

**FROM THE GATT TO THE WTO. DOES THE RULE OF
LAW MATTER?
LEGAL ORDER IN THE CONSENSUS BASED MULTILATERAL
TRADING SYSTEM**

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Abstract

The establishment of the WTO as a permanent institution to oversee the administration of the multilateral trade agreement and the continuing cooperation of its Members in maintaining legal order have prompted diplomats to laud this as an achievement – that the Rule of Law has overcome force or power in presiding over the conditions of international trade. This dissertation begins by tracing the origins of the Rule of Law in search of a meaning in its historical and contemporary context to establish the parameters of the conception of the Rule of Law as a set of doctrinal standards established by previous literature, and then analyses how legal culture, economic history, socio-political developments and general attitudes of diplomats influenced the contemporary multilateral trade agreements. Subsequently, this dissertation examines the structure of the multilateral trade agreements and case law emanating under its dispute settlement procedures for evidence of implementation and interpretation of the Rule of Law. Then this dissertation will identify unique and perplexing features of GATT/WTO jurisprudence and compare them against the doctrinal standards which have become infused within the concept of the Rule of Law. Based on these findings, this dissertation concludes with substantial qualifications, that the doctrine of the Rule of Law matters in the administration of the multilateral trade agreements.

Abstrak

Pembangunan WTO sebagai institusi kekal bagi penyelarasan hal ehwal berkenaan dengan perjanjian-perjanjian perdagangan antarabangsa dan kerjasama antara Ahli-ahlinya untuk mengekalkan kestabilan telah dipuji sebagai pencapaian oleh pakar-pakar perundingan perjanjian tersebut – terumanya, pemerintahan berdasarkan undang-undang yang telah mengatasi penggunaan kuasa dalam pelaksanaan hal ehwal perdagangan antarabangsa. Dissertasi ini bermula dengan pengesanan asal-usul konsep pemerintahan berdasarkan undang-undang bagi mencari maknanya dalam konteks kunonya dan dalam konteks masa kini supaya suatu parameter boleh ditubuhkan bagi menganalisisakan doktrin tersebut dari segi perkembangan budaya, sejarah ekonomi, sosio-politik dan sikap umum para diplomat terhadap perjanjian-perjanjian antarabangsa. Berdasarkan penemuan penyelidikan tersebut, dissertasi ini menyimpulkan, dengan beberapa pengecualian, bahawa pemerintahan berdasarkan undang-undang berperanan dalam pelaksanaan hal ehwal perdagangan antarabangsa.

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CHAPTER 1. INTRODUCTION

1.0 Statement of Problem

The problem with much research and critique of the Rule of Law has been made in the context of constitutional domestic legal systems where rules are normally clear, can be expected to be actively enforced by authority and compliance is the ultimate objective. This “adapt the norm to fit the doctrine” approach to legal theory taken by many positivist thinkers make it appear that and strict adherence to the Rule of Law characterised by a check on “unfettered discretion” must be a condition of a civilised legal system. This is perhaps true to a certain extent in the context of constitutional and administrative law in domestic legal systems. The result of this generalisation of the principle is that in some areas of substantive law, many underlying policy problems unique to that jurisprudence are either distilled or artificially simplified. The expression “Rule of Law” has, however, found its way increasingly into customs and international trade parlance.

All through the evolution of the General Agreement on Tariffs and Trade, 1947 (GATT) to the establishment of the World Trade Organisation (WTO) in 1994 as an institution to regulate and administer international trade and customs rules and policies, the relationship between the GATT/WTO and the rule of law has never been straightforward and there have at times been tensions. Arthur Dunkel, the GATT Director General between 1980 and 1993, described the Rule of Law as being embedded within a pile of uncertainty as far as the GATT is concerned (Dunkel, 1990). It will be discussed through this research that uncertainty is not only in the economic but in the legal environment. The facts are that Article III(2) of the Agreement sets out the legal status accorded by the signatory members

to the World Trade Organisation (WTO). Signatories to the Agreement, with the consent of one another, are bound by and would be entitled to the benefit of laws collectively formulated by representatives of each member and administered by an institution whose role and function they have all agreed upon. Prima facie, this falls into place with what many jurists accept as the core principle of the rule of law. But for all its virtues in a conventional “law enforced by authority system”, the research undertaken in this dissertation is undertaken on the premise that the Rule of Law is overemphasised.

In reality, the application of the Rule of Law in this branch of international law is not so simple. Firstly, the WTO as with its predecessor, the GATT does not have a constitutional base. Then again, neither do other branches of international law. So what makes the GATT/WTO so unique? The answer is in the fact that the GATT was from the outset set up for the purpose of proliferating *free trade* and not *fair trade*. Equality, justice, clarity of legal provisions and almost all the principles that the Diceyan model of the Rule of Law stands were somewhat obscure and were never quite important to negotiators of the Trade Agreements in the early days. As far as the trade in goods is concerned, the GATT and even the modern WTO really only places two principal obligations on its signatories:

- i. Any favourable customs or trade treatment granted to one member must be granted to all (the Most Favoured Nation or ‘MFN’ principle)¹;
- ii. A contracting party should not ‘nullify or impair’ (nullification and impairment) another contracting party’s benefit under the agreement²

¹ Article I, General Agreement of Tariffs and Trade 1947.

² Article XXIII, GATT 1947.

Much as a result of its unique jurisprudence, international trade legislators have never shown favour for strict rules based governance (presumably because it stifles trade), much preferring instead to negotiate, or what Hudec terms the diplomat's jurisprudence (Hudec, 1975). John H. Jackson (1969:16) points out that the GATT was at the time he penned this statement "at the vortex of powerful political and economic forces in the world and there is little way of meaningful sanction or other device to ensure compliance with its rules" which leaves much room for unimpeded discrepancies between the practice and technical rules of the GATT. In fact, there are mechanisms embedded within the GATT and WTO agreements for divergent practices to become legitimised³, so much so, Brink (2010) initiated a research entitled 'Which WTO Rules Can a PTA [Preferential Trade Agreement] Lawfully Breach? Completing the Analysis in Brazil – Tyres'.⁴ In contrast to what many WTO officials praise as the "flexibility" and "adaptability" of the WTO, it is really not the WTO which is flexible and adaptable, but the practice which is tolerated by its signatories. Furthermore, it is also interesting to note that the WTO acts also in a judicial role and administers its own dispute settlement separately from the international court of justice. Even more interestingly, unlike decisions of a court of law, decisions pursuant to the WTO Dispute Settlement Understanding (DSU) administered the WTO dispute settlement board are not binding, which only goes to suggest all the more that the institution is not strictly guided by substantive legal principles.

To add to the complication of the issue legality, the GATT is a result of seven rounds of negotiations spanning over 50 years resulting in a collection of text so voluminous it is

³ John H. Jackson, *World Trade and The Law of GATT*, 1969, at p 17.

⁴ Brink, Tegan, *Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil – Tyres*, 2010, *Journal of World Trade* 44 no. 4, at p 813 – 146.

sometimes difficult, even for the sharpest of legal minds, to differentiate legal principle from trade policy or mere political or economic rhetoric.

The problems are practical and philosophical. The philosophical problem is that the Rule of Law is an abstract expression, but there are fundamental principles that jurists broadly agree upon (eg. clarity and access to law, independence of the judiciary etc.). The practical problem is, that the economic forces who penned the world trade agreements and called them legally binding regulatory instruments did so for the proliferation of mutual wealth and prosperity and did not have in mind the kind of Diceyan “Rule of Law” that the student of jurisprudence is accustomed to uphold in high regard. Ultimately, the problem that this thesis aims to address is whether unique non-constitutional legal systems like the WTO benefit from strict adherence to the principle of the Rule of Law.

1.1 Objective

This research was born out of a desire to understand the historical developments of the multilateral trading system’s governance and dispute settlement system, in particular, the evolution from the flexible GATT to the rules-based WTO characterised by the principle of the Rule of Law. This study aims to understand the factors behind this evolution and examine what role the Rule of Law plays in the maintenance of legal order in the multilateral trading system.

This study, in part, answers to Wolfe's (2001) call for further empirical research to support his theoretical analysis and observation that "law is pervasive throughout a global trading system of which the WTO is only a part."⁵ I must assert, of course, that my attempt to seek empirical exposition of how well the evolution to a rules based system has worked for the multilateral trading system is carried out objectively and from neutral perspectives and its results may or may not support Wolfe's assertions. The objectives of this research must also be differentiated from that of Wolfe's. While Wolfe set out to establish a legal theory demonstrating that democracy and the rule of law existed within the WTO, this study does not delve into the advocacy of one normative value over another. It seeks instead to understand what the Rule of Law as a legal theory means to the multilateral trading system, juxtaposed against how constitutional jurists like Steyn and Bingham saw it. Unlike many constitutional lawyers who propound that civilised systems of governance must have its foundations laid on the principles of the Rule of Law, and I must assert that many such assertions take the assumption that the jurisprudence between systems of governance are similar enough for the principle to be applied regardless of the underlying uniqueness of that jurisprudence, this study does not subscribe to the "adapt the norm to fit the doctrine" approach to interpretation and development of legal theory. Instead, the opposite approach is taken here. The norm is first analysed and then the principle. If a strongly emphasised Rule of Law centric system of governance does not serve to optimally meet the needs of the multilateral trading system of governance and dispute settlement, then both the doctrine and the multilateral trading system's values need to be re-imagined.

⁵ See Robert Wolfe, *See you in Geneva? Democracy, the Rule of Law and the WTO*, 2001, School of Policy Studies Queen's University Kingston, Ontario, at p. 9.

Much study and critique has been undertaken on the subject matter of the rule of law, but it is almost always from a constitutional law perspective (Robson, 1928; Jennings, 1959; Steyn, 1999; Jowell, 2007 and Bingham, 2010). Most works apply general legal theory and conclude that systems of governance should observe the principle. Most text books (in Malaysia and the British Commonwealth at least) proffer adherence to the principle of the Rule of Law as a measure of good governance. In fact, administrative law literature is littered with the idea that the Rule of Law and separation of powers are the only truly important measure of good governance. While the concept of the separation of powers has very much remained within the context of administrative and constitutional law, the principle of the Rule of Law has been debated in much broader areas of jurisprudence. A once foreign concept to GATT jurisprudence, there is an increasing allusion to the principle in WTO discourse. In addition to Arthur Dunkel's speech in 1990, the WTO's dispute settlement website proclaims that 'The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable'.⁶

In reality, a vast number of the WTO's administrative and dispute settlement decisions are made by mutual consent of parties rather than by strict adherence to rules. Steyn and Jowell are more careful to confine their critique of the Rule of Law to democratic constitutional systems. There is however, little exploration into whether more unique systems of jurisprudence like international trade law benefit from strict adherence to a rules based system of approach, completely curtailed of judicial discretion.

⁶ What is the WTO. Website of the WTO, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last accessed on 2 January 2013).

This research explores the WTO's system of governance and dispute settlement aims to establish where and to what extent the principle of the rule of law fits. This is a two prong approach. First, this research aims to understand the drivers behind the evolution of international trade governance during the GATT days from a flexible, consensus based system to an increasingly rules based system under the WTO umbrella where reference to the Rule of Law is increasingly made by its administrators. Secondly, this research will study whether the substantive evolution of the Trade Agreements⁷ from a flexible system of governance to a rules based system is adopted by the institution and its Member Countries in the administration of Member countries' obligations under the Agreement. This is achieved through a combination of studies of Customs practices and national policy in selected jurisdictions (namely Malaysia, Thailand and Singapore) as well as case studies of cases administered by the WTO under its dispute settlement mechanism.

Through the course of this study, the WTO's function, in particular, its mechanism of accountability amongst Member Countries in administrative action and dispute settlement are constantly examined. This is because the WTO plays a dual role. Its Member Countries (known also as Contracting Parties) legislate and make the laws to which they themselves are bound by. At the same time, the WTO also acts in a judicial role in the administration of its Dispute Settlement Understanding (DSU), which is another unique feature of the WTO. In many other branches of international law, the institution undertakes an administrative role while dispute settlement is administered by the International Court of Justice. It all the more calls for a review of whether the WTO's evolution from a flexible system of governance to observance of the Rule of Law is aligned in practice. It is submitted that the

⁷ Trade Agreements in this context refers to the GATT 1947 and the GATT 1994 which came to be absorbed under the umbrella of the WTO. It does not denote reference to bilateral, multilateral or regional trade agreements separately signed between countries for the promotion of trade between them.

underlying doctrines upon which the GATT and its successor, the WTO, are not strictly rules based and this work is in search of the values upon which the system is premised on. This is easier said than done because there numerous administrative bodies that exist under the WTO's umbrella that continually evolve to meet socio-economic demands. In fact, the institution of the WTO itself is an engine of constant change.

It is hoped that the results of this research will contribute to the development of legal theory that supports the practical needs of the WTO's system of administration and dispute settlement. The objective of this work is to understand the legal theory upon which the framework for governance of customs and international trade is established. There are two reasons for this. Firstly, it aids the legal practitioner in understanding his role in the regulation of customs and international trade. Secondly, it is submitted that the doctrinal arguments uncovered in this dissertation adds new perspective to the manner in which the concept of the Rule of Law has traditionally been perceived, interpreted and at times advocated. This is achieved from a top-to-bottom perspective in a sense that the end-product, which is the WTO's governance structure, is dissected to study its underlying values and achieve conceptual clarity.

In summary, the purpose of this research is to examine how a rule of law system of administration functions in a jurisprudence which upholds values that are almost completely opposite to what the rule of law stands for.

1.2 Research Questions

This dissertation examines the debate between the rule of law based understandings of the WTO and the flexibility based argument by examining the extent to which the WTO is a rules based system and examining features of the multilateral agreements which do not “fit the bill” as far as the common standards of the rule of law is concerned. The dissertation examines and answers four questions:

- i. What is the rule of law in the context of the multilateral trade agreements?
- ii. What is driving the evolution and claims of success?
- iii. How is accountability attained under the WTO system of governance and how are deviant practices dealt with?
- iv. How well does a doctrine of a rules based system of governance and dispute settlement serve the substance of the multilateral trading system which was not in the first place designed to govern by rules?

1.3 Methodology

This research will consider amongst other primary sources, the relevant trade agreements, legislation, texts of trade negotiations. The empirical value of case studies will be drawn upon, in particular, the qualitative study of post-WTO and pre-WTO case law for the study of how panels interpreted the Agreement and decided dispute resolution cases, and ultimately whether or not the rules based approach of decision making was followed.

Secondary sources include literature on customs and international trade such as books, speeches, lectures and articles published in the law journals. The comparative nature of this research also means that the world wide web is used extensively as a resource for a variety of material. Cases and materials from other jurisdictions, particularly WTO member jurisdictions

This research also draws heavily from observations and experience of the researcher in his professional capacity as a customs and international trade advisory services provider.

1.4 Scope

The WTO consists of over 140 member countries, not all of which can be studied in this research. Comparative studies are confined to the countries that most frequently use the WTO Dispute Settlement mechanism or engage in dialogue at the international level, namely the US, European Communities and Japan for accessibility to data and resources. For the allusion to domestic practice, Malaysia is generally used. It is both a member of the WTO and the Association of South East Asian Nations (ASEAN). International case law is of course selected for their relevance to the subject matter.

This research also focuses only on the Customs and Trade in Goods element of the WTO. The General Agreement on the Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are specifically excluded from this research. This research focuses exclusively on the trade in goods agreement for two reasons. Firstly, the GATT before the WTO was solely a trade in goods agreement in its pre-WTO days and continues to remain so distinctly separate from the GATS and TRIPS

after its incorporation under the WTO umbrella agreement in the present day. Secondly, much of this thesis focuses on customs issues which very are not relevant to the trade in non-tangible goods (ie. services and intellectual property).

There are three further limits to this work that need to be noted. Firstly, this work is interpretive in nature. It largely works around dissecting and analysing established norms and understanding and critiques existing principles. This work recognises that other treaties of international law (eg. environmental and human rights treaties) boast heavily substantive features and are very much rules based in the manner in which the substantive rules are regulated. No attempt, however, is made in this dissertation to prescribe a new institutional framework for the WTO's system of governance and dispute settlement. The reason for this is that the role of the WTO in its current attire needs to be analysed in detail to see if it sufficiently meets the demands of economic and administrative accountability. If the existing structure is found to be insufficient, then it will be time to reconsider the institution's role and the underlying legal principles. Embarking on prescription at this point may simply risk replacing an uncertain structure with another one. The scope of this work is in this regard confined to the study of legal principles at the interpretive level and not the prescriptive.

Secondly, the arguments forwarded in this dissertation are largely doctrinal. In undertaking this research, it is submitted that it is not possible to delve into the complexities of the study of legal principles and international relations without establishing theoretical understanding. The doctrinal approach adds depth to the discussion of philosophical aspects of jurisprudence that the study of legal principle so often demands, to which the study of the principle of the Rule of Law is no exception. In this regard, references will be made

throughout this work to theoretical conceptions for the purpose of the critique of existing norms and understanding or formulating new ideas.

Third and most importantly, this work does not entangle itself in the advocacy of rights and merits. In fact, many recent works that have discussed the system of governance and dispute settlement of international trade law have opted to do so from a developing country perspective and often highlight limitations of the system need to be addressed in order for weaker members of the WTO to benefit from the system.⁸ This work recognises that the design of a system of governance is always a game of balancing the scales. No matter what adjustments are made to that system, there will always be a section of subjects to that system of governance who will be in need somewhat. In this respect, this work is not concerned with needs and rights. Its interpretive objective and doctrinal approach confines critique in this work to legal theory. It does, however, explore in depth the role and function of the WTO as a legal and judicial institution, its historical development as a regulatory authority of international trade and customs practices, and the attitudes and behaviours of its negotiators through its development from the GATT to its current status.

It is submitted that the common pitfall of advocating a principle of governance before first understanding the underlying values of the relevant stakeholders runs the risk of prescribing the replacement of one dubious structure with another and is consciously avoided in this work.

⁸ See Gregory C. Shaffer & Ricardo Mele'ndez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience*, 2010, Cambridge University Press; Wenhua Ji and Cui Huang, *WTO Dispute Settlement: A Chinese Perspective*, 2011, *Journal of World Trade* 45, no. 1 at p 1 – 37; Faizel Ismail, *How Can Least Developed Countries and Other Small, Weak, and Vulnerable Economies Also Gain From The Doha Development Agenda on The Road To Hong Kong?*, 2006, *Journal of World Trade* 40, at p 37 – 68.

1.5 Assumptions

This study is undertaken on the premise that the WTO legal system functions as a branch of public international law. The question of whether the WTO legal system either on its own, or as a constituent of public international law fulfils the rules of recognition to be recognised as law is discussed as a separate matter in this thesis in the determination of the application of the concept of the rule of law.

1.6 Structure

The dissertation is divided into three broad parts. Part I studies the doctrine of the Rule of Law. It examines its origins and historical developments leading to the various connotations and theories propounded by legal philosophers of today. It aims to discover what values the doctrine stands for, who it benefits and what its limitations are. Part II reviews the historical developments of the multilateral trading system, in particular the legal, political and socio-economic factors behind the evolution from the GATT's flexible system of governance and dispute settlement to the post 1994 WTO's rules based system. It examines the Rule of Law between states and how the doctrine is perceived by the multilateral trading system. It is submitted that there are practical challenges in its observation and its success in supporting the spirit of the multilateral trading system is a vital precursor of this study. Part III specifically examines how member states of the WTO observe the multilateral trading system's brand of the Rule of Law (in particular Malaysia, Thailand and Singapore), if they do at all. It is clarified that this study is not concerned with the Rule of Law in states' administrative and constitutional systems and does not delve into the popular whether the sovereignty of state is infringed by the WTO's influence on its

domestic policies. The ultimate question which this thesis aims to answer is whether the Rule of Law makes a difference to governance and dispute settlement in customs and international trade. The first chapter after this introductory chapter, Chapter 2, is a literature review. The fundamental principles of the rule of law are examined in Chapter 3. Here, the traditional theories and varied propositions of the rule of law are discussed at length to establish an argument as to how it is applied. Chapter 4 is commentary of customs and international trade, the regulatory system and historical development. The purpose of this chapter is to equip the reader with sufficient grasp of the subject matter for understanding of the thesis' underlying arguments.

