alexander Wendt, *Anarchy is what States Make of it: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 392 (1992).

248. *Id.* at 395 (emphasis omitted).

but are driven to do so by endogenous factors. They act on the basis of the meanings that the objects constitute for them.<sup>249</sup> Such meanings are defined in accordance with the social situation; to quote Wendt, “[a]ctors do not have a ‘portfolio’ of interests that they carry around independent of social context.”<sup>250</sup> Accordingly, anarchy exists because the social conditions, which include interests and interest-based interactions, necessitate it.

According to neoliberals, anarchy could be conquered by institutionalized patterns of cooperation.<sup>251</sup> Such a situation can be provided by regimes, which are principles, norms, rules, and decision-making procedures around which actors’ expectations converge. Through regimes, actors seek to reduce conflicts of interest and risk by coordinating their behavior.<sup>252</sup> However, the emergence of regimes is not a deliberate action; they are natural formations. Krasner conceptualized regime formation as “[the] intervening . . . [action] between basic causal factors . . . and outcomes and behavior.”<sup>253</sup> Although this action might be the result of egoistic self-interest on the part of some states or a concentration of power in a single actor or group of actors—both of which impede the rest of the actors and jeopardize common interests—the end result is a convergence of the expectations of many individual actors.

Such a convergence could occur for two reasons: 1) a desire to regain an equilibrium of common interests and 2) a fear that if the tables are turned, there is a likelihood of reciprocation.<sup>254</sup> The core of this contention is that regime formation is a societal response to anarchy and uncertainty, that is, a social force.<sup>255</sup> These forces lead to conventionalized behavior, which generates a certain set of values. The values then form the basis of international normativity.<sup>256</sup> Accordingly, a regime is a normative structure upon which states can construct shared understandings. The norms, however, are validated by the social conventions that create them. Yet, mere convergence of expectations around a set of valid norms is pointless. Given the decentralized nature of international relations, such a normative system remains ineffective; it requires institutional forms and organizational structures with decision-making power and procedures.

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249. *Id.* at 396-97.

250. *Id.* at 398.

251. *See, e.g.,* Keohane, *supra* note 237, at 325.

252. *See generally* Krasner, *supra* note 237.

253. *Id.* at 1.

254. This is a reversed version of the argument put forward in Robert Jervis, *Security Regimes*, 36 INT’L ORG. 357 (1982).

255. *See generally* Young, *supra* note 242.

256. *See* Jaye Ellis, *International Regimes and the Legitimacy of Rules: A Discourse-Ethical Approach*, 27 ALTERNATIVES: GLOBAL. LOC., POL. 273, 274-77 (2002).

*b. Why do International Organizations Matter?*

Under a neoliberal governance scheme, a system of shared values, norms, and enforcement mechanisms diffuses a common culture throughout the globe. The scheme, however, is manifested through IOs with programmed strategies related to voting, membership, and dispute settlement as well as administrative bodies such as secretariats. However, such structural features are common to all IOs that have existed to date. Why are modern IOs special? Why do they matter in the new world order? What makes them the centerpiece of contemporary scholarly discourse?

We now understand that IOs in a neoliberal scheme are in a pivotal position and perform multifarious tasks, but an increase in their number or activities does not evince authority. The authority of modern IOs is undisputed, although little is known about its source. Regime theorists generally rely on the Prisoner's Dilemma (PD) to account for it. They normally argue that the "system" (which includes regimes as well as IOs) increases the incentive to cooperate by "lengthening the shadow of the future, limiting the number of players, increasing the transparency of state action, and altering the payoff structure."<sup>257</sup> However, this view can be subjected to the criticism that states that are in iterative cooperation are not like prisoners, who stay separated from each other. This criticism will have little vigor, as will be pointed out below. Moreover, the PD only offers an explanation as to how the cooperation works; it implies that regimes have some kind of inherent quality that makes cooperation inevitable but fails to explain what that inevitability is. Otherwise, the PD can be an effective theory to explain the authority of IOs. The lacuna, however, can be filled in by drawing from the sociological discourse on globalization.

A good starting point for this discussion is the nation-state because the dominance of nation-states is parallel to the development of international relations.<sup>258</sup> In the world system, nation-states guarded their territories, nurtured their cultures, and secured recognition of their autonomy from other states through international relations,<sup>259</sup> what Anthony Giddens calls "reflexively ordered relations."<sup>260</sup> The system overall was a "simple model[ ]

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257. See Haggard & Simmons, *supra* note, 237 at 513 (providing basis for this summary of the regime theorists' view on the authority of regimes as a whole).

258. MALCOLM WATERS, *GLOBALIZATION* 47 (1995); drawing heavily on ROBERTSON, *supra* note 195; GIDDENS, *infra* note 257.

259. See ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 73 (1990).

260. *Id.*

of world polity.”<sup>261</sup> At the same time, nation-states were citadels of national interests and in a state of anarchy were sanctuaries of security and peace. The world in that state of affairs was a collection of states dwelling in anarchy. The nation-state system with its centralized governmental control over the citizens posed the biggest impediment to achieving the neoliberal goals. The neoliberal action plan targeted the system accordingly and attempted to remove all the “national barricades” that it had erected. This process involved lifting all kinds of social relations out of their national/local context and restructuring them at the global level.<sup>262</sup> This decontextualization posed a formidable threat to the fundamental design of nation-states,<sup>263</sup> but the argument does not mean that the nation-state is dead; rather, it has gained resilience and now performs actions once managed unilaterally in cooperation with other global actors and in an enhanced network of relationships. These relationships between the local and the global are facilitated by the annihilation of space by time, Giddens’ “time-space distanciation process,”<sup>264</sup> as a result of which social relationships materialize across great expanses of time and space. States now deal with each other through non-state actors, who may even remain invisible to each other, much like the prisoners in the PD. The developing progression of neoliberalism requires states, as well as other actors, to keep themselves informed about the multiplying nature of activities and “system developments,” including changes in the character and rules of the market. To this end, the participants build fiduciary relationships while remaining cautious about risks. To maintain these relationships, a knowledge of the risks involved as well as other actors’ strategy is necessary, and this is where IOs play a significant role.

In this scheme, IOs, as framed by Jan Klabbers, serve as an *agora*<sup>265</sup>—a sort of epistemic forum, although Klabbers called the idea “less progressive, less optimistic, [and] less modernist.”<sup>266</sup> Klabbers’ position

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261. ROBERTSON, *supra* note 195, at 61 (internal quotations omitted).

