

Deconstructing the WTO Conformity  
Obligation: A Theory of Compliance as a  
Process

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## ARTICLE

# DECONSTRUCTING THE WTO CONFORMITY OBLIGATION: A THEORY OF COMPLIANCE AS A PROCESS

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### INTRODUCTION

The World Trade Organization (“WTO”) celebrates its twentieth anniversary in 2015 and has proved very successful in strengthening the contours of the international economic order and promoting reforms in a number of member countries.<sup>1</sup> One can find abundant literature on amendments made by different countries and sectors related to the law, the organization, or the Dispute Settlement Body (“DSB”) decisions.<sup>2</sup> Indeed, almost all of the 460-plus trade disputes<sup>3</sup> that have arisen since 1995 have been resolved in accordance with WTO law.<sup>4</sup> Unsurprisingly, Bruce Wilson, former

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1. The World Trade Organization (“WTO”) was established on January 1, 1995, replacing the General Agreement on Tariffs and Trade (“GATT”), under the terms of the Marrakesh Agreement. This international organization serves as a common institutional framework for trade among its 160 Member States, and as provided for under this agreement. See *Understanding the WTO: The Organization, Members and Observers*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Aug. 2014). Its work consists of facilitating “the implementation, administration and operation, and furthering the objectives” of the Marrakesh Agreement Establishing the WTO. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement] (concerning several fields of international trade, such as goods, services, and intellectual property rights).

2. For instance, in 1994 the United States passed the Uruguay Round Agreement Act, which implemented several changes to domestic patent law required by the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”). See Adam Isaac Hasson, *Domestic Implementation of International Obligations: The Quest for World Patent Law Harmonization*, 25 B.C. INT’L & COMP. L. REV. 373, 374 (2002). After the US claim, the WTO ordered Europe to amend its banana import rules. See Joel P. Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT’L L. 655, 667 (1999) [hereinafter Trachtman]. The TRIPs Agreement compelled India to amend its patent regime in a substantial manner since 1999. See K. D. Raju, *WTO–TRIPs Obligations and Patent Amendments in India: A Critical Stocktaking*, 9 J. INTELL. PROP. RTS. 226, 227 (2004). South Africa’s anti-dumping law and practice incorporate WTO tenets. See Lonias Ndlovu, *An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa’s Dumping and Anti-Dumping Law*, 5 J. INT’L COM. L. & TECH. 29, 30 (2010).

3. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

4. See generally Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO’s Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT’L ECON. L. 9 (2013). In fact, the WTO is so successful that WTO interpretations are being increasingly imported into investment arbitrations. This trend has generated some doubts because investment and trade regulation are not part of the same system, and the birth, growth, and evolution of the concepts may be substantially different. Jürgen Kurtz supported the view that arbitral tribunals, through their multiple misunderstandings of the WTO acquis, have actually produced greater incoherence

Director of the WTO Legal Affairs Division, observed that in almost all cases a Member found to be in violation of its WTO obligations would later comply with WTO law.<sup>5</sup> After all, Professor Louis Henkin rightly observed that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>6</sup>

However, the key issue of compliance with WTO law is always approached in a vertical manner. The law of the WTO is superior to domestic legal systems, and Members comply with international trade law because they have expressed their willingness to be bound. Much of the reflection has addressed the nature, *i.e.*, the binding character of WTO law. A wealth of analyses has focused on the Dispute Settlement Understanding (“DSU”).<sup>7</sup> Indeed, the DSU is one of the central achievements of the Uruguay Round negotiations.<sup>8</sup>

This Article deconstructs the WTO obligation of conformity enshrined in Article XVI:4 of the WTO Agreement, demonstrating that this key provision is not a mere interface between international and domestic law. In fact, the obligation of conformity is the source of a process of compliance which, although more modest than usual law of international responsibility, has proven to be effective in securing final compliance. Deconstructing the obligation of conformity helps to explain and demystify the high level of

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and inconsistency in the case of the National Treatment standard. See Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and its Discontents*, 20 EUR. J. INT’L L. 749, 750 (2009).

5. Wilson indicated that in the same article that in ninety percent of the adopted reports, one or more violations of the WTO obligations have been found by panels and/or the Appellate Body. See Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT’L ECON. L. 397, 398 (2007); see also WORLDTRADELAW.NET, <http://www.worldtradelaw.net/databases/implementaverage.php> (last visited Oct. 24, 2014) (providing very useful statistics, in particular the average implementation time period).

6. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979); see also, Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175, 177 (1993).

7. See, e.g., PETROS C. MAVROIDIS & THOMAS COTTIER, *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO* 1-2 (Petros C. Mavroidis & Thomas Cottier eds., 2003); David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT’L L. 398, 399 (1998); YANG GUOHUA, BRYAN MERCURIO & LI YONGJIE, *WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION* (2005); see also Dan Sarooshi, *Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?*, 49 TEX. INT’L L.J. 445, 446 (2014).

8. See Dispute Settlement Body, *Overview of the State of Play of WTO Disputes: Annual Report (2013)*, WT/DSB/61/Add.1 (Nov. 1, 2013).

compliance with WTO law while significantly contributing to the understanding of why and how States comply with international law.

This Article contributes to the understanding of why States comply with international law, specifically WTO law. It focuses on a key provision of the WTO agreement, Article XVI:4, which plays a key role—and crystalizes other processes—in inducing compliance. This provision reads “*Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.*”

The significance of this provision was underscored by John H. Jackson<sup>9</sup> and is often cited but rarely commented upon—something this Article intends to remedy.<sup>10</sup> The obligation enshrined in this provision is not the mere driving force of States compliance with international trade law. WTO compliance—through the general obligation of conformity—is a complex process. Professor Harold Koh offered a general theory of why States comply with international law by showing that transnational actors obey international law as a result of repeated interaction with other actors in the transnational legal process.<sup>11</sup> In deconstructing the WTO obligation of conformity, this Article unveils the complex and dynamic process of compliance.

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9. Insofar as it can serve as a basis for the notion that the purpose of the Dispute Settlement (“DS”) procedure is to establish an international law obligation for the Member States to comply with the results of the interpretations and applications made in the DS process. John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109, 112 (2004). For a fascinating debate which preceded Jackson’s article, see Judith Hippler Bello, *The WTO Dispute Understanding Mechanism: Less is More*, 90 AM. J. INT’L L. 416 (1996); see also John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60, 60–64 (1997); Warren Schwartz & Alan Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002).

10. See, e.g., Jackson, *WTO Dispute Settlement Reports*, *supra* note 9, at 112; Rafael Leal-Arcas, *Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?*, 16 MINN. J. INT’L L. 1, 2 n. 2 (2007); Sarooshi, *supra* note 7, at 459 n. 65; Laura Spitz, *The Gift of Enron: An Opportunity to Talk About Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights*, 66 OHIO ST. L.J. 315, 379 n. 262 (2005); James D. Willets, *A Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization*, 31 U. PA. J. INT’L L. 753, 806 n. 149 (2010); Elena A. Wilson, *Russia in the WTO: Will It Give Full Direct Effect to WTO Law?*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 325, 326 (2014).

11. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656 (1997).

Part I outlines in what fashion conformity is a fundamental obligation of the multilateral trading system, which is two-fold in nature and places emphasis on the high degree of similarity between national and international law. Part II then discusses how its place in the normative corpus makes it a principle of higher importance, which not only precludes the invocation of domestic laws (VC 27) but further requires a positive act. When put into practice, the WTO obligation confirms its importance in light of its wide scope of application. However, although all norms of domestic law are subject to compliance, the ways and means employed by Members remain out of the scope of the obligation. Equally important to understand the impact of the obligation is its necessary combination with another provision. Part III examines that, although demanding in its reach while flexible in the way it is respected, the conformity obligation may engender to litigation. Part IV argues that compliance is not left to the appreciation of each Member but attributed to the DSB which plays a key role—direct and indirect—in the compliance process.<sup>12</sup> During this stage the shape and substance of the obligation are modified, giving birth to a secondary obligation to comply. More precise and subject to a deadline, and sometimes incorporating some intrusive guidance, the new secondary obligation gives a new opportunity to comply. The DSB is in fact a restatement of the initial obligation of compliance without imposing a sanction which would cover the period during which an internal rule existed in opposition to WTO law. Part V explains that the obligation, derived as formulated by the DSB, does not extinguish the obligation of Article XVI:4 of the WTO Agreement but reformulates it in a different way, giving it a precise nature. The binding character of the secondary obligation is complemented by a mechanism of counter-measure which largely contributes to securing full compliance.

### I. SEQUENCING THE WTO OBLIGATION TO COMPLY

This Part provides a sequencing of the conformity obligation structure with the aim of identifying the source of conformity in the

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12. The creation of an obligatory Dispute Settlement Mechanism (“DSM”), whose rulings are binding within the WTO framework, has modified the entire international economic structure. The DSB makes the WTO “an integration organization, rooted in contemporary international law. In simple terms, the WTO’s sophisticated dispute settlement mechanism makes it a distinctive organization.” Pascal Lamy, *The Place of the WTO and Its Law in the International Legal Order*, 17 EUR. J. INT’L L. 969, 970 (2006).

WTO system and offering a general definition of conformity. Section A shows that the conformity is a quest for similarity across national and international legal orders. In this respect, the conformity principle is better described as a centripetal force which creates a movement and assumes a dynamic role in the compliance process. Section B critically analyzes the conformity requirements that allows one to identify two complementary obligations which form the WTO law of compliance.

#### *A. Quest of Similarity: Transforming National Law*

All WTO Members are bound by the obligation to adapt their domestic law to WTO law.<sup>13</sup> This obligation expresses Members' willingness to ensure that international trade law is enforced effectively on behalf of those who have undertaken to implement it. Also, the obligation to conform is justified only insofar as its primary object is to avoid any risk of conflict between two legal systems, *i.e.*, the WTO system and Members' domestic systems, as well as serious disputes among various Members of the organization. The WTO Agreement makes it clear that, from the perspective of the WTO, its legal system prevails over domestic law. Article XVI:4 requires unequivocally that each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the WTO agreements. However, Article XVI:4 of the WTO Agreement requires "conformity" without defining it, probably because conventional wisdom is sufficient to grasp the essence of the word. This, however, raises an issue of interpretation.

In its plain meaning, "conformity" refers to the "compliance with standards, rules, or laws" and requires "similarity in form or type."<sup>14</sup> The compliance is "the action or fact of complying with a

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13. The "WTO law" is made of a number of agreements. Annex 1, the most extensive, consists of GATT 1994 and its 12 side agreements (Annex 1A); the General Agreement on Trade in Services ("GATS"), its instruments, and the Members' schedules (Annex 1B); and the TRIPs Agreement (Annex 1C). Further annexes comprise the DSU (Annex 2), the Trade Policy Review Mechanism (Annex 3) and the plurilateral agreements (Annex 4). See Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 21 U. PA. J. INT'L ECON. L. 153 (2007).

14. OXFORD DICTIONARY OF ENGLISH 366 (3d ed. 2012). The origin of the word "conformity" is to be found in the late Middle English transposing Old French "conformité" and late Latin "conformitas," both originating from the Latin verb "conformare" which means "to form, fashion." *Id.*

wish or command” and “the state or fact of according with or meeting rules or standards<sup>15</sup>.” Meanwhile the similarity is the state or fact of being similar, *i.e.*, of “having a resemblance in appearance, character, or quantity, *without being identical*.”<sup>16</sup> Since the conformity does not require identity, it means that domestic laws do not have to be identical, *i.e.*, “similar in every detail; exactly alike” as the WTO norms.