Chapter 5 discusses the relationship between the world trade regulatory system and the law. It considers questions of the concept of law and whether world trade rules are laws, considering also the legal status of the GATT and WTO agreements.

While the merits of the concept of the rule of law would be explored in Chapter 4 and 5, Chapter 6 considers one aspect of Robert Hudec's philosophy which has dominated world trade law jurisprudence for almost half a century – the techniques of the diplomat's jurisprudence. The purpose of the chapter is to consider circumstances that may limit the applicability of effectiveness of the rule of law, and assess where WTO jurisprudence stands today, 18 years after having evolved from the GATT. Chapters 4, 5 and 6 consists of a continuous analysis of the themes and problems raised in the previous chapters. Chapter 7 is the conclusion and focuses on answering the question of the thesis by piecing together the findings to the three themes in examined. Chapter 7 also lays out a concluding summary and considers suggestions and recommendations to aid the lawyer and the jurist in his role in the regulation of customs and international trade.

1.7 Introductory Comments

The dynamics of world trade governance is not very difficult to grasp. Members of the World Trade Organisation negotiated and agreed to give recognition and cede authority to the Organisation to administer the laws and rules which the Members themselves negotiate and legislate. In this respect, the institution of the WTO discharges the function of a government. Government is, of course, universally accepted to be necessary, without which man, and in this case, nation states comprised of men, cannot establish an ordered society. The WTO's Dispute Settlement Board (DSB) discharges the judicial function similar to that of a court of law. Yet, this necessity for government (or in the context of international law, I use the expression 'governance' instead) has created a newly emerging subtle tension between jurists and legal commentators who advocate governance by strict adherence to a set of clear and unambiguous rules characterised by the Rule of Law and economists who have since the inception of the GATT advocated a flexible system characterised by broad substantive principles and guidelines where procedural elements are largely negotiated, sometimes even on a need to basis.

This research was fuelled partly by the thick increase in literature around the subject matter of the Rule of Law, in particular, the traditional Diceyan model of the Rule of Law which rejects judicial discretion (Steyn, 1999; Jowell, 2007; Bingham, 2010) but more so by the increased verbiage of jurists, legal scholars, politicians and diplomats, in particular, it's increased presence in international relations parlance. Kofi Annan (2004) sets out that the rule of law is a principle that requires all persons, institutions and entities to be subject to laws. This comes in addition to allusions made by Dunkel (1990) and the WTO's own website.

The traditionalist works do not stray far from Dicey's rigid dissertation. Bingham (2006) argues that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion, amongst seven other sub-rules which he devises in support of a system of governance which upholds the principles of the Rule of Law.

Reports in literature, recent case law and a review of the WTO's dispute settlement structure appear to suggest that the administrators of customs and international trade laws have not warmed up to a strict rules based approach in spite of the new WTO agreement having replaced the General Agreement on Tariffs and Trade (GATT) in 1994 with a new rules based system of international governance.

Authors from the 1970's through to the present have questioned whether the WTO rules are "binding" in the traditional sense (Hudec, 1975; Bello, 1996). For the WTO and its component institutions, as organisations set out to administer the legal policies and meet the arbitration needs of the international trade community, much still needs to be learned in terms of how well a strict rules based system works. In performing this research, the national trade legislation, policies practices of Malaysia, Thailand and Singapore (members of the WTO) are also analysed and compared for consistency with the international trade agreements.

Resolving this tug-o-war between the rigid, binding rules based "rule of law" advocates on the one hand and the pro-flexibility camp of the WTO would have significant results for the nature of the legal regime as a whole. While this is not a Bingham vs. Hudec debate *per se*

(although it would seem as such, considering the manner in which this dissertation is structured), there are important considerations from a legal perspective. If parties to the multilateral trade agreements can simply avoid their legal obligations because of the traditionally keen emphasis on diplomacy and flexibility, then the much-heralded rules based system would be significantly weaker, and worse, its prestige would be compromised. Since the WTO is famous among scholars and practitioners for being the most advanced rules based system in the realm of international law, the way the GATT/WTO legal framework is understood will be significantly affected if parties can simply dodge their legal obligations. If the system were too rigid, however, it would simply fall into redundancy for the sheer impossibility of compliance, taking into consideration the disparity in terms of political and economical power of the Member states.

1.8 Theoretical Framework

This dissertation is interpretative, and its arguments largely doctrinal. It does not, however, mean that there is no theoretical framework to be discerned. International trade is deeply rooted in philosophical theory, richly intertwined with legal, political and socio-economic aspects. These philosophical considerations are very much expounded upon in this doctrinal approach. Throughout this work, references will be made to the theoretical conceptions for verification and development of new ideas.

In order to properly discuss doctrine of law and administration in context, it is necessary in this case to do so in the context of basic economic theories of international trade upon which the GATT's foundations are laid. It is submitted that legal and economic theories do not necessarily pull in the same direction as will be shown through the course of this

dissertation. While it remains to be discovered whether they are mutually exclusive, this is perhaps one aspect of the way things are in the world that scholars of pure legal theory often do not pay sufficient attention to. I submit that legal theory is only reliable if subtleties like these are accorded sufficient respect.

While this study will not evaluate the different trade models, Anderson⁹ expresses that there are gains to be made from trade regardless of the model. Anderson goes on to point out that there will, however, also be losers because the division from gains will be uneven. He observes that internationally, with only mild qualifications, there is only so much gain to be made from trade and this needs to be shared amongst nations, but some trade is still better than none. While each nation can act to take more of that gain through restrictive trade policies that attempt to minimise imports and maximise exports, leading, Anderson goes further to express, to destructive trade wars with mutual losses.¹⁰

Anderson's observation is, of course, a statement of fact. There is a consensus amongst many economists that, barring the appetites of Hitler, Stalin, Mussolini and Hirohito for war, protectionist trade policies characterised by nations racing to be net exporters resulted in a surplus of goods manufactured for export having no markets for import. The resulting impatience of major economic forces with each others' retaliatory protectionist economic policies probably did add fuel to the political, racial and socio-economic fires Europe was already facing at the time and spiralled uncontrollably into the first and second world wars, a phenomenon which will be discussed in greater detail in Chapter 4. According to Meier,

⁹ James E. Anderson and Eric van Wincoop. *Trade Costs*, Journal of Economic Literature, 2004, at p 2.

¹⁰ *Ibid*, p 3.

the GATT was born out of an intention to reverse the protectionist and discriminatory trade practices that were prevalent during the prewar depression years.¹¹

The trade negotiations following the world wars producing amongst other things the GATT shows negotiators beginning to lean towards a modified Ricardian theory of comparative advantage.¹² The basic Ricardian theory, as illustrated by Anderson¹³ recognises that not every nation will be able to produce everything as cheaply or as efficiently as another country does. In some cases, some nations are simply limited by factors such as climate and geographical location, making it impossible to produce a certain kind of good. Ricardo saw that world trade would be at equilibrium if countries exported what it produced more cheaply and efficiently and imported what another country produced more cheaply and efficiently. Even if one country produced everything more cheaply and efficiently than another country, the Ricardian theory proffers,¹⁴ there is still a 'comparative advantage' in mutual trade for the fact that market forces are not necessarily always driven by cost and price advantages. It is submitted that this argument is well supported by the booming trade in luxury goods. The multilateral trade agreements were born out of the failure of the protectionist economic model which its negotiators hoped the proliferation of liberal trade policies characterised by reduced tariffs and open markets would rectify.

As far as domestic administrative law is concerned, the primary source of power and conflict resolution is the constitution, even in the few countries like the UK, Israel and New Zealand whose constitutions are not found in a single written document. The role of the

¹¹ Gerald M. Meier, *Problems of Trade Policy*, (1973), Oxford University Press, at p. 13.

¹² See David Ricardo, *On The Principles of Political Economy And Taxation*, (1817).

¹³ See James E. Anderson and Eric van Wincoop, *Trade Costs*, *Journal of Economic Literature*, (2004), at p 4.

¹⁴ *Ibid*, p 6.

courts then is to interpret the constitution and laws legislated under its authority in a manner consistent with the spirit of that constitution. In this context, it is easy to say, as Wade and Forsyth do, in spite of the rule of law having a number of meanings and interpretations, that “its primary meaning is that everything must be done according to law”.¹⁵ Within the constitutional context, it makes perfect sense where S.A de Smith comments: “the concept of the rule of law has an interesting characteristic; everyone who tries to redefine it begins with the assumption that it is a good thing, like justice and courage”.¹⁶

The multilateral trading system, however, does not have a constitutional base.¹⁷ In relation to the source of power and resolution of conflicts, the Agreement is the primary document. It is, however, the Contracting Parties themselves through the administration of the DSB that give life to the otherwise dead letter of the Agreement, not any judicial system. The Contracting Parties themselves painstakingly negotiate the Agreement, but they (through their elected representatives) also negotiate resolution of disputes. In this respect, the Contracting Parties, through their elected representatives interpret the provisions they themselves drafted on their own terms.

It is unlikely that the post-World War II multilateral trade negotiators had anything more complex in mind other than a genuine desire for an institution to enforce the agreements they were at that time negotiating. Along with the establishment of a system of governance and administration, even one as loose as the GATT, however, comes the question of how the rules were to be enforced, which is of course the inevitable question of legal theory. It is

¹⁵ Wade and Forsyth, *Administrative Law*, 2000, 8th Ed. Oxford University Press, Oxford, at p.20.

¹⁶ De Smith and Brazier, *Constitutional and Administrative Law*, 6th Ed. 1989. Penguin, London, at p.19.

¹⁷ See John H. Jackson, *World Trade and The Law of GATT*, 1969 at p.17.

only natural to presume that the multilateral trade negotiators want to be bound by some form of legal order so as to ensure the sustainability of the agreements and the Institution they were negotiating. The question is what legal order, what theory of law. Robert Wolfe, in his research *See you in Geneva?*¹⁸ attempts to sort out what the rule of law might mean in the context of the WTO. In doing so, he believes that it can only be understood by also considering the meaning of Administrative law, which this study also does.

Wolfe's insight goes further to set out that "much of the debate about the rule of law depends on positivist and centralist theories of "law," whose inadequacy for Wolfe's purpose leads to first, a discussion of pluralism and implicit law in legal theory and second, that interpretations of law in the WTO and the trading system cannot be reduced to the Dispute Settlement Body (DSB). While Wolfe's observation lends support to my own that much of the discourse of the rule of law is dominated by positivist and centralist theory, the consideration of the GATT/WTO's legal theory does not, it is submitted, need to be so complicated. Nor does it always hold true, it is further submitted, that where there is no rule of law, the rule of the jungle prevails.¹⁹ A much respected authority on GATT/WTO law and policy, Robert E. Hudec sets out a much simpler theoretical framework of the GATT legal system which he calls "a diplomat's jurisprudence".²⁰ Hudec's "diplomat's jurisprudence" is so advanced an idea in legal theory that it will be analysed as a separate chapter in this dissertation.

¹⁸ See Robert Wolfe, *See you in Geneva? Democracy, the Rule of Law and the WTO*, 2001, School of Policy Studies Queen's University Kingston, Ontario, at p. 1.

¹⁹ Lord Bingham (Tom Bingham), in the 6th Sir David Williams Lecture, 2006, is quoted as saying "Britain's involvement in the 2003 war on Iraq was in breach of international law and thus, if this sub-rule is sound, of the rule of law. But a revealing comparison may be made between the procedures followed in 2003 and those followed at the time of the Suez invasion of 1956, and the comparison does suggest that over that period the rule of law has indeed gained ground in this country and the law of the jungle lost it.

²⁰ Robert E. Hudec, *Essays On The Nature of International Trade Law*, 2000, Cameron May, at p.17.

In setting out this theoretical framework, Hudec acknowledges that while the substantive obligations of the Agreement are legalistic and carefully drafted, its enforcement procedures “by contrast, present a front of ambiguity and uncertainty which seems altogether at odds with the lawyerlike precision of the code”.²¹ Perhaps the most startling feature of the GATT to a legal scholar is the fact that aggrieved Members can seek redress over an action by another Member which was not in breach of the legal obligations under the Agreement at all, a notion which already runs counter to amongst the most fundamental principles of the Rule of Law, and was in fact Dicey’s first rule that “no person can be punished or reprimanded unless for a distinct breach of law established under the legal system in the ordinary courts”.²²

Hudec, however, aptly wraps up his position by stating that the Agreement is primarily the work of diplomats, not lawyers, designed for them to play by their rules. As if to say that lawyers and jurists should learn to respect this matter of fact before allowing themselves to be saddled with mechanical interpretations of the ideals of a system of governance by law that hang like millstones round the necks of far too many jurists and legal theorists, he says:

The apparent contradictions are the manifestations of a distinctive jurisprudence. It is a jurisprudence puzzling to lawyers, for it is primarily the work of diplomats rather than lawyers. Working with the tools peculiar to their own profession, the GATT diplomats have developed an approach toward law which attempts to reconcile, on their own terms, the regulatory objectives of a conventional legal system with the turbulent realities of international trade affairs.

²¹ Ibid, p.17.

²² See Dicey, A.V. *An Introduction to the Study of the Law of the Constitution* (1885; 9th edn., Macmillan, 1945), p.188.

In effect, this dissertation rejects the theoretical notion that “where the rule of law ends, the rule of the jungle begins”. Rather, it presupposes an alternative view that if the rule of the jungle is the necessary means to the end, it may simply be in the best interest of the judge and lawyer to accept it.

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PART I

CHAPTER 2. REVIEW OF LITERATURE

There is a general scarcity in terms of literature as far as the legal theory of the World Trade Organisation is concerned. The importance of WTO legal theory has through its inception played second fiddle to economic and political theories which have hogged much of literature commenting on the multilateral trading system, in part because many decisions whether or not to exchange a concession with another country depends on whether there is any economic benefit in doing so, and whether politically, not doing so would disrupt otherwise harmonious international relations. As a result of which, there continues to be a lack of an appropriate assessment of the WTO's jurisprudence – and by this I mean a set of ideas to conceptualise its legal framework and explain its legal identity. More importantly, for all the recent clamour that the Rule of Law is entrenched in the WTO,¹ there has been no real effort to ascertain what is meant by the rule of law in the context of international trade or how the rule of law operates at that level.

Where there have been commentary of the rule of law in the WTO, the focus tends to have been on whether the intrusive nature of WTO legal obligations compromises the sovereignty of a country's government and hence its rule of law.² Carmody acknowledged that identifying a WTO theory of law had its importance, quoting Thomas Cottier and

¹ See generally Moore, 'The WTO. Looking Ahead', *Fordham International Law Journal*, Volume 24, Issue 1, (2000), at 2; Dunkel, *Consumers of the World Unite: You Have Nothing To Lose But Your Chains* (speech at the award ceremony of the Consumers for World Trade Group), GATT/1482, 1 June 1990.

² See *supra* Robert Woolfe and Cao Jianming, 'WTO and the Rule of Law in China', (2002) 16 *Temp. Int'l & Comp. L.J.* 379.

Matthias Oesch in their observation that 'the absence of a longstanding legal theory or tradition of international trade regulation explains why even basic questions are still left in the open.'³ Carmody's work in itself offers insight into a possible theory of WTO law. Interestingly, his first observation of the WTO agreements as a body law seems already to be a roadblock, highlighting the observation of Claus-Dieter Ehlermann that 'there seems to be no – or at least little – structure and overall architecture to WTO law'.⁴

The WTO legal system is peculiar in a sense that it established itself not as a mechanism to regulate *fair trade* but *free trade*, more specifically, the principle of non-discrimination. In a sense, it is not actually wrong to say that a member's trade practices could be unfair or even repressive, as long as it did not impede other members' enjoyment of benefits accorded under the agreement. It is also safe to say that many of the fundamental values attached to the traditional Diceyan model of the rule of law are either missing or are unappreciated by the multilateral trading system which today negotiated the GATT and forms the WTO. In spite of this apparent vacuum, many academic authors that include jurists and economists accept WTO rules as principles of law.⁵

To put the magnitude of the development in reciprocal multilateral free trade from an inside out viewpoint, ie. in a national perspective, Malaysia's involvement at an international and ASEAN regional level have not been passive. Starting from the nineteen-eighties Malaysia has inked no fewer than ten multilateral, regional and bilateral free trade agreements (FTA) and the number continues to grow as it participates in negotiations for future agreements

³ See Carmody, 'A Theory of WTO Law', Jean Monnet Working Paper 05/06, NYU School of Law.

⁴ *Ibid*, at 3.

⁵ See Pauwelyn, 'The Role of Public International Law in the WTO, How Far Can We Go?' *The American Journal of International Law* (Vol. 95:535) p. 538; John H. Jackson, *The World Trading System* (1997) at 25.

that will involve amongst other territories, the United States and European Union. These are in addition to Malaysia acceding to the WTO on 1 January 1995.⁶ Parliament and the trade ministry have been at the forefront of this endeavour. The judiciary has kept its distance but this is understandable considering that matters involving cross border free trade rarely involve the judiciary. Various pieces of legislation have been put in place to draw Malaysia in line with requirements of the WTO treaties and it is pertinent to examine how these various pieces of legislation and subsidiary legislation have brought Malaysia into conformity with WTO rules. As an example, the Customs (Rules of Valuation) Order 1999 provides legal emphasis that Malaysia's Customs authorities must apply Article VII of the GATT when assessing the value of imported goods for customs duties. This provision is in line with the Agreement for the Implementation of Article VII, 1994 and provides certainty under domestic laws as to what valuation methods the Customs authority will apply, in what particular order. As a result, the Customs authority does not have discretion to impose a valuation method with the objective of achieving a more favourable revenue collection.

As for the legal aspect of global trade, there is increasing reference to the rule of law, both by negotiators, diplomats and by leaders of the multilateral trading institutions, lending the need for clarification of what is meant by the expression in the context of customs and international trade.⁷ There is little doubt that much has been written about the rule of law. However, much of these works are by jurists and legal scholars who are already biased in

⁶ Website of the WTO, available at http://www.wto.org/english/thewto_e/countries_e/malaysia_e.htm (last accessed on 27 February 2013).

⁷ See Mike Moore, *The WTO, Looking Ahead*, 2000, Fordham International Law Journal, Issue 1&2, at p. 2. Arthur Dunkel, *Consumers of the World Unite, You Have Nothing To Lose But Your Chains*, GATT/1482, 1 June 1990, at p. 2.

favour of its merits.⁸ As a concept, it is often equated to justice, equality, human rights, fair trial and judicial independence. In many scholarly works, and even in some written judgments, this correlation is taken for granted. Professor A.V. Dicey himself, credited for coining the expression, prescribes three meanings to the rule of law. In the first, he argues that no person can be punished or reprimanded unless for a distinct breach of law established under the legal system in the ordinary courts.⁹ His second point is that no man is above the law.¹⁰ In his third point, Dicey describes the rule of law as being a special attribute of the English legal system. He believed that human rights and freedoms were better protected under the common law than under the constitution as practised in many continental European legal systems. In his own words:

There remains yet a third and a different sense in which 'the rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individual results, or appears to result, from the general principles of the constitution.¹¹

Dicey's three rules set in motion much of today's discourse of the rule of law. Amongst the supporters of the Diceyan model of the rule of law are some of Britain's most eminent judges. As will be discussed in further detail in Chapter 3 which examines the concept fo

⁸ See Bingham: *The Rule of Law*, 2010, Penguin Books; Bingham, *The Sixth Sir David Williams Lecture*, 2006; and Jowell & Oliver, *The Changing Constitution*, 6th Ed, 2007, Oxford University Press

⁹ See Dicey, A.V., *An Introduction to the Study of the Law of the Constitution* (1885; 9th edn., Macmillan, 1945), p.188.

¹⁰ *Ibid.*, p. 193.

¹¹ *Ibid.*, at 195.

the Rule of Law, the Lord Steyn (2002)¹², very similar to Dicey in approach, sets out two core meanings to the rule of law in understanding the [United Kingdom] public law. The first (p. 4), he explains, is not a legal concept. It “conveys the idea of government not under men but under laws”. Steyn, however, introduces a moral dimension in his first meaning. He argues that the rule of law contemplates a “civil society under equal and just laws”, and that laws cannot be used to oppress.