262. WATERS, *supra* note 258, at 49 (drawing on GIDDENS, *supra* note 259).

263. See TONY SCHIRATO & JENN WEB, UNDERSTANDING GLOBALIZATION 104 (2003) (summarizing the effect of globalization on nation-states). However, scholars such as Giddens and Robertson believe that the fundamental logic of globalization lies in the very concept of the nation-state. Waters deduces this logic in the following words: “nation-states are bounded social systems; they will compete for resources and markets and they will not necessarily be materially self-sufficient; they will therefore engage in economic, military, political (diplomatic) and cultural exchanges across the boundaries that are both co-operative and conflictual; differential outcomes and therefore cross-national mimesis will ensue; states will seek to systematize international relations in order to secure the conditions of their own existence.” (parenthesis as in the original). WATERS, *supra* note 258, at 45.

264. GIDDENS, *supra* note 259, at 17-21.

265. Klabbers, *supra* note 229, at 282.

266. *Id.* at 283.



was akin to the cognitivist view on regimes that regimes, including IOs, have constitutive effects on actors' identities by providing knowledge about the ideas that are gaining importance in a given social order.<sup>267</sup> In this perspective, IOs provide "system awareness," offer expertise on specific issues, help states to build a reputation, and so on. Nevertheless, in a broader scheme, IOs are not mere epistemic communities; to borrow from Klabbers again, they operate on a "management-oriented concept" that facilitates increased cooperation. Keohane has an analogous logic to offer whereby nation-states in anarchy use international regimes including IOs to accomplish those objectives which may not be possible through unilateral action.<sup>268</sup> In this view, IOs provide outlets for settling disputes and universalizing norms and cultural values by building rules, monitoring compliance with those rules, and so forth. Cumulatively, IOs are focal points where actors' expectations converge—the material manifestations of regimes. Defection, mistrust, and other egotistic actions of states remove any scope for convergence and threaten common interests. The structural features of modern IOs, tailored to meet neoliberal requirements, facilitate convergence: the *agora* produces rules laying down norms; the epistemic community disseminates the situational requirements of rules as well as information regarding the dividends for compliance and the consequences of deviation; and the dispute settlement system facilitates and monitors compliance. Noncompliance is least preferred (though not unknown), for IOs will divulge the deviation, which then affects the reputation of the one who deviates from the rule. In addition, IOs provide amenities for retaliation against the transgressor. In sum, any cooperative venture outside the IOs is impossible, for every actor who stays outside the IO framework remains ignorant of the rules of the game and ends up a loser.

### C. WTO: The Neoliberal Manifesto

In this section, it is first shown that the WTO meets the criteria for a neoliberal IO as characterized above. This is done in two stages: 1) by unknotting the old tale of "GATT to WTO" in a regime-theoretical perspective to show that the current multilateral trade regime emerged from an anarchical situation, which created the GATT, and that the

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267. See generally HASENCLEVER ET AL., *supra* note 237.

268. See ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN WORLD POLITICAL ECONOMY 62 (1984).

regime subsequently underwent a “change” and necessitated an institution like the WTO with a large dose of neoliberalism; and 2) by demonstrating that the WTO’s institutional apparatuses and strategies are designed in such a way as to enable it to fulfill the role meant for an IO in the neoliberal agenda.

### *1. Anarchy and the Trade Regime: From GATT to the WTO*

In the aftermath of World War I, the United States set a pro-tariff policy in motion by enacting the Smoot-Hawley Tariff Act.<sup>269</sup> One of the immediate reasons for this policy, according to President Herbert Hoover, was to counter the substantial hike in the tariff duties on agricultural products in the world market.<sup>270</sup> Immediate retaliation against this policy came from Canada—the major trading partner of the United States—in the form of measures such as increasing the preferences given to British products, levying countervailing duties on certain products and making minor adjustments and reductions in the general tariff rates.<sup>271</sup> In this crisis, countries like Britain and France sought other pastures, whereas Germany resorted to autarchy. Soon all nations raised their tariffs and hid behind the walls of protectionism. In this “tariff war,” the self-help trade measures adopted by the states led to a precipitous decline in international trade and according to some economic historians, contributed to the economic depression of the 1930s.<sup>272</sup> Quantitative analyses show that in the wake of the Smoot-Hawley Act “the volume of US imports plummeted 41.2% between the second quarter of 1930 and its local trough in the third quarter of 1932,”<sup>273</sup> whereas world trade in general declined 14%.<sup>274</sup> The impact of Smoot-Hawley—falling prices, unemployment, and bank failures—demonstrated that excessive protectionism is harmful. Many economic historians defensively argue that the United States tariff policy in the wake of the Great Depression was a response to *changes* in the economic conditions and undercurrents of national

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269. Mario J. Crucini, *Sources of Variation in Real Tariff Rates: The United States 1900-1940*, 84 AM. ECON. REV. 732, 732 (1994). See also Colleen M. Callahan, Judith P. McDonald, & Anthony P. O’Brien, *Who Voted for Smoot-Hawley?*, 54 J. ECON. HIST. 683, 683 (1994).

270. Judith A. McDonald, Anthony P. O’Brien, & Colleen M. Callahan, *Trade Wars: Canada’s Reaction to the Smoot-Hawley Tariff*, 57 J. ECON. HIST. 802, 806 (1997).

271. See *id.* at 809.

272. See, e.g., *id.* at 802.

273. Douglas A. Irwin, *The Smoot-Hawley Tariff: A Quantitative Assessment*, 80 REV. ECON. & STAT. 326 (1998). However, in this review, the author shows that of the 40% decline in imports, only 8-10% can be directly attributed to the rise in tariffs.

274. Jakob B. Madsen, *Trade Barriers and the Collapse of World Trade During the Great Depression*, 67 S. ECON. J. 848, 848 (2001).

politics and an eventual choice.<sup>275</sup> Other countries, in order to secure their economies, were left with no choice but to resort to the firewall of protectionism. No matter what the rationale and policy behind the tariff hikes and the subsequent retaliatory actions were, the economic scenario represented anarchy in trade and political relations.

