

Legitimising the Illegitimate: Extending Interpretation beyond Reality. The *Shrimp* Fairytale and its Implications

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We live in an ever globalizing world. With greater integration as a result of globalisation it is vital that the international trading system provides a platform that sufficiently supports the ability of all players to benefit from globalisation.¹ This platform is referred to as the multilateral trading system which, through the World Trade Organisation provides a series of agreements that seek to regulate international trading activity. The current agreements were negotiated over a period spanning more than a decade, and therefore has to be appreciated within the context of which compromise and agreement were arrived upon. This is especially true as the previous platform, the GATT 1947 is said to have become obsolete as it failed to accommodate developments within the international trading system. Therefore, there are a number of matters that must be weighed when seeking to appreciate the context upon which the foundations that this regulatory system was built upon.

The notion of international trade integration is often referred to as free trade.² Although not a hundred percent linguistically accurate as even free trade as a policy concept contains some restriction,³ free trade basically means the elimination of all artificial/protective trade barriers to the exchange of products across national markets. The idea is that prices faced by producers and consumers will be determined by the world market, reflected by the availability of such goods.⁴ Indeed, some early free trade writers viewed the world market as one unit, and the quest for benefit and advantage was seen as a mutual endeavour throughout the world.⁵ Much of the underlying considerations and objectives of the free trade approach relate to concepts of efficiency in production, a large market base and that market barriers lead to inefficiencies.⁶

According to trade theorists,⁷ the basic/pure theory of trade is concerned with answering two sets of questions. First, why and how countries gain from trade. Second, is to explain

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¹ M.Martin, WTO Dispute Settlement Understanding and Development, Nijhoff International Trade Law Series, 2013

² Ibid

³ Examples include national security, protection of public morals, food safety and the contentious development policy vehicles such as infant industry protection and local content requirement

⁴ D. Irwin, *Against the Tide : an intellectual history of free trade*, Princeton University Press, 1996. P. 5

⁵ D. Irwin, *ibid*, at p. 60, referencing the work of Jacob Vanderlint, 1734.

⁶ Irwin, *ibid*, p. 87. The consolidation of the case for free trade through the theory of comparative advantage was developed by the classical economists in the 19th Century following through from Adam Smith's ideas.

⁷ A. Smith, *The Wealth of Nations*, New York: Modern Library, 1994 [1776] and D. Ricardo, *On the Principles of Political Economy, and Taxation*, Harmondsworth: Penguin, 1971 (Originally published 1817)

the pattern of that trade, basically meaning why certain countries export some goods, and import others.⁸ The first set is called welfare economics, while the second set is called positive economics. Welfare economics is primarily concerned with the effects of trade on real income, total satisfaction, welfare and development. Positive economics involves considerations that are non-monetary, and focuses on the structure, volume and direction of trade: focussing on the efficiency in production and between factors of production.

According to a prominent Classical trade theorist, Adam Smith, trade is a basic manifestation of human nature through the propensity to trade, barter and exchange one thing for another.⁹ To substantiate such an assertion, Smith submitted that instead of attempting to produce all products that they were able to, a country should focus on producing products where they enjoyed a cost advantage over other countries. By doing so, their resources would be concentrated on specialisation in producing such goods leading to greater efficiency and higher output. Smith also advocated for a large market base, stating that this would lead to wealth creation. To achieve this trade should be impediment free. Hence countries could then trade their surplus resulting in higher output from greater efficiency, at lower prices, based on the requisite terms of trade. The bigger the market base for trade the greater the wealth creation and satisfaction leading to welfare and development enhancement resulting from specialised production and trade. Smith's theory has been criticised for placing too much emphasis on absolute costs differences. However a number of subsequent theorists support the basic idea of specialization and large, impediment free market.¹⁰

Although mankind have been actively involved in cross border exchange of goods from the beginning of recorded history,¹¹ the full impact of trade theory in practice can be appreciated from attitudes taken by major economies through their international trade policy practices in the late eighteenth and nineteenth centuries.¹² As a result of this long relationship between man and the need to trade, it is expected that through such activity, customary practices developed including the notion of fair exchange and fair distribution arising from such activity.¹³ The influence of free trade precepts are connected to the quest for larger market bases, which led to greater unification of markets. As a result, barriers within domestic markets fell. This inevitably led to the practice of free trade being taken into a wider context as countries practiced such principles when trading across national borders. The repealing of the Corn Laws in 1846 which has been attributed in

⁸ N. Grimwade, *International Trade; New Patterns of Trade, Production and Investment*, 2nd Edition, Routledge, 2000, p. 29-30

⁹ A. Smith, supra note 7, p. 14

¹⁰ See J. S Mill, *Principles of Political Economy* [1884]. Ed. W.J Ashley London, 1909. See M. Trebilcock and R. Howse, *The Regulation of International Trade*, 3rd edition, Routledge, 2005, p. 5, for example David Ricardo, the Heckscher-Ohlin Theorem through the Factor Proportions Hypothesis and Raymond Vernon of the Harvard Business School through his Product Cycle Theory..

¹¹ S. Kemp, "Psychology and Opposition to Free Trade", *World Trade Review*, Volume 6:1, 2007, 25-44, p. 27
See also R. Horan, E. Bulte, and J. Shogren, "How Trade Saved Humanity from Biological Extinction : An Economic Theory of Neanderthal Extinction" *Journal of Economic behavior and Organization*, 58 (1) 1-29

¹² M. Trebilcock and R. Howse, supra note 10, p. 21

¹³ R. Trivers, "The Evolution of Reciprocal Altruism" *Quarterly Review of Biology*, Vol 46 (1) 35-57, March 1971, p. 37 available at JOSTOR <http://jstor.org>, accessed on 26/5/07 at 3.30 pm

part to the influence of Smith and Ricardo, was followed by unilateral liberalisation in Britain. Many other major European economies like France and Germany followed suit and as a result, these major economies negotiated trade liberalising treaties between them. Contained within these treaties was the most favoured nation (MFN) principle which in essence meant that they would extend to each other any more favourable concessions that each might subsequently negotiate with third countries,¹⁴ or in other words automatic reciprocity. This reinforced the environment for free trade and reciprocity and the importance of creating and maintaining a greater market base to this end. This move significantly contributed to multilateralism with the spread of standard provisions and treatment. These treaties also had a knock-on effect which led to the adoption of conventions to support the objectives of trade liberalising treaties especially in relation to transport and communication which further facilitated trade expansion.¹⁵ Hence, the regulation of international trade requires a system that ensures automatic reciprocity as well as one that is rule based rather than power based, supported by a fair and effective dispute settlement mechanism.