His second point is that the rule of law is “a general principle of constitutional law”.¹³ Amongst other things, Steyn stresses, the rule of law constrains the use of official power; protects a citizen’s right to legal certainty in respect of certainty with his liberties; and guarantees access to justice. In similar fashion, the Lord Bingham of Cornhill (2006, 2010) identified eight sub-rules that constitute the rule of law.¹⁴ His first point is that the law must be “so far as possible intelligible, clear and predictable”.¹⁵ Second, questions of legal right and liability should ordinarily be resolved by application of the law and not exercise of discretion.¹⁶ Third, the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.¹⁷

The fourth sub-rule is that the law must afford adequate protection of fundamental human rights.¹⁸ Fifth, means must be provided for resolving, without prohibitive cost or inordinate

¹² Steyn, J. *The Constitutionalisation of Public Law*, 1999

¹³ *Ibid.* p. 4

¹⁴ See Chapter 3 for further discussion. These eight sub-rules were originally set out in the Sixth Sir David Williams Lecture which Lord Bingham delivered in 2006. They were later expanded into a book titled “The Rule of Law” published by Penguin Books in 2010. The eight sub-rules in this study are cited from the more concise 2006 Lecture version.

¹⁵ Bingham, ‘The Sixth Sir David Williams Lecture’ (2006), at 6.

¹⁶ *Ibid.* p.10

¹⁷ *Ibid.* p.12

¹⁸ *Ibid.* p.16

delay, bona fide civil disputes which the parties themselves are unable to resolve.¹⁹ The sixth is that ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for the which the powers were conferred and without exceeding the limits of such powers.²⁰ The seventh sub-rule is that the adjudicative procedures provided by the state should be fair.²¹ Bingham's eighth and last sub-rule is that the "existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations."²²

The UK's case law is rife with allusions to the concept of the rule of law. Consider for example, Bingham's citations in his works. He quotes, for example, Lord Hoffman in the case of *R (Alconbury Developments Ltd. and Others) v Secretary of State for the Environment, Transport and Regions* [2001] as saying: 'There is however another relevant principle which must exist in a democratic society. That is the rule of law.'²³ He cites Lord Steyn in the House of Lords case of *R v Secretary of State for the Home Department, ex p. Pierson* [1998]: 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.'²⁴ He quotes also Lord Diplock in the House of Lords case of *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG* [1975]: 'The acceptance of the rule of law as a constitutional principle

¹⁹ *Ibid.*, p.20

²⁰ *Ibid.*, p.23

²¹ *Ibid.*, p.26

²² *Ibid.*, p.29

²³ Thomas Bingham. *The Rule of Law* (2010), at 6.

²⁴ *Ibid.*, p.6

requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.²⁵

In fact, in legal and political discourse, a substantial number of political, legal and academic commentators have continued to have something to say about the concept and the ideology behind it. The connotation is almost always positive and frequently contrasted with lawlessness and undue interference with the independence of the judiciary. The Sultan of Perak, Sultan Azlan Shah, himself a former high court judge, at the pledge of loyalty and investiture said in May 2012 called for the ‘safeguarding of the principle of the rule of law at all times to maintain peace and harmony in a country.’²⁶ In context, he said ‘it must be ensured that everyone enjoys protection of their rights as well as equality.’²⁷ Former UK prime minister, Tony Blair (2008) says:

My view is that, in today’s world, obedience to the Rule of Law is not just a right in itself; it is an important part of creating a successful country. In today’s world, it is a vital component of economic success. In today’s world, it is integral to a well functioning society. I believe adherence to the Rule of Law applies in all circumstances and at all stages of development.²⁸

More than rhetoric between legal scholars, several international treaties and organisations find their principles guided by the concept of the rule of law. In the 2004 United Nations Secretary General’s Report, Kofi Annan offered a broad definition of the rule of law as incorporating principle of governance in which all persons are governed by “laws that are

²⁵ *Ibid.*, p.39.

²⁶ See New Straits Times online (22 May 2012) available at: <http://www.nst.com.my/latest/perak-sultan-calls-for-safeguarding-rule-of-law-1.86559> (last accessed on 2 January 2013).

²⁷ *Ibid.*

²⁸ See Tony Blair, *Upholding the Rule of Law: A Reflection*. The twenty-second Sultan Azlan Shah Law Lecture, 2008 (Sweet & Maxwell, 2011).

publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”, amongst other things.²⁹

The Council of the International Bar Association passed a resolution in 2009 which set out as pre-requisites for the recognition of the existence of the Rule of Law in a legal system, that the system must at least have an independent, impartial jury, a an independent legal profession; protection of confidential communications between lawyer and client as well as the guarantee of equality of all before the law.³⁰

Paragraph 3 of the Preamble to the United Nations Universal Declaration of Human Rights (1948) reads:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.³¹

Likewise, the preambles to the Statute of the Council of Europe; the European Convention on Human Rights; the Treaty on the European Union; and indeed, even the Organisation for Economic Co-operation and Development (OECD) make reference to the rule of law.

There is little controversy about the importance of the Rule of Law as a constitutional principle. In fact, the European Commission For Democracy Through Law in its Report on the Rule of Law (2011), while acknowledging that references of many national and

²⁹ Report of the United Nations Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616), available at: <http://www.un.org/en/ruleoflaw/index.shtml> (last accessed on 2 January 2013).

³⁰ International Bar Association, *Resolution of the Council of the International Bar Association of October 8, 2009 on the Rule of Law*, 2.

³¹ Preamble, United Nations Declaration of Human Rights (1948), available at: <http://www.un.org/en/documents/udhr/index.shtml> (last accessed on 2 January 2013).

international legal instruments to the Rule of Law were of a general nature and did not define the principle in much detail, went on to assert that it believed the Rule of Law did constitute a common European standard to 'guide and constrain the exercise of democratic power.'³² While the concept of the Rule of Law has crept into international legal instruments, much of research or critique into the concept remains contained within a largely Anglo-American constitutional context.

While Dicey's advocacy for a rules based constitutional and administrative system devoid of judicial discretion were not without criticism from within the Anglo-American circle (most notably Jennings, 1959; Robson, 1928), upon closer inspection, these criticisms are not actually directed at the concept of a rules based system of governance. Robson criticised Dicey for his misinterpretation of the French administrative system (*droit administratif*)³³. Jowell³⁴ summarises Jennings' critique as repeating many of Robson's attacks but goes further to accuse Dicey of taking the position he takes for his political affiliations.³⁵ Jowell himself (2007: 14-15), much of whose works complement Bingham's, concedes that there are limitations to a rigid rules based system of governance even in constitutional law, a fault Bingham does not acknowledge. Where as a rules based system would require all to be treated equally under the law, Jowell explains that a strict rules based system would not be ideal in situations where rigid application of rules simply don't make sense. Jowell cites the example of colour coding in town planning in the UK, where town planning authorities had discretion in taking into account 'other material considerations' in allowing industrial activity in residential land, or vice versa. Having said

³² European Commission For Democracy Through Law (Venice Commission), Report On The Rule of Law, Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), at p. 4

³³ Robson, William, *Justice and Administrative Law* (1928; 2nd edn, 1947), p.343, cited by Jowell at p. 7

³⁴ Jowell, Jeffrey, *The Changing Constitution*, 6th edition, Oxford University Press, 2007, p. 8

³⁵ Jennings believed Dicey's opposition to discretionary state regulation stemmed from his support for the *laissez-faire* economic system and wanted as little interference as possible with profit making.

this, much of Anglo-American literature, even recent literature including Jowell's, appear to suggest broad support for administrative systems that adhere to the principle of the Rule of Law, in spite of its limitations and inconsistency in interpretations as a governing principle. Not all scholars ultimately agree. Professor Judith Skhlar in a rather frequently cited chapter on the topic dismissed it as nothing more than ruling class chatter having assessed how often the term fell into overuse, especially to describe anything in the legal system that was remotely good.³⁶ In the same light, David Dyzenhaus too offers an alternative view of the rule of law after having studied and compiled several dissenting theories of the benefits and virtues of the rule of law.³⁷

The expansion of the theory to the international legal order is somewhat much more recent. Other than Bingham's, few other works have given the subject of the international rule of law much thought.³⁸ Bingham strongly opposes the common argument that the lack of an international legislature results in the lack of legitimacy in the endorsement of the rule of law as opposed to in a domestic democracy.³⁹ While he acknowledges this is true, he argues that international law is observed more than it is breached because members to treaties make laws that suit themselves. In other words, members, 'by signature and ratification' in their domestic legislature, commit themselves to be bound. Following this assessment, it seems only logical that the international legal order is no different from a domestic legislature and Bingham very strongly sets out his view as such.⁴⁰ However, Bingham's

³⁶ See generally Judith Skhlar, *Political Theory and the Rule of Law*, in A. Hutchinson & P. Monohan, *The Rule of Law: Ideal or Ideology*, eds (1987).

³⁷ In this sense, see generally David Dyzenhaus, *Recrafting the Rule of Law: The Limits of Legal Order*, Hart Publishing (1999).

³⁸ See Tom Bingham, *The Rule of Law* (2010), Penguin Books, at 110 – 119.

³⁹ *Ibid.*, p. 112

⁴⁰ *Ibid.*, p. 111

works, as with much of previous legal doctrinal research, have made several untested theoretical assumptions:

1. It fails to recognise the unique jurisprudence of different branches of international law, such as the GATT/WTO, and assumes a “one size fits all” international jurisprudence;
2. That ‘general principles of law recognised by civilised nations’ are the same between international relations and those that concern individuals in civil society, and between nation to nation;
3. Broader practical considerations beyond general principles of law are more or less the same at international level and can still be managed by strict adherence to a conceptual rules based system.
4. The rule of law in many cases seems to be used loosely and interchangeably with the rule of good law.⁴¹

As a matter of fact, Simon Chesterman, in a well studied article of the international rule of law, appraises the conceptual application to law between states and citing the former president of the International Court of Justice herself, wondered what the international rule of law would look like by comparing what the theory actually sets out against the features of international.⁴² For one, the rule of law proffers the resolution of conflicts at independent courts of law which at the international level, is not something sovereign states are as free to do as individuals are. Even the International Court of Justice, if assessed closely, is not

⁴¹ Professor Andrei Marmor makes this same observation, see Marmor, Andrei. *Rule of Law and its Limits*. USC Public Policy Research Paper No. 03-16. 2003, p.1

⁴² Chesterman, *An International Rule of Law?* New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 08-11 (2008). at 2. available at: <http://ssrn.com/abstract=1081738> (last accessed on 16 March 2013).

quite a “court” in the domestic, judicial sense, but really a judicial review mechanism.⁴³

There is also no democratically elected executive at international level, legislating decisions which are equal and applicable to all which are reviewable in a court of law as a safeguard against public officials exercising discretion beyond the limits of their authority. As will be examined in Chapter 3, in a system essentially limited by voluntary jurisdiction, Chesterman cautions against the tendency of legal scholars to often too quickly translating domestic legal principles to the international realm on the assumption that those principles are interchangeable.⁴⁴

Given the fact, however, that many international legal instruments, in particular the United Nations Declaration of Human Rights 1948, the Statute of the Council of Europe and the European Declaration of Human Rights⁴⁵ and its prevalence in world trade jurisprudence, there still is a pressing need to understand how best to understand and apply the theory in that sphere now that legislators and jurists have already embedded it there.

As far as international trade is concerned, many early observations have already demonstrated that the trade experts who negotiated the multilateral trade agreements did not necessarily share these values inherent to the rule of law because they were faced with unique practical complexities that legal scholars and judges perhaps never fully understood. The attitude of international trade negotiators towards a rules based system of governance has been very different to that of Anglo-American legal theorists to the subject of constitutional and administrative law, as far as customs and international trade is

⁴³ See Rosalyn Higgins, *The I.C.J. and the Rule of Law* (speech at the United Nations University, Apr. 11, 2007), available at http://www.unu.edu/events/files/2007/20070411_Higgins_speech.pdf (last accessed on 16 March 2013).

⁴⁴ Chesterman, *op cit.*, at 35.

⁴⁵ See n 31 and 32 above.

concerned. The idea of a rules based system in the governance of international trade was not welcomed with open arms in the early days of trade treaty negotiations.

As far as pre-WTO literature is concerned, the works of Professor Robert E. Hudec are monumental. The GATT legal system has its foundations heavily laid on the concepts of the much more ambitious International Trade Organisation (ITO) Charter which however, did not materialise, wherein lies much of the GATT's negotiating history. This study elaborates the attitudes and perceptions of the governments during the pre-WTO GATT days in comparison to the modern post-WTO (1995 onwards) days. The ITO approach to legal obligations bore many of the characteristics of bilateral trade agreements negotiated before World War II. The primary (and sometimes sole) purpose of a trade agreement, even as they still are today, was the exchange of preferential tariffs. The exchange needed to be balanced in order for the parties on both ends of the bilateral table to be making a sound deal. This idea of balanced exchange is commonly referred to as the principle of "reciprocity" (Hudec, 1975). It was this desire for reciprocity which stimulated trade policy rules that were necessary in ensuring that there really was an exchange.⁴⁶ Other national trade policy measures needed to be held in check given that any commercial benefit of a tariff reduction could easily be negated by adjusting some other aspect of an importing country's trade policy to make it more difficult for the exporter to gain access to its markets. One favourite tactic, Hudec continues, is to impose onerous licensing procedures on imported goods that local producers either do not have to comply with or need only to comply to a far lesser degree of stringency. To maintain reciprocity, trade agreements often had provisions against quantitative restrictions, discrimination and the like.⁴⁷

⁴⁶ Hudec, Robert E. *The GATT Legal System and World Trade Diplomacy*, 1975, at p. 20

⁴⁷ *Ibid*, p.21.

It has been observed (primarily through the works of Hudec, Jackson, Meier, Trebilcock and Howse) that through the course negotiating the legal commitments of the ITO, therefore, the trade experts paid careful attention to the balance of commercial opportunity. The overriding concern for reciprocity naturally affected the kind of legal obligations the negotiators expected from each other. Legal obligations needed to be flexible commitments that could be terminated on short notice where the economic necessity called for, leaving the restraint against arbitrary termination to political pressure. Hudec (p. 20) stresses that trade agreement negotiators developed a legal system suited to these conditions but did not abandon legal obligations per say.⁴⁸

One of the most prominent features of the early GATT 1947 is that the remedies for non-compliance which resemble a bilateral treaty more than it does an international legal instrument. The GATT contains only one course of action if consultations between the conflicting parties fail to yield results. Article XXIII provides for “nullification and impairment”⁴⁹, allowing any contracting party to withdraw from the Agreement in response to the failure of another contracting party to carry out its obligation under the Agreement. Article XXIII applies to any measure, even though it does not conflict with the terms of the agreement⁵⁰ – meaning to say that the injured party can initiate a consultation or withdraw from the Agreement so long as benefits accruing directly or indirectly to that contracting party is being nullified or impaired in a manner that impedes the objectives of the Agreement from being fulfilled even though action by the perpetrating contracting party is

⁴⁸ *Ibid*, p.21.

⁴⁹ Article XXIII. General Agreement for Tariffs and Trade, 1947

⁵⁰ Article XXIII(1)(b), GATT 1947

perfectly permissible under the Agreement. The question of the potency of retaliation by withdrawal will be left for discussion at a later stage during the analysis.

Given that the procedure in all cases is the same – simply voluntary consultation, there appears to be a lack of effort on the part of the contracting parties to distinguish the types of legal claims, obligations or remedies or even establish the legal nature of any act or omission. In simple words, the remedies available to a contracting party for the failure by another contracting party to carry out its obligations were very mild and lay emphasis on consultation. The GATT negotiations give us a clear picture of the rationale for these mild remedies. Hudec cites that according to most trade experts, lawyers and judges simply “could not grapple with the realities of international business life”. The trade negotiators felt that economic disputes would be much better handled by economic experts whose approach to judgment would be pragmatic and unimpeded by “legalistic ritual”. The League of Nations’ Economic Committee was explicitly quoted as saying in a 1932 committee report that:

... bodies composed of judges, who cannot be thoroughly well acquainted with all the details of economic life, and who are rather inclined to rely on criteria of pure law in judging cases in which situations of fact and technical considerations are of predominant importance, do not always appear to operate in a way satisfactory to the parties. Moreover, it appears... that the (International) Court itself is of the opinion that judicial settlement is not always the best way of settling disputes of an economic nature.⁵¹

⁵¹ League of Nations, Procedure for the Friendly Settlement of Economic Disputes between States (Official No. C.57.M.32.1932.II.B), p.4

Hudec is cited as saying that the real problem with judges and lawyers is their failure to understand the need to compromise on these matters. His most powerful statement is in pointing out that trade agreement obligations were not meant to be enforced to the letter.⁵² This appears not to be the end of the lack of trade negotiators' confidence in a rules based approach. Hudec highlights this attitude as he quotes a passage from a memorandum submitted by the United Kingdom arguing against proposals for automatic appeals to the International Court of Justice (ITO)⁵³:

It seems to the United Kingdom Delegation that in these matters the analogy with ordinary commercial treaties and conventions is misleading, since these are precise, static and self-executing and require no exercise of discretionary power, whereas there are numerous provisions in the charter which require the exercise of discretion and economic judgment rather than precise interpretation of the terms of the Charter... [T]he law of the International Trade Organisation should be dynamic, and should be open to amendment and addition in the light of experience in this new field of international activity. The making of rulings under the Charter should therefore, we feel, be the function of the International Trade Organisation itself and not an outside body such as the International Court whose proper function is to determine questions of law and not to appraise economic facts....

In almost every conceivable case arising under the Charter, the issues will of their nature involve the element of economic appraisal and assessment and will not purely be legal in character, and it will be impossible to say where economic judgment ends and legal judgment begins.⁵⁴

Jackson's research of the GATT's approach to law from its inception up to the year 1969 (1969:760) is consistent with this sentiment.⁵⁵ The ITO (which never materialised), leaving

⁵² *Ibid.* p.21.

⁵³ *Ibid.* p.24.

⁵⁴ *Ibid.* p. 24, quoting the text of the Delegation of the United Kingdom memorandum E/PC/T/C.6/W.77 (Feb. 14, 1947).

⁵⁵ Jackson, John H., *World Trade and The Law of GATT* (1969) p.790.

the GATT as a general trade agreement with no regulatory body to enforce it. The legal obligations of members and dispute settlement procedures that would have been addressed in the ITO were not in any way ratified. As a result, even trade disputes between 1947 and 1995 were decided on an ad-hoc basis until the signing of the WTO Charter. Take for example, the first case in 1948 at the second meeting of the CONTRACTING PARTIES.⁵⁶ The Dutch delegation asked the Chairman in session, the Canadian Mr. Dana Wilgress, to rule whether the most-favoured-nation (MFN) obligations pursuant to Article I of the GATT applied to 'consular taxes'. On 24 August that same year, the Chairman simply replied:

[I]n response to a request for an interpretation of the phrase "charges of any kind" in paragraph 1 of Article I with respect to consular taxes, the Chairman ruled that such taxes would be covered by the phrase "charges of any kind".⁵⁷

More recent literature, however, suggests a changing attitude towards a rules based approach in the regulation and governance of international trade. Arthur Dunkel, Director-General of the GATT from 1980 to 1993 made this remark about the objective of the Uruguay Round during a speech in Washington:

And finally, it (the Uruguay Round) is about tackling the uncertainty in the economic environment through security, predictability and the rule of law.⁵⁸

⁵⁶ In GATT vocabulary, the term CONTRACTING PARTIES in upper case generally refers to the parties collectively as an organization; where as with initial capitals or in lower case refers to individual parties in their capacity as members.

⁵⁷ *The Phrase "Charges of Any Kind" in Article I:1 in Relation to Consular Taxes*, Aug. 24, 1948, GATT B.I.S.D. (vol. II) at 12 (1952).

⁵⁸ See *supra* Arthur Dunkel.