Following these developments, states, particularly the United States, desperately wanted to overcome the problem of excessive protectionism in which all were left worse off.<sup>276</sup> However, the pitfalls of an instantaneous unilateral tariff reduction were clearly apparent. Considering the exigencies of the situation, the United States began to campaign for bilateral agreements with trading partners as the most feasible method at hand. In 1933, Cordell Hull, then secretary of state drafted a bill authorizing the president to negotiate such agreements.<sup>277</sup> The bill became the Reciprocal Trade Agreements Acts (RTAA), which was a turning point towards liberalization of the world economy.<sup>278</sup>

The policy of trade liberalization under bilateral agreements was a great success.<sup>279</sup> At the same time, reciprocal tariff liberalization had a political side-effect: if tariffs were reduced instantly, "the export sector support for a reduction in foreign tariffs would serve as a political counterweight against complaints from the domestic import-competing

275. See, e.g., David Epstein & Sharyn O'Halloran, *The Partisan Paradox and the U.S. Tariff: 1877-1934*, 50 INT'L ORG. 301, 319 (1996).

276. See generally Percy W. Bidwell, *Tariff Reform: The Case for Bargaining*, 23 AM. ECON. REV. 137 (1933) (capturing the policy mood at the time). See also CHARLES KINDLEBERGER, *THE WORLD IN DEPRESSION: 1929-1939* (HISTORY OF THE WORLD ECONOMY IN THE TWENTIETH CENTURY) 291-308 (1973).

277. Michael J. Hiscox, *The Magic Bullet? RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG. 668, 671 (1999) (obtaining information from CORDELL HULL, MEMOIRS OF CORDELL HULL 365 (1948)).

278. General economic history literature gives two reasons, wittily called the "magic bullets" by Hiscox, for the RTAA and the trade liberalization in the mid-1930s. One was that the practice of logrolling prevalent among the members of Congress was alarming for any trade liberalizing measure and hence tariff setting was delegated to the executive branch to ensure more effective policies. The other was the Democratic Party's pro-liberalization policy, whereby it based the measures on reciprocal concessions that would strengthen the support from the export interests. However, Hiscox rejects complete reliance on these two reasons and argues that the trade liberalization policy and RTAA were to a large extent influenced by the societal preferences and the policy positions taken by the parties. For a more detailed account see Hiscox, *supra* note 277, at 673.

279. Between 1934 and 1939 twenty trade agreements were signed under the RTAA covering some 30% of U.S. exports and 45% of imports. See L. Alan Winters, *The Road to Uruguay*, 100 ECON. J. 1288, 1290 (1990).

sectors.”<sup>280</sup> However, the principle of non-discrimination—which served to speed the liberalization program—was seen as the remedy. In effect, through a policy of non-discrimination, “bilateral reciprocal tariff reductions could be multilateralized.”<sup>281</sup>

There was a general skepticism regarding multilateralism, particularly its Most Favoured Nation (MFN) treatment, for “no country would be inclined to make concessions to reduce a particular US tariff if there [were] a danger that in the US’s next negotiation another country would be allowed access at a lower rate.”<sup>282</sup> Hence, states considered it necessary to carry out a series of bilateral deals at the same time. The combination of bilateral reciprocity and MFN was not easy to cope with but states were nevertheless optimistic about the prospects of a multilateral trading system.<sup>283</sup> Their optimism mainly centered on a set of principles such as non-discrimination and reciprocity, which could ensure them a fair deal in trade relations. A sort of “indivisibility,” characterized by John Gerard Ruggie as a “social construction,”<sup>284</sup> had taken shape out of the common interests and expectations of states. Soon the states resolved to formalize their interests and expectations regarding these principles and international efforts came into play. The goal was an International Trade Organization (ITO) that would specify the rules under which multilateral negotiations would go on, as well as the way in which the rules would be enforced.<sup>285</sup> In due course, an interim agreement was reached—GATT.<sup>286</sup> The ambitious scheme of the ITO failed because of a refusal by the U.S. Congress to ratify the ITO Charter, and the interim GATT, drawn up on the principles envisioned for the ITO, was converted into a normative institution enabling members to pursue multilateral trade negotiations.<sup>287</sup>

GATT marked the genesis of a multilateral trade regime. However, it was a regime concerned with only one area of trade—tariffs.<sup>288</sup> Several trade issues, such as prices and earnings derived from the export of primary commodities, the effect of private business practices on trade, and non-tariff barriers (although their impact was minor), remained

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280. Kyle Bagwell & Robert W. Staiger, *GATT-Think* 29 (Nat’l Bureau of Econ. Research, Working Paper No. 8005, 2000).

281. *Id.*

282. Winters, *supra* note 279, at 1290.

283. *See id.* at 1290-91.

284. John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT’L ORG. 561, 571 (1992).

285. For details, see HOEKMAN & KOSTECKI, *supra* note 1, at 12-15.

286. Kofi Annan, *Laying the Foundations of a Fair and Free World Trade System*, in *THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE* 19, 20 (Gary P. Sampson, ed., 2001).

287. *Id.*

288. Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulations of Trade Barriers: Regime Dynamics and Functions*, 35 INT’L ORG. 561, 562 (1981).

outside the scope of GATT. Yet, states' expectations converged in GATT, which successfully regulated trade barriers through its own set of rules and decision-making procedures.

The principle of economic nationalism that permeated the era posed governance dilemmas for the new regime. The situation highlighted the need for a hegemon that would be able to maintain open markets for surplus goods and sustain the flow of capital while managing the institutions and instilling values and norms into the regime. The United States, which had control over raw materials and capital and a competitive advantage in value-added goods, took on this function.<sup>289</sup> However, its tenure was short-lived; the power-oriented United States hegemony could not successfully maintain the robustness of the regime. According to John Ikenberry, the principal reason for the failure of the United States hegemony in the multilateral trade regime was the economic and political disequilibrium created by the war.<sup>290</sup> In effect, the objectives of hegemony could not be balanced with the power at the disposal of the United States.<sup>291</sup> The collapse of the unipolar global structure and the emergence of bipolarism as a part of the Cold War loosened the United States' grip over power structures. In addition, the emergence of regional arrangements with legalized preferential trading arrangements attenuated norms like nondiscrimination. In the wake of these changes, the norms and rules of GATT underwent substantial erosion, moving the regime towards being a cluster of sterile norms and rules.<sup>292</sup> Yet, it was not until 1970s that the trade regime came under severe pressure.<sup>293</sup> In the wake of the economic recession, protectionist measures became widespread, mostly in the form of non-tariff barriers.<sup>294</sup> GATT made an attempt to

289. See generally G. John Ikenberry, *Rethinking the Origins of American Hegemony*, 104 POL. SCI. Q. 375 (1989).

290. *Id.* at 385.