When the Appellate Body was called upon to interpret the conformity principle, it also relied on the ordinary meaning stressing the demanding nature of the obligation. The Appellate Body stated that “much more is required before one thing may be regarded as ‘conform[ing] to’ another: the former must ‘comply with,’ ‘yield or show compliance’ with the latter. The reference of ‘conform to’ is to ‘correspondence in form of manner,’ to ‘compliance with’ or ‘acquiescence,’ to ‘follow[ing] in form of nature.’”<sup>17</sup>

This first attempt to define the ordinary meaning of conformity helps to interpret the WTO concept of conformity and also to identify the key practical elements of conformity. First, conformity requires an action by the Member States who must comply with the law of the WTO. Second, compliance requires reaching similarity, which is a requirement for domestic laws to resemble in appearance, contents, and character to international law. Conformity is a demanding requirement which, however, does not extend to a requirement of formal identity. Third, from a normative perspective, WTO compliance is a process whose goal is to bring national laws to a certain threshold of resemblance with WTO law. In the compliance process, the WTO conformity obligation acts as a centripetal force which “is that by which bodies are drawn or impelled, or in any way tend, towards a point as to a centre.”<sup>18</sup> Fourth, using the physics metaphor again, Member States are like satellites in orbit around the WTO; the centripetal force is supplied by the conformity requirement which acts like gravity. The requirement of similarity with WTO law

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15. “COMPLIANCE” in OXFORD DICTIONARIES OF U.S. ENGLISH [http://www.oxforddictionaries.com/definition/american\\_english](http://www.oxforddictionaries.com/definition/american_english).

16. “SIMILAR” IN OXFORD DICTIONARIES OF U.S. ENGLISH [http://www.oxforddictionaries.com/definition/american\\_english](http://www.oxforddictionaries.com/definition/american_english) (emphasis added).

17. Appellate Body Report, *EC Measures Affecting Meat and Meat Products (Hormones)*, ¶ 163, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998); 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 477 (6th ed. 2007).

18. ISAAC NEWTON, THE PRINCIPIA: MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 10 (2010).



also results in the logical deduction that gradually all 161 WTO Members should have similar national laws on trade measures.<sup>19</sup>

At a more conceptual and general level, conformity, as defined by the WTO system, is an obligatory process in which each Member State has to transform its internal law in accordance with the rules contained in the various WTO agreements.<sup>20</sup> In such a process, aiming at conformity is obligatory. In a nutshell, by ratifying the WTO agreements, each and all Member States agree to limit their autonomy and to exercise their normative power only in a particular direction.

### *B. Duplication: Primary and Secondary Obligation to Comply*

Since the principle expressed by Article XVI:4 is included in the Agreement Establishing the WTO, which forms the very basis of the organization, the conformity obligation applies to all other WTO agreements even if those agreements do not refer to it specifically.<sup>21</sup> In addition, under Article XVI:3, if there is “a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.”<sup>22</sup> As a result, one can deduce that Article

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19. As concluded by Wang:

in the end, for the purpose of complying with the WTO requirements, the approach, policy and style of legislation of Members will gradually become unified and have common or similar features. The WTO's impact on the substantive provisions of laws and regulations of its Members was intended by the fathers of the WTO. Its effect on other aspects of legislation may not have been foreseen.

GUIGUO WANG, RADIATING IMPACT OF WTO ON ITS MEMBERS' LEGAL SYSTEM: THE CHINESE PERSPECTIVE 349, 352 (2010).

20. Internal law encompasses all the normative acts that produce a legal effect, including judiciary decisions. Indeed, a WTO Member “bears responsibility for acts of all its departments of government, including its judiciary.” Without doubt, “the judiciary is a state organ and even if an act or omission derives from a WTO Member's judiciary, it is nevertheless still attributable to that WTO Member.” See Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, ¶ 182, WT/DS322/AB/RW (Aug. 8, 2009).

21. The Appellate Body states that “Article XVI:4 of the *WTO Agreement* provides that ‘[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’, which include the *Anti-Dumping Agreement* and the *SCM Agreement*.” Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 301, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

22. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

XVI:4 is a rule of higher rank than the provisions of the agreements listed in the Annexes.

Also, WTO Agreement Article XVI:4 is a general clause which is reaffirmed by other provisions contained in specific agreements whose observance calls for the adaptation of domestic law. For instance, Article 18.4 of the Anti-Dumping Agreement requires each Member to “take all necessary steps, of a general or particular character, to ensure, no later than the date of entry into force of the WTO Agreements for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Agreement.”<sup>23</sup> Even if some terms of the Anti-Dumping Agreement (“ADA”) Article 18.4 differ from those of Article XVI:4, they are identical as far as the basic obligation of ensuring the conformity of a Member’s laws, regulations, and administrative procedures—found in both Articles—is concerned. Such identity is validated by the Appellate Body (“AB”), which basically, gives the same meaning to the specific provisions which simply reiterates the general clause of Article XVI:4.<sup>24</sup>

Finally, if a provision of an “annexed Agreement” is breached, a violation of Article XVI:4 immediately occurs.<sup>25</sup> As a result, the inclusion of the conformity requirement in the WTO agreement, the supreme rank of this agreement in the WTO normative corpus, and the fact that any violation of WTO rules immediately results into a

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23. See Agreement on Import Licensing Procedures, Annex 1A art. 8(2)(a), reprinted in I LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION 261, 269 (Joseph F. Dinnin ed., 1995) (“Each Member shall ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.”). See also *Agreement on Trade in Civil Aircraft* (Apr. 12, 1979), GATT B.I.S.D (26th Supp.) at 188 (1979) (“Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.”).

24. “With respect to Article XVI:4 of the Agreement Establishing the WTO, we note that, if some of the terms of Article XVI:4 differ from those of Article 18.4, they are identical and unqualified as far as the basic obligation of ensuring the conformity of laws, regulations and administrative procedures found in both articles is concerned.” Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by Japan*, ¶ 6.287, WT/DS162/R (May 29, 2000).

25. In this respect, it was logically deduced that “[A]n additional finding on whether the same measure is also in breach of Article XVI:4 of the WTO Agreement would not be necessary in order to resolve the dispute between the parties. It was already noted that a Panel does not need to examine all legal claims made by a complaining party, but just those ‘which must be addressed in order to resolve the matter in issue in the dispute.’” Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, ¶ 17.170, WT/DS207/RW (Dec. 8, 2006).

violation of Article XVI:4, make the conformity requirement a primary obligation, *i.e.*, an obligation which is at the core of the WTO legal system.

If a Member does not comply with WTO rules, this may give rise to a dispute. A dispute arises when a Member State believes that another Member State is violating an agreement or a commitment that it has made to the WTO.<sup>26</sup> A violation complaint will succeed when the respondent fails to carry out its obligations under the WTO agreements resulting, directly or indirectly, in nullification or impairment of a benefit accruing to the complainant under these agreements. If such an argument can be established before a Panel and the AB, it means that these two conditions are satisfied, and thus the defendant will have to change its legislation.<sup>27</sup> The Dispute Settlement Mechanism (“DSM”) then appears as the second element to ensure the conformity of domestic law with the WTO prescriptions.

When the DSB adopts a decision to end a dispute, the primary obligation contained in the WTO agreement is redefined and transformed into a secondary obligation to comply. The secondary obligation to comply is conceptually distinct from the primary obligation to comply. They both have the same aim; however, they differ in the form, content, and enforcement.

This Section has provided a preliminary deconstruction of the obligation to comply. It has demonstrated that, firstly, the WTO system is exerting an influence on domestic systems, which have to

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26. See, e.g., Julien Chaisse, *The WTO Seals Products Dispute - Traditional Hunting, Public Morals and Technical Barriers to Trade*, 22 *COLO. J. INT’L ENVTL. L. & POL’Y* 79, 80-82 (2011).

27. In practice, the first of these two conditions, *viz.*, violation, plays a much more important role than the second condition, *viz.*, nullification or impairment of a benefit, does—this is because nullification or impairment is “presumed” to exist whenever a violation has been established. Members may also initiate “non-violation complaints,” relying on “non-violation nullification or impairment and unavailability of benefits based on reasonable expectations.” This argument might apply, for example, where a Member’s laws and regulations conform to a WTO obligation, yet the Member systematically refuses to apply those laws and regulations, thereby nullifying or impairing a benefit expected to accrue (whether directly or indirectly) under WTO law. See Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in 11 *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, STUDIES IN TRANSNATIONAL ECONOMIC LAW* 125, 141-42 (Ernst-Ulrich Petersmann ed., 1997). See generally Thomas Cottier & Schefer Krista Nadakavukaren, *Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future*, in 11 *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, STUDIES IN TRANSNATIONAL ECONOMIC LAW* 145–183 (Ernst-Ulrich Petersmann ed., 1997).

transform in order to reach some degree of similarity—with the WTO and, consequently, across them. Secondly, the influence is due to a centripetal force which is formed by the general obligation of conformity—primary conformity obligation—complemented by the rulings of the DSB—secondary conformity obligation. Subsequent developments will focus on each aspect of the primary and secondary obligation to comply in order to fully deconstruct the contribution of the conformity obligation with the WTO compliance process.

## II. COMPARING WTO CONFORMITY TO PUBLIC INTERNATIONAL PRINCIPLE

As prescribed by customary international law and the Vienna Convention on the Law of Treaties (“VCLT”), States are obliged to perform the treaty obligations.<sup>28</sup> This fundamental principle is the cornerstone of classic international law.<sup>29</sup> It means that the parties are bound by the contract that they have concluded and they cannot, therefore, shirk the obligations that they have thereby accepted. This is an indication of the predominance of willingness and, more importantly, of consent as the material source of law and, consequently, where formal sources are concerned, the predominance of treaties over national laws. Section A explains that in WTO law, compliance obligation fully incorporates the classic rule of *pacta sunt servanda*. Section B, however, points out that the WTO conformity obligation also imposes a positive obligation to comply, *i.e.*, to enact the law.