It is worth noting that amongst the salient features of the post 1995 WTO that seems to suggest an evolution towards a rules based system of governance is a separate Dispute Settlement Understanding (DSU) which sets out a rules based approach in relation to how disputes should be settle, a feature that the 1947 GATT did not possess. An independent Dispute Settlement Board (DSB) administers the DSB. Article III (2,) Agreement Establishing The World Trade Organisation (1994) demonstrates a move towards a rules based system of governance:

The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

The difference therefore, between the GATT 1947 and the modern post-WTO GATT 1994 is that dispute settlement in the modern system are theoretically resolved against the backdrop of a very comprehensive, rules based DSU as opposed to the purely ad-hoc GATT 1947 system. To this end, however, the interaction between the rule of law and the GATT/WTO's jurisprudence has never been assessed. More recent works have tended to avoid a conceptual discussion of the multilateral trading system's legal framework but have gone straight into discussing individual areas of the WTO's covered agreements where research is rightly warranted, such as the definition of discrimination,⁵⁹ and especially the dispute settlement understanding (DSU).⁶⁰ In fact, even a recent critique of the WTO's jurisprudence was made in the context of the DSU,⁶¹ in which the author considered the

⁵⁹ See Ya Qin, 'Defining Non-discrimination Under The Law of The World Trade Organisation', Boston University International Law Journal 23, no. 215 (2005).

⁶⁰ See Van der Borgh, 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate', American University International Law Review 14, no. 4 (1999): 1223-1243.

⁶¹ See Magnuson, 'WTO Jurisprudence and Its Critiques: The Appellate Body's Anti-Constitutional Resistance', Harvard International LJ 51 (2010).

Appellate Body's resistance to 'constitutionalisation' in international trade law. The scarcity of literature simply means that this research needs to be undertaken by piecing together the findings of various individual pieces of work to arrive at one single, coherent conclusion.

CHAPTER 3. THE CONCEPT OF THE RULE OF LAW

Before setting out arguments over the doctrine so far as the multilateral trading system is concerned, several questions require further examination. What is the Rule of Law? Who determines how it is interpreted? Is the Rule of Law necessarily different from “rule by law” or “rule by the law”? Does the Rule of Law necessarily equate rule of good law? The sheer volume of commentary and literary sources, and the resulting differences in interpretation means that it is near impossible to attempt to define the concept, anymore at least. These themes are explored in this chapter by studying the origins and historical developments of the concept, but will be continually re-visited through the course of this dissertation.

3.1 Understanding The Origins and Historical Development of the Rule of Law

It is generally accepted there is no consensus on what the Rule of Law really means. Even prominent jurists and legal theorists have on occasion agreed to disagree. With loose utterances of the term abound in speech and text likewise, in formal and informal documents, including even in legislative instruments¹, it is insufficient merely to dabble with the far too many contrasting attempts at definition, for many have offered a definition, often sugar coating it with their vested interests during the process. For the purpose of this dissertation, the most useful way to seek an understanding of the notion is to trace its

¹ See the Preamble to the Statute of the Council of Europe 1949, Preamble to the European Convention on Human Rights 1950 and the preamble to the United Nations Universal Declaration of Human Rights 1948.

origins and historical developments up to its contemporary application (or over-application).

The European Commission for Democracy Through Law compiled a report which tracks the concept to its origins. The four authors of the paper thoroughly trace the concept as far back as ancient Greece where Plato is quoted as saying:

Where the law is subject to some other authority and has none of its own, the collapse of state, in my view, is not far off, but if the law is the master government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state.²

Two authors, Jeffrey Jowell (who was incidentally one of the members of the The European Commission for Democracy Through Law) and Thomas Bingham (The Lord Bingham of Cornhill) set out very well studied commentaries of the origins of the concept of the Rule of Law and the comparable doctrines of the German *Rechtsaat* and the French *Etat de droit* from feudal Europe through subsequent changes in the socio-political landscape to the post-Diceyan debate over executive constraint vs discretion.

Even if Dicey coined the term in 1885³, and a number of text book authors do credit him for this⁴, he did not invent the doctrine. While the notion itself may well have had its roots

² European Commission For Democracy Through Law (Venice Commission). Report On The Rule of Law, Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), at p. 3

³ Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th Ed, 1968, ELBS, London, cited in Bingham, *The Rule of Law*, at p. 3

⁴ See generally Hilaire Barnett in *Constitutional and Administrative Law* (2007); FH Lawson in *The Oxford Law School 1850-1860*; Bingham in the *Rule of Law* (2010), Penguin Books, at p.3 is quoted as saying: "Credit for coining the expression 'the rule of law' is usually given to Professor A.V. Dicey, the Vinerian Professor of English Law at Oxford, who used it in his book *An Introduction to the Study of the Law of the Constitution*, published in 1885."

in Aristotelian Greek civilization,⁵ Bingham recognises the Magna Carta of 1215 as a key milestone in modern constitutional history.⁶ Although exacted from King John by the Barons under duress (Bingham concedes it would be reading too much into history to say that the barons who confronted King John had anything other than their self interest and self preservation at heart), the Magna Carta was the first known written document in Britain (and probably Europe) expressly recognising fundamental human rights and justice; in particular chapters 39 and 40, a “grant to all free men” that:

39. No man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

40. To no one will we sell, to no one deny or delay right or justice.⁷

Bingham argues that the Magna Carta is a significant milestone in the development of the Rule of Law for its representation and expression of “a clear rejection of unbridled, unaccountable royal power, an assertion that even the supreme power in the state must be subject to certain overriding rules.”⁸ As much as the Barons who exacted the commitment from King John did not so out of a desire to see justice and equality prevail throughout the land, nor was it out of any desire to make the world a better place, here is one of the earliest declaration in writing of an allusion to a rules based system of governance in Europe – a system under which the written law recognises (or was compelled to recognise) the

⁵ Sir Ivor Jennings, cf. *The Law and The Constitution*, 5th ed. 1959, University of London Press, London at p. 45 n1 “The notion is to be found like every other notion, in Aristotle”.

⁶ Thomas Bingham, *The Rule of Law*, Penguin Books (2010) at p. 10.

⁷ *Ibid.*, at p.11.

⁸ *Ibid.*, at p.12.

fundamental rights of the individual against undue force, incarcerations or access to justice.

Bingham stresses this as governance on the principles of the rule of law in its infancy.⁹

Goodman goes back slightly earlier, tracing the roots of the Rule of Law to the new rules in England after the Norman invasion in 1066. After the invasion, the new rulers of Britannia, while claiming their ancestral heritage in France, declared themselves rulers in their own right over their new found land. Armed occupation alone was insufficient to govern the land, so the king sent judges across the land to establish a common system of law, determining what law to apply and ensuring that the king's rule extended consistently through the kingdom.¹⁰ These train of events may have been rather superficial from a doctrinal perspective and were probably done with the intention of consolidating the king's powers more than anything else, what more to establish a system of governance based on any specific set of principles, but it did also create the common law system used today in the US and the British Commonwealth.¹¹ It is also this judge made common law system, as we shall see later in this chapter, which Professor A.V. Dicey holds in such high esteem in his exposition of the Rule of Law.

Subsequent to the Magna Carta of 1215, Bingham recognises eleven other significant historical milestones developing the rule of law as we know it today. Chronologically, these are:

⁹ *Ibid.*, p. 11.

¹⁰ Carl Goodman, *The Rule of Law in Japan: A Comparative Analysis (Second Revised Edition)* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2008), at p. 9.

¹¹ *Ibid.*, at p.9.

1. The writ of habeas corpus and the challenge to unlawful detention familiar in the common law system by the early thirteenth century;¹²
2. The gradual abolition of torture and trial by ordeal in most European legal systems by the mid 1800s¹³;
3. The Petition of Right 1628¹⁴;
4. Sir Matthew Hale's resolutions, believed to be written around the 1660s¹⁵;
5. The Habeas Corpus Amendment Act 1679¹⁶;
6. The Bill of Rights 1689 and the Act of 1689 and the Act of Settlement 1701¹⁷;
7. The Constitution of the United States of America¹⁸;
8. The French Declaration of the Rights of Man and the Citizen 1789¹⁹;
9. The American Bill of Rights²⁰;
10. The laws of war starting covering amongst other documents, the ordinances of Richard II in 1385 and Henry V in 1415; to the works of Gentili (1552-1608) and Grotius (1583-1645); to the ratification of the 1998 Rome Statute of the International Criminal Court to adjudicate the 1864 Geneva Convention on Treatment of the Wounded²¹; and
11. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in Paris on 10 December 1948.²²

¹² Thomas Bingham. *The Rule of Law*, Penguin Books (2010) at p. 13

¹³ *Ibid.* at p.14.

¹⁴ *Ibid.* at p.17.

¹⁵ *Ibid.* at p.20.

¹⁶ *Ibid.* at p.22.

¹⁷ *Ibid.* at p.23.

¹⁸ *Ibid.* at p.25.

¹⁹ *Ibid.* at p.27.

²⁰ *Ibid.* at p.28.

²¹ *Ibid.* at p.30.

²² *Ibid.* at p.32.

The philosophical idea of a state governed by law exists in the civil law systems of continental Europe in the form of the concept of *Rechtsstaat* in the German influenced principalities of Europe, while the French approach can be seen manifested in the concept of *Etat de Droit*. While having many doctrinal similarities with the of the Rule of Law, the concept of *Rechtsstaat* is not synonymous with the Rule of Law. Translated into English as ‘legal state’, ‘state of law’, ‘state of justice’, or ‘state of rights’, *Rechtsstaat* lays emphasis on the nature of the state. Whereas the Rule of Law was conceptually conceived from a common law system of judge made law where the judiciary played the role of holding the officials of the executive accountable for the powers entrusted to it by the scrutiny of administrative discretion, *Rechtsstaat* emerges from written constitution. Similar to the Rule of Law, the idea of *Rechtsstaat* is in opposition to an absolutist state; one where the power of the executive subsisted completely unchecked. The difference lies in the ideological emphasis – the idea of *Rechtsstaat* is one of a ‘constitutional state’. It promulgates that the protection from absolutism should be provided by the legislature and not the courts alone²³.

Similarly, the French notion of *Etat de Droit* or ‘legal state’, ‘state of laws’ or ‘the law-governed state’ also finds its conception within the constitution, only with less emphasis on the nature of the state²⁴. Conversely instead, the idea of *etat de droit* considers the state as the “guarantor of fundamental rights enshrined in the Constitution against the legislator.”²⁵

Having established its historical development, it is still necessary to turn the attention now to Professor A.V. Dicey, author of *An Introduction to the Study of Law of the Constitution*,

²³ European Commission For Democracy Through Law (Venice Commission), Report On The Rule of Law. Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), at p. 4

²⁴ Cf Bingham, *The Rule of Law*, at p. 7.

²⁵ *Ibid.*, at p.4.

published in 1885, not only because the term 'Rule of Law' was for the first time used but because of the immense influence this work exercised. There is a considerable volume of literature which have already examined his work and it has attracted as many critics as it has supporters.²⁶ Dicey saw the rule of law as having the three core features:

- i. First, that no person should be punished but for the breach of law, which must be certain and prospective so as to guide the action and compliance of individuals whereby they cannot be retroactively punished for an offence which could not earlier have been a breach. Dicey held on strongly to the view that discretionary power led to arbitrariness and the "rule of law" was a necessary means of such constrain;
- ii. Second, every person was equal before the law. The law should not treat one person differently from another – that every man is subject to the ordinary law of the land;
- iii. Third, the Rule of Law should derive from "judge-made-law" or common law as determined by the ordinary courts, and not from any written constitution.

Professor Jowell concedes that the first feature, the fettering of discretion, has some compelling limitations in the context of most contemporary jurisdictions where a certain amount of administrative discretion is inevitable to function in the complex socio-economic and geo-political atmosphere of an increasingly globalised world. Citing the example of town and country planning in Britain, Jowell illustrates in cases where there were formal rules over how commercial or residential land could be developed, and would-be

²⁶ See the works of Ivor Jennings, Jeffry Jowell, Lon Fuller, Thomas Bingham, Hilaire Barnett and Ronald Dworkin amongst others.

developers could tell by the colour coding. The rules were however, softened and town planning officials could take into account 'other material considerations' in deciding what could be done with the land. Jowell concedes that a fair amount of judgment and discretion is needed on the part of the land office officials in considering these 'other material considerations' and eventually arriving at a decision.²⁷

It is also highly unlikely Dicey's third feature can survive the political or socio-economic environment of today, for the most obvious reason, Dicey's parochial commentary appears to be British centric and neglects the fact that most countries of the world have written constitutions.²⁸ Jowell, while not defending the flaw does, however, offers an explanation why Dicey felt compelled to express that the Rule of Law should emerge from judge made common rather than the written constitution – an argument which to many contemporary scholars would seem a moot point favouring the opposing view. Dicey was not in any way against Constitution, but like Bentham before him, was against the idea of a basic document setting out a "catalogue of human rights". He instead saw laws and liberties as arising from decisions in the courts – the common law.²⁹

Qualitative arguments notwithstanding, there are some key observations to be deduced from Bingham and Goodman's studies of the origins of the Rule of Law as well as the position of Dicey in relation to the doctrine. The substance of the Diceyan idea of the Rule of Law, amplified by Bingham, stood for the opposition to arbitrary power, the discretion of officials as Dicey calls it, certainty in legislation, protection by the law of certain

²⁷ Jeffrey Jowell and Dawn Oliver, *The Changing Constitution*, 6th Ed, 2007, Oxford University Press, at p. 14

²⁸ Only the United Kingdom, Canada, New Zealand, Israel and Saudi Arabia have no written constitution, see http://en.wikipedia.org/wiki/Uncodified_constitution (last accessed on 21 February 2013).

²⁹ Jowell et al, at p. 7.

fundamental rights of the individual, equality before the law and the presumption of primarily democratic values in the system of governance. In spite of its fallacies and criticisms mainly against his parochial attitude, political affiliations and misinterpretations of the British and French constitutional systems, Dicey's core principles continue to find support in and from institutions that profess to uphold democratic values. Even the Council of the International Bar Association passed a resolution in 2009 requiring several commonly accepted virtues as essential to the Rule of Law which the Association resolves to uphold.

The concept of the constraint of executive absolutism and the promulgation of moral principles like equality, law and order, access to the courts and protection of fundamental human rights by the courts and laws are elements read into it by its authors, putting the doctrine of the Rule of Law in a position where it can convincingly be argued that it is synonymous with 'rule of good law'. The emphasis that men are to be ruled by prospective and certain laws, and not to be punished for the breach of something which was not at that time law. it is also not surprising therefore, that some have taken this notion to be synonymous with 'rule by law' or 'rule by the law'³⁰. The moral principles differentiating these alternative interpretations from the Rule of Law are outside the scope of this study, but it is important at the minimum to understand why its authors and supporters insisted that the doctrine of the Rule of Law be not confused with 'rule of good law', 'rule by law' or 'rule by the law' in order to then examine its conceptual appearance and evolution in multilateral trade jurisprudence.

³⁰ The Report of the Venice Committee asserts that such an interpretation would permit authoritarian actions by governments and do not reflect the meaning of the rule of law today. see p. 5.

The 2011 Venice Commission dismisses the “rule by law”, “rule by the law” and “law by rules” versions of the notion as distorting the essence of the Rule of Law. It argues that the Rule of Law must be distinguished from the “purely formalistic concept” by which public officials are allowed to act simply because the law authorises it. The Venice Commission’s report asserts that such interpretations lose the essence of the Rule of Law and have permitted authoritarian actions by governments. The empirical evidence of this assertion is better left to the work of other researches to confirm. In a remark meant to criticise Dicey’s parochial scope of the doctrine (which sets out the observation of Englishmen being ruled by law and by the law alone), Jennings happened instead to illustrate precisely the Commission’s point in saying:

The powers of Louis XIV, of Napoleon I, of Hitler and of Mussolini were derived from the law, even though that law be only “The Leader may do and order what he pleases”. The doctrine involves some considerable limitation on the powers of every political authority, except possibly (for this is open to dispute) those of a representative legislature. Indeed it contains, as we shall see, something more, though it is not capable of precise definition. It is an attitude, an expression of liberal and democratic principles, in themselves vague when it sought to analyse them, but clear enough in their results.³¹

The American judge and critic, Justice Antonin Scalia of the US Supreme Court adds his contribution to the differentiation, explaining that the rule of law is a law of rules.³² From his perspective, the doctrine meant that everybody, from the richest to the poorest, from the politically most powerful to the weakest, is subject to the same set of laws, adjudicated and interpreted in a consistent manner by an independent judiciary or institutions of governance. The expression ‘rule by law’, on the other hand, simply connotes the use of

³¹ W. Ivor Jennings, *The Law and the Constitution*, 1933, at p. 131

³² Antonin Scalia, *The Rule of Law is a Law of Rules*, *The University of Chicago Law Review* 56 (4)(1989): 1175- 1188.

laws and norms to govern. Underlying values like equality before the law, consistency of adjudication and interpretation and judicial independence are not necessarily inherent in it.

To the question of the Rule of Law being equated with the 'rule of good law', Jowell simply points out that nowhere does Dicey equate the Rule of Law with the notion of 'good' law. Nor does he contend, Jowell continues, "that in order to qualify as 'law' a particular rule had to be fair, or reasonable, or just". To Dicey, it did not matter so much that the laws were harsh, more importantly they had to be known. Friedrich von Hayek lends support to this observation by illustrating:

It does not matter whether we all drive on the left or the right hand side of the roads so long as we all do the same. The important thing is that the rule enables us to predict other people's behaviour correctly, and this requires that it should apply in all cases – even if in a particular instance we feel it to be unjust.³³

In spite of these attempts by distinguished philosophers like Jennings, Bingham, Jowell and Hayek to narrow the scope of the Rule of Law to an ideal interpretation, there remain many facets of the rule of law. The development of the doctrine remains an evolutionary process which grows in tandem with the political, social and economic development of the legal system. The developments scrutinised at this juncture reflect the need for greater clarity in the practical application of the doctrine.

³³ F.A. Hayek, *The Road to Serfdom*, 1943, at p.60, cf. Jowell, *The Changing Constitution*, at p. 11.

3.2 Influence of the Rule of Law as a Doctrine of Legal Order

Criticisms notwithstanding, there appear to be many more proponents of Dicey's core principle compared to critics. Many modern legal theorists, after having had the opportunity to study the criticisms of Jennings, Robson and Fuller still adopt the fundamental doctrine, removing the inaccurate or offensive portions of Dicey's political and economic observations. It would, however, be misleading to think that its increase in usage in legal, judicial and political verbiage (at times overuse) is synonymous with an increasing tendency of legal systems and institutions to abide by the doctrine. Professor Brian Tamanaha describes this phenomenon as a result of 'rampant divergence of understandings' and analogous to the notion of the Good that 'everyone is for it, but have contrasting convictions about what it is'³⁴. In similar vein, de Smith observes that: "the concept of the rule of law has an interesting characteristic; everyone who tries to redefine it begins with the assumption that it is a good thing, like justice and courage"³⁵.

In spite of such opinions, the importance of the Rule of Law still cannot be undermined or passed off as being too uncertain for serious study for a number of reasons. Firstly, because leading judges (especially of the Commonwealth) have on numerous occasions referred to the rule of law not only in delivering their judgments but also in their non-judicial academic works. Second, the doctrine can be found in an increasing number of authoritative international instruments of governance. Thirdly, the rule of law can be found embedded in legislation and constitutions of a number of countries. These three reasons are borrowed from Bingham³⁶, and one more, a fourth of my own is added – that leaders of international

³⁴ Brian Z. Tamanaha, *On the Rule of Law*, 2004, Cambridge University Press, at p. 3.

³⁵ De Smith and Brazier, *Constitutional and Administrative Law*, 6th Ed, 1989, Penguin, London, at p.19.

³⁶ See Bingham, *The Rule of Law*, at p. 6 – 7.

institutions and organisations in non-judicial roles increasingly carry themselves in a manner that their leadership is seen to be guided by the rule of law during their tenure and this is reflected most significantly in their speeches and written addresses. It is also noteworthy that a number of these organisations either have general provisions to abide by the rule of law, or are at least guided by the principle even if not explicitly spelt out.