Between the two world wars, conferences/discussions were undertaken on the challenges of liberalisation of international trade.¹⁶ It is claimed that two aspects of the interwar conferences were of great value to international economic law. Firstly was the realisation that in the past there was a tendency to be satisfied with sweeping, unspecific statements on best principles, which always led to often a meaningless outcome without hard and fast commitments. The second was their episodic character.¹⁷ These can be grouped as gaining an insight from past mistakes where agreements of a vague nature did not serve to attain the requirements of the trading environment of the day. What was required was a rule-based system with clear certain rules supported by an effective dispute settlement mechanism.¹⁸ Further, without any long term framework, it was easy for trading partners to slip back to mercantilist based policies.¹⁹

Subsequent international conferences provided trade officials from major trading nations the opportunity to do exactly this, which eventually resulted in the commissioning of draft texts dealing with the main trade restrictive issues of the time. The drafting exercises allowed officials the opportunity to re-examine problematic issues previously circumvented by the unspecific wordings in earlier initiatives, and more importantly, to clarify what indeed such ambiguity meant.²⁰ This motivation led to the crafting of the International Trade Organisation (ITO), which was an ambitious initiative said to have been capable of producing the platform that would have addressed all these concerns.

¹⁴ See discussion by R. Spaulding Jr, "German Trade Policy in Eastern Europe, 1890-1990: preconditions for Applying International Trade Leverage" *International Organization*, Vol 45, No. 3 (summer 1991) pp. 343-368, p. 349 and also M. Trebilcock and R. Howse, supra note 10, p. 21

¹⁵ M. Trebilcock and R. Howse, supra note 10, p. 21

¹⁶ Robert E Hudec, *The GATT Legal System and World Trade Diplomacy*, Butterworth Legal Publishers, Second Edition, 1990, p. 5.

¹⁷ Robert E Hudec, *ibid*, p. 7

¹⁸ M. Martin, supra note 1

¹⁹ J. Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order", *International Organization*, Vol 36, No. 2 *International regimes*, (Spring 1982), pp 379-415, p. 384

²⁰ Robert E Hudec, supra note 16, p. 8

However, the resulting reluctance by the major players of the time to commit to such far reaching reforms in the international system led to the ITO's failure. Instead the GATT 1947 which was meant to be only one component of the ITO survived as the multilateral trading system regulatory platform for the following five decades, before it was replaced. Over the course of fifty or so years, underlying philosophies of regulation changed. The GATT 1947 focused on negative harmonisation which is eliminating discrimination. During the run up to the conclusion of the Uruguay Round of multilateral trade negotiations, focus moved to a new philosophy for the regulation of international trade, namely positive harmonisation, towards harmonisation of national policies.²¹ Some authors indicate that such harmonisation involves the trading of trade policies.²² What is evident in relation to harmonisation however is that the degree of harmonisation needed to be stepped up. In fact towards the end of the GATT's life, the Tokyo Round of negotiations actually split the diverse membership of the GATT, indicating that the GATT as a regulatory platform could no longer sustain the multilateral trading system. Times had changed. There were new players in the international trading system, and the international trading environment provided for new opportunities, which really required the inclusion of these new players who mostly were developing countries. The result was the establishment of the World Trade Organisation (WTO) in 1995.

Much of the discontentment with the regulatory base under the GATT 1947 was expected to be abated with the conclusion of the UR which brought some important developments. Firstly was the single undertaking commitment which unified the coverage of the agreements. This rectified the splitting and segregation of members.²³ The WTO also created a framework for liberalisation of trade in services, protection of intellectual property rights and very importantly, formalised and improved dispute settlement.

The notion of dispute settlement involves conflicting assertions as to the rights and obligations of the parties involved.²⁴ A legal dispute refers to conflicts of rights between parties within the jurisdiction of a dispute settlement mechanism (DSM) but does not involve conflicts of interests of the parties.²⁵ Therefore one may conclude that it is the rights and obligations that are covered in the agreements through which the dispute is raised is of prime importance in a dispute settlement proceeding. Disputes arise from freely entered relationships between parties that create expectations as to their future conduct. Such expectations are upon what parties plan their future conduct. Such a conclusion in turn gives rise to two situations. Firstly, conflict of interests should have

²¹ V. Heiskanen, "The Regulatory Philosophy of International Trade Law", *Journal of World Trade*, 38 (1), 1-36, 2004, p. 29

²² B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System, The WTO and Beyond*, 2nd Edition, Oxford University Press, 2001, p. 27

²³ Hans van Houtte, *The Law of International Trade*, 2nd edition, London Sweet and Maxwell, 2002, p. 77

²⁴ P. Behrens, "Adjudicative Methods of Dispute Settlement in International Economic Relations", in E. Petersmann and G. Jaenicke, *Adjudication of International Trade Disputes in International and National Economic Law*, PUPIL volume 7, D. Dickie (ed), University Press, Fribourg Switzerland, 1992, p. 5

²⁵ Article 25 of the ICSID Convention on Settlement of Investment Disputes Between States and Nationals of Other States, 1965. ICSID Doc. R 65-6, para.25 (8 January 1965) available at <http://www.worldbank.org/icsid/basicdoc-archive/17.htm>, at 5.10 pm on 20 July 2004.

been resolved before binding obligations were entered into, as, to allow conflicting interests subsequent to reaching a negotiated compromise would make the DSM redundant, and secondly, rights and obligations of parties' under the DSM cannot be extended without the parties' agreement. It is submitted that in the context of a multilateral agreement the magnitude of the WTO, such extension would entail proper negotiations where the benefits of the proposed wider coverage would be weighed against national policies/interests before further binding obligations are entered into.