291. *Id.*

292. Finlayson and Zacher have identified seven broad categories of norms of the multilateral trade regime under GATT: nondiscrimination, liberalization, reciprocity, the right to take safeguard action, economic development, norms relating to multilateralism, and the role of states with major interests in trade relations. They analyze in detail why these norms failed to be effective under the multilateral trade regime. See Finlayson & Zacher, *supra* note 288, at 566-98.

293. Howse, *supra* note 51, at 101.

294. Drawing on Bhagwati, Howse lists the factors that led to the economic recession in the 1970s. These included the collapse of the gold standard, mounting intellectual and practical challenges to the postwar economic model, which in turn led to various macro-economic interventions for adjustment purposes, as well as new practices such as voluntary export restraints. See *id.* See also JAGDISH BHAGWATI, PROTECTIONISM (1988).

address the challenges of the new protectionism through the Multilateral Trade Negotiations (MTN) in what was an economically unstable and politically disturbed world,<sup>295</sup> but its institutional inadequacies became apparent in short order, e.g., the obsolescence of rules and outmoded negotiating strategies.<sup>296</sup> At the normative level, GATT was strangled between its conventional economic nationalism and the call for interdependency that permeated the mid-1970s.<sup>297</sup> These concerns became the core of the Uruguay Round negotiations.

The Uruguay Round proceeded with an ambitious agenda of dealing with non-tariff barriers to trade and other liberalization policies.<sup>298</sup> In the negotiations, many of the GATT rules were retained, and some new ones were instituted in order to address new substantive areas, e.g., intellectual property, investments and services. One significant trend noted in the Round was the use of mutual adjustments in connection with protectionist non-tariff barriers that were constrained by domestic political and economic pressures.<sup>299</sup> Compromises were also reached in the liberalization of agriculture and textiles. The results nevertheless indicated the continuation of multilateral trading arrangements.

The core architectural principles of GATT, e.g., Most Favoured Nation Treatment (MFN) and reciprocity, were transposed into the WTO, although subject to minor alterations, mostly at the operational level. For example, the scope of derogation from MFN in the form of exemptions was broadened in the Uruguay Round.<sup>300</sup> Reciprocity also took on new forms to deal with non-tariff measures.<sup>301</sup> In the area of dispute settlement, apart from remarkable structural changes, the system of power- and diplomacy-

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295. According to Jackson, the political world was watching the U.S. military activity in Vietnam, which had economic repercussions such as hike in oil prices, high unemployment and rampant inflation. Most of the political systems were operating on narrow parliamentary majorities and had to respond to the complaints about the harm caused by imports. JACKSON, *supra* note 1 at 36. *See also id.* at 34-38 (describing how GATT conducted the MTN in the midst of these issues).

296. *Id.* at 39-42.

297. *See* Robert Keohane, *International Organization and the Crisis of Interdependence*, 29 INT'L ORG. 357 (1975) (sketching interdependence).

298. For details, see Winters, *supra* note 279, at 1296-1303. *See also* Bernard Hoekman, *New Issues in the Uruguay Round and Beyond*, 103 ECON. J. 1528 (1993).

299. KEOHANE, *supra* note 268, at 194.

300. Although GATT demanded unconditional MFN, it provided exceptions relating to balance of payment difficulties, the establishment of customs unions and free trade areas, dumping, and the accession of new members. Under the WTO, exceptions relate to balance of payment difficulties, newly acceded members, general and security exceptions, anti-dumping, customs unions and free trade areas, the settlement of disputes, nullification and impairment, and the establishment of infant industries. For details, see RORDEN WILKINSON, *MULTILATERALISM AND THE WORLD TRADE ORGANIZATION: THE ARCHITECTURE AND EXTENSION OF INTERNATIONAL TRADE REGULATION* 80-99 (2000).

301. *See* HOEKMAN & KOSTECKI, *supra* note 1, at 76.

based dispute settlement gave way to a rule-based approach.<sup>302</sup> Other changes in this regard included the added legitimacy of the dispute settlement system, enhanced judiciability, and international law obligations under the rules.<sup>303</sup> On balance, the shift from GATT to WTO can be characterized as a “system transplantation.”

At this point a summation of these events from a regime-theoretical perspective seems relevant. However, a rigorous analysis of the “regime status” of the multilateral trading system is beyond the scope of this article.

The multilateral trade regime took shape from the vantage point of the post-world-war political economy. Although the regime aimed at an open trading structure and had liberal sentiments, it lacked strategies for the effectuation of its goals. The United States, which had both liberal sentiments and the ability to invest in and support the costs of a regime, became the hegemonic power within the regime,<sup>304</sup> which at the risk of exaggeration, could be described as *Pax Americana*.<sup>305</sup> However, after a short period of ascendancy, the United States hegemony began to crack under pressure, leaving the principles, norms, rules, and decision-making procedures of the regime in a state of ambiguity.<sup>306</sup> The ambiguous nature of the regime impacted actual practice with a high level of inconsistency, thereby weakening it.<sup>307</sup> Yet, the regime did not collapse altogether; it endured with the aid of proliferating cooperation—the natural alternative to hegemony. Cooperation thus came to sustain the regime, but the modules of the regime—norms, principles, rules, and procedures—that had been shaped in accordance with hegemonic needs required a retooling in keeping with the needs of cooperation. This

302. JACKSON, *supra* note 1, at 118-32.

303. *See generally id.* at 162-67.

304. There is abundant literature on the theory of hegemonic stability. *See, e.g.*, KEOHANE, *supra* note 268, at 182-216; HASENCLEVER ET AL., *supra* note 237 (reviewing the theory); *but see* Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 579 INT'L ORG. 579 (1985) (criticizing the theory).

305. Snidal, *supra* note 304, at 613.

306. *See* KEOHANE, *supra* note 268 at 135-81 (providing a progressive picture of the rise and fall of American hegemony).

307. According to Krasner, “[i]f the principles, norms, rules, and decision-making procedures of the regime become less coherent, or if actual practice is increasingly inconsistent with principles, norms, rules, and procedures, then [it means] a regime has weakened.” Krasner, *supra* note 237, at 189 (emphasis omitted).

transformation of the rules, procedures, norms and principles of the regime constituted a comprehensive change.<sup>308</sup>

In this development, the trade regimes—old and new—represented the variable intervening between certain basic causal factors, e.g., economic self-interest, power shifts and the resulting common expectations, and certain outcomes and behavior. If Stephen Krasner's assertion that regimes are sometimes dependent variables is taken seriously,<sup>309</sup> then it follows that basic causal factors influence the nature of the regimes. This is exactly what happened in the case of the multilateral trade regime. Both the hegemonic and the cooperative regimes were predisposed by the basic factors discussed above.