3.2.1 Judges and the Rule of Law

Former Lord President of the Federal Court of Malaya and Yang Di-Pertuan Agong, Sultan Azlan Shah remarked at the pledge of loyalty and investiture in conjunction with his 84th birthday called for safeguarding of the rule of law at all times to maintain peace and harmony in the country. To this end, his majesty remarked that:

The confidence of the people in the principle of the rule of law should be backed by a respected law enforcement body of integrity.³⁷

Lord Steyn (1999) introduces two dimensions to the understanding of the Rule of Law in shedding light on why the doctrine was important, albeit from a UK public law perspective.³⁸ The first, he explains, is not a legal concept but a moral one. Contrasting the apartheid situation in South Africa where the institutionalised system of laws were used to oppress and discriminate, Steyn argues that the Rule of Law addresses a moral aspect of public power and conveys the idea of government not under men but under laws.³⁹ The

³⁷ New Straits Times Press, Bernama, 22 May 2012.

³⁸ The Rt Hon Lord Steyn, *The Constitutionalisation of Public Law*, 1999, at p. 4.

³⁹ *Ibid*, at p.4.

second is the familiar constitutional law principle of the constraint of abuse of power by officials characterised by:

- i. Citizens' rights to legal certainty in respect of interference with his liberties;
- ii. The guarantee of access to justice; and
- iii. Procedural fairness in the manner in which public officials make administrative decisions.⁴⁰

Using the UK House of Lords case of *Wheeler v. Leicester City Council*⁴¹, Steyn illustrates how the British courts applied this point. In that case, a local authority revoked the license of a football club because some of its members had visited South Africa. The court in deciding that case observed there was no law prohibiting contact with South Africa and held the local authority's action to be contrary to the Rule of Law.

The same Lord Steyn, sitting in the House of Lords in the case of *R v Secretary of State for the Home Department, ex p. Pierson*⁴², where a convicted young murderer was faced with the prospect of having his mandatory prison sentence increased by the Home Secretary, said:

Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.⁴³

⁴⁰ *Ibid.* at p.4.

⁴¹ [1985] A.C. 1054.

⁴² [1998] AC 539, 591.

⁴³ Cf. Bingham, at p. 6.

In Malaysia, this point was expressed poignantly by the Court of Appeal in the case of *Sugumar*:

Malaysia has a written constitution the basic framework of which has been fashioned in language that upholds the Rule of Law. The fundamental guarantees that all persons are equal before the law and have equal before the law and have equal protection of it and that no person shall be deprived of life or personal liberty save in accordance with law clearly demonstrate that ours is a Government of mere humans but of laws.⁴⁴

The most compelling evidence that the doctrine was applied in case law in other jurisdiction comes from a paragraph in the International Bar Association (IBA) Council's 2005 Resolution which commends recent decisions in some jurisdictions, albeit not specified which jurisdictions:

...[The] IBA welcomes recent decisions of courts in some countries that reiterate the principles underlying the Rule of Law. These decisions reflect the fundamental role of an independent judiciary and legal profession in upholding these principles. The IBA also welcomes and supports the efforts of its member Bar Associations to draw attention and seek adherence to these principles.

In the light of numerous allusions to the doctrine such as these, all evidence point to the fact that judges have enough faith in the doctrine to use it in their judgments. The authority that these statements carry and the manner in which they are applied suggest that even if there is no consensus, some of doctrine's fundamental elements are undisputed. It is clear these fundamental elements are attached with moral and philosophical values which cannot be alienated from the rule of law. These elements, to summarise concisely, are the equality of

⁴⁴ *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor Appeal [1998] MLJ 289 ar p.305 (COA).*

man before laws, the access to justice, the non-interference of the state with civil liberties, consistency in judicial interpretation of laws, governance only by prospective laws known to citizens, and accountability of public officials for power granted to them in their capacity as public officials.

3.2.2 The Rule of Law in International Instruments of Governance

From the years following the second world war, efforts towards international peacekeeping began to take shape with the negotiations and eventual signings of various of international and regional agreements and treaties on the regulation of a variety of international affairs, in particular economic relations, international trade, human rights and the environment. A number of these are built on the foundations of the rule of law. The Preamble to the United Nations' Universal Declaration of Human Rights reads:

“...Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...”

The concept is probably more widely found in European instruments – the Preamble to the Statute of the Council of Europe emphasises the devotion of its member states “to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.”

Similarly, the Preamble to the European Convention on Human Rights states that “the governments of European countries... are like-minded and have a common heritage of

political traditions, ideals, freedom and the rule of law". More significantly, the concept of the rule of law is found enshrined not only in the Preamble but in Article 2 of the Treaty of the European Union. According to Article 2, "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

3.2.3 The Rule of Law In National Legislation and Constitutions

As an important constitutional in the United Kingdom, professed by British jurists and legal scholars (ie. Dicey, Jennings, Steyn, Bingham, Jowell et al) as a constraint of government action and the exercise of power, the Rule of Law is found explicitly in the Part 1, the Introduction to the Constitutional Reform Act 2005 stating that: "This Act does not adversely affect – (a) the existing constitutional principle of the rule of law, or – (b) the Lord Chancellor's existing constitutional role in relation to that principle."

The European Commission for Democracy Through Law observes that the notion of the rule of law appears as a main feature in the constitutions of former socialist countries of Central and Eastern Europe that include Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, "the former Yugoslav Republic of Macedonia" and Ukraine.⁴⁵ It also points out that Article 5.1 of Spain's Constitution sets out that "the Courts control the power to issue regulations and to ensure that the rule of law

⁴⁵ European Commission For Democracy Through Law (Venice Commission), Report On The Rule of Law, Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), at p. 8, see para. 32.

prevails in administrative action.”⁴⁶ It is, however, not part of the scope of this study to independently verify these observations.

3.2.4 Influence of the Rule of Law on International Institutions and Multilateral Organisations

Perhaps the most widely regarded contemporary definition offered by a figure of international influence is that of the former UN Secretary-General Kofi Annan which he includes in his 2004 report defining the concept as:

... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁴⁷

More recently, the Council of the International Bar Association in 2009 adopted the IBA Council’s Commentary on the ‘Rule of Law’ Resolution 2005 which sets out what the rule of law stands for:

An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment, a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly,

⁴⁶ *Ibid.*, at p. 8.

⁴⁷ Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Doc. S/2004/616, 23 August 2004, see para. 6.

arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable. The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities.⁴⁸

Similarly, the International Commission of Jurists (ICJ), which according to the Venice Commission's report had been "systematically studying the rule of law over the years and adopts a notion of the rule of law as a fundamental principle for the protection of individuals from the arbitrary power of the state and which empowers human dignity."⁴⁹

Of greater interest to this study is the fact that one former director-general of the GATT and one former director-general of the WTO had used the expression in their addresses. Arthur Dunkel, director-general of the GATT between 1980 and 1993 urging the conclusion of the Uruguay Round said in his speech in Washington in 1990:

[The Uruguay Round] is about the existence of the GATT system. It is about fundamental reform of the multilateral trading system. It is about adjusting it to the changing needs of traders, producers, exporters, importers – and consumers – for the rest of this century and beyond. It is about bringing effective multilaterally agreed disciplines to bear on trading relationships. And, finally, it is about tackling the uncertainty in the international economic environment through security, predictability and the rule of law.⁵⁰

⁴⁸ Commentary on the IBA Council 'Rule of Law' Resolution of September 2005, Adopted by the International Bar Association on 8 October 2009, at p. 2.

⁴⁹ See *Report on the Rule of Law*, European Commission for Democracy Through Law at p. 7 – 8.

⁵⁰ See *supra*, Arthur Dunkel.

Mike Moore, director-general of the WTO from 1999 to 2002 regards the rule of law as the “cornerstone of the WTO”.⁵¹ He stresses that one of the key components in maintaining the stability and predictability of trade conditions promoted in the multilateral trading system is the respect for the agreed rules. He contends that “one of the essential functions of the WTO is to ensure that the rule of law, not force or power, presides of conditions of international trade”.⁵²

3.3 Arguments In Favour of the Rule of Law

Professor Jowell explains that Dicey’s concept of the rule of law is not merely seeking a general theory of law, but rather, a general principle of how power should be applied. According to Jowell, Dicey’s Rule of Law was more than just a rules based system of government, not wholly formalistic and devoid of any substantive content. There is a general consensus amongst the interpreters of Dicey like Jowell, Bingham and Steyn that law needs to guide human conduct and there are a set of fundamental conditions the law needs to meet in order to function properly as an instrument for guidance of human conduct. Jowell sets out these conditions, explaining that Dicey’s rule of law is laid upon the foundations of legality, certainty, consistency, accountability, efficiency and due process and access to justice.⁵³

By legality. Jowell means firstly, that the law must be obeyed. Secondly, that public officials must exercise their authority within prescribed boundaries. By certainty, Jowell explains that the law should be certain and predictable. Referring to Maitland, Jowell

⁵¹ See *supra*, Moore, at p. 2.

⁵² *Ibid*, at p. 3.

⁵³ See Jowell and Oliver. *The Changing Constitution*, 6th Ed, 2007, Oxford University Press, at p. 10.

argues that 'known general laws, however bad, interfere less with freedom than decisions based on no previously known rule.'⁵⁴ By consistency, it is meant that like cases are treated alike, as opposed to discretionary powers which may be applied selectively. The third value Jowell ascribes to the rule of law is that of accountability. By accountability, it is meant that rules provide a published standard against which the legality of official action can be measured, enabling redress by the public against officials whose actions are not within the scope of their authority.⁵⁵ As a fourth value, Jowell argues that a rules based system of governance indirectly provides the added benefit of efficiency by announcing or clarifying official policies to people who will be affected by them.⁵⁶ The fifth value is one on which Dicey himself had laid much emphasis. Dicey believed that no person should be condemned without first having the opportunity to be heard. Paraphrasing this, Jowell contends simply that no crime should be punishable without trial.⁵⁷

The general consensus on what the conditions are for the effective guidance of human conduct can be seen through the similarities between the five precepts outlined by Jowell (and he outlines them again in the European Commission for Democracy Through Law Report on the Rule of Law) and Bingham's eight ingredients or 'sub-rules' of the rule of law. These sub-rules, roughly expanded along the lines of Dicey's original broad idea are:

(1) *The accessibility of the law*: Legal prescriptions must be accessible to people in order that they have the opportunity to know what they can or cannot do. People cannot appropriately be punished for the breach of a provision they had no possibility of knowing.

⁵⁴ *Ibid.*, at p. 10, see Maitland, *Collected Papers*, Vol. i (1911).

⁵⁵ *Ibid.*, at p. 11.

⁵⁶ *Ibid.*, at p. 12.

⁵⁷ *Ibid.*, at p. 12.

(2) *Resolution of questions of legal right and liability by application of law and not discretion*: Discretionary powers granted to public officials and ministers should be constrained so at the very least as to minimise the opportunity for arbitrariness.

(3) *Equality before the law*: No person should be treated differently or discriminated under the law unless special circumstances require that a particular class of persons (eg. children, the elderly and disabled persons) should be treated differently.

(4) *Exercise of power by public officials fairly and in good faith*: Bingham expresses that this principle follows naturally from principles (2) and (3) just considered,⁵⁸ but deserves separate mention. Bingham implicitly argues this as a salient feature of democracy and contends that a state (in the absence of contrary expressions) does not intend to govern unfairly as the rules of natural justice require.

(5) *Adequate protection of fundamental human rights*: Bingham concedes that this is not an ingredient of the rule of law that would be universally accepted. It is arguable whether Dicey included the protection of human rights within the scope of his rule of law. Bingham's logic for including it as a sub-rule is first, that the Universal Declaration of Human Rights is linked with the rule of law and second, he could not comprehend a state which savagely represses and persecutes section of its own citizens to be observing the rule of law.⁵⁹

⁵⁸ *Ibid.*, at p. 60.

⁵⁹ *Ibid.*, at p. 66 – 67.

(6) *Access to means of dispute resolution without prohibitive cost or delay:* Any citizen that was bound by a just and equal set of laws needed to have access to a court of law or dispute settlement mechanism to enforce his rights under that law. It would not seem very logical for a person to be granted rights with no avenue to enforce it on a timely basis.

(7) *The right to fair trial:* Both parties to a case or dispute (claimant and defendant) must be given equal opportunity to articulate and defend their position.

(8) *The rule of law in the international legal order:* Just as citizens and public officials should be bound to observe the rule of law at national level, so too should states be bound to observe the rule of law between states.⁶⁰

In summary, it has become clear that this unqualified admiration for the 'rule of law' by several notable individuals can in fact more specifically be classed as reverence for the principles of accountable exercise of power, equality before the law and prevention of excess. Over the course of the doctrine's evolution, proponents of the rule of law have read so much into it and attached values of morality about what the law should be, which are by now integral to the doctrine. It has not become widely associated with the ideal of a well ordered society. As they remain proponents primarily because they have interpreted the doctrine to be built on these values, one question which then looms large is whether arguments for a rule of law bundled with these supplemental values withstands closer scrutiny.

⁶⁰ *Ibid.*, at p. 110.

3.4 Opposing Views

Opposition arguments to the notion of the rule of law vary in intensity from outright objection to circumspect acceptance that the rule of law is by and large a desirable thing, only that its inherent values are not without limitations. The argument of Judith Skhlar of its loss in philosophical value by casual overuse is by far the most compelling and frequently cited opposing argument. Skhlar comments that:

'It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.'⁶¹

The Marxists on the other hand, resented it as an instrument of the bourgeois to manipulate the masses into accomplishing their selfish political aspirations. In fact, Marx's attack on the Western ideal of government under the rule of law in the Communist Manifesto demonstrates this school of thought:

Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all; a will, whose essential character and direction are determined by the economic conditions of existence of your class The selfish misconception that induces you to transform into eternal laws of nature and of

⁶¹ J. Skhlar, *Political Theory and the Rule of Law*, in *The Rule of Law, Ideal of Ideology* 1, Allan C. Hutchinson & Patrick Monahan eds. (1987) at 1, see also Chesterman, *An International Rule of Law?* New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 08-11 (2008), at 2, available at: <http://ssrn.com/abstract=1081738> (last accessed on 16 March 2013); in that sense, see also Bingham, *op cit.* at 5; see also *supra* Dyzenhaus.

reason, the social forms springing from your present mode of production and form of property—this misconception you share with every ruling class that has preceded you.⁶²

The Marxist philosophy was, however, one of class struggle so the rule of law was not the only ‘bourgeois’ ideal they opposed. Most other opposing views are not outright critical theories. They can better be described as acceptance of the rule of law’s underlying values with qualifications. Amongst these qualifications are that of Jowell’s conceding that in a modern and complex state, some amount of discretionary power is not only inevitable but desirable, so the constitutional and administrative system needs to recognise a fair amount of flexibility as being necessary, especially in special cases.⁶³

Opposing views and critical theories are, however, not a primary interest of this study which seeks to examine the role of the rule of law system of administration in a jurisprudence which upholds values that are opposed to it.

3.5 Evaluating The Rule of Law Between States

In spite of the frequent reverberations in the use of the rhetoric by diplomats, heads of states and international legal instruments, surprisingly little literature exists in the examination of what, if anything, is meant by the rule of law between states. While it has been established through the course of this chapter and through the overwhelmingly rich literature of works in relation to the constitutional rule of law that there exists a high degree of consensus on its virtues, surely the rule of law between states with its vastly differing

⁶² Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, ch. 2

⁶³ Jowell, *op cit.* at p. 14-15.

substantive framework in achieving legal order cannot be premised on the same fundamental virtues as the law of constitutions – not all at least.

Yet, Bingham, taking the idea offered by the UN Secretary-General in 2004⁶⁴ expands this to mean that “nothing in this formulation points towards a concept different from that familiar in the domestic sphere”. Bingham uses as his support, the formulation of William Bishop:

‘Without precise definition, I believe we could agree that the concept includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force; and the realisation that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals.’⁶⁵

Bingham, himself an authority on the subject matter having held the distinguished roles of Master of the Rolls, Senior Law Lord and the first president of the Supreme Court of the United Kingdom takes the position that:

‘This would suggest that the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ at large. Such an impression is fortified by two further sources. According to Professor Chesterman, “the international rule of law” may be understood as the application of rule of law principles to relations between States and other subjects of international law’. In their Millennium Declaration the member states of the United Nations resolved to “strengthen respect for the rule of law in international as in national affairs and, in particular; to ensure compliance by Member States with the decisions of the International Court of Justice, in

⁶⁴ See Annan, *supra*, sub-chapter 3.2.4 above.

⁶⁵ Bingham, *op cit*, at 111, quoting W. Bishop, *The International Rule of Law*, Michigan Law Review, 59 (1961), at 553.

compliance with the Charter of the United Nations, in cases to which they are parties. The analogy, even if inexact, with the domestic situation makes plain, I suggest, why we should favour strict compliance with the law.⁶⁶

To have arrived at this conclusion, Bingham reasons that while many have raised the argument that the extent of the rule of law to the international level is limited by the nature of international law having no constitution or centralised legislature, adherence to rules and obligations are a norm as opposed to breach. States more commonly abide by international laws rather than breach the because they want to out of a sheer necessity to do so. The laws between states, he stresses, are not imposed on states by an external legislature but a compelling reason why states comply is the fact that states make and bind themselves by laws that suit them, drawing the analogy that ‘they are rules of a members’, not a proprietor’s club’.⁶⁷ Bingham attributes the necessity of states to be strictly governed by the rule of law as emanating from their self interest, reasoning firstly, that there is a need for international co-operation to tackle problems which afflicts a single state but have an international impact, giving as an example, the tendency for criminals who commit a crime in one country to flee to another. Here, he also makes reference to the three Bretton Woods agreements (which include the GATT) as ‘serious, effective and strictly controlled international schemes to promote development, relieve poverty and raise living standards, reinforced by establishment of the International Centre for the Settlement of Investment Disputes and the Multilateral Investment Guarantee Agency’⁶⁸

⁶⁶ See Bingham. *op cit*, at 111 – 112.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*, at 115.

His second and third points as to why the international law between states is as important as that at the national level is for the protection of human rights and freedoms and the increasing recognition of the closeness of the relationship between the international protection of human rights and the rule of law, citing decisions of the European Courts of Justice and Human Rights into which I will not dwell in detail.⁶⁹ This line of argument from Bingham does not come across as being very surprising.

Bingham's ideas of how it is in the best interest of states to observe the obligations to which they voluntarily bind themselves are valid and it certainly makes no sense to dispute them. What is apparent, however, is the emphasised significance of the protection of human rights and freedoms and a lack of methodical appraisal of the correlation between the concept of the rule of law and the very character of international relations, of which the GATT/WTO is a subset, before concluding in absolute terms that it is applied in the same way as the rule of law at national level. Bingham also seems to have concluded that the rule of law between states is equally as important as that in the domestic sense which is demonstrated by the greater propensity of states to comply rather than breach. This is a rather pre-mature conclusion because the normative intricacies of the nature of international law were not considered in great detail, or rather, were dismissed too early. In this regard, I draw from Chesterman who in his evaluation, proposes three possible meanings to the international rule of law.⁷⁰

The "international rule of law", Chesterman proposes, may in the first instance be understood as the 'application of rule of law principles to relations between States and other

⁶⁹ *Ibid.* at 116 – 117.

⁷⁰ Chesterman, *supra* n. 61, at 33.

subjects of international law.⁷¹ This seems to be the conclusion Bingham has chosen to arrive at. The second possible meaning is the primacy of the “rule of international law” over domestic law, establishing for example, the supremacy of international legislation over domestic legal provisions. This line of argument is a favourite amongst critics of the WTO who accuse their national governments of undermining national sovereignty and the domestic rule of law by its assent to be bound by provisions of the WTO.⁷² This, on the part of the anti-WTO critics does not impress me as a convincing argument because the overriding objective of the rule of law’s principles, if applied correctly, is intended to promulgate peace, security, prosperity and stability and not the reverse. In this regard, the only quarters who will feel undermined are those whose aspirations are not aligned with the fundamental principles of the rule of law. This second possible meaning of the rule of law too does not impress as a very convincing meaning. Under no circumstances in its traditional or contemporary sense does the formal, core doctrine of the rule of law promulgate supremacy of one set of laws over another. To interpret as such would simply be to read too much into the doctrine.