When parties negotiated the Uruguay Round Agreements, including the WTO Dispute Settlement Understanding (DSU), they intended a rule-oriented system. The pre-UR power-oriented system, premised on the use of one party's dominance/power to influence the conduct of the other party, has been criticised as having the aim of redistributing income to the benefit of the powerful²⁶ and not satisfying the balanced development requirements resulting from the evolution of the international system in general. The rule-oriented approach is instead based on free negotiation.²⁷ This notion of free negotiation was necessary as the multilateral trading system grew in scope and character, creating new problems in international economic relations resulting from a congruence of circumstances.²⁸ To meet the measure of discipline that was required for national governments to take initiatives to attain the desired integration, a check on the ability of national governments to backslide on their commitments was necessary.²⁹ Some authors have recognised that the nature of binding decisions of the rule-oriented approach is a basis for long-term obligations based on mutual agreement, and that this approach would avoid the risks of over dependence on diplomatic solutions that would inevitably reflect the relative power of the parties,³⁰ especially in a forum with such a diverse membership as the WTO. The function of multilateral trade rules as described by some authors is to maximise welfare and this is achieved through a rule-oriented settlement of such disputes.³¹ Hence, the final outcome of dispute settlement negotiations in the UR was a rule-oriented approach evidenced by the adjudicative features of the system,³² as an attractive and transparent alternative to unilateral measures and a system that could protect the contractual rights of all members including developing nations.³³

²⁶ See E. Petersmann, "The GATT Dispute Settlement and the Uruguay Negotiations on its Reform", in P. Sarcevic and H. van Houtte (eds), *Legal Issues in International Trade*, Graham & Trotman/Martinus Nijhoff, 1990, pp. 55-57 for discussion.

²⁷ Ibid, p. 56.

²⁸ J. Jackson, *The World Trade Organization, Constitution and Jurisprudence*, The Royal Institute of International Affairs, 1998, p. 13. See also D. Mc. Rea "What is the Future of WTO Dispute Settlement?" *Journal of International Economic Law* 7(1) 3-21, Oxford University Press 2004, p. 3. Examples of such congruence were discussed in chapter 1 of this paper.

²⁹ J. Jackson, *ibid*, p. 24

³⁰ E. Petersmann, *supra* note 26, p. 59

³¹ J. Jackson, *supra* note 28 p. 57

³² This includes the panel process, independence, written exchange between parties and the time limits. See discussion at E. Petersmann, *supra* note 26, p. 64

³³ J. Brewer and S. Young, "WTO Disputes and Developing Countries", *Journal of World Trade* 33 (5) 169-182, 1999, p. 172.

A degree of consultations was included into the dispute settlement process, as some authors state³⁴ providing for both diplomatic and legal means of addressing the issue at hand, therefore maximising the chances of settlement by successive or alternative use of different methods. This view on the surface would seem to describe the WTO DSU. However, in viewing the decision to negotiate for improving the dispute settlement at the UR, and in appreciation of the prevailing situation of dispute settlement at that time and the deficiencies that a new DSU was meant to rectify, together with the clear subdivision between the conciliatory/consultative and actual panel/adjudicatory process, the view of there being alternative processes is criticised as inaccurate. Consultations required by Article 4 of the DSU are undertaken as part of the entire dispute settlement process. It should be viewed as being sequential in nature. Engaging in consultation is without prejudice to the right of any party to proceed with requesting the establishment of a panel should an amicable solution not be reached.

A reading of the dispute settlement-negotiating plan of the Negotiating Group on Dispute Settlement for the UR negotiating process,³⁵ indicates that there existed a three-pronged objective of the negotiating plan. These were, firstly that there was acceptance that greater effectiveness and enforceability of rights and obligations under GATT rules was beneficial to all members, and therefore desired. Secondly, to achieve this, the rules and procedures relating to dispute settlement needed to be strengthened with the ultimate view of, the third objective, the attainment of an effective and efficient method of resolving disputes arising from the covered agreements. The resulting large number of proposals submitted for this exercise³⁶ indicated that there was a high degree of interest across the board to achieve the goals identified in the agreed negotiating plan.

However, developing countries have expressed concern over the interpretation and application of the WTO Agreements.³⁷ The accumulated jurisprudence of the WTO dispute settlement system thus far reveals that the interest and perceptions of developing countries have not been adequately taken into account. The Panels and Appellate Bodies have displayed an excessive concern for legalism.³⁸

Some authors are of the opinion that the Appellate Body prefers the literal approach to interpretation.³⁹ This form of interpretation is criticised in that it stops any examination of the intention of the parties or objects and purpose of the agreement.⁴⁰ Therefore, there

³⁴E. Petersmann, *supra* note 26, p. 57

³⁵ This Negotiating Group being part of the Uruguay Round negotiating process which consisted of 14 such individual groups reporting to the central Trade Negotiations Committee.