However, the theory that influenced the development of the second phase of the multilateral trade regime was interest-based, which favored (the scheme of) cooperation. It coincided with the advent of a liberal market ideology—neoliberalism.<sup>310</sup> The interest-based theory nevertheless recognized the economic self-interests of states in the trade regime—a feature it shared with the power-based approach—and cooperation was only seen as a mode for coordinating common expectations among states.<sup>311</sup> The threat of protectionism hung over the world economy as a consequence of the liberal market ideology. States, in pursuit of capital, were already racing to the bottom by erecting various barriers—political, cultural, and environmental. In terms of strategy, they resembled the prisoners in the PD, secluded from one another and speculating on one another's action, with each wanting to be better off than his counterparts.<sup>312</sup> For this reason, states looked upon the trade regime for mutual gains. What they saw, however, was a trade regime handicapped by a lack of institutional coordination. The pressing need of the time was a new IO to formalize the norms, rules and principles and to enforce these by way of sanctions. The WTO was established in response to this situation.

As the material manifestation of the multilateral trade regime, the WTO is primarily expected to ensure predictability in trade deals,

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308. Krasner has classified regime change into change within a regime and change of a regime. If there is a change in the rules and procedures of the regime, it constitutes a change within the regime, whereas any change in the norms and principles constitutes a change of the regime. *Id.*

309. *Id.* at 195.

310. In order to avoid confusion between the neoliberal view under IR literature, which deals with regimes in cooperative terms, and neoliberalism as the liberal market ideology—the central theme of this article—the former is presented as an “interest-based theory.”

311. *Cf.* KEOHANE, *supra* note 268, at 51-55 (repeatedly emphasizing the existence of cooperation does not presuppose harmony). *See also* HASENCLEVER ET AL., *supra* note 237, at 28-33.

312. *See* HASENCLEVER ET AL., *supra* note 311, at 31 n.7 (illustrating the Prisoner's Dilemma game in the interest-based context).



precluding any scope for unpredictable moves on the part of states.<sup>313</sup> Its auxiliary functions in a broader perspective include harmonizing global trade standards, diffusing norms and values, shaping the future neoliberal manifesto by establishing cross-sectoral linkages<sup>314</sup> and enforcing the neoliberal agenda.

## 2. *The Neoliberal Strategies and Tools in the WTO*

Under neoliberalism, tasks are equitably delegated by the state (which remains the epicenter) among various actors. Such delegation of tasks is made on the basis of certain performance criteria and on mutually constitutive terms with neoliberal requirements. In this scheme, the state yields a lion's share of its authority to IOs, with the rationale that IOs constitute the tools for the governance of common state interests. However, given the nature of their existence as "juridical persons," IOs face many restrictions and cannot perform every neoliberal role assigned to them. This handicap has been adequately remedied in global governance by framing apposite tools and functional working arrangements, although many are left to be designed. Several of the innovative institutional strategies in the WTO—lauded and censured—are a reflection of the governance strategy. This part of the article will analyze three novel institutional features of the WTO: the provision for *amicus curiae* briefs, negative consensus, and trade policy review. The discussion will not focus on the scholarly perspectives on these strategies, which are well articulated elsewhere;<sup>315</sup> rather it aims to highlight how they complement neoliberalism.

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313. This view is buttressed by the bicycle theory, according to which a multilateral trade regime resembles a bicycle, which must gradually and incrementally go forward. Despite the pressures, economic contingencies, and political circumstances, the bicycle regime must progress towards even freer trade. On this journey, IOs like the WTO, by ensuring predictability regarding the route, facilitate the smooth progress of the bicycle—the multilateral trading system. For a basic account of the significance of the theory, see James Bacchus, *The Bicycle Club: Affirming the American Interests in the Future of the WTO*, 37 J. WORLD TRADE 429, 430 (2003).

314. For perspectives on linkages, see Symposium, *The Boundaries of WTO*, 96 AM. J. INT'L L. 1 (1996). For a recent discussion in this vein, see Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79 (2006).

315. See, e.g., Steve Charnovitz, *Opening the WTO to Nongovernmental Interest*, 24 FORDHAM INT'L L. J. 173 (2000); C.L. Kim, *The Amicus Brief Issue at the WTO*, 4 CHINESE J. INT'L L. 85 (2005).

*The concept of amicus curiae briefs:* Amicus curiae<sup>316</sup> (hereinafter amicus), for international law, exemplifies private actor participation in international lawmaking. While the concept is not alien to international law,<sup>317</sup> it does not have any glorious tradition of practice.<sup>318</sup> However, there has been an exponential increase in the number of amicus briefs before the international courts in the era of globalization.<sup>319</sup> The concept came into the limelight when the WTO Appellate Body's (AB) overruled a Panel report rejecting an application for an amicus brief in the Shrimp Turtle Case.<sup>320</sup> Since then, however, the available jurisprudence of the DSB provides a convoluted picture of amicus participation in dispute settlement with the AB (which is confronted with the interpretation) most of the time hiding behind extreme formalism.<sup>321</sup> The abrupt rejection by the AB of all applications for filing an amicus in the *Measures Affecting Asbestos and Asbestos-Containing Products* (Asbestos case) is touted as an instance of the victory of state sovereignty over the WTO.<sup>322</sup> Yet, behind the molds of formalism and the glorification of state sovereignty lurks the organization's *status quo* as a site for the governance of globalization.<sup>323</sup> If the provision for amicus participation is interpreted less in strict legal terms and more in light of the existential logic of the WTO, the organization's receptiveness to the universalization of liberal democratic

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316. The term literally means "friend of the court" who calls the attention of the court to some point of law or judgment or on any matter relating to the case. OXFORD ENGLISH DICTIONARY, 2nd ed. 1989. The provision for amicus curiae briefs is generally set out in the writ of certiorari.

317. There are quite many instances where nongovernmental organizations participate in the negotiations at various international bodies, such as the ILO and UN. However, such participation has not been widespread in international settlement of disputes.

318. It was understood that international courts had the power to permit amicus participation under the general principles of law. Yet, in most of the cases the statute establishing the court specifically conferred this power upon it. See Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 238-39 (2002). In this regard, also see Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994).