### A. Congruence of Obligations’ Scopes

As a basic principle of civil law and public international law, *pacta sunt servanda* must be based on good faith as underscored by

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28. In public international law, the implementation of treaties is an obligation under Article 26 of the Vienna Convention on the Law of Treaties, which insists on the execution of a treaty in good faith and in compliance with the classic rule *pacta sunt servanda* (*i.e.*, “agreements must be kept”). See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter Vienna Convention] (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”)

29. This is generally understood as a moral obligation to keep a promise, rather than just a legal obligation. “According to this interpretation of the *pacta maxim*, then, the role of the law is to provide a state sanction for moral norms. This point, so obvious to civil lawyers, is much less so to anyone trained in the Holmesian tradition.” Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT’L L. 405, 406 (1994); see DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 15 (3d ed. 2010).

the International Court of Justice (“ICJ”) in the 1974 *Nuclear Tests* judgment.<sup>30</sup> Earlier, in 1932, the Permanent Court of International Justice (“PCIJ”) logically considered that domestic legislation could not be invoked to justify the non-enforcement of an international obligation.<sup>31</sup> In this regard, the State Constitution, the supreme norm in a domestic legal order, cannot be invoked in such a case, either, as stated in another PCIJ judgment.<sup>32</sup>

According to Article 26 of the VCLT, “every treaty in force is binding upon the parties to it and must be performed by them in good faith,” or else States can be found to be in violation of the treaty.<sup>33</sup> Tracking the obligation of good faith performance is a general rule of treaty interpretation, which implies that treaties must be construed in good faith, and their interpretations must take into account “any relevant rules of international law applicable in the relations between the parties.”<sup>34</sup> Under international law, a State is obliged not to frustrate or undermine the object and purpose of a treaty when it is a signatory. The PCIJ’s jurisprudence has, to some extent, completed this general obligation stipulated in Article 27 of the VCLT, that is, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>35</sup>

The WTO follows interpretations of public international law as explained by the arbitrators in the 2003 *Canada – Export Credits* dispute:

Pursuant to the general principle of international law *pacta sunt servanda*, as embodied in Article 26 of the Vienna Convention on the Law of Treaties (1969), States are not only presumed to perform their treaty obligations in good faith, they are expected

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30. “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this Co-operation in many fields is becoming increasingly essential.” *Nuclear Tests (Austl. v. Fr.)*, Judgement, 1974 I.C.J. 268, ¶ 46 (Dec. 20).

31. *See Free Zones of Upper Savoy and the District of Gex*, Judgment, 1932 P.C.I.J. (ser. A/B) No. 46 (June 7).

32. *See Access to, or Anchorage in, the port of Danzig, of Polish War Vessels*, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 43 (Dec. 11).

33. Vienna Convention, *supra* note 28.

34. *Id.* at art. 31(3)(c). In determining the purpose and context of the treaty, suitable recourse may be made to the preamble and annexes of the treaty. *Id.* at art. 31(2).

35. To ensure consistency in State behavior, the Permanent Court of International Justice, in a number of cases, affirmed the principle that a “State cannot invoke its municipal law as a reason for failure to fulfill its international obligation.” *See I.C. MacGibbon, Estoppel in International Law*, 7 INT’L & COMP. L. Q. 468, 473 (1958).

and obliged to do so. We also note that Article 27 of the same Vienna Convention specifies that obligations under internal law cannot excuse States from complying with their international obligations.<sup>36</sup>

And this interpretation also stands in 1998's *Anti-Dumping Investigation Regarding Portland Cement* case in which the Panel concluded that "the argument that Guatemala could not have initiated the investigation until after it had notified Mexico, pursuant to provisions of its own Constitution and law, does not affect our conclusion in this regard."<sup>37</sup>

*Pacta sunt servanda* is, however, not an absolute, rigid and formalistic principle under which States must in any and all circumstances strictly obey to the letter promises that they have made under the WTO agreements no matter what the content of those promises, no matter how severely circumstances have changed, or no matter what dire effects obedience might have on the State's operations or existence.<sup>38</sup> States may on some occasions escape liability for breaching their promises if their defenses are determined to be applicable as a matter of law, such as the defenses of necessity, which has been at the center of a number of recent investment

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36. Decision by the Arbitrators, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 3.104, WT/DS222/ARB (Feb. 17, 2003) [hereinafter *Canada – Export Credit and Loan Guarantees*].

37. Furthermore, "[i]n acceding to the WTO, Guatemala undertook to be bound by Article 5.5 when initiating anti-dumping investigations. Any failure to respect Article 5.5 may not be justified on the basis of inconsistent provisions of domestic law. Article XVI:4 of the WTO Agreement explicitly states that each Member shall ensure the conformity of its law, regulations and administrative procedures with its obligations as provided in the annexed Agreements." See Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, § 7.38, WT/DS60/R (June 19, 1998).

38. As explained by Jennings:

"[i]t is wrong to suppose that *pacta sunt servanda* must apply *tout court* in all cases or in none. No mature law of contract is absolute, and few principles of law are to be understood without qualification. . . . Is it not likely that the true position is that the principle functions, as it does in the case of treaties, as a presumption: a presumption leaning against the existence of any right of unilateral termination; but which, like all presumptions, may in some cases be successfully rebutted? Thus understood it may be found both to fit readily into the pattern of existing law and to explain it."

R.Y. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156, 177 (1961).

arbitrations, *force majeure*,<sup>39</sup> *ultra vires*,<sup>40</sup> and fundamental change of circumstances.

In WTO law, exceptions take the form of waivers or general exceptions. Article IX:3 of the WTO Agreement therefore provides that the Ministerial Conference may decide in exceptional circumstances to waive an obligation imposed on a Member by WTO law. Such a decision is to be taken formally by casting a vote of three fourths of the Members. Consensus is required for waivers in respect of any obligation subject to a transition period or a period for staged implementation.<sup>41</sup> In practice, all decisions are prepared and taken by consensus in the General Council. Article IX:3 of the WTO Agreement extends Article XXV:5 of the GATT 1947 and makes it clear that waivers may be adopted with regard to any obligation and agreement under the WTO legal framework. Waivers are of practical importance.<sup>42</sup> They have been requested by Members several times and were subsequently granted by the Contracting Parties under the GATT 1947 and now by the Ministerial Conference under the WTO.<sup>43</sup>

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39. State necessity is the *force majeure* of international law. It permits the contravention of state obligations when absolutely necessary. In those cases, the exceptional circumstances preclude the wrongfulness of the act. Special Rapporteur on State Responsibility, *Addendum to the 8th Report on State Responsibility*, [1980] 2 Y.B. INT'L L. COMM'N. 14, U.N. Doc. A/CN.4/318/Add. 5-7 [hereinafter *Addendum to the 8th Report on State Responsibility*] (*Force majeure* describes the situation "where an unforeseen and unavoidable external circumstance, an irresistible 'force' beyond the control of the subject taking the action, makes it materially impossible for that subject to act in conformity with an international obligation").

40. Because of a lack of competent institutions that can deal with such *ultra vires* acts, international law relies on such doctrines as protest and non-recognition. IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY, PART I* 26-27 (1983); see Theodor Meron, *State Responsibility for Violations of Human Rights*, 83 AM. SOC'Y INT'L L. PROC. 372, 375-76 (1989). For a Japanese civil law scholar's view that *ultra vires* does not apply to States because a State can be liable internationally even for those acts which it undertakes in violation of its own laws, see Mizushima Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct*, 29 DENV. J. INT'L L. & POL'Y 261, 277-78 (2001).

41. WTO Agreement *supra* note 1, at art. IX(3) ("In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements. . . ."). For an interesting contribution to analyzing the potential of the WTO waiver as a legal instrument to reconcile conflicting norms and interests, see Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 645 (2009).

42. See D. Marinberg, *GATT/WTO Waivers: "Exceptional Circumstances" as Applied to the Lomé Waiver*, 19 B. U. INT'L L. J. 129 (2001).

43. One of the most important waivers ever was the one granted to the European Commission ("EC") in relation to the preferential treatment for bananas originating in the

WTO conformity may also not apply if an exception is applicable. The WTO system regulates a number of specific or general exceptions.<sup>44</sup> In addition to the exceptions of the general prohibition of quantitative restrictions set out in GATT Article XI:2,<sup>45</sup> one can identify specific exceptions in the TRIPs agreement,<sup>46</sup> such as the doctrine of fair use exceptions.<sup>47</sup> Article 3 of the TRIPs Agreement allows for existing exceptions provided for in other relevant intellectual property conventions.<sup>48</sup> Articles XVI and XVII of

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African, Caribbean, and Pacific Group of States (“ACP”) countries pursuant to the Fourth Lomé Convention. It became necessary to waive the most-favored-nation (“MFN”) obligation under Article I:1 of the GATT, as the agreement did not comply with the requirements of Article XXIV of the GATT, but was indispensable to avoid disruption of production in and exports from ACP countries. Subsequently, the question arose, and was eventually brought before a panel and the Appellate Body, whether the EC regime was covered by the waiver with regard to preferential treatment of ACP bananas. The report of the Appellate Body indicates how carefully the text of a waiver is analyzed and assessed. See Appellate Body Report, *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R 509 (Sept. 9, 1997).

44. For a commentary on the regime of Article XX of the GATT, see Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections – General Exceptions Clause as a Forced Perspective*, 39 AM. J.L. & MED. 332 (2013). For more specific aspects of the WTO exceptions, see also BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 441 (2001) (discussing GATT Article XX’s application to human rights and labor standards); Glenn Weiser, *The Clean Development Mechanism Versus the World Trade Organization: Can Free-Market Greenhouse Gas Emissions Abatement Survive Free Trade?*, 11 GEO. INT’L ENVTL. L. REV. 531, 553-55, 583-85 (1999) (discussing the WTO Dispute Settlement Body’s tendencies to interpret Article XX narrowly and to respond negatively towards unilateral trade measures adopted to protect the global commons).

45. Article XI:2 of the GATT 1994 gained some importance with regard to agricultural products as it excludes them, under certain conditions, from the general prohibition of quantitative restrictions (“QRs”). Under the GATT 1947, various panels were called upon to interpret Article XI:2(c). Under the WTO, with the conclusion of the Agreement on Agriculture, this paragraph has lost its relevance.

46. On the role of the TRIPs Agreement, see generally Julien Chaisse & Puneeth Nagaraj, *Changing Lanes – Trade, Investment and Intellectual Property Rights*, 36 HASTINGS INT’L & COMP. L. REV. 223 (2014).

47. The TRIPs Agreement recognises the doctrine of fair use exceptions in Article 17 (copyright) and Article 30 (patents). These provisions allow governments to make limited exceptions for public policy reasons. These provisions have not yet been fully explored and refined in jurisprudence. See Panel Report, *US – Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000), in which a panel had to deal with two US copyright provisions exempting certain transmissions from copyright infringement. The panel focused mainly on Article 13 of the TRIPs Agreement in deciding whether these exceptions were permissible. When interpreting Article 13, the panel failed to make explicit reference to the objectives and purposes of the TRIPs Agreement as embodied in Articles 7 and 8.

48. See J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, 29 INT’L LAW. 345, 349-50 (1995) (discussing authorization for Members to unilaterally offer “more extensive protection



the GATS<sup>49</sup> allow for far-reaching individualized exemptions and qualifications set out in the Members' specific schedules.<sup>50</sup> Further GATT<sup>51</sup> exceptions are contained in Article XII (balance-of-payments safeguard measures),<sup>52</sup> Article XX (general exceptions),<sup>53</sup> and Article XXI (national security exceptions)<sup>54</sup> of the GATT 1994. These exceptions are frequently utilized to pursue other legitimate policy goals. WTO conformity is congruent to *pacta sunt servanda* rules. If there is no valid exception—in the form of a waiver or Article XX—Members are obliged to perform treaty obligations.

### B. *WTO Additional Requirements*

Whereas WTO jurisprudence did not clarify the exact sense of Article XVI:4, the European Union stated in the *Sections 301–310 of the Trade Act of 1974* case that “Article XVI:4 must be interpreted to impose requirements with respect to domestic law additional to the requirements that arise already from the substantive WTO obligations

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than is required by this Agreement” for intellectual property rights, so long as, in doing so, other TRIPs Agreement provisions are not contravened, and the “national treatment” provisions of the main international conventions are honored); *see also* Joost Pauwelyn, *The Dog that Barked but Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO*, 1 J. INT'L DISP. SETTLEMENT 389, 392 (2010).