³⁶ E. Petersmann, "Settlement of International and National Trade Disputes Through the GATT: The Case of Antidumping Law", in E. Petersmann and G. Jaenicke, *Adjudication of International Trade Disputes in International and National Economic Law*, PUPIL volume 7, D. Dickie (ed), University Press, Fribourg Switzerland, 1992, p. 55

³⁷ A. Qureshi, "Interpreting World Trade Organisation Agreements for the Development Objective" *Journal of World Trade* 37 (5) 847-882, 2003, p. 848

³⁸ Zambia on behalf of the LDC Group, (TN/DS/W/17) 9 October 2002

³⁹ C. Ehlermann, "Six Years on the Bench of the World Trade Court". Some Personal Experiences as a Member of the Appellate Body of the World Trade Organisation", *Journal of World Trade* 36 (4) 2002, 605-639, p

⁴⁰ A. Qureshi, *supra* note 37, p 866. See also A. Chua, "Reasonable Expectations and non-Violation Complaints in GATT/WTO Jurisprudence", *Journal of World Trade* 32 (2) 27-50, 1998, for a discussion on the principle of reasonable expectations and subsequent assumptions as a result.

cannot be security and predictability where the intention of parties expressed in the objectives and purpose of the agreement are being diluted. Other authors find that interpretation of WTO Agreements should be based on the fact that there is an overall balance of concessions in the WTO.⁴¹

The issue with interpretation of the DSU itself as well as the covered agreements by Panels and the Appellate Body can best be appreciated through what this paper seeks to introduce as the “extended” approach.⁴² When Members decided to replace the power-based approach of relationships between themselves to a more rule-based approach, the value of negotiations and discussion between Members were not under-preserved. The nature of international/multilateral trade requires an avenue to propose, discuss and exchange technical know-how of new issues before binding obligations are undertaken. However, the diversity of interests between Members and caution especially amongst developing countries has meant that the work progress for the acceptance of expansion of regulatory coverage by developing countries has been slow. This has caused a degree of frustration amongst some developed countries causing them to increasingly require the covered agreements to be interpreted to extract the intentions of the parties of the agreements during dispute settlement as a means of “smuggling in” new, especially non-trade issues into the DSU,⁴³ thereby adjusting the parameters or extent of consent to be bound, and displacing the intended rule-based system.⁴⁴ The dangers of such an approach have been recognised earlier by some authors,⁴⁵ although others have been inclined to assert that such an approach is judicial activism by the appellate body.⁴⁶ This is criticised as such interpretation is as a result of certain Members persistently requiring interpretation of the covered agreements that has brought about this phenomenon. Some authors observe that these are attempts to use the dispute settlement process to pursue

⁴¹ G. Marceau, “WTO Dispute Settlement and Human Rights” *13 E.J.I.L* 4 (2002) 753-841

⁴² As opposed to the rule-based and power-based approaches discussed above. See discussion in D. Shanker “The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha declaration on the TRIPS Agreement” *Journal of World Trade* 36 (4) 721-772, 2002 on how the over use of interpretation under the Vienna convention can undermine the WTO DSU.

⁴³ According to D. Mc. Rea supra note 28, , p. 3, there is practice of Members to use dispute settlement to gain further clarification of provisions in order to expand the scope of existing obligations to encompass matters which no negotiating progress has been made.

⁴⁴ Accordingly, J. Weiler in “The Rule of Lawyers and the Ethos of Diplomats”, *Journal of World Trade* 35 (2) 191-207, 2001, p. 194 asks the question if the shift in paradigm in relation to the WTO DSU has been a victory for the rule of law or a victory for the rule of lawyers, asserting that such developments have not benefited the deeper objectives of the WTO. M. Dunne, “Redefining Power Orientation : A Reassessment of Jackson’s paradigm in Light of Asymmetries of Power, Negotiation and Compliance in the GATT/WTO Dispute Settlement System”, *34 Law and Policy in International Business* 277, Fall 2002, p. 280 suggests the need to reconsider the traditional understanding of the realist perspective of “power-based” to a new contextual understanding that is not static in its approach to the meaning of “power-based”. D. Shanker supra note 42, discusses how the interpretative approach is now influencing the WTO negotiating agenda.

⁴⁵ C. Ehlermann, “Six Years on the Bench of the World Trade Court”. Some Personal Experiences as a Member of the Appellate Body of the World Trade Organisation”, *Journal of World Trade* 36 (4) 2002, 605-639, at p. 605

⁴⁶ R. Steinburg, “Judicial Law making at the WTO : Discursive, Constitutional and Political Constraints”, 98 *American Journal International Law* 247, April 2004. See also E. Vermulst, P. Mavroidis and P. Waer, “The Functioning of the Appellate Body After Four Years : Towards Rule Integrity”, *Journal of World Trade*, 33 (2), 1-50, 1999, p. 23

matters that they are unable to win in negotiations despite Article 3 (2) DSU that the DSB cannot add or diminish rights and obligations provided under the covered agreements.⁴⁷

Connected to the “extended” approach is the Trade Stakeholder model.⁴⁸ This model is premised on the pursuance of interests of certain segments of stakeholders or pressure groups in a Member’s economy.⁴⁹ The naive rational of this model⁵⁰ does not consider that to permit the infiltration of such a model into the WTO DSU would be legitimising public choice policies.⁵¹ Within an administration, a government has to weigh the interests of all its stakeholders. It is very often that the many stakeholders in one country would have conflicting interests. If the interest of one segment of stakeholders is pursued to the detriment of another, the rational given by such authors for the importance of this model holds very little water. In pursuing an international agreement, such interests should have been weighed domestically and exercised through a member’s foreign policy. The use of interpretative strategies to mould or manipulate the outcome of a prior agreement cannot logically be calibrated with the intentions of parties at the time of negotiations.⁵² The use of the extended approach to satisfy the trade stakeholder model goes against the grain of dispute settlement in general which is to provide security and predictability to the covered agreements.