319. Amicus participation is not limited to the WTO, but has also been seen in the International Criminal Tribunals for Rwanda and Yugoslavia, the Inter-American Court of Human Rights, and others.

320. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 99-110, WT/DS58/AB/R (Oct. 12, 1998).

321. See, e.g., Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 50-57, WT/DS135/AB/R (Mar. 12, 2001).

322. See, e.g., Hollis, *supra* note 318.

323. Jens L. Mortensen, *The Institutional Requirements of the WTO in an Era of Globalization: Imperfection in the Global Economic Polity*, 6 EUR. L.J. 176, 77 (2000). However, given the institutional imperfection of the WTO, Mortensen does not fully agree with the view that the WTO has become a governance site.

values is clear.<sup>324</sup> Given that such values are the cornerstone of governance, the participation of civil society in the WTO's governance task is essential. This indispensability has a simple logic: when the transplantation of social activities from the local to the global level took place, it also required a transformation, characterized by Thomas Franck as "a cosmic but unmysterious change," of the democratic rights of civil society from the national level to the universal level.<sup>325</sup> This democratic right by design conferred upon civil society a right to be consulted and to take part in the global governance process.<sup>326</sup> However, these democratic rights and the associated public participation are much larger in scope than those seen in the IO-NGO relations of the recent past.

The scope of amicus participation in the overall neoliberal program for the WTO cannot be overstated. Its significance cannot even be restricted to that of a mere procedure of judicial efficiency. There is likelihood of falling prey to the latter approach if the DSB's role is measured only in terms of the settlement of disputes. However if one considers the overall functions of the DSB, i.e., securing a positive solution that is mutually acceptable to the parties and thereby maintaining the equilibrium of the multilateral trade regime, it becomes apparent that the DSB needs to reconcile conflicting values, rules, cultures, social activities, ideologies, tastes, and so on. In other words, the DSB plays an indirect role in homogenizing a broad-based consciousness. In this perspective, every dispute before the DSB is a sign of a threat of disequilibrium in a given area that needs to be rectified. Information regarding the state of affairs in the area under threat is a prerequisite for the effective reinstatement of a balance, as well as an indication of the values and norms that need repair. A lawyer's brief is likely to overlook

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324. The provision that is of primary importance in this regard is Article 13 of the DSU. However, jurisprudence shows that Articles 11 (objective assessment criterion) and 17(9) (procedural autonomy) are used as aids in interpreting Article 13. For support, see Appellate Body Report, *United States Imposition of Countervailing Duties on certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, ¶¶ 36-42 (May 10, 2000).

325. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 85 (1995).

326. An argument in a similar vein is made in Petros Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in *EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUSE-DIETER EHLERMANN* 317 (Armin von Bogdandy, Petros C. Mavroidis & Yves Meny eds., Kluwer, 2002), available at <http://www.worldtradelaw.net/articles/mavroidis.pdf>.

the interests of the relevant actors in the given area, consideration of which is decisive for restoring a balance and for preventing future imbalances. Provisions like amicus participation, aside from providing the decision makers with a true picture of the situation, enable the relevant actors, such as civil society, to offer resistance to any sweeping changes—a good neoliberal bargain.

*Negative consensus:* Negative consensus is a well-known negotiating strategy, but its judicial application, brought out by the WTO, is an innovation. In this strategy, a proposal—introduced in a negative manner, e.g., “Panel Report X will not be adopted”—is deemed to have been accepted when there is *no* objection from any WTO member present at the meeting of the DSB.<sup>327</sup> It is obvious that the winning member will oppose the non-adoption of a Panel report in its favor, thereby making the adoption practically automatic. In short, a decision is said to have been taken when a consensus fails. The established reason for such a procedure in the WTO decision-making process is to overcome the problem common under GATT of non-adoption, or blocking, of Panel reports, which required adoption by consensus at various stages.<sup>328</sup> Non-adoption served the GATT Contracting Parties as a delaying strategy.<sup>329</sup> Negative consensus has overcome this problem.

When negative consensus was introduced, a time limit was set for every legal process that required a negative consensus vote.<sup>330</sup> In effect, no such DSB proceedings can be delayed on account of a lack of consensus. If this is the case, then what does negative consensus aim at? First, it aims at minimizing aggressive unilateralism.<sup>331</sup> Second, and significantly, it acts as a safety valve by ensuring the unhindered progress of the multilateral trade regime, which is moving steadily forward towards freer trade with the advance of neoliberalism. Economists have cautioned the world about the possible danger of retarding the trade regime,<sup>332</sup> the logic of which is aptly captured by James Bacchus in terms of the bicycle theory:

[W]hatever the pressures, whatever the economic happenstances, and whatever the political circumstances, we must always keep the bicycle we call the “world trading system” going forward by making ever more progress toward ever freer trade. . . . [I]f we do not [move steadily forward], the world will be overwhelmed by all the many reactionary forces that would have the nations of

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327. DSU art. 16(4).

328. JACKSON, *supra* note 1, at 384–85.

329. *Id.* at 123.

330. *Id.* at 384–85.

331. ISIKELI MATAITOGA, THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT MECHANISM: A DEVELOPING COUNTRY PERSPECTIVE 2 (2005), <http://documents.ag.gov.fj/wto/DisputeResolution-mataitoga.pdf>.

332. See generally BHAGWATI, *supra* note 294.

the world retreat from trade. . . . [T]he world will turn away from growing economic integration, turn away from the mutual propensity of growing economic interdependence, and turn inward toward all the self-deceiving illusions and all the self-defeating delusions of an isolating and enervating economic autarchy.<sup>333</sup>

Given the role of the DSB in maintaining the balance of the trade regime and in facilitating the progress of the multilateral trading system, its institutional limbs must also work towards removing all procedural barriers which are likely to encourage inertia. A consensus rule like the one that stalled the adoption of many Panel Reports in GATT is next to impossible in the WTO. The present automatic nature of the procedure foils any blocking or halting of DSB proceedings and ensures the organization's unconstrained functioning.

*Trade policy review:* The Trade Policy Review Mechanism (TPRM) is the surveillance wing of the WTO, which monitors and periodically reviews the trade policies of the member countries.<sup>334</sup> The TPRM enhances the transparency of members' trade policies and thereby facilitates the smooth functioning of the multilateral trading system.<sup>335</sup> Central to the strategic objectives of the TPRM is the harmonization of the trade policies of various countries, which, if left in discord, would likely encourage protectionism and impede free trade. A system of transparency in national trade policies helps the member countries to better understand and evaluate each other's position and coordinate their activities accordingly.<sup>336</sup> The resulting openness foils any protectionist measures. However, a review by the TPRM is not an investigation culminating in a judicial process and followed by sanctions for nonconformity.<sup>337</sup> This orientation enshrined in the WTO Agreement itself declares: "[Trade policy review] is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement

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333. Bacchus, *supra* note 313, at 430.