49. WTO Agreement, *supra* note 1, at General Agreement on Trade in Services, Annex 1B on Financial Services.

50. On GATS exceptions, *see* Wei Wang, *On the Relationship Between Market Access and National Treatment Under the GATS*, 46 INT'L LAW. 1045, 1053 (2012).

51. General Agreement on Tariffs and Trade (“GATT”) art. XX, Apr. 15, 1994, 1867 U.N.T.S. 187.

52. GATT Article XII permits a WTO Member to increase a bound tariff in order to address a shortfall in its balance-of-payments position. Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 AM. J. INT'L L. 561, 571 (2002).

53. In the practice of WTO law, Article XX of the GATT 1994 is one of the most important provisions. It justifies deviations from other rules, in particular, but not exclusively, from the principle of national treatment and from the prohibition of quantitative restrictions. *See* MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION* 787 (2d ed. 2006); *see also* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 45 (1991).

54. *See* Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1278 (2003) (“This exception confers a potentially broad grant of authority, because the GATT does not define critical terms such as ‘considers necessary,’ ‘essential security interests,’ ‘time of war,’ and ‘emergency in international relations.’ Consequently, the scope of the ‘war’ and ‘emergency’ exception in Article XXI is not readily discernible. Similarly, the fact that a WTO Member may take any action to protect ‘essential’ interests that ‘it considers necessary’ leaves open the question of whether the use of Article XXI is subject to review by a WTO panel.”).

themselves. This is achieved if Article XVI:4 is interpreted to stipulate a ‘correspondence, likeness or agreement’ between domestic law and the relevant WTO obligations.”<sup>55</sup> In that case the European Union was opposed to the United States, which defended a more restrictive approach of Article XVI:4 and considered that this Article did nothing but confirm the traditional sense of the rule *pacta sunt servanda*.<sup>56</sup> According to the European Union,<sup>57</sup> “the terms ‘ensure’ and ‘conformity,’ taken together in their context, therefore indicate that Article XVI:4 obliges Members not merely to give their executive authorities formally the right to act consistently with WTO law, but to structure their law in a manner that ‘makes certain’ that the objectives of the covered agreements will be achieved.”<sup>58</sup> Making use of the interpretation principle of *ut res magis valeat quam pereat*, i.e., the principle of effectiveness,<sup>59</sup> the Panel finally chose the interpretation<sup>60</sup> of Article XVI:4 provided by the European Union

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55. Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, ¶ 4.370, WT/DS152/R (Dec. 22, 1999). [hereinafter Section 301 Panel Report].

56. One can observe here a difference in the understanding of the principle’s meaning, probably caused by the fact that *pacta sunt servanda* comes from civil law. The role of the principle in common law is much more limited. See A. Hyland, *Pacta Sunt Servanda: A Mediation*, 34 VA. J. INT’L L. 405, 433 (1994).

57. Before the Treaty of Lisbon took effect on December 1, 2009, the European Union did not have the legal capacity to enter into international agreements. See Consolidated Version of the Treaty on the Functioning of the European Union art. 216-218, 2008 O.J. C 115/1, for amendments that gave the EU the legal ability to forge international treaties. As of December 1, 2009, the WTO officially began using the term “European Union” to refer to what had previously been called the European Communities. In order to facilitate the reading of this article, the author uses the term “European Union” throughout, even when disputes occurred prior to the WTO’s adoption of the term in 2009. The WTO official website which reminds that “Before that, ‘European Communities’ was the official name in WTO business for legal reasons, and that name continues to appear in older material.” See *The European Union and The WTO*, WTO, [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm).

58. Section 301 Panel Report, *supra* note 55, ¶ 4.371.

59. *Ut res magis valeat quam pereat* literally translates to: “that the matter may have effect rather than fail.” BLACK’S LAW DICTIONARY 1762–1763 (8th ed. 2004). This principle implies that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. For an application by the Appellate Body (“AB”), see Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 26, WT/DS2/AB/R (Apr. 29, 1996).

60. In its broadest sense, the principle *ut res magis* results in “favoring the interpretation that would most effectively fulfill the object and purpose of a provision or a treaty.” In this light, the principle *ut res magis* “serves as an adjunct to the teleological approach to treaty interpretation.” N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42 VAND. J. TRANSNAT’L L. 1393, 1414 n.78 (2009).

since the Panel considered that “Article XVI:4, in contrast, not only precludes pleading conflicting internal law as a justification for WTO inconsistencies, but requires WTO Members actually to ensure the conformity of internal law with its WTO obligations.”<sup>61</sup> This means that in the WTO legal system, Article XVI:4 is not only a fundamental and additional principle to govern the relations between Members’ domestic laws, regulations, administrative procedures, and WTO law, but it also applies over and above the obligation under general public international law enshrined in Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

The legal consequences of the consistency between internal legal systems and WTO law are significant. Indeed, Article 27 of the VCLT prohibits Members from taking advantage of an internal provision to escape their international obligations but it does not hold that an internal provision contrary to international law constitutes a violation *ipso facto*. There may, however, be a violation when a domestic norm, even non-applied, contradicts WTO law. This is precisely the case with the WTO system. It is not new because this approach was followed at the time of the GATT 1947. In GATT jurisprudence, legislation providing for tax discrimination against imported products was, for instance, found to violate the GATT, and this was the case even before it had actually been applied to specific products, *i.e.*, before any given product had actually been discriminated against.<sup>62</sup> As a result, “GATT *acquis*, confirmed in Article XVI:4 of the WTO Agreement and recent WTO panel reports, make it abundantly clear that legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations.”<sup>63</sup> Article XVI:4 imposes upon Members an obligation to take positive measures in adapting their normative

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61. Section 301 Panel Report, *supra* note 55, ¶ 7.41 n.652.

62. *See, e.g.*, Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, ¶ 5.2.2, L/6175 (June 5, 1987) (where the legislation imposing the tax discrimination only had to be applied by the tax authorities at the end of the year after the panel examined the matter); Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, ¶¶ 5.39, 5.57, 5.60, 5.66, WT/DS23/R (Mar. 16, 1992) (where the legislation imposing the discrimination was, for example, not being enforced by the authorities). *But see, e.g.*, Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 84, WT/DS10/R (Oct. 5, 1990); Panel Report, *EU – Regulation on Imports of Parts and Components*, ¶¶ 5.25-5.26, L/6657 (Mar. 22, 1990); Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, ¶ 118, WT/DS44/R (Aug. 12, 1994).

63. Section 301 Panel Report, *supra* note 55, ¶ 7.41.

system upon the entry into force of the WTO agreements. Even before generating a material contradiction between the application of an internal rule and a WTO law, the simple absence of conformity constitutes a manifest breach of the engagement contained in Article XVI:4. The Panel set up for the *Anti-Dumping Act of 1916* case thus observed that “a Member’s anti-dumping legislation must be compatible with the WTO Agreement continuously, whether that legislation is applied or not.”<sup>64</sup> A given law, independently of its application in a precise case—and comparatively without any actual damage—can be incompatible with the WTO law as reaffirmed in WTO jurisprudence.<sup>65</sup> About this, a Panel explains that it is because “Article XVI:4, though not expanding the material obligations under WTO agreements, expands the type of measures made subject to these obligations.”<sup>66</sup>

In other words, by making the three types of measures, *i.e.*, Members’ laws, regulations, and administrative procedures, fully subject to their obligations imposed in the WTO Agreements, Article XVI:4 can thus be applied to the greatest extent possible, not only to a given measure in a specific case or dispute. It makes sense especially when considering the indirect impact of such a law on economic operators who may only be indirect recipients but will ultimately be affected by the WTO agreements.<sup>67</sup> After all, “in a treaty, the benefits of which depend in part on the activity of individual operators[,] the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable ‘chilling effect’ on the economic activities of individuals.”<sup>68</sup> Moreover, since the majority of complaints are filed not about the controversial application of a national rule but rather about the very existence of a domestic rule that may constitute a violation of the WTO agreements,

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64. Panel Report, *United States – Anti-Dumping Act of 1916 (Complaint by the European Communities)*, ¶ 5.25, WT/DS136/R (Mar. 31, 2000) [hereinafter *Complaint by the European Communities*].

65. See Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶¶ 6.45-6.47, WT/DS56/R (Nov. 25, 1997); Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶¶ 48-55, WT/DS56/AB/R (Mar. 27, 1998); see also Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶¶ 9.124, 9.208, WT/DS70/R (Apr. 14, 1999); Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 9.37, WT/DS34/R (May 31, 1999).

66. Section 301 Panel Report, *supra* note 55, ¶ 7.41.

67. See WANG, *supra* note 19, at 350.

68. Section 301 Panel Report, *supra* note 55, ¶ 7.81.

the amendment of the national law is taken not as a simple means of fulfilling a particular obligation but, more significantly, as the object of a general obligation.

The WTO obligation to comply can be described as a “Pacta Plus” obligation as it goes beyond the classic “*pacta sunt servanda*” principle of public international law. As a result, Article XVI:4 has two consequences for the relation between domestic law and WTO law. First, Members cannot invoke their national law in a negative manner to escape an obligation imposed by the international trade law. Second, they cannot do so because they are bound by the obligation to positively adapt their national law, through transformation or creation, whenever their law is contrary to WTO law.<sup>69</sup> These two consequences shed light on the ultimate objective, that is, to remove any conflict between the two legal orders. Hence, “Article 27 of the VCLT spells out a negative obligation by prohibiting a State from invoking its domestic law to justify any departure from its international obligation, while Article XVI:4 of the WTO Agreement establishes a positive obligation by mandating that the State ensures the conformity of such domestic law with its WTO obligations.”<sup>70</sup>

### III. ENFORCING THE WTO OBLIGATION TO COMPLY

When the WTO agreements have become effective<sup>71</sup> and if a Member cannot benefit from any derogation, it must amend its

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69. This requirement has consequences on the burden of proof in the WTO system. In this system, it is sufficient to establish a prima facie case. Once the complaining party has done so, however, it is for the defending party to submit arguments and sufficient evidence to rebut that presumption. Should all arguments and evidence remain in equipoise, the party bearing the original burden of proof would lose. What is requested from the defending party in terms of evidence is, in a sense, more demanding than that for the complaining party. It makes sense when read in relation to Article XVI:4, according to which a WTO Member can only be aware of its obligations under WTO law. As a result, a respondent should be able to make a demonstration that its domestic measure is not a WTO law violation. See Panel Report, *European Communities – Export Subsidies on Sugar (Complaint by Australia)*, ¶ 7.229, WT/DS265/R (Oct. 15, 2004).