The use of interpretory aids may become necessary when there is ambiguity in the text of the agreement.⁵³ Accordingly, there must be good reason to doubt the natural sense of the words used in the treaty.⁵⁴ It is submitted that the opinion of a segment of the population of a Member will not satisfy this test. As a government is charged to balance the interests of all its stakeholders before undertaking binding commitments internationally, a dissatisfied group, notwithstanding an appreciation of the degree of influence such a group may have on the survival of the government of the day in that country should not negate the principle of *pacta sunt servanda*.⁵⁵

⁴⁷ T. Stewart, P. McDonough and M. Prado, “Opportunities for Increased Liberalisation of Goods “ Making Sure Rules Work for All and That Special Needs Are Addressed”, 24 *Fordham International Law Journal* 652, Nov/Dec 2000, p. 672

⁴⁸ M. Trebilcock and R. Howse, *The Regulation of International Trade*, 2nd Edition Routledge, 1999 p. 55 are very much in favour of this model

⁴⁹ J. Schultz, “The Demise of “Green” Protectionism : the WTO Decision on US Gasoline Rule” 25 *Denver Journal of International Law and Policy* 1, Fall 1996, provides a discussion and illustration of such a model is used by pressure groups to overcome the competitive edge of foreign exporters and operates as a non-tariff barrier.

⁵⁰ Especially explained and applied by M. Trebilcock and R. Howse, *supra* note 48, in Chapter 3

⁵¹ E. Icobucci, “The Interdependence of Trade and Competition Policies”, 21 (2) *World Competition* 1997, p. 12 for a discussion on the ill effects of public choice policies which according to him will negatively impact on global welfare.

⁵² According to L. Bartels in “Article XX of GATT and the Problem of Extraterritorial Jurisdiction : The Case of Trade measures for the Protection of Human Rights”, *Journal of World Trade* 36 (2), 2002, the use of the Vienna Convention on the Law of Treaties to justify extraterritorial application of human rights and environmental policies cannot be said to form intention of Members notwithstanding Article 3 (2) DSU as this would be adding to rights and obligations of members.

⁵³ See M. Fitzmaurice, “The Practical Workings of the Law of Treaties”, in M. Evans (ed), *International Law*, Oxford University Press, 2003, pp. 185-187

⁵⁴ *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, Advisory Opinion, 1932, PCIJ, Ser A/B, No. 50*, p. 365

⁵⁵ Article 26 of VCLT

Observations by other authors⁵⁶ indicate that the Trade Stakeholder model is flawed in that Article XVI of the Marrakesh Agreement,⁵⁷ paragraph 4 requires each member to ensure that their domestic laws are in conformity with their obligations under the covered agreements. Further it has been pointed out that the purpose of providing the security and predictability under Article 3 (2) DSU was for all such stakeholders to regulate their affairs in accordance with the covered agreements.

The increasing influence of this model can be seen from an observation of similar-type cases over the years. In *Tuna/Dolphin 1*,⁵⁸ the United States (US) were not allowed to ban imports of Mexican tuna based on the process used to catch the tuna as it did not affect the tuna as a product.⁵⁹ The US claimed that Mexican fishermen failed to satisfy US authorities that the methods they used did not cause damage to dolphins. In criticising this ruling, supporters of the Trade Stakeholder model state that such import restrictions are not for protection of domestic industry but for the protection of global common environment. If it were a global issue, then unilaterally imposing obligations on Mexican fishermen would not seem to be a coherent method of solving a global problem. Indeed, a global matter would require a global solution.⁶⁰ Apart from the WTO, there are a number of specialised environmental fora that provide a platform for discussion and agreement. This of course would entail negotiating a global standard, not necessarily an American one, but one that would entail negotiation and bargaining. Dismissing the US attempts to make its actions compatible with its obligations under the WTO through Article XX (b), the panel stated that in order for the exception to be operative, the test of necessity is to show that all other less trade restrictive means of solving the problem were exhausted. This included international cooperation. Interestingly, no mention was made on the importance of the higher objective of the WTO, namely the need to maintain a liberal trading regime.

In *Tuna/Dolphin II*⁶¹ the panel maintained the need to restrict the unilateral imposition of US laws extraterritorially for inducing policy changes in other countries, although changing the view of the use of GATT 1994 Article XX (b) and (g) exceptions, stating that these could be used for the protection of environment beyond domestic borders, provided other less trade restrictive means were exhausted.

⁵⁶ J. Jackson, "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?", *American Journal International Law*, 98 (109), January 2004, p. 116

⁵⁷ Marrakesh Agreement Establishing the World Trade Organisation 1994

⁵⁸ *United States-Restriction on Import of Tuna* (action brought by Mexico) report circulated but not adopted 1991, available at www.wto.org/tratop_e/envir_e/edis04_e.htm as at 8.20 pm 16 August 2004

⁵⁹ Article III (1), The General Agreement on Tariffs and Trade 1994

⁶⁰ M. Martin, "Child Labour in Developing Countries: - reasons and solutions", A presentation at the SLSA Annual Conference, University of Striling, 2006. See also M. Martin, "Child Labour: A Global Problem Requiring a Global solution", a 4 part series in the *Sunday Citizen, Dar Es Salaam, Tanzania, ISSN 0856-9754*, 20 Jan 2008-10 Feb 2008, M. Martin "Child Labour, Parameters, Development Implications, Causes and Consequences" *Contemporary Social Science: Journal of the Academy of Social Sciences Special Issue: Young People, Social Science Research and the Law* Volume 8, Issue 2, 2013

⁶¹ *United States-Restriction on Import of Tuna* (action brought by EC) report circulated but not adopted 16 July 1994, available at www.wto.org/tratop_e/envir_e/edis05_e.htm as at 8.20 pm 16 August 2004

Promulgators of the Trade Stakeholder model are further confused over the decision of *Taxes on Automobiles*.⁶² Although supporting the approach of such cases on a case-by-case basis,⁶³ the very fundamental differences between the two *Tuna* cases and this one is missed. The consideration in *Taxes on Automobiles* was that the “wasteful” act of consuming higher fuel was occurring in the US. However, in *Tunas I & II*, the “wasteful” act occurred outside the US. Therefore, the unilateral extraterritorial application of US laws, in the case of *Taxes on Automobiles* did not occur. The decision would have been different if import restrictions were placed by the US on, say, vegetables that were transported on a high fuel consuming trucks in another country.