334. See Annex III of the Agreement Establishing the World Trade Organization. Generally, two reports on the trade policies of the member country under review are prepared; one by the WTO secretariat and the other by the government of the member country under review. The former is an independent one, whereas the latter is a governmental policy statement. Trade Policy Review Mechanism, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, Legal Instruments- Results of the Uruguay Round [hereinafter TPRM], [http://www.wto.org/english/docs\\_e/legal\\_e/29-tpm.pdf](http://www.wto.org/english/docs_e/legal_e/29-tpm.pdf).

335. TPRM ¶ A.

336. Petros Mavroidis, *Surveillance Schemes: The GATT's New Trade Policy Review Mechanism*, 13 MICH. J. INT'L L. 374, 375 (1992).

337. See Roderick Abbott, *GATT and the Trade Policy Review Mechanism: Further Reflections on Earlier Reflections*, 27 J. WORLD TRADE 117, 117-18 (1993).

procedures, or to impose new policy commitments on Members.”<sup>338</sup> The TPRM ensures smooth progress towards freer trade.

If this is the legal status of the TPRM, then its philosophical base is in neoliberalism. A compelling argument supporting this assertion is found in the IR literature, in the cognitivist approach to regimes. Cognitivism, despite the duality in the school,<sup>339</sup> emphasizes the importance of ideas and knowledge in the shaping and functioning of regimes. In such a knowledge-based perspective, an assessment of the situation and the identification of interests in a given area enables states to make effective policy decisions. The TPRM provides states with knowledge about the general trading climate, acting as an epistemic community having a common awareness of the trading situation. The fact that the TPRM is housed in an IO with strong normative roots forestalls the prospect of loose, interest-based epistemic communities influencing state policies and thus provides a high degree of institutionalization in the sharing of ideas and knowledge. The resulting transparency helps states to understand the trading situation and fashion their trade policies in accordance with neoliberal requirements, while at the same time balancing their interests and continuing role in the multilateral trade regime.

The three features observed above do not exhaust the list of governance tools in WTO. The neoliberal agenda is advanced through the joint action of any number of such tools. The dose of neoliberalism incorporated in each tool nevertheless varies depending on its function.

Even collectively the three tools discussed—amicus participation, negative consensus and trade policy review—account for only a minor share in the whole work of the organization. In the general governance scheme of the WTO, amicus participation provides expertise on work in specific areas, to a large extent functioning as the *agora*; the same holds for trade policy reviews, which provide system awareness; negative consensus, which removes procedural blocks in the DSB, for its part, applies more on the management side of the WTO.

The arguments presented in the two sections above substantiate the WTO’s status as a neoliberal IO.

## VI. CONCLUSION: THE RECKONING

Although it has dispelled the myths surrounding WTO and identified its real source of authority, the article has not yet taken up the question why, after all, the WTO matters in the modern world. An unsophisticated

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338. TPRM ¶ A (i).

339. The dual views are categorized as weak cognitivism and strong cognitivism. See *supra* note 245. For present purposes, I consider both views together.

answer, in the form of a syllogism, will serve as a starting point: IOs matter in the modern world; the WTO is an IO; therefore the WTO matters. Too naïve a deduction, to be sure, yet herein lie elements of a simple truth. The major and minor premises of the syllogism (IOs matter; the WTO is an IO) have been proven above. The task remaining is to elucidate the conclusion (the WTO matters), which is undertaken below. Once this is done, the paper relates the findings to the thickened normativity in international law and to the legacy of legal positivism.

#### A. Why Does the WTO Matter?

The post-world-war economy was fashioned on the basis of a compromise. On one side was the economic nationalism of the 1930s and on the other free trade and certain liberal monetary policies. Domestic interventionism and multilateralism coexisted. In other words, what one saw was a combination of Keynesian economics—"national self-sufficiency" and "economic isolation"<sup>340</sup>—and Fordist ideas of capital accumulation regimes and modes of regulation.<sup>341</sup> The condition is better known as "embedded liberalism," to use John Gerard Ruggie's term.<sup>342</sup> What made the compromise possible was the formation of a multilateral trade regime and the ensuing institutionalization of embedded liberalism—an unprecedented and odd configuration. In the overall scheme, the Fordist policy of capital flight was given primacy. The monetary side-effects of the flight of capital e.g., balance of payments deficits, were handled by the Bretton Woods Institutions (mainly the IMF). However, regimes of capital accumulation, although providing economic growth, are highly susceptible to crises.<sup>343</sup> This drawback was remedied to a certain extent by the Keynesian strategy of state intervention and other modes of regulation, which included laws, institutions, power, and hegemony.

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340. The main objective behind Keynes' call for economic isolationism and national self-sufficiency was the elimination of the threat of capital flight. For details, see James R. Crotty, *On Keynes and Capital Flight*, 21 J. ECON. LITERATURE 59, 61 (1983).

341. Regimes of capital accumulation, although providing economic growth, are highly vulnerable to crises; hence they are stabilized and maintained by modes of regulations, which include laws, institutions, power, and hegemony. For an understanding of the theory and various perspectives, see REGULATION THEORY: THE STATE OF ART (Robert Boyer & Yves Salliard eds., 2002).

342. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. (SPECIAL ISSUE) 379, 393 (1982).

343. Boyer & Salliard, *supra* note 341, at 30.

Nevertheless, the trade regime was maintained by the United States hegemony. In this framework GATT had a minor role, i.e., the elimination of tariff barriers to facilitate the smooth flight of capital by encouraging states to enter into reciprocal and mutually beneficial arrangements. There was nothing in its framework of rules or functions that could generate strong compliance by the states.<sup>344</sup> GATT first worked as a tool of the hegemon's interests and later as a negotiation forum. What success it has to its credit owes mainly to the economic and security interests the hegemon and other states had at that time.