The third possible meaning which Chesterman offers is that a “global rule of law” ‘might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.’⁷³ He, however, qualifies that this approach is only reflective of quasi-administrative regimes that fall outside domestic and international legal categories.

⁷¹ *Ibid.*

⁷² See *supra* Wolfe and Ya Qin.

⁷³ Chesterman, *op cit*, at 32.

Independent of his three possible meanings, Chesterman had already observed that endorsements of the international rule of law had been cautious and the primitive nature of international law, in particular the GATT/WTO whose unique features will be examined in chapters 4, 5 and 6 of this dissertation raises one question which had been raised from the beginning of this dissertation – that whether the rule of law understood in its formal sense can at all be used where it is inconclusive whether the process of international rule making can itself be said to be governed by laws, given that their judicial institutions are limited to voluntary jurisdiction.⁷⁴ This forms the launchpad for his criticism which I fully resonate with that is the trap that many constitutional legal scholars fall into when addressing the rule of law between states, and a fact Bingham had grossly downplayed – the ‘uncritical assumption that domestic legal principles can be translated directly into the international sphere.’⁷⁵

Of course, any legal wanting to address the topic of international legal theory needs also to be reminded that the status of international law has long been the subject of tension over the question of whether international law is law. Hundreds of literary works have through history argued either way leaving the argument remaining wide open. In that sense, this thesis cannot and will not establish whether or not international law is law other than to agree that if it is not, then there can be no such thing as “international rule of law”. The idea of this dissertation is obviously not to cut the evaluation short by concluding as such because an increasing number of diplomats of the multilateral trading system, including two former GATT/WTO director-generals have expressed confidence in system as a result

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

of the Rule of Law in WTO jurisprudence. This has, in that sense, created some faith and expectation in and of the rule of law in the international sense, rightly or wrongly.

In spite of Bingham's efforts in the use of analogy to convince us that the rule of law at the international level is no different from that at national level other than the characters to whom the doctrine applies, while later in this dissertation perplexing features of GATT/WTO jurisprudence to highlight the complexities, one actually only needs to look at the broad framework of international law to understand the gaps. The most valuable exposition which Chesterman identifies is one by the former president of the International Court of Justice herself, who, having cited Dicey's Rule of Law goes on to consider the notion in the international sense:

'How then, in this national model, should an "international rule of law" look? First, there should be an executive reflecting popular choice, taking non-arbitrary decisions applicable to all, for the most part judicially-reviewable for constitutionality, laws known to all, applied equally to all, and independent courts to resolve legal disputes and to hold accountable violations of criminal law, itself applying the governing legal rules in a consistent manner. One has only to state this set of propositions to see the problems. There is manifestly no world government system into which the model could most easily fit'⁷⁶

Along these lines, Chesterman, taking into account Dicey's insistence on amongst other things, equality where there clearly can be no such thing as 'sovereign equality', takes the position that such an account might 'conclude that that there is presently no such thing as the international rule of law, or at least that international law has yet to achieve a certain

⁷⁶ Rosalyn Higgins, *The I.C.J. and the Rule of Law* (speech at the United Nations University, Apr. 11, 2007), available at http://www.unu.edu/events/files/2007/20070411_Higgins_speech.pdf (last accessed on 16 March 2013).

normative or institutional threshold to justify use of the term.⁷⁷ While I would not agree to conclude that there is no justification for the use of the term in the international sense, the point I would like to make before proceeding to the next chapters is that there is enough empirical evidence to show that the doctrine which applies to domestic principles of law cannot simply be translated and amplified into the international sense, not at least with significant modifications, at the risk of incurring criticism that such modification may alter the identity and character of the notion of the rule of law. Another point I would like to make is that it is clear here that while there is an increasing reference to the notion in international legal instruments and by international organisations in setting out their endeavours or running their day to day operations, there needs to be caution in the sense that the nature of international relations, in particular the GATT/WTO may not accommodate the doctrine the way a domestic constitutional system with an executive, legislature, court and judiciary does.

3.6 Concluding Statements: Rule of Law or Rule of Virtues?

It is clear at this point that the rule of law taught to us is a notion built on two substantive blocks. At the first, it is a requirement that public officials and ministers exercise their power in accordance to law and not by exercise of discretion. The second, the rule of law contains values which are generally accepted to be principles of justice, legality and moral integrity. In spite of this, Professor Andrei Marmor reiterates a sentiment shared by many rule of law scholars like Jowell and Bingham – that the “most common mistake about the

⁷⁷ Chesterman, *op cit.* at 35.

rule of law is to confuse it with the ideal of the rule of good law, the kind of law, for instance, that respects freedom and human dignity.”⁷⁸

The way the rule of law is often elaborated, however, it is difficult not to make that ‘mistake’, if it can appropriately be labelled a mistake at all. How then, is it possible to reconcile the rule of law to these values without accepting, even to a certain extent, that even if the rule of law does not equal the rule of good law, or rule of virtues, these are at least conditions to the rule of law? As Kelsen argues the case for a ‘pure theory of law’, surely there must be a similarly pure positivist doctrine of the rule of law which recognises the segregation of pure law from virtues.

It is of importance that the rule of law be examined in this vein for two reasons. Firstly, along the lines of the Marxist attack in sub-chapter 3.4 above, what may be a virtue to some can be a vice to others. Secondly, and more pertinent to this study, some of these values attached to the doctrine simply make very little sense in the context of the multilateral trading system. At the most fundamental, discretion and flexibility which are abhorred by Diceyans are highly regarded values within the multilateral trade system. It was not that Dicey had no answer to this phenomenon. To Dicey, administrative systems that did not observe the rule of law were simply inferior to those that did. Indeed, to Dicey, international law consisted of “rules of public ethics, which are miscalled international law”.⁷⁹ Regardless of whether or not it will ever be proven that international law is law, or otherwise, I submit that interpreters of the Diceyan concept who came after Dicey may

⁷⁸ Marmor, *The Rule of Law and Its Limits* (April 2003). USC Law and Public Policy Research Paper No. 03-16, Available at SSRN: <http://ssrn.com/abstract=424613> or <http://dx.doi.org/10.2139/ssrn.424613> (last accessed on 27 February 2013), at 1

⁷⁹ See *supra*. Chesterman at 35, n. 150.

have been too quick to make a normative generalisation before first attempting to understand the subtleties of different veins of jurisprudence and thereafter considering, for each individual scenario, whether there is adequate justification to apply principles of the rule of law.

In fact, there is good reason for submitting as such because it seems that many of these virtues and standards such as democracy and human rights and freedoms which have become latched the rule of law appear to have been glued on not by Dicey himself but by subsequent writers propounding their ideas as to what they believe a theory of law should be, and using the rule of law as a platform.⁸⁰ Not that the rule of law is not a good thing, but caution is certainly needed before going straight into accepting much of the contemporary interpretations of the subject matter without first understanding its history and evolution. I accept the support of Chesterman's concluding observations and proceed to the next chapter as such:

'But assertions that the rule of law is a meaningful concept at the international level depend on a coherent meaning at the national level, and the applicability of the term to power relations between States as well as within them. Neither should be taken for granted.

Through examining the evolution of the term, this article has sought to establish a core definition of "rule of law" that properly reflects what is distinctive about the term and is applicable across cultures. The price of clarity is abandoning the additional role that the rule of law sometimes plays as a Trojan horse to import other political goals such as democracy, human rights, and specific economic policies. It is a price worth paying, however, as these substantive goals may properly be

⁸⁰ See generally *supra*, Dyzenhaus.

seen as distinct from the rule of law—folding them into its robes reduces it to a rhetorical device at best, a disingenuous ideological tool at worst.⁸¹

In setting the tone for the subsequent chapters therefore, it is apt to highlight that a fair deal of political and economic effort in terms of international relations does need to be present in order for power and authority to be channelled through law.

⁸¹ Chesterman, *op cit*, at 38-39.

PART II

CHAPTER 4. ADMINISTRATION OF THE MULTILATERAL TRADING ORDER

4.0. Introduction

The institutionalisation of world trade through the establishment of the World Trade Organisation demonstrates, in theory, an evolution of a consensus based system of governance towards a rules based one. In order to understand the application of the rule of law in customs and international trade, a full comprehension of how sudden shocks in trade, economic and political history influenced international relations leading to the multilateral trade negotiations which then gradually evolved into the WTO of today. This chapter explores the historical development of customs and international trade administration, the values and virtues its negotiators embraced as well as the rules and obligations by which Customs and multilateral trade practices are, for the want of a better word, 'governed'. The focal point is the evolution of international trade jurisprudence from 1947 to the present day, exploring in brief events before 1947 for the illustration of evolution in perceptions, attitudes and practical regulatory needs.

4.1 A Brief History of Cross Border Trade

Much has been written about the uniqueness of customs and international trade. The trade in goods is arguably amongst the globe's oldest activity of gainful employment and it is probably safe to say that it has been around since human beings learned to communicate.

As communities began to live under the governance of established governments where there were distinguishable borders between city states and the trade in goods began to cross these borders, 'customs' and border control practices began to emerge. Until the emergence of nation states or city states with defined borders, international trade was not quite as international, nor was it anywhere near as diverse or multi-layered as it is today. The term 'international' trade could, therefore, not be literally applied in the borderless pre-nation state era. A more apt description of that activity would have been the movement and sale or exchange of goods across long distances.

From between the time of the ancient civilisations to the middle ages, most people were either peasants who produced their own food, or merchants who travelled from place to place exchanging surpluses what for they lacked. Very often, these were between neighbouring towns or villages. For centuries, trade was concentrated along the shores of the Mediterranean and Baltic seas, and around the Asian caravan routes to which they were linked. The focal points of international exchange were the Italian cities of Venice and Genoa.¹ Spices from India, precious stones from the Middle East and a variety of high value luxuries from the East have been brought to Europe from as early as around the time of Alexander the Great but long distance trading was still relatively rare owing to the low output of products and the expense and danger of long distance travel. For this reason, and for the reason that there was no "international community" to speak of, international trade went largely unregulated. There was in fact, no international cooperation, let alone regulation of anything. There was no one standardised system for measurements of weights

¹ See generally Wikipedia – International Trade, available at: http://en.wikipedia.org/wiki/International_trade (last accessed on 27 February 2013).

or coinage. Any uniformity achieved was more often a result of a tyrant forcing that uniformity over the empire he conquered.²

By the time of the industrial revolution in the 18th and 19th centuries, there were enough nation states coupled with sufficiently advanced technology for the mass production of consumer goods with surpluses for export. In equilibrium, there also emerged a sufficiently large world population to provide the purchasing power and the labour force. By this time, transportation had modernised not only with the invention of motorised vehicles but also the building of canals and artificial waterways. This very much paved the way for the rapid growth in international trade.³

The industrialisation of modern world economies, in particular in Europe and the United States in the early 1900s led of course to modernisation in trade practices and national trade policies. “Modernisation”, in the negative sense, also meant that the world began to complicate things that were earlier much simpler, a phenomenon almost synonymous with growth and development. The realisation for the need to collectively address these complexities or at least come to the agreement that they could not be addressed led the then industrialised world, or a large part of it at least, to come together to seek a consensus, fuelled either by a genuine desire to cooperate towards a system of multilateral trade, or by self interest created by the awareness that they each stood to benefit from cooperation, or a combination of both.

² See Wikipedia, *Timeline of International Trade*, available at http://en.wikipedia.org/wiki/Timeline_of_international_trade (last accessed on 24 August 2012)

³ *Ibid.*

While the impact to the jurisprudence of customs and international trade law would have been neutral regardless of when it really became 'international', it is important because it provides a timeline for discussion. It is also important because international law and social cultures were vastly different through different points in history. This study is concerned with administration of the multilateral trading system, so the importance is in finding the point when international trade became international enough for global economic forces to pay collective attention to the introduction of a system of administration and to legalism in its regulation.

Imports from Asia to Europe date back to Greek times, perhaps even earlier. Marco Polo (1254-1324), the Venetian trader, spent twenty-five years in China and other parts of Asia. When Europeans finally arrived in the Indian Ocean and the South China Sea around the 1500s to 1600s, they discovered established trade networks of Arabs, Indians and Chinese. The one obvious question is why then is this study limited only to international trade from 1947 and beyond and not extended also to these times. Surely, people could not trade without sharing some rules of the game. This is true but with qualifications. The world then was not as politically, economically or socially integrated as it came to be in 1947. According to Pomeranz and Topik, societies then had different ideas about who should pay what if merchandise is spoiled, prices changed suddenly, etc. Today, elaborate contracts, commercial treaties and international law exist to address most eventualities and traders would be able to assess these in advance before deciding on undertaking a transaction. In the earlier days, such things barely existed.⁴

⁴ See generally Pomeranz and Topik, *The World That Trade Created* (2006).

As trade evolved, so too did commercial law. But the early legal systems or dispute resolution mechanisms could hardly be said to be very sustainable. Pomeranz and Topik observed that in most Southeast Asian ports during the 1600s through to the 1800s, traders were organised into ethnic communities, each of which had a headman who was supposed to keep order.⁵ Pomeranz and Topik gave the example that if a Gujarati and Dutch merchant fell out, their respective head men would first meet to settle the dispute. This sort of trade regulation was really no regulation at all. First of all, there were no universally agreed upon standards of operation. Secondly, it exemplifies a state of lawlessness. Individual merchants are exposed to the same kind of risks as those who employ the services of the mafia. Individual merchants often lacked the opportunity to speak for themselves as headmen were more inclined to speak in the interest of the group, rather than the individual he represented.⁶

When the industrial revolution occurred, much higher volumes of consumer goods began to be traded beyond the borders of individual countries. It gradually became unavoidable for governments not to pay attention to the legal culture of cross border trade. The legal and administrative development only occurred much later (at the time of the GATT negotiations). It is submitted that this due to a lack of consensus over exactly how or when industrialisation occurred⁷ and to what degree trade played in the transformation for a due in part to the fact that people have made things and sold them for centuries, but also that 'sweatshops' employing large numbers slave labourers to work iron ores and produce weapons for armies were already common by the time of the Greek and Roman empires.⁸

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

Pomeranz and Topik argue that the differentiating point between industrialisation and pre-industrialisation is the use of large numbers of workers working intensely in a coordinated way, not each working separately side by side under one roof. This modern factory model, they argue, was first to be found in the European colonial owned sugar mills of Latin America, where “cane (which rots quickly) was crushed, boiled, and made ready for its trans-Atlantic journey”.⁹ The model having spread to the textile industry in Britain and within a matter of years, to the manufacturing of a variety of products, it was probably at this point that international trade really became “international” but yet, the legal framework still did not catch up. For centuries, trade regulation was administered by treaties and common understanding between military forces and their chartered companies like the British and Dutch East India Companies. Pomeranz et al observes that disputes, especially between colonies outside of Europe were sometimes settled by armed conflict.¹⁰

4.1.1 Customs and Border Controls

The expression ‘customs’ has today become synonymous with regulation and collection of tariffs and duties that are imposed on the sale and purchase of goods. While this is not incorrect, it paints neither an accurate nor complete picture. The purview of Customs is in fact rather more than the safeguard of national revenues through the collection of Customs duties, they extend to border controls and enforcement of trade compliance procedures. In Malaysia, this role is undertaken by the Royal Malaysian Customs (Kastam Diraja Malaysia).¹¹ Customs authorities or agencies in most other countries are normally also

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Website of the Royal Malaysian Customs Department, available at: <http://www.customs.gov.my/> (last accessed 14 March 2013).

responsible for the control and monitoring of the flow of goods including animals, transport, personal effects and hazardous items in and out of the country. The Customs authorities are normally first in the line of defence against dangerous narcotics being brought into the country or endangered species of animals being smuggled out. The role of Customs in crime prevention is therefore enormous. As trade of goods is by far the most significant of cross border activity (other than personal travel which falls under the purview of the immigrations department), it is only natural that Customs authorities spend most of their time being occupied with what is already their obligation in the first place and a profitable one as well, to the national revenue – the collection of Customs tariffs (or duties as they are commonly known).

Tariffs in most countries are commonly imposed on the import of goods and less commonly, on exports. Tariffs existed from early on in the ancient world. Duties on imports of goods are not unknown in ancient history. In fact, during the time of Hellenistic era, Robin Lane Fox¹² writes:-

Customs dues were levied on goods being moved between administrative districts of the country, the 'nomes', and even across the line between Upper (southern) and Lower Egypt. Import taxes were imposed at many points of entry into Egypt, at harbours on the Nile Delta or at the southern frontier of Nubia. Known customs rates are as high as 25% or even 50%, and another tax, the 'Gate Toll', was applied to imports which were brought into Alexandria.

The levying of indirect taxes soon became common throughout ancient Greece and Rome and became prevalent throughout medieval Europe more than a millennia later.¹³ They

¹² Robin Lane Fox, *The Classical World*, 2005, Penguin Books, at p. 267.

¹³ Knes, Michael, *Encyclopedia of Business* (2012) 2nd ed.

were levied mostly to raise revenue but in different points in history were used in an attempt to keep scarce commodities available for the home market or to keep imports available in the abundance from flooding the local market. Not much of this has changed in the present day. Through much of the 16th, 17th, and 18th centuries, however, import tariffs were seen primarily as a way to guarantee the accumulation of gold and silver in government coffers. By the 1700s, in an effort to increase exports, many countries sought trade agreements that would bilaterally lower tariffs. Many of these countries were caught in a typical tariff double trap, however, by seeking protection of their own growing industries by imposing import duties on other countries.¹⁴

4.1.2 Tariffs and Customs Duties – The Road to a Global Standard of Administration and Regulation

Duty rates and the imposition of tariffs have since their inception been a source of controversy and at times even conflict. They are imposed for a variety of reasons which can be split into two broad categories – tariffs imposed for the generation of revenue (revenue tariffs) and tariffs imposed for the protection of domestic trade (protective tariffs). The purpose of the former is to raise government revenues. In Malaysia, about RM2 billion of the government's RM159 billion revenue in the financial year 2010¹⁵ came from import duties. A protective tariff, on the other hand, is imposed to protect something—it could be a specific industry regarded as of importance to the domestic economy of that or country or a political concept, or both. In fact, very often the two are infused together, such as Malaysia's protection of the automotive industry in the form of the National Automotive

¹⁴ *Ibid.*

¹⁵ Report of the Auditor General of Malaysia (2010).

Policy.¹⁶ The high excise duties resulting from the policy acts both as a shield in protecting Malaysia's less competitive automobile manufacturers from the threat of market penetration by more established manufacturers and additionally contributed to xx% of the Federal government's revenues in 2010. There are, however, protective tariffs that are strictly used as a defence mechanism like 'anti-dumping' and countervailing duties, the use of which are heavily restricted by modern day multilateral trade agreements.¹⁷ Anti-dumping duties are allowed (but not encouraged) because dumping can adversely affect a country's trade and economy and crippled its competitiveness if left unchecked. Dumping occurs when an exporter exports a product for sale in the importing country at a price below the market rate in its own country or in quantities that are in excess of normal market conditions, thus "flooding" the importing country with the product and injuring the competitiveness of domestic producers. A tax on the import of that particular import from that particular country and the subsequent rise in prices or lowering of profit margins will reduce the competitiveness of the foreign manufacturer of the exporting country, allowing the home industry the opportunity to recover from the injurious effects of dumping.¹⁸ A tariff may also be put on imports in order to protect an industry thought to be vital to a nation's well-being. Steel, in Malaysia is one such industry.¹⁹ A duty on imported steel would make it less desirable to import, while encouraging home production. An export duty is similarly imposed on steel, likely because of the government wishing to keep this scarce commodity well within its borders.

¹⁶ National Automotive Policy Framework, Prime Minister's Department of Malaysia, 19 October 2005

¹⁷ Sir Eric Wyndham White, *GATT*, Geneva, Aug. 1961, pp. 5-12, cited by Meier in *Problems of Trade Policy*, Oxford University Press, 1973, at pp. 22-25.

¹⁸ See WTO gateway on Anti Dumping, available at the website of the WTO at: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last accessed on 29 March 2013).