The decision of *Taxes on Automobiles* must be distinguished from that of *Reformulated Gasoline*.⁶⁴ The US restricted the importation of reformulated gasoline from Brazil and Venezuela, based on US environmental legislation. Although the panel held Article XX (b) exemptions did not apply due to the lack of the US using the least trade-restrictive means of achieving its environmental objective, and the AB stressing that the chapeau of Article XX meant regard must be held to the rights of both parties, the US claim failed due to lack of seeking cooperation with foreign authorities in achieving environmental objectives. The difference between the two is that in *Reformulated Gasoline*, there was clear discrimination in the calculation of baseline for emissions in favour of US produce. Here, the underlying issue is clearly an attempted abuse of the DSU to achieve public choice policy goals, and a blatant disregard of international obligations.

The implications of the consistency in attempts to manipulate negotiated rights and obligations through the “extended” approach became clear in *Shrimp*.⁶⁵ The issue was the same, the unilateral imposition of US laws extraterritorially for inducing policy changes in other countries. Interestingly, all of the above cases except for *Tuna/Dolphin II* involved weaker, developing countries, which depend heavily on the US market. In *Shrimp* however, the US finally managed to legitimise its illegitimate use of extraterritorial policy imposition. In both instances, the panel and AB found the US to be in violation of its WTO obligations. However, the manipulation of the constant insistence of past jurisprudence requiring the need for cooperation between national authorities to satisfy US environmental concerns was finally been achieved. It is unfortunate that the DSB did not enquire if the US had attempted to initiate a multilateral turtle conservation programme (the lesser trade restrictive measure accepted as a means of bringing its measure into conformity) prior to the unilateral application of its WTO inconsistent embargo on shrimp, as in *Tuna/Dolphin I*. Indeed the Malaysian delegation specifically stated that had the US been sincere in its concern for sea turtles, it would have first sought the cooperation of the Malaysian government with its requirement for turtle exclusion devices before imposing the embargo. In undertaking international obligations, such cooperation has to take place in a proper context, forum and with respect for national sovereignty to decide on undertaking treaty obligations, based on its perception of the benefits that would

⁶² *United States-Taxes on Automobiles*, report circulated but not adopted 11 October 1994, available at www.wto.org/tratop_e/envir_e/edis06_e.htm as at 8.20 pm 16 August 2004

⁶³ M. Trebilcock and R. Howse, *supra* note 48, p. 413

⁶⁴ *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS4/AB/R of 12 January 1995

⁶⁵ *United States-Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R

accrue from its rights and obligations under such a treaty. The final outcome of *Shrimp* has compromised the sovereignty of all Members of the WTO in allowing the use of international cooperation, subsequent to DSB adoption of the AB report that the US measure was inconsistent with its obligations, allowing the US to “bring its measure into conformity” by legitimising its measure that was found to be inconsistent with its WTO obligations in the first place. Any attempt to rationalise this as a lesser trade restrictive measure is misplaced. Some authors incorrectly assert that such interpretation is unlikely to determine the substantive outcome of a WTO dispute.⁶⁶ Others place unnecessary emphasis on the preparatory work and drafters’ intentions, with the mistaken belief that these are sufficient to expand the WTO’s DSB mandate.⁶⁷ Such an approach to interpretation has been held by other authors to be unstable.⁶⁸ Further to assert that the WTO’s mandate is capable of being expanded through this way is very misplaced. According to these authors, the AB is able to expand the scope of Article XX GATT exceptions through the application of the *Vienna Convention on Law of Treaties 1969* and even have created a whole methodology on how this is to be achieved in future,⁶⁹ without addressing the fundamental question of whether the AB has gone beyond its mandate in the first place and if such expansion was what parties intended during negotiations. Other authors state that this decision satisfies a public relations objective and that this was accomplished without seriously compromising the trade rights guaranteed under the WTO Agreement.⁷⁰ This contention is contrary to the rule-based approach where public relations has no place in the balance of rights and obligations. This decision, notwithstanding its clear incompatibility with everything the WTO stands for, would render obsolete the introduction of new issues into Ministerial Declarations and WTO work programmes. The diplomacy function of international trade relations becomes redundant, and the rule-oriented approach becomes senseless, and the entire security and predictability of the envisaged DSU of the Punta Del Este Declaration is obliterated. As observed by some, the over emphasis by the AB on interpretation in this regard has exceeded its mandate. Rights and obligations as a result, are no longer derived from the agreement but from the decision of the AB.⁷¹ In the above case, such interpretation did indeed modify the meaning of compliance and the objectives of Article 3 (7) DSU.

There is a view that the current slant of DSB decisions being declaratory⁷² in nature should continue to be applied.⁷³ According to this view, the ambiguity of such decisions

⁶⁶ J. Pauwelyn, “How to Win a World Trade Organisation Dispute Settlement Based on Non-World Trade Organisation law”, *Journal of World Trade*, 37 (6) 977-1030, pp. 997-998

⁶⁷ J. Hu, “The Role of International law in the Development of WTO Law” *Journal of International Economic law* 7 (1) 143-167, Oxford University Press 2004, p. 150

⁶⁸ A. McNair, *The Law of Treaties*, 2nd edition, Oxford university Press 1986, p. 421

⁶⁹ P. Ala’i, “Free Trade or Sustainable Development? An Analysis of WTO Appellate Body’s Shift to a More Balanced Approach to Trade Liberalisation”, 14 *American University International Law Review* 1129, 1999, p. 1132-1169

⁷⁰ A. Appleton “Shrimp/Turtle:Untangling the Nets”, *Journal of International Economic law* 2 (3) 477-496, 1999