With the collapse of United States hegemony and the change of regime towards a cooperation-based model, the role of IOs also underwent a transformation (Post-Fordists consider this a transformation towards a new regime of capital accumulation). The new regime of multilateral trade driven by the neoliberal ideology also required the accumulation of capital, regulated and stabilized by new modes of regulation. However, under the new regime, capital accumulation worked on the basis of a global demand rather than demand within a nation. To meet this requirement, all social relations were removed from their national context and restructured at the global level. In this state of affairs, the old mode of regulation comprising the Keynesian strategy of state intervention became a counterfeit coin. What was required instead was a new and innovative mode of regulation to control and stabilize the international flight of capital. In political terms, the scenario represented the failure of nation-states to work effectively in the available mode of regulation. Under the new mode of regulation, Keynesianism, quite obviously, was discarded, as was hegemonic control. The strategy of institutionalization was retained, however, to serve the cooperation model regime. The state, although remaining the centerpiece, retreated from the limelight, and now functioned through non-state actors, that is, in a fiduciary position.

However, the post-Fordists have cautioned about the crisis hanging over every regime of capital accumulation;<sup>345</sup> if such a crisis occurred, it would be disastrous for the current multilateral trade regime, even with the new modes of regulation. The fall of the old trade regime was due to the collapse of the hegemon, which constituted the primary mode of regulation of that regime. In order to avoid such a situation, the present cooperative model regime must, at whatever cost, maintain cooperation. In other words, the fiduciary relationship between the states must be maintained. This requires more effective modes of regulation.

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344. Cf. Douglas A. Irwin, *GATT in Historical Perspective*, 85 AM. ECON. REV. 323 (1995) (discussing how GATT, though imperfect, still helped to encourage trade after during the interwar period).

345. See generally Boyer & Salliard, *supra* note 341.



The WTO, as the institutional manifestation of the regime, is assigned the primary function of maintaining the fiduciary relationship among states by providing system awareness, helping states build a reputation in their dealings (*agora*) and, thereby, ensuring predictability for the regime. Second, the WTO performs the traditional roles—to some extent performed by GATT as well—such as removing, by universalizing norms and cultures, all trade barriers that threaten cooperation, settling disputes, and ensuring compliance. The WTO's specially designed structural features augment the performance of its role: mechanisms like the TPRM, which reveals the existing barriers to trade and conveys to the members the likelihood of danger, and the DSB, which tackles deviation from the rules and secures a positive solution that is mutually acceptable to the parties and thereby maintains the equilibrium of the multilateral trade regime. Non-compliance is least preferred, given the danger of hampering cooperation. In sum, the expectations of states converge in the WTO, which is the material manifestation of the trade regime.

Atomistic states, which act behind the scenes through their agents and hence resemble prisoners, will always try to minimize their losses—the only and best option to maximize their gains. The WTO reveals each member's trading position and hence minimizes the danger of egoistic actions from other members—thanks to the *agora*. This is, however, notwithstanding its role in removing trade barriers through positive harmonization.

In the present international trade regime, where trade relations are enmeshed in the labyrinth of the prisoners' dilemma, reciprocity finds no resistance and the WTO as the embodiment of the regime, appears to have the teeth to bite. However, the WTO's institutional features are not immaterial but become salient only when the social situation in which the institution functions becomes favorable.

### *B. The Normative Case for International Law and the Return of Positivism*

In the present context, normativity is a result of certain patterned behavior among states<sup>346</sup> whereby states, having fallen into anarchy, responded positively to the common interest of ongoing cooperation. This behavior

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346. For support, see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998) (discussing the norm "life cycle").

generated certain values, which in turn formed the basis of a set of norms. When a set of valid norms came into existence, it naturally gave rise to a new regime. Yet, that regime was far from complete because its component norms remained sterile in the absence of rules urging compliance and institutional mechanisms to coordinate the governance of common interests. Therefore, states by agreement gave shape to a rule-based architecture, in the form of the WTO, based on a uniform set of principles and a mechanism for settling disputes. At the same time that the *robustness* of the regime fetched a high degree of compliance with the rules from the states, international law, which governs the relationship between states, gained a strong case for its thickened normativity.

However, on the whole, rules, norms, and regimes all seem to have some element of artificiality attached to them. Rules can certainly be identified with norms, and norms can arguably constitute a regime, but what makes a regime a basis of valid normativity? If regimes are forged by humans, then any claims regarding their normative content are suspect at best, for the existence of norms requires social practices resulting from a particular social situation. However, throughout this part of the article, I have asserted the view that although regimes are maintained by human strategies, the formation of those regimes is purely a social action. In other words, regimes are formed when states react to a prevailing anarchy. The reaction (social forces) leads to a new patterned behavior, which generates norms. States construct their common expectations on the basis of these norms. Accordingly, a regime is a normative base validated by social conventions. This validation of norms by social conventions has been the fundamental assertion of legal positivists. In sum, social forces stand in prime perspective; they constitute Austin's sovereign as well as Hart's ultimate rule; their authority derives from a social situation, e.g., anarchy, and leads to patterned behavior and generates norms. However, given the fact that the driving ideology behind these forces is neoliberalism, it must stand as the protagonist in any reckoning.

This article set out to achieve three goals: 1) to locate the WTO within the contemporary social order, 2) to liberate international lawyers from their obsession with positivism as generally understood and from their futile hunt for alternatives to a sovereign, its commands and sanctions in the WTO, and 3) to reveal the synchrony between legal positivism and neoliberalism.

With regard to the first of these ambitions, the work rectified the myth concerning WTO as a positivist enterprise. It demonstrated that the forces of neoliberalism are the real source of power for the WTO and thereby situated the organization within the contemporary social order driven by neoliberalism. It also showed that the thickened normativity

of international law is a product of the social order and not the apparatuses of the WTO.

Where the second aim is concerned, the research revealed that Austin's theories and assertions on the legality—or lack thereof—of international law were products of his era, whereby international lawyers' adversaries in the battle for legality were their own misunderstandings about Austin's work. Indeed, positivism in its fundamental form has favored international law throughout the former's existence. International lawyers are hereinafter liberated from the search for a sovereign sitting on a throne or commands and sanctions in any institutional structures. In addition, by showing that neoliberalism is positivism in another manifestation, the article brings legal positivism to the ongoing world-order discourse centered on neoliberalism.

Third, the article aspired to synchronize legal positivism and neoliberalism; this ambition did not, however, avow that the two were conflicting schools of thought but rather that they are different forms of the same wisdom. Positivism's dynamism also becomes obvious. In pointing out the parallels between neoliberalism and positivism, the article enabled international lawyers and social scientists to develop a common viewpoint regarding the WTO and pool their ideas jointly for enhancing the social utility of the organization.