70. Section 301 Panel Report, *supra* note 55, ¶¶ 4.31-4.32.

71. Since the WTO agreements entered into force on January 1, 1995, founding Members were required to bring their law into compliance with the law of the new organization. The WTO Members determine the terms and conditions of entry into the WTO for the applicant nations, and may allow such countries some leeway in complying with the WTO rules. See An Chen, *The Three Big Rounds of U.S. Unilateralism Versus WTO Multilateralism During the Last Decade: A Combined Analysis of the Great 1994 Sovereignty*

legislation to conform to the law of the WTO. To that extent, the obligation contained in Article XVI:4 of the WTO Agreement is of cardinal importance because a violation of any provision in any WTO agreement automatically leads to a violation of Article XVI:4 of the WTO Agreement.<sup>72</sup> Also, since the measure is immediately regarded as a breach of Article XVI:4, a DSB Panel has no need to address this issue, either, when resolving the dispute between the parties. In order to determine the exact nature of the WTO conformity, Section A describes why it is necessary to clarify the meaning and objective of this principle, and to analyze the different modalities available for Member States to adapt their internal law as required by the WTO agreements. Consequently, WTO law imposes limitations on important authority of its Members, *viz.*, the authority to govern a social body that it constitutes. Section B discusses why all WTO Members are all bound by the obligation to adapt their legal systems to WTO law.

#### A. Modalities to Comply

First, the effect of the compliance act must be to remove the non-conformity, which can be done in two different manners. The non-conforming measure can be brought into a state of conformity with specified treaty provisions either by *withdrawing* such measure completely,<sup>73</sup> or, alternatively by *modifying* it. One can only assume

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*Debate, Section 301 Disputes (1998-2000), and Section 201 Disputes (2002-Present)*, 17 TEMP. INT'L & COMP. L.J. 409, 429 (2003).

72. See Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, ¶ 7.167, WT/DS207/RW (Dec. 8, 2006) (“Normally, the determination of a breach of any provision of any WTO covered agreement gives automatically rise to a violation of Article XVI:4 of the WTO Agreement.”). Here reference is made to the Panel in *US – 1916 Act (EC)* who first found that “If Article XVI:4 has any meaning, it is that when a law, regulation or administrative procedure of a Member has been found incompatible with the WTO obligations of that Member under any agreement annexed to the WTO Agreement, that Member is also in breach of its obligations under Article XVI:4.” *Complaint by the European Communities*, *supra* note 64, ¶ 6.223.

73. Under Article 22.1 of the DSU, both “[c]ompensation and suspension of concessions” are available to WTO Members as a temporary measure pending compliance by a Member found to be in breach of its WTO obligations. See DSU, *supra* note 3, art. 22.1. However, recourse to compensation has rarely been used. See MATSUSHITA ET AL., *supra* note 53, at 166-67. The notable exception is the US-EC Copyright dispute where, due to failure to reach agreement on the amount of compensation, a WTO Tribunal determined the award to be EU€1,219,900 annually. Award of the Arbitrator, *United States – Section 110(5) of the US*

that a WTO Member has the capacity to withdraw or modify a domestic rule, precisely because it makes the promise to respect the conformity obligation.<sup>74</sup> In case of withdrawal, a normative act will terminate the non-conforming measure which ceases to exist. In case of modification, the measure is amended “by excising or correcting the offending portion of the measure involved.”<sup>75</sup> This was iteratively confirmed in WTO case law.<sup>76</sup>

Second, withdrawal or modification of the non-conforming measures raises the question of the legal nature of the domestic act which is employed. In this regard, the conformity of domestic law can be reached through legislative or infra-legislative norms. The question of the nature of the norm which is adopted in order to comply with international rules is left to the Member States. The Panel states that the 1974 American Law on foreign trade, which predicates the adoption of unilateral sanction measures, albeit contrary in essence to WTO regulations, is consistent insofar as there is a “licit and effective” limitation.<sup>77</sup> The latter can be seen in the administrative measures laid down by the American Congress at the time the Marrakesh Agreement was signed. In fact, the American administration can make a decision limiting the discretionary power of the Representative on Trade Issues—who can enact unilateral measures—in order to comply with WTO regulations.<sup>78</sup> As a consequence, there will be as many ways to comply with WTO as national variations of legal orders.<sup>79</sup>

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*Copyright Act: Recourse to Arbitration under Article 25 of the DSU*, ¶ 5.1, WT/DS160/ARB25/1 (Nov. 9, 2001).

74. As argued by the US government in the *China - Countervailing and Anti-dumping Duties* case, the obligations under Article XVI:4 of the WTO Agreement are an “evidence of China's ability to withdraw the measures at issue.” See Award of the Arbitrator, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶ 3.13, WT/DS414/12 (May 3, 2013).

75. Award of the Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU*, ¶ 40, WT/DS155/10 (Aug. 31, 2001).

76. See Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 49, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

77. Section 301 Panel Report, *supra* note 55, ¶ 7.25.

78. Consequently, it is possible for Members to comply with WTO regulations through legislative or infra-legislative measures. See Dan Sarooshi, *Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship*, 15 EUR. J. OF INT'L L. 651, 662 (2004).

79. The “[c]onformity can be ensured in different ways in different legal systems . . . [o]nly by understanding and respecting the specificities of each Member's legal system, can a correct evaluation of conformity be established.” The Panel further affirms that “[f]requently

WTO allows its Members considerable room for maneuver as far as the formal conditions of conformity are concerned. In fact, it is not obligatory for WTO Members to comply in a determined, homogeneous, and formal manner following the enactment of law incorporating these rules in their internal legal systems.<sup>80</sup> In this regard, WTO conformity quite resembles the EU directives that bind Member States to achieving their objectives only within a particular time-limit while allowing national governments to choose the form and means to be used. Directives have to be implemented within the national legal framework in accordance with the procedures laid down by individual Member States. As for the EU directives, in the WTO compliance process “[i]t is the end result that counts, not the manner in which it is achieved,”<sup>81</sup> and the WTO refrains from imposing a standard procedure for ensuring conformity.

### B. *Substantive Variable*

The scope of WTO law is considerable. The subject matter and instruments addressed by the various WTO agreements cover a great number of trade practices. The bulk of agreements, the GATT 1994 and its side agreements as well as the Schedule of Tariff Concessions of each Member,<sup>82</sup> deal with trade in physical goods, ranging from industrial products to agriculture. The GATS deals with all kind of services, often called invisibles. The TRIPs Agreement addresses information by defining the demarcation of appropriation, exclusive rights, and public availability of information—or its expression—which is of crucial importance for producing goods and providing services in a competitive environment. The subject matter

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the Legislator itself does not seek to control, through statute, all covered conduct. Instead it delegates to pre-existing or specially created administrative agencies or other public authorities, regulatory and supervisory tasks which are to be administered according to certain criteria and within discretionary limits set out by the Legislator. The discretion can be wide or narrow according to the will of the Legislator.” Section 301 Panel Report, *supra* note 55, ¶¶ 7.24-7.25.

80. As stated by Wang, “Members have the freedom to choose their own ways to implement their WTO obligations.” See WANG, *supra* note 19, at 351.

81. Section 301 Panel Report, *supra* note 55, ¶ 7.24.

82. A schedule is negotiated for new Members, and schedules of existing Members are updated and modified at the end of a multilateral trade round. According to Article II:7, they form an integral part of WTO treaty law. In the print version, these schedules comprise about 30,000 pages for all WTO Members, thus forming the bulk of the system’s legally binding texts.



as well as instruments may increase as needs are articulated and accepted.<sup>83</sup>

WTO conformity obligation never changes in terms of severity; what can change is only the explicit and precise nature of the norms of reference, as was explained by Hans Kelsen in his *General Theory of Norms*.<sup>84</sup> Among these rules, some are of a general nature whereas others are much more specific, which may induce variable normative intensity into domestic legal orders. When the WTO conformity requirement is combined to a loose provision, the Member is left with a relatively wide margin of maneuver to comply. In this connection, the impact into the domestic order may be relatively mild. On the contrary, when the WTO provision is precise, narrow, and demanding, the combination with the requirement of conformity will be not to leave any flexibility to the Member: the WTO requirement will have to be transposed. In this scenario, the impact of the WTO may be more tangible in the sense that it substantially affects the national law.

For example, the fundamental obligation of national treatment enshrined in Article III of the GATT allows national authorities a wide range of possibilities to conform, from the formal and material point of view. One can however, observe that the application and the understanding of Article III evolved quite a lot over time according to the jurisprudence. Article III:1 of the GATT 1994 establishes a general principle according to which internal regulations and taxes should not be applied “so as to afford protection to domestic production.” It informs, as a chapeau, the following paragraphs of the provision: Paragraph 2 stipulates national treatment in relation to internal taxes and other internal charges, whereas Paragraph 4 sets out the general obligation to accord imported products treatment no less favourable than that accorded to like products of national origin in respect of internal laws and regulations affecting the sale and use of such products. In regulations explicitly treating domestic and imported products differently, a violation of the national treatment obligation is obvious since an internal law affecting the sale of products, or a tax, on its face has a discriminatory effect. Most

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83. There are no logical or inherent limits to trade regulation, and it remains a matter of political expedience and negotiations, rather than theory and legal classifications, to define the scope of WTO law. As much as the WTO deals with intellectual property, it may also do so in relation to competition and investment protection.

84. See generally HANS KELSEN, *GENERAL THEORY OF NORMS* (1991).

regulations, however, are designed in a neutral and de jure non-discriminatory manner but nonetheless result in de facto discriminatory treatment of imported products.<sup>85</sup>

The scope and practical relevance of Article III of the GATT 1994 is to a large extent dependent on the reading of the term ‘like product.’ Its definition essentially sets the benchmark for national regulatory freedom to treat certain imported products differently from those domestically produced. Not astonishingly, the matter is at the heart of the WTO system, and much attention has been paid to it in jurisprudence and literature. Over the years, the WTO jurisprudence developed a so-called ‘aims-and-effect’ test which was first applied in *US—Measures Affecting Alcoholic and Malt Beverages*.<sup>86</sup> An assessment of the ‘aims-and-effect’ test in light of the case law allows for two conclusions: first, the Appellate Body refused to rely on the legislative or regulatory intent for determining likeness under the first sentence of Article III:2 of the GATT 1994, as intent is difficult to assess in a pluralist political process where regulators pursue diverging goals simultaneously. To rely on protectionist effects, however, was not denied in the context of assessing the competitive relationship of substitutable products, and the test of Article III:1 *in fine* (“so as to afford protection”) fully applies. Second, the Appellate Body’s approach in *EC – Asbestos* with which health risk was examined, under Article III:4, as part of the two existing criteria of physical product characteristics and the consumers’ tastes and habits, implies that a distinction shall not be based on protectionist motives and effects. In essence, the Appellate Body implicitly recognized what the ‘aims-and-effect’ test seeks to achieve, namely to enlarge the governments’ leeway of maneuver in the pursuit of legitimate, non-protectionist policy goals.

Some other WTO agreements, in particular the TRIPs<sup>87</sup> and the Anti-Dumping Agreement, are full of very detailed provisions. In

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85. The distinction between de jure and de facto discrimination is often difficult to draw and blurred in practice. The problem is related to the scope of protection under national treatment. Since the early days of the GATT 1947, the scope of national treatment has been read in broad terms and thus has traditionally covered de facto discriminations extensively. See Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833 - 7S/60 (July 15, 1958) (adopted Oct. 23, 1958).