⁷¹ D. Mc. Rea, *supra* note 28, p. 6

⁷² As opposed to corrective orders

⁷³C. Carmody, “Remedies and Conformity Under the WTO Agreement”, *Journal of International Economic Law* (2002) pp. 307-326. See also M. Bronckers, “Better Rules for a New Millennium : A Warning Against Undemocratic Developments in the WTO”, *Journal of International Economic Law* (1999), pp. 547-566

is strategic, in that it is purposefully unclear to bring parties to the negotiating table.⁷⁴ The rationale given is that it allows Members to deliberate without outside interference where parties could fashion the relief and the job of the decision maker is only of legal interpretation rather than material remediation.⁷⁵ Taking up this point with regard to issues mentioned above,⁷⁶ then it is not too safe an avenue, due to the imbalance in economic power between Members of the WTO. The place for such deliberations to fashion the relief for the purposes of discussion so far under this view should be, and is provided for under Article 4 of the DSU consultations.⁷⁷ This point further emphasises the reasons for the weaknesses in the consultative process, as Members, usually the more powerful of the two would benefit more from delaying the discussions to the last stage of the dispute settlement process, whilst continuing the application of the inconsistent measure. Furthermore, in the context of the WTO, where representation is governmental and the right to participate as third parties is not automatic,⁷⁸ the environment is quite secure from outside interference during negotiations.

The declaratory view draws its support in the WTO from the use of the plural “recommendations” of Article 19 (1) and (2) of the DSU, suggesting that a panel might make more than one recommendation. It supports its strategic theory from the use of bringing the measures “into conformity” in that “conformity” is ambiguous enough to achieve the objective of strategic ambiguity.

According to this approach, to achieve compliance of the wrongdoer rather than correction of the plaintiff’s injury, would seek to prohibit the reinstatement of an offending measure, but not forbid measures of equivalent effect, provided they are implemented in a WTO-consistent manner.⁷⁹ In *US Superfund*,⁸⁰ a case involving a tax differential on petroleum products refined in the US, the panel explained that the respondent had three remedial options and that it was not the role of the panel to dictate any particular one. Accordingly, the three options included lowering the tax on foreign-refined crude or raising the tax on domestic crude or harmonizing the rate applicable to both domestic and foreign refined at some third point.⁸¹ Given the GATT’s objective of lowering trade barriers, the panel should have noted the three options but recommended the best one in line with the objectives and spirit of the WTO Agreement. The ability to make suggestions on how to bring measures into conformity with WTO rules is a powerful tool that should be used more often.⁸² Some authors have proposed that Panels should make more use of their prevailing power⁸³ to suggest specific measures for implementing WTO dispute settlement

⁷⁴ C. Carmody, *Ibid*

⁷⁵ *Ibid*.

⁷⁶ Regarding the matters that influence the decisions of a country to participate in a DSP.

⁷⁷ Japan and EC submissions TN/DS/W/32 and TN/DS/W/38 are criticized as the DSU provides sufficient avenue for consultations within the dispute settlement process. Additional consultations would eat away at the already sensitive issue of the duration of a dispute settlement process.

⁷⁸ Article 10 DSU

⁷⁹ Chi Carmody, *supra* note 73

⁸⁰ *United States-Taxes on Petroleum and Certain Imported Substances* BISD 34th Supp 136 (17 June 1987)

⁸¹ C. Carmody, *supra* note 73

⁸² J. Pauwelyn, “Enforcement and Countermeasures in the WTO : Rules are rules-Toward a more collective approach” *The American Journal of International Law*, April 2000, 94 A.J.I.L. 335

⁸³ Article 19 (1) DSU

decisions. Respondents' taking the suggested implementing measure would benefit from a legal presumption of WTO consistency and would dispense with the problems and concerns the "extended" approach has caused, which in turn would create greater faith and participation in the system by all Members.⁸⁴

In settling a dispute under the WTO, Article 3 of the DSU speaks of a "satisfactory settlement of the matter" and to a "solution mutually acceptable to parties to a dispute and consistent with the covered agreements" with the view of providing security and predictability to the multilateral trading system. The outcome of the *Shrimp*⁸⁵ applying the concept of strategic ambiguity satisfied neither of these objectives. The outcome of the case could be seen as a legitimisation of unilateralism, and would further contribute to the exclusion of weaker members in participating in dispute settlement procedures due to the increased uncertainty. The contention that implementation in the *Shrimp* case is a multilateral concern and that it illustrates that compliance will probably go far beyond the original complainants to involve all those interested in supplying the relevant market⁸⁶ is flawed for a number of reasons. Firstly, the negotiation of a multilateral turtle conservation agreement should not be made a criterion for conformity as the WTO offers the forum to initiate new multilateral agreements, and the DSU as an avenue to do so is incorrect. The effect of allowing this interpretation of conformity also impeaches on the sovereignty of a Member nation in interfering with its choice of whether to agree to negotiate a new endeavor. Further, as in this case⁸⁷, the pressure by environmental lobbyist was the driving force to the US administration enforcing a law that was in existence for some time but never applied extraterritorially for obvious reasons.⁸⁸ Secondly, Members conduct themselves based on negotiations already concluded. Accepting negotiations on a separated agreement as part of conformity is akin to asking members to negotiate on something where negotiations have already concluded and rights and obligations already exist, ignoring the doctrine of *pacta sunt servanda* in public international law and disrupting the already existing negotiated balance of rights and obligations.⁸⁹ The fact that the complainant's persistent assertion that the negotiation of a multilateral turtle conservation agreement and the conformity obligations of the US for the case at hand were separate issues, sacrifices the main aims of the DSU⁹⁰ in favour of strategic ambiguity. Thirdly it puts market access (for the complainant) in a worst position then before the new negotiations and the burden of obligations are operationalised before an agreement is reached. It ignores the issue of intentions of parties when adopting the agreement.

⁸⁴ E. Petersmann, "WTO Negotiators Meet Academics; The Negotiations on Improvements of the WTO Dispute Settlement System" *Journal of International Economic Law* (2003),

⁸⁵ *United States-Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R

⁸⁶ C. Carmody, *supra* note 73

⁸⁷ s. 601 of the US Endangered Species Act

⁸⁸ Paragraph 2 (a) of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations encumbers upon members to have submitted the WTO Agreement to their respective authorities for approval, therefore ideally there should never be such an application of a domestic law extraterritorially in violation of WTO rules.