¹⁹ Policy Review of Iron and Steel Industry (2002). Malaysian Ministry of International Trade and Industry, available at: http://www.miti.gov.my/cms/contentPrint.jsp?id=com.tms.cms.article.Article_ec34eb98-c0a81573-f8e0f8e0-eeefcf999&paging=0 (last accessed on 14 March 2013).

The imposition of tariffs is only one amongst the many facets that contribute to the complexity of customs and international trade. These are complexities that the international trade community has either had to adapt to or address head on. Amongst these are how one determines whether or not the product he imports is subject to Customs duties and if so, at what rates. This is a matter of tariff classification (discussed later). Of even greater complexity is where a particular imported product has been determined to be classified as one that attracts import duties, how does one determine the value on which those duties should be assessed - the seller's cost price, the buyer's price plus margins? What if there is no sale? And there are many more facets that weave its way around this odd labyrinth. It is observed that these are questions that are causes to and results of trade theories and multilateral negotiations.

4.2 Changes In Socio-Economic and Cultural Paradigms and the Influence on the Development of Legal and Regulatory Cooperation on Multilateral Trade Administration

At the outset, this appears to be a rather bizarre idea, that international trade should have a distinct theory of its own, and if it did, why should its economical, political and social aspects differ from trade taking place between two persons within the same geographical borders? It is none the less an important consideration, especially where matters of legal theory and the role of a rules based system will be discussed at length later in this dissertation.

It is submitted that legal theory and application of the rule of law must be harmonised with socio-economic stigma of society at any given place and time, taking into account certain prejudices that society may harbour. Only then can respect be appropriately shown for the doctrine of the rule of law. It will be argued later in this dissertation that certain prejudices may be legitimate and do not run counter to the rule of law. If the rule of law is a rigid doctrine and insists to the contrary, then it is submitted that the rule of law stifles economic growth. The ideas surrounding foreign trade differed immensely depending on the culture and ideology of society at that given point in time. In the archaic world of the Greeks, Romans and Persians, inter city-state trade was rarely favourably viewed²⁰, although there is nothing to suggest that such trade did not take place. In fact, the use of Tyrian purple dye obtained from the Murex snail as a royal dye in most Hellenistic city states and as far as Jerusalem and the use of Cedar from Lebanon in the building of ships and building structures by the Egyptians, Assyrians, Jews, Romans, Greeks and Babylonians appear to suggest that inter city-state trade was robust and bustling. The success of the Phoenecians as a seafaring nation and of cities like Tyre and Rome as sea ports make it plain to see.²¹ But all was not rosy. There is plenty to suggest that bigotry and prejudice was common amongst more than just several of the civilisations known to us today. Fox illustrates this vividly in the ninth chapter of *Classical World*, in that the Greeks often viewed non-Greek cultures as barbaric. The Persians in 400BC at the time of the historian Herodotus (being in actual fact culturally, economically, socially and technologically equally as, if not more accomplished than the ancient Greeks) were the first known victims of Hellenistic bigotry. The costumes, gold and jewellery were to the Greek observer, soft and 'effeminate'. And their "barbarian tongue" (barbaros) was labelled as such for the alien 'bar-bar' sound of

²⁰ Trebilcock, M.J and Howse, R, *The Regulation of International Trade*, 2nd Ed, Routledge, 1999, at p.1.

non-Greek speech. The Macedonians, who although had almost entirely embraced Hellenistic culture by around 300BC, were also to the Greeks, barbarian invaders from the north. The rise of Rome and Carthage to prominence in later years made them no less barbarian to the Greeks.²²

This general caution of foreigners, mainly for non-economic reasons, probably influenced the degree to which trade freely took place between civilisations of the time and the reason why cooperation to administer and regulate multilateral trade based on the foundations of the rule of law did not gain headway until so late in time. In his assessment of the history of free trade, *Against The Tide*²³, Douglas Irwin observes a “general hostility to merchants where contact with strangers could disrupt domestic life by exposing citizens to the bad manners and corrupt morals of barbarians.” There were few writers of the time who could be called proponents of free trade, but there were some like Plato and Plutarch who remained neutral. Suspicion of commercial activity and interaction with foreigners for fear it would disrupt civil life continued well into the medieval times and can be seen in writings of authors as recent as St. Thomas of Aquinas.²⁴ It is in view of these complexities that it is submitted that there are ‘legitimate prejudices’ or ‘legitimate vices’ that the rule of law should not interfere with. In relation to this passage of normative theory, the question of whether the rule of law is right to coerce one person to accept another person and accord him equal treatment to his own detriment is accorded due consideration at a later part of this dissertation.

²² Fox, Robin Lane. *Alexander The Great*, Penguin Books, 1974, at pp.178-193; Part of this view is attributable to the Romans’ affinity to be entertained by gore and violence (gladiator fights with animals for example) as opposed to the Greek preference for more culturally refined types of entertainment like poetry and music.

²³ Douglas Irwin. *Against The Tide: An Intellectual History of Free Trade*, Princeton NJ: Princeton University Press, 1996; cited by Trebilcock & Howse, *op cit*, at p. 1

²⁴ *Ibid*, at pp. 1-2

Considerations of legal theory notwithstanding, the change in attitude towards foreign trade especially in the age of industrialisation are attributable to a natural acknowledgement of its benefits over time. Economic theories had by then emerged to lend support to this recognition.

4.2.1 Impact of Economic Changes and Emerging Economic Theory on Legal Attitudes and Behaviours That Shaped The Multilateral Trade Negotiations

The trade negotiations that led to the signing of the GATT in 1947 were commenced with the objective of liberalising trade. Meier attributes the idea of modern liberal trade theory to Adam Smith, who in the *Wealth of Nations* (1776) exposed the flaws of mercantilism. In rejecting the trade restrictive principles of mercantilism,²⁵ Meier observes that Smith set in motion the gradual move towards free trade by proposing the idea of what we term today as the theory of absolute advantage. In setting out this theory, Smith maintained that no country should make at home what would cost more to make than to import.²⁶

If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage...²⁷

²⁵ It must be noted that Smith did so out of a need to address a state of affairs in his country that he viewed as a distortion to the equilibrium of social welfare, not out of academic pleasure. see Meier, at p. 4. Trebilcock & Howse, *Op cit*, explain (at p. 2) that mercantilists argued for close government regulation of international trade for two reasons: (1) to maintain a favourable balance of trade via aggressive export but restrictive import policies; and (2) to promote the manufacturing of raw materials at home, rather than importing manufactured goods, which would displace domestic production and employment.

²⁶ Meier, G.M. (1973). *Problems of Trade Policy*. (Oxford University Press), at pp. 4-5.

²⁷ Smith, Adam. *The Wealth of Nations*. (Modern Library Edition), 1776. at p.425, cited by Meier at p. 5.

Smith's theory, according to Meier, was too rigid and simplistic and slowly gave way to David Ricardo's theory of comparative advantage²⁸. Trebilcock and Howse advance his theory by means of an arithmetic example:

England could produce a given quantity of cloth with the labour of 100 men. It could also produce a given quantity of wine with the labour of 120 men. Portugal, in turn could produce the same quantity of cloth with the labour of 90 men and the same quantity of wine with the labour of 80 men. Thus, Portugal enjoyed an absolute advantage over England with respect to the production of both cloth and wine, ie. it could produce both cloth and wine with less labour input than England. However, Ricardo argued that trade was still mutually advantageous, assuming full employment in both countries: when England exported to Portugal the cloth produced by the labour of 100 men in exchange for wine produced by 80 Portuguese, she imported wine that would have required the labour of 120 Englishmen to produce. As for Portugal, she gained by her 80 men's labour cloth that would have taken 90 of her labourers to produce. Both countries therefore have something to benefit from mutual trade. The principle of comparative advantage has been continually refined since the beginning of systematic economics.²⁹

The arguments in favour of protectionism, according to Meier, began to wane away. The best and only argument in favour of tariff protection is that of optimising the terms of trade. The other arguments have non-economic objectives (eg. full employment and improvement in balance of payments).³⁰ This did not, however, mean that the embrace to a global free trade order was instantaneous. In reality, between the conception of Ricardo's theory of comparative advantage and the Second World War, the world's foreign trade policy was heavily driven by its surrounding circumstances. The world experienced strong movements back and forth between advancements towards free trade and reversals towards protection.

²⁸ Ricardo, David, *The Principles of Political Economy*, 1817, cited by Meier at pp. 5-7.

²⁹ Trebilcock & Howse, *op cit*, at pp. 3-4.

³⁰ Meier, *op cit*, at p. 8.

The first major movement towards free trade occurred between 1846, with the repeal of the Corn Laws,³¹ and the 1880's. As Europe slipped into severe recession in the 1870s, it found itself facing increased competition from non-European goods exporters, in particular, grain producers. Germany became the first of the major trading powers to retreat to protectionist measures, with Bismarck raising tariffs substantially on a number of imports, partly in response to the impending crisis, and partly under the influence of writers like Friedrich List, whose exposure to American culture had him heavily influenced by the idea that protection of infant industries with high tariffs were necessary, in particular the manufacturing sectors. France followed suit, along with a few other European countries soon after, leaving Britain as the only remaining economy committed to free trade.³²

After World War I, the pursuit of trade liberalisation again began to pick up pace, but another economic recession, this time the great depression of the 1930's would interrupt its progress once again. Protectionism reached its peak with the introduction of the Smoot-Hawley tariff in the United States in 1930. The overarching aim of the Tariff was to protect American jobs and farmers from foreign competition. The US did, however, pass the Reciprocal Trade Agreements Act in 1934 which allowed for bilateral negotiations for the reductions in tariffs. This did much to loosen the tensions of the time and pave the way for the freeing of trade. World War II broke out in the late 1930s and destroyed what progress had been made in international trade policy up until then. Then soon after the Second World War, emerged the General Agreement on Tariffs and Trade (GATT) along with the

³¹ Meier, *op cit*, at p. 5. *En. Wikipedia*: The Corn Laws were trade barriers designed to protect cereal producers in the United Kingdom of Great Britain and Ireland against competition from less expensive foreign imports between 1815 and 1846. The barriers were introduced by the Importation Act 1815 (55 Geo. 3 c. 26) and repealed by the Importation Act 1846 (9 & 10 Vict. c. 22).

³² Trebilcock and Howse, *op cit*, at 19.

other two Bretton Woods agreements which are illustrated in greater detail below.³³ These historical events demonstrate that it was only until fairly recently that the international community made any real attempt to align the legal framework and policy on Customs and trade in goods. This is surprising and unsurprising at the same time. Surprising because it took so long before the world finally decided to collectively address the oldest and probably most significant economic activity. Unsurprising, though, because the economic atmosphere and political objectives of many governments were not historically the same as they are today. The geography of the world as it was before the mid 1900s, was also very different - it was nowhere near as borderless as it is today.

From as early as the time of the ancient civilisations up until the second world war, it can be observed that to conquer your neighbour always seemed a more fundamental ambition than prospering him so that both can mutually enjoy the economic benefits the other had to offer without the need for war. The "empire attitude" of ancient civilisations of course needed to make way for legal order to support modern trade theories, as well as a general consensus amongst trading nations at the end of the second world war that economic prosperity needed to be a mutual effort.³⁴

This is not to say that there was absolutely no cross-border cooperation at all on matters of economics and trade. In fact, bilateral treaties were by the age of the white man's burden a very common thing. Take for example, the monumental Treaty of Tordesillas, signed in Tordesillas (modern day Valladolid), Spain in 1494³⁵ between Portugal and Spain, two

³³ *Ibid.*

³⁴ See *supra*, Meier.

³⁵ See En. Wikipedia. available at: Wikipedia. http://en.wikipedia.org/wiki/Treaty_of_Tordesillas (last accessed on 8 November 2012).

superpowers of the world at that time to resolve a dispute following the return of Christopher Columbus from the Americas in 1481. It divided the newly discovered lands outside of Europe between Spain and Portugal along a meridian 370 leagues west of the Cape Verde islands. In layman's parlance, it was a line that cut vertically through the middle of the continent of Africa. Many more similar treaties would in future be signed between powers that later emerged, between the British and the French, between the British and the Dutch amongst others.

It is arguably safe to deduce that concerted international effort to cooperate towards legal order in the regulation of trade surfaced in the years following the boom in the free market economies of the Nineteenth Century because the complexity of international relations had outgrown the traditional safeguards that relied almost solely on mutual trust. As trade continued to develop and international events drew nations to greater interdependence, the occasion called for the invention of new devices for the regulation of international trade. Meier, amongst many trade scholars, agrees that the world needed also to cooperate on the revival of economies that were completely ravaged by war and the economic disasters of the 1930's, better known as the great depression, in particular Europe and Japan.³⁶ The deficiencies and uncertainties in the realm of law and economics culminating in those disasters, leading next to cooperation on legal order are a focal point of this study as it is, I would argue, the starting point of what former secretary-generals of the GATT Mr. Dunkel and Mr. Moore (see Chapter 5 of this dissertation) regard as the 'rule of law' in the multilateral trading system.

³⁶ Meier, *op cit.* at 5-11.

4.3 The Multilateral Trade Negotiations: Towards Economic Integration and Legal Order

The study in (4.2.1) above demonstrates that the vigorous modern day advocacy of the idea of free trade for which the WTO has garnered a reputation did not emerge suddenly, or by chance. Nor, as Meier puts it, is trade liberalisation a natural state of affairs.³⁷ Along with the co-operation on a multilateral legal system, it had to be actively pursued. The question is for what reason and to achieve what end. Most observers of international relations argue that it was a response to the devastations caused by the first and second World Wars, as a measure to avoid the recurrence of the crises said to have caused the wars. The blame was pinned on onerous trade restrictions imposed by zealously protectionist governments whose policies led to squabbles over market access³⁸. Closer examination of the underlying historical developments demonstrate that the answer is neither that simple nor straightforward. The fallacy of the 'response to the World Wars' argument is that, while partly true, it undermines the determination of the Axis powers to create a 'new world order'. The determination of the rest of the world to resist, in particular the Allies whose political ideals were not congenial to that of the Axis powers, seem to suggest that the world was heading for war regardless of individual countries' trade policies and the blockage of market access. Restrictive trade policies may have been only one amongst many catalysts.

What is true, however, is that (1) the trade negotiations were aimed at reversing trade policies which were identified to have been detrimental to international relations, and (2)

³⁷ *Ibid.*, at p. 3.

³⁸ In this sense, see generally *supra*, Meier, Hudec, Jackson and Trebilcock & Howse.

these formed part of a larger pursuit of restoration of legal order to international relations and to rebuild economies that were ravaged by war, a set of three multilateral agreements known as the Bretton Woods Agreements. This pursuit consisted of more than one multilateral agreement, examined in sub-chapter 4.4 below.

4.4 The Multilateral Trade Agreements

Because the WTO has as amongst its primary objectives the liberalisation of trade and the creation of access to markets, it is only a matter of common sense that much of its regulatory framework is designed to ensure that its signatory members domestic trade practices and policies are aligned with this broad objective, which is rather perplexing to some, in particular because it is not always easy to understand, given the magnitude of the role the institution that governs the regulation of international trade plays in international relation politically, economically and socially, its ability to influence the globe can only be tremendous. For this reason, one would think it would be in the interest of the global community that the WTO should have as its priority say, equity in the implementation of domestic and foreign trade policies, or the standardisation of trade practices, or a just and equitable dispute resolution system (although all these issues are addressed in the Agreement), instead of the liberalisation of trade. At this point, the legal practitioner must ponder would be where the regulatory institution has as its purpose not regulation for the sake of justice and equity or adherence to socially accepted standards or norms, which are the traditional pillars of legal governance, but instead, the promotion of one particular concept, or rather one particular manner in which a few men thought trade was best conducted, how then can we measure whether the law is adhered to and at what point a breach occurs? How then does the rule of law matter? Why should it? In this sub-chapter,

we examine the origins of the concept of free trade, how and why it came about and why it is so important to the authors of the Agreement.

The General Agreement on Tariffs and Trade, or GATT was one of the initiatives of those economic forces of the time to bring order into the chaos of international trade. It began its life as an arm or leg of a larger machinery of international cooperation on trade – the International Trade Organisation. Following the second world war, policy makers from the United States and Britain developed the GATT and ITO in an effort to establish a legal mechanism to govern trade between states.³⁹

The United States and United Kingdom submitted proposals to the Economic and Social Council (ECOSOC) of the United Nations to establish an international trade body which was to be called the International Trade Organisation. The original intention was to create an institution to oversee and regulate the trade in goods side of international economic cooperation in addition to the other two institutions established under Bretton Woods Agreements in 1944⁴⁰, the World Bank, whose goal was to reduce world poverty by the provision of loans to developing countries for capital programmes, and the International Monetary Fund, an organisation whose membership today numbers 187 countries working to foster global monetary cooperation and secure financial stability amongst other objectives.⁴¹ The ambitious ITO charter extended beyond trade disciplines to include rules on employment, commodity agreements, restrictive business practices, international investment and services. The GATT, on the other hand, was not a treaty in the true sense.

³⁹ Aaronson, Susan A., *National Policy Association, Historical Roots of GATT and Failure of the ITO* (2010).

⁴⁰ The Bretton Woods Agreements, United Nations Monetary and Financial Conference, 1944.

⁴¹ About the IMF, Official Website of the IMF, available at: <http://www.imf.org/external/about.htm> (last accessed on 29 March 2013).

Far from handsomely crafted, it was closer equated to a giant scrap book containing the scribble of all who participated in its negotiations.⁴² In December 1945, 15 countries had begun talks in December 1945 to reduce and bind customs tariffs. With the Second World War only recently ended, they wanted to give an early boost to trade liberalization, and to begin to correct the legacy of protectionist measures which remained in place from the early 1930s. The first round of negotiations resulted in trade rules and 45,000 tariff concessions. The group expanded from 15 to 23 by the time the deal was signed on 30 October 1947. The tariff concessions came into effect by 30 June 1948 through a “Protocol of Provisional Application”. And so the new General Agreement on Tariffs and Trade was born, with 23 founding members (officially “contracting parties”). These 23 countries were part of the larger group at the same time negotiating the ITO charter. Included in the provisions of the GATT, therefore, were provisions that some of the trade rules of the draft ITO charter should be accepted. It was, however, agreed that the inclusion of these rules would be “provisional” as a means of ensuring that the tariff concessions they had recently negotiated remained intact, in other words, as a means of ensuring that any of the rules, if implemented, did not stifle the enjoyment of the benefits those concessions had to offer. The relationship between the GATT and the ITO was duly spelt out and even provided for in case the ITO did not materialise. True enough, it did not.⁴³

The ITO charter was agreed upon in Havana in March 1948⁴⁴, but several national legislatures opposed its ratification, amongst them, one of its initial proponents – the United States. The ITO in effect never materialised, leaving the GATT as the sole surviving

⁴² See *supra*, Jackson.

⁴³ History of the WTO, available at: http://www.wto.org/english/thewto_e/cwr_e/cwr_history_e.htm (last accessed on 29 March 2013).

⁴⁴ The Havana Conference began on 21 November 1947, less than a month after the GATT was signed.

multilateral instrument for the regulation of international trade until a new set of agreements gave rise to the establishment of the WTO in 1995. Non-ratification by member governments of the ITO also meant that the GATT, for almost half a century between 1948 and 1994, functioned as a “provisional” and “interim” agreement, without a formal organisation to enforce it.⁴⁵ Until the Final Act of the Uruguay Round eventually brought the World Trade Organisation into being, the Secretariat that administered the GATT kept the title of Interim Committee of the International Trade Organisation (ICITO).

Meier asserts that the passing of the Reciprocal Trade Agreements Act in the US in 1934 lent encouragement to countries to develop bilateral trade partnerships.⁴⁶ But it soon became clear by the 1940s to the major economic powers of the time that bilateral trade relationships would not be sustainable in rebuilding a world economy devastated by two world wars. What the world needed was a single concerted effort instead of fragmented initiatives between a few interested economies. The original General Agreement on Tariffs and Trade (GATT) of 1947 was a result of this need and assumed a pivotal role in nation building after World War II.

In summary, the GATT was a peculiar long, complex and carefully drafted instrument setting out enforcement procedures over aspects of global trade but without a formal organisation to endorse, enforce or monitor its Contracting Parties for compliance. The Contracting Parties who negotiated the GATT had very specific objectives. In this regard, all legal obligations and regulatory focus pursuant to the Agreement revolve around these objectives, discussed further below.