86. See Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R - 39S/206 (Mar. 16, 1992) (adopted June 19, 1992).

87. One of the core provisions of the TRIPs Agreement is Article 50, which provides for prompt and effective provisional measures. Most actions for infringement, or for unlawful importation and distribution by way of parallel trade, are settled by means of such procedures

the ADA, in order to prevent the abuse of anti-dumping duty proceedings, it is crucial that national anti-dumping authorities conduct objective and unbiased investigations and determinations of injury to a domestic industry. Therefore, the agreement sets forth detailed provisions on the proper establishment and evaluation of the facts and evidentiary issues. For instance, Article 18.1 of the ADA sets that “specific action against dumping of exports from another Member can be taken except in accordance with the provisions of the GATT 1994, as interpreted by this Agreement.” Very soon, the issue arose whether a WTO Member is permitted to distribute duties assessed pursuant to an anti-dumping duty order—or pursuant to a countervailing duty order—to the affected domestic producers for qualifying expenditures. The Appellate Body confirmed the panel report according to which such a law is a non-permissible “specific action against dumping” contrary to Article 18:1 of the ADA.<sup>88</sup>

Consequently, as this Article will discuss later, when the DSB was called upon to determine the conformity of Indian law with the WTO agreements, the claim of violation of certain TRIPs provisions in the case *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* was established; not because the DSB was more demanding (i.e., the WTO-conformity obligation was reinforced), but only because the reference norm was very specific.

### *C. Fallback in the Event of Non-Compliance*

Binding DSB decisions, following fully-fledged dispute settlement proceedings, assess legal entitlement in an authoritative manner between two or more parties to the specific disputes. They leave no doubt as to whether obligations were met or violated. DSB decisions are binding upon national authorities and the losing party must bring its legislation in line with the DSB decisions.

If the losing Member State fails to comply within the period of time indicated by the DSB, it has to enter into negotiations with the complaining country—or countries—in order to determine mutually acceptable compensation: for instance, tariff reductions in areas of

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and do not reach the stage of ordinary and costly proceedings on the merits. The powers granted in Article 50 are of particular importance for trademark and copyright enforcement in the field of software protection, as infringements can be easily deleted upon notice of impending measures.

88. Appellate Body Report, *US – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 1023, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

particular interest to the complaining side. If, after twenty days, no satisfactory compensation is agreed upon,<sup>89</sup> the complaining side may request the DSB for permission to impose limited trade sanctions—“suspend concessions or obligations”—against the other side. This gives the Member imposing authorized countermeasures the right to temporarily desist from respecting the conformity of its national law to the law of the WTO, vis-à-vis the defaulting Member. However, “one of the recognized purposes of countermeasures is to induce the defaulting party to comply with DSB recommendations.”<sup>90</sup>

Technically, the DSB authorizes the suspension of concessions automatically under the negative consensus rule unless the respondent objects, in which case the matter is referred to arbitration, normally to the original panel. Actually these procedures are really the subject of a new dispute relating to enforcement. The DSB should grant this authorization within thirty days of the expiry of the “reasonable period of time,” unless there is a consensus against this action. In case of suspension of benefits,<sup>91</sup> the WTO allows the winning party to suspend favorable treatment, or, in simple words, to retaliate in case the losing party does not comply with its obligation even at the end of the “reasonable period of time.”

Materially, the magnitude of any compensation or suspension of concessions is required to be equivalent to the level of harm—nullification or impairment—that is caused by any illegal measure.<sup>92</sup> The extent of retaliation depends on the level of estimated trade loss caused by the continued application of WTO-incompatible measures.<sup>93</sup> In the *EU – Hormones (US)* case, the Arbitrators stated

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89. Bryan Mercurio, *Improving Dispute Settlement in the WTO: The DSU Review – Making It Work?*, 38 J. WORLD TRADE 795, 827, 832, 834 (2004).

90. *Canada – Export Credit and Loan Guarantees*, *supra* note 36, ¶ 3.47.

91. The procedure for implementing the suspension of concessions includes the drawing-up and publication of a retaliatory list of products to be targeted by a plaintiff. A respondent may object to the list if there is a dispute over the value of the harm or whether the products covered conform to the sectoral requirements.

92. The power of the DSB and, therefore, a Dispute Panel, to authorize the suspension of trade concessions by a plaintiff to a respondent where there is harm (nullification or impairment), is established in Paragraph 2 of Article XXIII of GATT 1994. This paragraph effectively binds Members of the WTO to accepting the rulings of the DSB and, also, where appropriate, for the DSB to permit sanctions against countries found to be acting contrary to the WTO rules.

93. *See, e.g.,* Decision by the Arbitrator, *EC Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/ARB (July 12, 1999) [hereinafter *EC Measures Concerning Meat*]. In the beef hormone dispute, arbitration established that the annual value of trade affected by these measures was CAN\$11.3 million for Canada and US\$116.8 million for the

that the minimum requirements attached to a request to suspend concessions or other obligations are: “(1) the request must set out a specific level of suspension, *i.e.*, a level equivalent to the nullification and impairment caused by the WTO-inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3.”<sup>94</sup>

In regards to compliance, countermeasures seem to be the last chance to force Members to respect the conformity obligation.<sup>95</sup> In the event of failure to comply with the initial obligations of conformity, despite all reminders and negotiations, the defaulting Member will, as a last resort, become the target of a countermeasure, because non-compliance is the very event justifying the adoption of countermeasures. It is only when the illicit fact is noted that the authority to react to it can be granted to the injured Member because “authorization by the DSB of the suspension of concessions or other obligations presupposes the existence of a failure to comply with the recommendations or rulings contained in panel and/or Appellate Body reports as adopted by the DSB.”<sup>96</sup>

#### IV. LITIGATING ON COMPLIANCE

The dispute settlement practice followed by the WTO since 1995 shows that the purpose of judicial organs responsible for resolving

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United States. *Id.* ¶ 83. This represents only a small fraction of the total value of the transatlantic beef trade. In the banana dispute, the initial claim for the suspension of concessions by the United States was for US\$520 million, but this was reduced to US\$191.4 million after arbitration. *See* Trachtman, *supra* note 2, at 662. In the same dispute, the Arbitration Panel awarded Ecuador sanctions worth US\$201.6 million, substantially greater than the annual value of its imports from the EU. In the case of the recent steel dispute, the EU estimated that the lost value of its trade concessions as a result of US restrictions on steel imports was some US\$3 billion (EU€2.407 billion) per annum.

94. *EC Measures Affecting Meat and Meat Products (Hormones)*, *supra* note 17, ¶ 16.

95. Where disputes are between unequal trade partners, it may be counterproductive to resort to suspension of concessions as the last resort. *See generally* Bryan Mercurio, *Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding*, 8 *WORLD TRADE REV.* 318 (2009) [hereinafter *Trade Retaliation in the WTO DSU*]. The significantly weaker injured Member may not be able to hurt the defaulting party. The sanctions may actually harm the injured Member further, while the economic effects on the defaulting party may be negligible. Thus, the final remedy of countermeasures may in certain cases be ineffective in fulfilling its recognized purpose of inducing the defaulting party to comply with DSB recommendations. *Id.*

96. Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 4.4, WT/DS27/ARB (Apr. 9, 1999).

disputes is a reminder of the legality, rather than the protection of particular interests, of the contracting governments. Its intrinsic dynamism has led the WTO and its organs to judge matters of prime importance in sectors that seem to bear no relation to trade, but whose solution is essential for the natural expansion of its goals.<sup>97</sup> In addition, the author agrees with Mercurio that “the DSU, as written and interpreted, does not have clear aims and objectives (beyond simply resolving the dispute),”<sup>98</sup> but believes that its aims and objectives can be understood if the DSU is read in relation to the WTO Agreement.

As clearly as the obligation to comply may be asserted in the WTO legal system, violations of the rules do occur, be they based on deliberate actions, wrong interpretations, etc. What is relevant to the compliance process is to look at how the WTO “judges” contribute to ensuring the respect of this central obligation to comply.<sup>99</sup>

DSM, a central feature of the WTO, has had an enormous impact on the world trade system and trade diplomacy, and it principally deals with questions related to the conformity of domestic law with the WTO agreements. The DSB has to carry on the difficult task of determining the conformity of a domestic legal order with WTO law.<sup>100</sup> Once the DSB makes a decision, its ruling is binding and there is a legal obligation to comply with the ruling.<sup>101</sup> Although no other WTO agreements have generated as much interest as the DSU, this Article will not go into the details of the general DSU

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97. See Carla L. Reyes, *WTO-Compliant Protection of Fundamental Rights: Lessons from the EU Privacy Directive*, 12 MELB. J. INT'L L. 141, 163-66 (2011) (discussing regulatory restraints on privacy protection under the WTO).

98. *Trade Retaliation in the WTO DSU*, *supra* note 95.

99. The WTO has two major functions: legislative and judicial. The legislative function refers to the role of the WTO as a forum in which sovereign Members seek to reach trade agreements. The judicial function is performed by the WTO's dispute settlement system, which is one of the major features of this multilateral trade system. However, since the long stalemate in multilateral negotiations has put WTO's legislative function in low gear while the judicial arm keeps doing its job, the implementation of WTO law has largely taken the form of compliance with the rulings of the DSB. These rulings, in effect, have facilitated the system at the center of trade regulation. Even so, there is no focused conceptual analysis of why the WTO has been so efficient in enforcing its rules and compelling Members to proceed with in-depth amendments to their domestic law.

100. The DSU is “a central element in providing security and predictability to the multilateral trading system.” DSU, *supra* note 3, art. 3(2).

101. See Jackson, *supra* note 10, at 109–25.

mechanism,<sup>102</sup> but Section A concentrates on the standard of review adopted by the Panels and the AB in order to explain in Section B the ramifications of the nature of national legislation on the compliance process.

#### A. *Standard of Review*

This Article would like to highlight that when the WTO provision underlying the control is more precise, the examination by the DSB of the contested national measures is less likely to use the *de novo* approach. Inversely, when the WTO provision is not very precise, the DSB will have to examine the context of the national measures more thoroughly in order to assess its conformity.

As mentioned, conformity within the framework of the WTO system imposes on each Member the obligation to include in its legal system the rules contained in the WTO agreements because this process is of an obligatory nature. To that extent, the conformity determination by the DSB consists of analyzing whether the contested measures are consistent with WTO law or not. The role of the Panels and the AB is to determine whether the national measures conform to WTO law.<sup>103</sup> “The verb ‘to determine’ means to find out, to ascertain, to establish, or to carry out all those activities necessary to reach a reasoned decision.”<sup>104</sup> Such a determination can be done through a text-to-text comparison of the domestic legislation with the relevant WTO provisions or through a comparison of the WTO provision with the administrative practice.

In practice, when the examination of an allegedly WTO-inconsistent domestic measure or law falls within the competence of a

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102. The efficiency of the GATT’s DSM was limited because it was necessary to obtain a general consensus for adopting a report of a dispute settlement panel, and the foreseeable refusal of a succumbing party was sufficient to prevent the adoption of the report. Under the WTO, the GATT consensus requirement has been reversed: according to its DSU, a consensus is required to reject a report (called “*negative consensus*”), rather than to adopt one. In other words, a decision will be taken if any Member votes for it. The result of this reversal can be seen in the quasi-automatic nature of the process. For a comprehensive overview, see SIMON LESTER ET AL., *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 234 (2008).

103. Petros Mavroidis argues that WTO DSB organs, including panels and the AB, have broad discretion to establish procedures necessary to fulfill their functions. See Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT’L L. 421, 424 (2008).

104. Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 24, WT/DS213/AB/R (Nov. 28, 2002).

panel, the question arises with what depth or intensity it should be reviewed. The standard of review deemed appropriate in a specific case defines the degree to which a panel should ‘second guess’ a Member’s measure or law.<sup>105</sup> Again, the DSU does not directly address this issue.<sup>106</sup>

The DSB, however, may face a problem when it has to deal with determinations already made by national governments. Because “the issue of standard of review [will arise] where a panel is examining the domestic law of a Member as interpreted by domestic authorities and tribunals to determine whether the law, or the actions of those authorities and tribunals (including fact-finding), or both are in compliance with provisions of the covered agreements.”<sup>107</sup> Since the WTO Agreements remain silent on the proper standard of review, traditionally, the standard of review may be oriented in two opposite directions according to the deference principle and the *de novo* principle.<sup>108</sup> However, considering jurisprudence on the whole, it shows that the panels and the AB have opted for “a middle-of-the-road approach and have applied a test which is a mixture of these two principles depending on the particulars of the case concerned.”<sup>109</sup>

### B. *Mandatory vs. Discretionary Legislation*

But there is still a limit in the role of the DSB regarding the determination of WTO conformity. According to the DSB jurisprudence, there is a clear distinction between mandatory legislation and discretionary legislation. As underscored by Wang,

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105. Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT’L ECON. L. 635, 637 (2003).

106. The Anti-Dumping (“AD”) Agreement is the only agreement for which specific standards of review of both facts and law could be agreed upon during the Uruguay Round. GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Article VI, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

107. ROBERT HOWSE & MICHAEL TREBILCOCK, *THE REGULATION OF INTERNATIONAL TRADE* 194 (Routledge) (1999); see SIMON LESTER, BRYAN MERCURIO & ARWEL DAVIES, *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 206-10 (2d ed. 2012).

108. An illustration of the *de novo* approach is the *Thailand – Anti-dumping duties* case in which the AB held that panels are given a broad authority to investigate whether the anti-dumping authority of a Member properly performed fact-finding, and suggested that it could examine not only the evidence before the anti-dumping authority but also other evidence. Appellate Body Report, *Thailand – Anti-Dumping Duties on – Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶ 107 WT/DS122/AB/R, (Mar. 12, 2001).

109. MATSUSHITA ET AL., *supra* note 53, at 42.



“government measures (including laws, regulations and administrative actions) which leave no discretion to enforcement authorities are capable of violating international treaties.”<sup>110</sup>

Mandatory law is law that is enforceable on its own and its implementation does not allow the executive authority any room for maneuver. Also, mandatory law that does not contain provisions in conformity with WTO law automatically violates the organization’s rules. Conversely, discretionary law allows the executive authority room for maneuver through administrative action. It leaves the authorities room to maneuver and enables them to remove from the law provisions that are in conflict with WTO rules and to adopt measures that are in conformity with international trade requirements. Thus, these discretionary laws do not by themselves constitute a violation of the WTO agreements and they are called into question only if, at the time of their actual application in a particular case, they violate the terms of the WTO Agreement, as underlined by a Panel report: “legislation which merely gives the executive authority the discretion, either through silence or otherwise, to act inconsistently with the Agreement cannot as such be challenged before a Panel, i.e., independent of its actual application in a particular case.”<sup>111</sup> Even so, it is not tenable that the question of the WTO conformity of a domestic law with a Member’s WTO obligations may not form a subject matter of that assessment independently of its application. It is a significant limit imposed on the general principle of the conformity obligation.

The origin of this distinction goes back to the GATT 1947, and the action of the GATT panels was summarized as follows in the *United States – Tobacco* case: “panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority [. . .] to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.”<sup>112</sup>

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110. WANG, *supra* note 19, at 351.

111. Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, ¶ 7.129, WT/DS236/R (Sept. 27, 2002).

112. Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, ¶ 118, B.I.S.D. 41S/131 (Oct. 4, 1994) (internal quotations omitted).

The purpose of this distinction was to make it possible to determine “when legislation as such—rather than a specific application of that legislation—was inconsistent with a Contracting Party’s GATT 1947 obligations.”<sup>113</sup> In any event, “the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government.”<sup>114</sup>

The opening offered by the concept of discretionary legislation, however, has recently been reduced by jurisprudence. It is considered that the freedom allowed to national authorities to act in a way incompatible with WTO agreements could amount to a violation of these agreements, after all. In other words, a distinction is maintained between mandatory and discretionary legislation, according to which only the latter requires a WTO-inconsistent application to violate WTO rules. This is in reference to a development of an important case of 1999 regarding *Sections 301–310 of the Trade Act of 1974*, in which the panel advanced several arguments that are sometimes considered as indecisive, and thus it led Yoshiko Naiki<sup>115</sup> to comment that “*impressionist* may be an appropriate description of the panel’s way of speaking.” In that case, a US law authorized the US authorities, without any obligation on their part, to unilaterally sanction a pled violation of WTO law by another Member. However, the Panel considered that the US law, whether the freedom it allows to the Administration is exerted or not, constitutes a violation of the WTO agreements.

Although, with some criticism one can imagine that if the panel had admitted the compatibility of the US law, it would have left a permanent doubt about the viability of the DSM. Also, such a doubt would have implied significant legal risks for economic operators who are the principal actors even though they may not be the immediate recipients of benefits under the WTO law. If individual economic operators cannot be confident about the integrity of WTO dispute resolution and may fear unilateral measures outside the guarantees and disciplines which the DSU ensures, their confidence in each and every one of the substantive rules of the system will be

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113. Appellate Body Report, *United States – Anti-Dumping Act of 1916*, ¶ 88, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000).

114. *Id.* ¶ 89.

115. Yoshiko Naiki, *The Mandatory Discretionary Doctrine in WTO Law – The US – Section 301 Case and Its Aftermath*, 7 J. INT’L ECON. L. 23, 36 (2004).

undermined as well. “The overall systemic damage and the denial of benefits would be amplified accordingly. The assurances thus given under the DSU may [ . . . ] be of even greater importance than those provided under substantive WTO provisions.”<sup>116</sup>

In any case, the general principle of conformity gains importance especially when there is concern about the indirect effects of discretionary legislation on economic operators. This kind of limit imposed by the distinction between mandatory legislation and discretionary legislation is however relative. Primarily, because it relates to the application and respect of an Article of the DSM which determines the settlement of the disputes that the Panel regards as fundamental, noting in addition that “the preservation of the specific guarantees provided for in Article 23 is of added importance given the spill-over effect they have on all material WTO rights and obligations.”<sup>117</sup>

Insistence on discretionary legislation despite nonconformity with WTO rules, among other things, will pose a problem, that is, to continue to leave Members exposed to the risk of violation. Such a situation undermines the safety and predictability of trade, and it is difficult to reconcile it with the obligation to ensure conformity. After all, when the law leaves room for violation, conformity is unlikely to be guaranteed. Furthermore, the increasing number of cases raising the issue of mandatory/discretionary legislation can demonstrate that more and more complainants base their arguments on this theory in an attempt to eliminate other Members’ illegal administrative practices.<sup>118</sup>

This Article thus would like to point out an issue: if the discretionary legislation can persist even after the implementation of its measures has been disapproved, it may encourage the use of this legislation as a protectionist tool. Indeed, as long as it continues, it may become an incentive to enact some measures that are contrary to the WTO rules. About this issue, without calling into question the concept of discretionary legislation, the Japanese representatives, however, proposed making an exception to the application of the theory of discretionary legislation as the repetition of the same infringement is highly probable: “[F]or instance, when it was evident that a Member had deliberately ignored the recommendation of the

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116. Section 301 Panel Report, *supra* note 55, ¶ 7.94.

117. *See id.*

118. Naiki, *supra* note 115, at 63.

DSB not to apply a particular measure enacted pursuant to the law and applied similar measures subsequently.”<sup>119</sup> Meanwhile, they also suggested that the burden of proof in cases involving “discretionary” law should be shifted to the Member imposing such measures, if there was evidence that repeated violation had taken place. In such situations, the measures would be presumed to be inconsistent with the WTO rules, unless proven otherwise.

#### V. NOVATION OF THE COMPLIANCE OBLIGATION

In the early days of the WTO, Professor Petros C. Mavroidis conjectured that the then-newly penned DSU could theoretically allow “hit and run”-style breach.<sup>120</sup> When deconstructing the obligation of conformity, I would rather emphasize a peculiar phenomenon which shed a great light of the WTO compliance process, consisting of the novation of the obligation of conformity.

The absence of conformity leads the DSB to specify the contents of the primary obligation by the creation of a derived obligation.<sup>121</sup> This new obligation specifies the content of the primary obligation: such internal rules must comply with the provisions of the WTO agreements. The DSB reports isolate the non-conformity measures and the reasons for their non-conformity. They also locate the exact point where the international obligation must be applied in the internal legal system. Conceptually, a secondary obligation contained in the decision of the DSB—which requires the law to conform to WTO law—is grafted to treaty obligations to ensure compliance. So there is a novation of the primary obligation to comply. Section A will discuss the interpretation given by the DSB reports and how it transforms the initial requirement in its form, and Section B will discuss how it transforms the substantive content.

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119. DSU Special Session, *Minutes of Meeting Held in the Centre William Rappard on 13 – 15 November 2002*, ¶ 3, TN/DS/M/6 (Mar. 31, 2003).

120. Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763, 783 (2000). Professor John Jackson applied the phrase “free pass” in 2008, pointing to the “compliance incentive problem” but leaving that problem's resolution for another day. See John H. Jackson, *The Case of the World Trade Organization*, 84 INT'L AFF. 437, 452 (2008) (applying the term “free pass” to the time lag).

121. The reasons that the adopted reports of a panel or the AB bind the parties to the dispute are proclaimed in the DSU Agreement. According to Jackson, there are at least 11 clauses, which strongly suggest that “[T]he legal effect of an adopted panel report is the international law obligation to perform the recommendation of the panel report.” JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 783 (2000).

*A. Transformations in the Form of the Obligation*

The primary obligation to comply is the vector of the DSB determination of compliance. When a non-conforming measure is identified, the DSB ruling will require its compliance by either withdrawal or modification. The DSB ruling generates a new obligation to comply which is distinct from the primary one. First, the secondary obligation is now emanating from the specific body of the WTO, which makes it unilateral in nature. Second, the compliance of the losing party is now subject to a deadline which never existed earlier.

First, originally from a conventional source, the compliance obligation is turned into a unilateral act when later made in a report adopted by the DSB. The DSB, composed of all WTO Members, exercises the powers of the General Council and performs the functions of dispute resolution. It is only when the report has been formally adopted by the DSB that it expresses the will of the WTO to force compliance of domestic law. If the report is not adopted—or as long as it has not been adopted—the findings of a panel or Appellate Body reports have no legal status in the WTO. This reformulation of the obligation to comply in a unilateral act does not carry an increased strength of the obligation. However, it comes back directly to the Member concerned as it shall respect the commitment contained in Article XVI:4 of the WTO Agreement.

In essence, the DSM goes beyond Article XVI:4 because a Member is no longer free to decide how it should act but has to follow the collective ruling against it. More precisely, if the obligation resulting from the treaty expects the Member to ensure the conformity of its domestic law, the obligation resulting from the DSB report instructs the Member how to bring its measures into conformity with the WTO law. In this respect, spontaneous execution has become a directed execution of the treaty. Second, a deadline for the compliance appears in the DSB ruling. DSU Article 21.1 states the general principle that “[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”<sup>122</sup> Accordingly, Members

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122. This requirement is specified in Article 21.3 of the DSU providing that “[i]f it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so.” DSU, art. 21.3.

should seek to comply “immediately” with the recommendations and rulings of the DSB.