⁸⁹ S. Charnovitz, "Rethinking WTO Trade Sanctions", *The American Journal of International Law*, Vol. 95, No. 4 (Oct., 2001) pp. 792-832

⁹⁰ Article 3 (6) DSU

In the *Shrimp* case, the better approach, it is submitted was for the panel or Appellate Body to make a clear, definitive decision whether the measure was either consistent, and if it were not, recommend its withdrawal, as in Article 3 (7). The ambiguity of “bringing into conformity” and the subsequent qualification by the Article 21 (5) panel that the proposed negotiation of a multilateral turtle conservation agreement was sufficient conformity in the light of the surrounding circumstances of persistent objection and the manner the embargo was initiated in the first place creates extreme uncertainty in the DSU.

The Article 21 (5) panel in this case referred to the good faith efforts to reach a multilateral agreement as satisfied and compliance was deemed justified.⁹¹ The US government never approached the Malaysian Government before instituting the shrimp embargo. It only referred to the multilateral turtle conservation agreement after the finding of the Appellate Body in the original action. The Malaysian government’s response before and during the Article 21 (5) panel proceeding was that compliance and the proposed multilateral shrimping agreement were separate and distinct issues. The manner in which the panel was able to read good faith from this adds even greater uncertainty and increases developing country lack of faith the DSU. According to some authors’ Malaysia’s ability to demand another Article 21 (5) panel is open-ended and that WTO conformity by the US may be reassessed at any time.⁹² It is submitted, that for a developing country that has had to endure an embargo in excess of seven years, it is highly unlikely that Malaysia would seek another Article 21 (5) panel unlike Canada in the case of *Brazil-Aircraft*,⁹³ for at least two reasons. Firstly it might be circumspect of what the panel will rule as in the first instance, and secondly there has been irreparable damage to its shrimping industry. The impact of the 21 (5) panel report was also to indirectly to create a reasonable period of time in perpetuity. Time can never run out as long as there is good faith efforts, the impact of such rulings are very obviously outside the competence of the DSU. It has been held that there are three key features that sets the WTO DSU apart from the rest. One of these is its ability to render binding decisions.⁹⁴ Binding decisions that are ambiguous enough to accommodate the declaratory view, it is submitted, is not worth the financial and political costs for a weaker nation to be willing to utilise the dispute settlement system.

Article 3 (1) states that the DSU contains the principles for the management of disputes applied under Articles XXII and XXIII of the GATT 1994. Article 3 (2) states that the WTO dispute settlement system is a central element in providing security and predictability to the multilateral trading system⁹⁵ and the DSB though its recommendations and rulings cannot add or diminish the rights and obligations of members provided in the covered agreements. Article 3 (3) recognizes that the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered

⁹¹ WT/DS58/RW

⁹² J. Kearns and S. Charnovitz, “Adjudicating Compliance in the WTO : A Review of DSU Article 21.5”, *Journal of International Economic Law*, (2002)

⁹³ *Brazil-Export Financing Programme for Aircraft* WTO Doc WT/DS46/ARB

⁹⁴ B. McGivern, “Seeking Compliance With WTO Rulings on Globalisation”, 36 *The International Lawyer* 141, Spring 2002

⁹⁵ Indeed an effective and credible DSM is pivotal to the success of any agreement. See M. Martin, *supra* note 1

agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. DSB decisions are aimed at achieving a satisfactory settlement of matters in accordance with rights and obligations under the Understanding and covered agreements.⁹⁶ The aim of the DSM is to secure a positive solution to a dispute.⁹⁷

Article 3 (7) of the DSU sets out a hierarchy of four methods of implementation of DSB decisions⁹⁸:

- i. a mutually acceptable solution, which is clearly to be preferred;
- ii. in the absence of a mutually acceptable solution, is usually the withdrawal of the measure concerned;
- iii. if immediate withdrawal of the measure concerned is impractical parties should agree on compensation as a temporary measure;
- iv. as a last resort, the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis a vis the failing Member, subject to authorization of the DSB.

Therefore the DSU and Articles XXII and XXIII of GATT 1994 seek to provide a balanced approach to the settlement of disputes through firstly, consultations to achieve a mutually acceptable solution as envisaged by article 3 (7), and failing a settlement/solution, a mechanism that provides transparent, prompt, equitable and positive conclusion through the panel and appellate processes. Central to this is that such decisions of the DSB must be confined to matters related to in the covered agreements to which the WTO DSU is guardian. This conclusion is arrived at from the emphasis placed on the covered agreements in Article 3 (2) – (9) and 3. (11) and (12), and Article 1 (1) which cites Appendix 1 as containing a list of covered agreements to which the WTO DSU will apply. This therefore makes it unequivocally clear that the WTO DSU cannot concern itself with matters not arising from or having anything to do with the agreements mentioned in Appendix 1.

The impact of the Article 21 (5) Panel on what compliance entails in *Shrimp*, has damaged the DSU as it has created uncertainty from what is to be expected from a dispute settlement proceeding. The uncertainty, in turn affects the credibility and stability of the system. The economic and political cost of participating in a dispute, especially when the complainant is a developing country and the respondent a powerful developed member is clear. When the DSM does not create an environment for a weaker country to pursue its rights due to the instability of the system, it will cause members to opt for alternative means of settling disputes. This when relating to parties of unequal economic and political power reverts the system to a power-based as opposed to a rule based one, undoing everything the WTO was meant to achieve.

⁹⁶ Article 3 (4) DSU

⁹⁷ Article 3 (7) DSU

⁹⁸ A. Rosas, "Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective," *Journal of International Economic Law* (2001) pp 131-144

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