It is only if it is “impossible” that the Member concerned is entitled to a “reasonable time” for implementation. In determining the reasonable period of time, the Arbitrator will have to look at the regulatory means available in the domestic legal order. Only then does it become possible to define the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.<sup>123</sup> In considering the case of whether it “is impracticable to comply immediately with the recommendations and rulings,” WTO law gives up the initial requirement of immediate compliance. However, it is not an abandonment of the compliance obligation itself. Instead, the WTO adopts a pragmatic position by balancing the need for compliance and the time more or less that can help reach compliance.

In other words, WTO law tolerates that in certain circumstances it is not possible to immediately meet the requirement of compliance. In this light, the secondary obligation to comply involves a reduction of Article XVI:4 primary obligation to comply. The introduction of a prompt compliance or the tolerance of a “reasonable period of time”<sup>124</sup> have a point in common: they both imply the emergence of a deadline. The obligation to comply thus undergoes another transformation in terms of the time that is given to the Member to change its law. Indeed, the secondary obligation sets the time at which the Member will have the obligation to conform to WTO law.

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123. *EC Measures Concerning Meat*, *supra* note 93, at ¶ 16. The Arbitrators held, *inter alia*, that “when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months.” Further:

[T]he ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a ‘guideline for the arbitrator’, and not a rule. This guideline is stated expressly to be that ‘the reasonable period of time . . . should not exceed 15 months from the date of adoption of a panel or Appellate Body report. In other words, the 15-month guideline is an outer limit or a maximum in the usual case. For example, when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months. However, the reasonable period of time could be shorter or longer, depending upon the particular circumstances, as specified in Article 21.3(c).

*Id.*

124. DSU, art. 21.3.

*B. Transformations of the Content of the Obligation*

The obligation to comply also changes in its substantive content since the DSB decision specifies the content of the primary obligation and sometimes indicates the means to achieve conformity of domestic law with the law of the WTO.

The obligation of compliance with WTO law, enshrined in the Agreement Establishing the WTO, is general in nature. It applies to all agreements annexed, which explicitly or implicitly state so. However, a dispute raised before the DSB is always about an alleged contradiction between a treaty provision and a precise and specific internal measure. The role of the Panel or the Appellate Body consists of determining compliance of a specific domestic rule with a specific WTO law requirement. The report isolates the non-conforming measure and the reasons for its non-compliance. The DSB ruling identifies the point where the international obligation should apply in the internal legal order. The secondary obligation to comply is a new obligation which specifies the content of the primary obligation: such internal rules<sup>125</sup> must comply with the provisions of the WTO agreements.<sup>126</sup> In this sense, the secondary obligation clarifies the primary obligation of Article XVI:4 of the WTO Agreement. In this respect, the words show that the Member is no longer master of the treaty. Indeed, if the obligation under the Treaty requires “the Member concerned bring the measure into conformity with that agreement.” While the primary obligation to comply involves an accepted and spontaneous enforcement, the secondary obligation execution carries an enforcement supervised by the DSB.

Generally, the requirement of Article XVI:4 of the WTO Agreement does not prescribe any particular legal technique to perform compliance.<sup>127</sup> However, the DSB may employ the ability to suggest some means of enforcement of the obligation to comply which is an authoritative opportunity there may be to exercise is left to the discretion of the panel or the AB.<sup>128</sup> According to Article 19:1

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125. See, e.g., Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sept. 5, 1997) [hereinafter *India Panel Report*].

126. In this case, TRIPs art. 70.8(a).

127. Consequently, Members have a real autonomy to conduct compliance of their normative spaces. This principle is not questioned when the DSB adopts the decision to require a Member to change an internal measure to comply with its obligations.

128. Some authors are favorable and encouraging. Y. Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9 J. INT'L ECON. L. 383, 400 (2006) (“As long as the complaining party specifies a certain way in

of the DSU,<sup>129</sup> when a panel or the AB concludes that “a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.” Meanwhile, the panel or AB “may suggest ways in which the Member concerned could implement the recommendations”<sup>130</sup> and could bring the measure into accordance with that agreement. This provision has been interpreted by the panel according to which:

Article 19.1 appears to envisage suggestions regarding what could be done to a measure to bring it into conformity or, in case of a recommendation under Article 4.7 of the *SCM Agreement*, what could be done to ‘withdraw’ the prohibited subsidy. It is not clear if Article 19.1 also addresses issues of surveillance of those steps. That said, any agreement that WTO Members might reach among themselves to improve transparency regarding the implementation of WTO obligations can only be encouraged.<sup>131</sup>

There are some instances of DSB Reports making such substantive recommendations. Thus, the Panel in *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* suggested to India and the United States that they should negotiate a phase-out period for the offending restrictions.<sup>132</sup> In another case, the United States requested that the Panel suggest to India that it should implement its obligation in the same way as Pakistan had implemented its obligation under TRIPs by establishing a mechanism to protect patent applications during a transitional period. The Panel formally declined this demand, saying that it would impair India’s right to choose how to implement, but discreetly added that “India should take into account the interests of those persons who would have filed patent applications had an appropriate mechanism been maintained.”<sup>133</sup> In a sense, Article 19.1 of the DSU reinforces the requirement of conformity as indicated by how materially the losing

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which the DSB recommendations can be implemented, it would be preferable to encourage a panel to assess the specified way and, if appropriate, to suggest the specified way as a valid implementation option, with an explicit statement that there may exist other effective ways to implement the DSB recommendations.”)

129. DSU, art. 19.1 (“In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.”).

130. *See id.*

131. Panel Report, *Brazil – Export Financing Programme for Aircraft*, ¶ 7.3, WT/DS46/RW (May 9, 2000).

132. Panel Report, *Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 7.7, WT/DS90/R (Apr. 6, 1999).

133. *See* India Panel Report, *supra* note 125, ¶ 8.2.



party can comply, *i.e.*, modify and correct the domestic measure. Of course, such a material suggestion is not binding on the Member, however, when the Member concerned follows a suggestion of a Panel or the AB, its action would be seen as being *de facto* in compliance with any provision of Article 21:5 of the DSU reviewed by that tribunal which is an incentive for the losing party to take the suggestion.<sup>134</sup>

### CONCLUSION

In light of the WTO's massive impact on domestic legal systems and its great influence, the topic of conformity of domestic law with WTO law has become a systemic issue that goes to the core and *raison d'être* of the multilateral trading system. Also, this impressive compliance over the years must reinforce the Members' will to obtain the best results possible during the present negotiations. Any new agreement will benefit from the WTO-conformity principle. In this respect, each new engagement should be considered in light of the changes it implies for domestic law. These changes have consequences for the economic sector and also have social repercussions, which should be the countries' main preoccupation.

The WTO compliance obligation is not absolute as it has a few limits.<sup>135</sup> In addition, the DSB is in fact a restatement of the initial obligation of compliance without imposing a sanction which would cover the period during which an internal rule existed in opposition to WTO law. In reality, the multilateral trading system does not seek absolute compliance with WTO law, or even to repair the lack of conformity. The WTO system only wants the law to not permanently impede the implementation of the treaty commitments.

The obligation to conform on the basis of a DSB report does not invalidate the conformity obligation in the agreement. However, even though the primary rule remains valid, only the compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB is required. The non-fulfillment of the initial obligation is invalidated by the execution of the treaty and there is no attempt to examine the

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134. See DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION – PRACTICE AND PROCEDURE* 299 (2004).

135. Especially in terms of tolerance reserved for dispositive law.

reasons for its non-fulfillment. In other words, only the suspension of the illicit act is essential.<sup>136</sup>

In the WTO compliance process, the defaulting Member is thus only asked to fulfill his initial obligation without being held responsible for remedying the consequences of his illegal action. In essence, the Member is only expected to do what he was initially supposed to but not at the time when it should have been done in the first place, which is however a basic principle of both domestic law and international law.<sup>137</sup> In a strict sense, the Member does not have to answer for the breach of the obligation, but rather is only expected to put an end to it. Neither compensation nor the suspension of concessions can be applied retrospectively, and, in essence WTO views remedies as being only prospective and not retrospective.<sup>138</sup> This means that there is no recompense for any harm caused by an illegal trade measure prior to and during the implementation of dispute procedures. Also, it means that the action of the defaulting State cannot be punished.<sup>139</sup> The DSB does not take into account the damage already caused and gives more importance to the future execution of the treaty.

Conceptually, non-observance of the primary obligation does not entail a secondary obligation to remedy the failure to act, but

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136. As the Arbitrators have said, “language used throughout the DSU demonstrates that when a Member’s measure has been found to be inconsistent with a WTO Agreement, the Member’s obligation extends only to providing prospective relief, and not to remedying past transgressions.” Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶ 3.87, WT/DS221/R (July 15, 2002) [hereinafter Panel Report United States – Section 129(c)(1)].

137. As stated in 1928 by the Permanent International Court of Justice in the *Chorzow Factory* case, because “[T]he essential principle contained in the actual notion of an illegal act (a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals) is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” *Factory at Chorzow* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, ¶ 125 (Sept. 13) [hereinafter *Chorzow Factory*].

138. As Petros Mavroidis states, “WTO practice suggests that, contrary to what is the case in customary international law, damages will be calculated from the end of the implementation period and not from the earlier moment when the illegality occurred.” Mavroidis, *supra* note 103, at 438. Public international law approach to remedies was set out in the 1928 *Chorzow Factory* decision of the Permanent Court of International Justice. *See Chorzow Factory*, *supra* note 137.

139. In this regard, the Arbitrators have said that “a countermeasure becomes punitive when it is not only intended to ensure that the State in breach of its obligations brings its conduct into conformity with its international obligations, but contains an additional dimension meant to sanction the action of that State.” *See* Panel Report United States – Section 129(c)(1), *supra* note 136.

rather a secondary obligation in the form of a reminder to comply with the primary obligation. Even more fascinating, the primary obligation of similarity is replaced by a secondary obligation of proximity, and the DSB decision is controlled by fixing a threshold of compatibility.

Compliance with WTO law cannot be explained by the existence of a mere obligation to comply. Actually, this obligation to comply generates complex transnational legal processes which even modify the initial obligation. The distinctive feature of the WTO settlement system does not lay in a vertical obligation which would force Members to comply. This is just an illusion because such a rigid framework does not actually exist in the law of the Organization. However, once deconstructed, the obligation of conformity reveals a complex mutation which generates a process. In that process, Members are enmeshed in procedural requirements and successive exchanges which gradually show them how they can align their laws and policies with international rules. Until the adoption of countermeasures, everything in the WTO Dispute Settlement process smoothly converges in just one direction, in other words, ensuring the execution of the WTO Agreement and consequently, the compliance of the national law.

So when one reads that compliance with DSB is high, it is a forced perspective. Indeed, if there is a ruling of noncompliance, it means that one Member did not respect the initial obligation. Instead of looking at the past, the WTO, very pragmatically, reformulates a secondary obligation which this time must be enforced. One may criticize WTO as not implementing a full-fledged law of responsibility, but results over past decades speak stunningly to the contrary.