⁴⁵ Healy, Stephen, *The Implications of the Uruguay Round Agreement on Agriculture on Developing Countries*(1998).

⁴⁶ Meier, *op cit.* at p. 9.

4.5 Legal Design of the GATT: More Than A Treaty, Less Than An Institution

The GATT was an Agreement, not an institution. It was meant to be administered and enforced by the ITO. The failures of the ITO negotiations left it with institutional responsibilities that were more than it was designed for, leaving much, as Jackson expresses⁴⁷, to be discussed and agreed on an ad-hoc basis, or where this was not the case, to the good offices of the Chairman, even in cases of the settlement of disputes. The very first such case, in 1948, was brought by the delegate of the Netherlands before Mr. Dana Wilgress, Chairman of the Contracting Parties, seeking a ruling whether 'Consular Taxes' imposed by the government of Cuba constituted 'charges of any kind' for the purposes of Article I of the GATT. The response, documented in GATT archives as a formal dispute resolution document was:

In response to a request for an interpretation of the phrase "charges of any kind" in paragraph 1 of Article I with respect to consular taxes, the Chairman ruled that such taxes would be covered by the phrase "charges of any kind".⁴⁸

No analysis, observations or rationale, or "ratio decidendi" as one would expect from a constitutional court of law, was offered. The jurisprudence and legality of the GATT remained obscure. An attempt to understand its legal design by piecing together the works of Hudec, Smith, Meier and Trebilcock & Howse, as well as more recent literature, is undertaken in the subsequent parts of this chapter.

⁴⁷ See *supra*, Jackson.

⁴⁸ Ruling by the Chairman on 24 August 1948, The Phrase "Charges of Any Kind" In Article I:1 In Relation to Consular Taxes, BISD II/12.

4.5.1 Substantive Principles: Reciprocity, Non-Discrimination And The Nullification And Impairment Doctrine

The term 'substantive principles' is chosen over 'substantive law' so as to recognise that the legality of the GATT had always been cast in shadow. The principle of non-discrimination is the GATT's foundation. The GATT's primary focus is not strictly speaking regulatory, but instead sets out broadly the Contracting Parties' commitment to the mutual exchange of tariff reductions and the elimination of tariff barriers. The text of the preamble to the Agreement sets out that the governments of the Contracting Parties:

Recognising that their relation in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce...⁴⁹

There are in essence two substantive principles enshrined in the GATT's legal design each contracting party binds itself to observe as a member. The first is that of reciprocity and non-discrimination contained in Article I (the Most Favoured Nation principle) and Article III (the principle of National Treatment). The second is the nullification and impairment

⁴⁹ Preamble, *The General Agreement on Tariffs and Trade*, 1947.

clause contained in Article XXIII which is designed to the effect that any measure of a Contracting Party that impedes another member from enjoying benefits under the Agreement is a violation of the Agreement, even if that action does not actually violate the Agreement itself. Where regulatory systems punish for offences clearly spelt out, the regulatory system of the GATT. Hudec calls this a 'punishment in search of sins' approach to governance.⁵⁰

4.5.1.1 Reciprocity and Non-Discrimination

The Most Favoured Nation Principle under Article I of the GATT requires that any kind of customs duties or taxes imposed on goods imported from or to one country must be applied in a like manner to every other country. Likewise, any advantage, favour, privilege or immunity accorded to one country must immediately and unconditionally be accorded to every other Member. This general rule applies with only a few exceptions. The first, Trebilcock and Howse explain, is that Article I takes precedence over preferences that were in force between countries at the inception of the GATT, subject to a rule that locks the margin of preference, so that they cannot subsequently be increased.⁵¹ A second is that the formation of regional trading blocs are permitted.⁵² Trading blocs can take the form of customs unions, or much more commonly in Asia, free trade areas (FTA). The ASEAN Free Trade Area (AFTA) and the North American Free Trade Area (NAFTA) are some of the more commonly known examples of regional blocs.

⁵⁰ Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy*, Praeger Publishers (1975), at p. 35.

⁵¹ Trebilcock and Howse, *op cit.* at p.28, assert that in practice, this rule has become anomalous to many countries as tariff rates have been negotiated downwards instead of upwards.

⁵² Article XXIV of the General Agreement.

While the MFN principle set out in Article I of the GATT is designed to prevent discriminatory practices by Members towards foreign exporters, ie. treating one country with preference over another, the principle of National Treatment set out in Article III of the GATT is designed to prevent a more inward facing kind of discrimination. Article III does not permit the adoption of internal or domestic regulation of policy that favour a Member's domestic producers over foreign producers of a given product. This rule applies even if all foreign exporters were treated in a like manner. Article III:4 provides that products of any Contracting Party should be accorded treatment no less favourable than they would have been accorded had they been products of domestic origin. This means to say, according to Trebilcock and Howse, that in addition to import duties as provided for in the importing country's tariff schedule,⁵³ there should be no additional burdens imposed through internal sales taxes, levies, import restrictions or quotas where domestic producers do not bear the same burden. In summary, the National Treatment principle is aimed at avoiding practices that favour local producers and unfairly disadvantage foreign producers from entering the market.

4.5.1.2 Nullification And Impairment

The nullification and impairment doctrine (which will be discussed at greater length in Chapter 5) is at the heart of the of the GATT/WTO legal system. Pauwelyn observes that the WTO's legal framework is designed in such a way as to offer redress not for breach of legal obligations, but for 'nullification of benefits that accrue to another a particular

⁵³ Trebilcock and Howse, *op cit*, at p. 29

member.’⁵⁴ The doctrine is found in Article XXIII of the GATT 1947 (incorporated without amendment into the GATT 1994) provides for action to be taken by Member which felt that its benefits under the covered agreements were ‘directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded.’ Interestingly, nullification and impairment is actionable even if the offending country’s action is not in breach of the covered agreements, so long as it impedes another Member’s enjoyment of benefits.⁵⁵ A very open ended cause of action, panel and Appellate Body disputes have shown that “nullification and impairment” can include anything from the most common discriminatory treatment on tariffs,⁵⁶ to the imposition of non-tariff barriers such as quality standards for imported goods which were not the same as that of locally produces goods.⁵⁷ Hudec traces the history of the nullification and impairment clause back to US bilateral treaties, which are in turn found its way into the GATT during ITO negotiations as part of the US’ draft ITO Charter.⁵⁸

Even in its early negotiating days, the “nullification and impairment” clause was not without opposition. It was the remarks by the South African delegate, Dr. J.E. Holloway that prompted Hudec to remark it as a ‘punishment in search of sins.’ Holloway made two points, the first being that the nullification and impairment procedures had no substantive guidelines – the principle was so broad it could cover almost anything.⁵⁹ The second, the

⁵⁴ Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 Euro. J. Int’l L. 907, 937 (2003).

⁵⁵ See Article XXIII:1(b), GATT 1947.

⁵⁶ See for example, European Communities — Regime for the Importation, Sale and Distribution of Bananas, Dispute DS27 (Appellate Body Report circulated on 8 November 2008).

⁵⁷ See for example, United States — Standards for Reformulated and Conventional Gasoline, DS2 (Appellate Body Report Circulated on 19 April 1996).

⁵⁸ See Hudec, *op cit.* at 35.

⁵⁹ *Ibid.*

“sanctions” for a case of nullification and impairment were the same as that involving a breach of legal obligations. The US delegate defended the principle, saying that:

‘There are many commitments in the Charter, some of them general, some of them specific. But if any of these commitments are violated, there is only one sanction that can be applied. And that, in its crudest terms, is retaliation by another state.

Now this sanction was not invented by the framers of the [Draft ITO] Charter. It has existed from time immemorial. It will exist tomorrow, even though the Organisation that we have conceived is never brought to life. What then have we done in Article 35? We have introduced a new principle in international economic relations. We have asked the nations of the world to confer upon an international organisation the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. By subjecting it to the restraints of international control, we have endeavoured to check its spread and growth, to convert it from a weapon of economic warfare to an instrument of international order.’⁶⁰

Not much of the substantive principles of the nullification and impairment principles have changed even with the establishment of the WTO. As case laws have shown, the principle is indeed so broad it could cover almost anything, and the dispute settlement mechanism has had to deal with the reality that it is in fact administering a mechanism for punishment in search of sins. This is not to say that the system is arbitrary *per se*. What has changed about the WTO is what the US delegate had contemplated. A Dispute Settlement Understanding had been carefully negotiated and agreed on, with Members conferring on it the authority to resolve conflict, very much like a court. It is this piece of advanced judicial instrument between states that would subject retaliation to international control (later discussion will demonstrate that the DSU has been effective in that objective).

⁶⁰ *Ibid*, at 36.

4.5.2 Procedural Principles

This study will focus primarily on customs valuation, the determination of origin, and tariff classification, three procedural aspects that affect international traders of goods on a day to day basis.

4.5.2.1 Administration

The World Customs Organisation (WCO)⁶¹, administers the technical aspects of the WTO Agreements on Customs Valuation and Rules of Origin, in addition to maintaining the international Harmonised System goods nomenclature.⁶² Members to the WCO sign a separate Convention to accede to the Organisation in addition to that of the WTO. In this regard, a WTO member is not necessarily a WCO member. They are interlinked but not the same and the relationship can at times be very confusing because many of the WTO Agreements prescribe the establishment of general Committees which are administered by the WTO, and Technical Committees which are administered by the WCO (CCC).

These technical and administrative aspects are examined briefly to ensure that the roles of the various enforcement and administration institutions are correctly understood as this will become important when discussing the application of the Rule of Law in later chapters given that different parts of the Agreements are administered by different organisations. A

⁶¹ Formally referred to as the Customs Co-Operation Council (CCC), the Convention to Establish the Customs Co-Operation Council was signed in Brussels on December 15, 1950 and entered into force on November 4, 1952.

⁶² World Customs Organisation official website, available at: http://www.wcoomd.org/home_about_us.htm (last accessed on 3 May 2012).

point to note is that there are also other organisations in addition to the WCO that administer other Agreements under the WTO which are not relevant to this study.

Article 18 of the Agreement on the Implementation of Article VII establishes two committees that facilitate the administration of customs valuation. The Committee on Customs Valuation⁶³ meets once a year for the purpose of affording Members the opportunity to consult on matters relating to the administration of the customs valuation system. The WTO Secretariat acts as the secretariat to this Committee.

The Technical Committee on Customs Valuation⁶⁴ undertakes various day to day responsibilities prescribed in Annex II of the Agreement (on the Implementation of article VII), including making recommendations during dispute settlement consultations. The Technical Committee functions under the auspices of the Customs Co-Operation Council (World Customs Organisation) and not the WTO.

4.5.2.2 Customs Valuation

The implementation of a standard set of Customs valuation and administrative rules is arguably the GATT's greatest accomplishment in cooperation in regulating Customs practices worldwide. The importance remains regardless of the world's economic climate (trade liberalisation or protectionism) for a number of reasons because the primary functions of Customs authorities are the collection of Customs duties at specified tariff

⁶³ Article 18(1). Agreement on the Implementation of Article VII of the GATT 1994.

⁶⁴ *Ibid*, Article 18(2).

rates and the prevention of the movement of prohibited or restricted goods through its territorial borders. Harmonised valuation rules give businesses that undertake cross border trade in goods at least some form of assurance that, while it is inevitable that differences of interpretation can and almost always do occur, the methodologies applied in assessing imports and exports for tax are fundamentally consistent through the Customs territories of GATT signatories. The valuation system is highly sophisticated and is a result of a combination of rounds of technical brainstorming sessions involving think tanks from various industry backgrounds and many years of trial and error, so significant is it an element of the GATT that it possesses a jurisprudence and regulatory mechanism of its own, examined separately below.

When making a Customs declaration, the importer must value the goods and declare the right value (this study will focus primarily on imports when discussing customs duties for the reason that in many countries, export duties are rare so as to encourage exports and discourage imports). If the goods are dutiable, valuation becomes all the more important. There are a set of uniform rules and methods to be applied in deriving a Customs value. The GATT Customs Valuation Code is found in Article VII of the GATT ("the Code"). It became the first worldwide system of customs valuation since its first entry into force on 1 July 1980.⁶⁵ There is a separate Agreement signed by contracting parties to the WTO to rectify Article VII of the GATT.⁶⁶

A sophisticated set of rules, many practising trade professionals and Customs officials consider valuation to be the most challenging of the WTO's workstreams, by virtue of the

⁶⁵ Sherman, S.A and Glashoff, H). *Commentary on the GATT Customs Valuation Code*, 1987, at p. 51.
⁶⁶ Agreement On Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

subjectivity of “value”, coupled with the vested interests authorities and importers alike have in manipulating it. The primary reason for the valuation code’s existence is the assessment of customs duties.

The doctrine of customs valuation was not a complex thing at the beginning. Prior to the Code, according to Sherman and Glashoff⁶⁷, the subject of customs valuation was left largely to national legislation. There were some international guidelines, but they were neither binding nor comprehensive. By the 1950s, the world split into two distinctive trading blocs – Europe and the American continent. Thirty-odd European nations, Australia and Japan adopted the Brussels Definition of Value⁶⁸ while America and Canada did not.

What makes Customs valuation evolve to the level of complexity it is at today is really not the Code. It is the intricacies of the circumstances surrounding the collection of duties, and of modern trade transactions, that make the rules difficult to apply. Observation suggests that, with revenue collection at stake, every interested person wanted the rules applied or interpreted in such a way that best favours them.

Rates of duty are typically established on an *ad valorem* (Latin meaning ‘on the value’) basis, eg. 10% of the value of goods, which makes the value of the goods necessary for the assessment of duties. There are other methods of establishing rates of duties like, such as specific rates for example (eg. 10 cents per stick of cigarette), but by and large, these are relatively uncommon and used only very rarely, making *ad-valorem* rates used more than 95% of the time. The challenge lies in establishing a price for Customs declaration. What

⁶⁷ Sherman and Glashoff, *op cit.* at p. 51.

⁶⁸ Convention on the Customs Valuation of Goods, Brussels (1950).

price to declare, which sale? What payments to include and what to exclude from the Customs value?

The BDV prescribes the use of the “normal market price” of goods as the means of Customs valuation, the “the price that a good would fetch in an open market between a buyer and seller independent of each other”. As would be discussed below, this made trading very difficult for many traders as its failure to take into account that sales between related parties (eg. between the principal and its subsidiaries) that were obviously not independent of each other accounted for over 50% of global transactions laid an onerous burden on traders undertaking those transactions to prove that prices were at arms-length and were not influenced by the relationship simply because it was a related party transaction.

The United States legislation adopted the “selling price method”, while Canada based customs value on prices of goods for home consumption. All these systems proved to contain significant weakness in practice. Sherman & Glashoff are apt to point out in their Commentary on the GATT Customs Valuation Code (second edition, 1987, p. 53) that the US legislation was criticised on a few points, among others:

- The American Selling Price method of valuation, applied to benzenoid chemicals and a few other products, based on the customs value of imported products on the price in the United States of competing domestic products. Thus the domestic producer indirectly controlled the value applied to his import competitor.

- The United States was very reluctant to accept as valid transfer prices between related companies. It was felt that such prices should be more readily accepted and should not be presumed to be distorted.
- The United States was criticised for resorting too often to overseas investigations into the confidential cost figures of foreign producers. This method was left as the last to be used under the Code (as it had been under the US law), and the right of the overseas producers to decline to furnish such cost information was expressly acknowledged.

The BDV was criticised on these points, among others:

- Transfer prices between related companies were too often subjected to 'uplifts' (arbitrary or artificial increase in the Customs value) without clear standards as to when the prices should be accepted or how the uplifts should be calculated.
- The BDV, without more detailed interpretative materials, was too vague.
- Trademark royalties (sometimes hypothetical) and advertising expenses of the buyer were too often included in customs value.

The Canadian system was criticised for its use of prices for home consumption in the country of export – which often distorted the import value of the goods especially where the variables in the costs of import were significant. Taking into consideration all the inherent weaknesses identified, the Code aimed to address them all by coming up with a comprehensive set of methodologies aimed at deriving a value that could accommodate the intricacies and complexities of modern trade transactions and at the same time minimise any opportunity for either importer or Customs authority to manipulate the system in their

favour. It was also hoped that the uniform valuation system, its principles defined with precision, would negate the need for Customs authorities, such as in the case of the US legislation, to put traders through that amount of hassle to satisfy them of the Customs value.

The approach of the drafters of the Code was to adapt it to business operations instead of the other way round. Key phrases of the Code's preamble set out its underlying policies and objectives.⁶⁹ Article VII prescribes the measurement of value on four basis, to quote Sherman and Glashoff again, all derived from the stream of exports moving from the same country of exportation to the country of importation:

- Article 1 – Transaction Value of the goods being valued (TV)
- Article 2 and 3 – Transaction Value of identical (or similar) goods (TVI or TVS)
- Article 5 – Deductive Value – ‘resale price, less (usual) importer’s markup (DDV)
- Article 6 – Computed Value – manufacturer’s cost plus (usual) producer’s markup (CPV).

There is much that can be expanded on each of the methods and how they should be applied that will not be visited in this study, in particular because any slight variation in scenario can change the manner in which the valuation rules apply. The Code emphasises the primacy of the Transaction Value method of Article 1. It lays its foundations on the acceptance of business decisions on pricing with only a few specified adjustments to the

Sherman and Glashoff. *op cit*, at p. 51.

price. Which means to say if not already included in the price declared to Customs as Customs value, the Customs authorities may add the following:-

- Commissions and brokerage, other than buying commissions;
- The cost of containers (if not a reusable transportation device) and packaging;
- The value of certain specified types of goods and services supplied by the buyer free of charge or at a reduced cost for use in the production or sale of the imported goods (but excluding design and engineering undertaken in the country of importation);
- Royalties and license fees related to the goods imported which must be paid as a condition of export sale; and
- The value of any part of the proceeds of resale, disposal or use of the goods that accrues to the seller

To safeguard revenue interests at the same time, the Code also provides four recognised grounds for the departure from the transaction value. This is to ensure that Customs authorities are not rigidly bound by the transaction value where the price is obviously distorted. The grounds for rejecting the transaction value, and conditions attached, are (1) the seller imposes a restriction (other than geographical) on the disposition or use of the goods by the buyer – if the value of the goods is substantially affected; (2) the sale is subject to a condition or consideration – if a value cannot be determined for the condition or consideration; (3) the seller is to receive part of the proceeds of resale, disposal or use of the goods – if the value of his share of the proceeds cannot be established; (4) the buyer and seller are related – if the price is influenced by the relationship (C 8-15). There are no other grounds for departure from the Transaction Value, except where the Transaction Value

cannot be determined (where there is no sale, eg. the goods are on lease). Otherwise, the Transaction Value by default must be applied 'to the greatest extent possible' (C 5).⁷⁰

One important observation about identifying a method of valuation is that this often requires mutual consent between the Customs authority. The Code leaves as little as possible to the discretion of Customs officials to decide what value to apply, but as will be seen in the case of *Tobacco, Philippines v Thailand (2008)*, it is virtually impossible to completely divest customs officials from applying discretion and there is only a fine line between arbitrariness and generating legitimate national revenue.

4.5.2.2 Determination of Origin

Determination of origin of goods is important for a variety of reasons, including accordance of MFN status, imposition of anti-dumping or countervailing duties, and imposition of health and safety standards. Members of the WTO, in rectifying the Agreement on Rules of Origin, and Agreement under the WTO umbrella, agree to adopt an international standard in the determination of origin.⁷¹

Like the Agreement on Valuation, it has a Committee established under the WTO which affords Members the opportunity to consult on matters relating to operation of this Agreement, as well as a Technical Committee established under the CCC which undertakes the technical aspects and day to day responsibilities. Dispute settlement procedures, are

⁷⁰ *Ibid.*

⁷¹ Article 9, Agreement on Rules of Origin.

however, not separately provided for in this Agreement and is referenced directly to Article XXIII of the GATT 1994.

4.5.2.3 Tariff Classification

The Harmonised Commodity Description and Coding System⁷² (more commonly known as the Harmonised System or “HS”) is an instrument developed by the World Customs Organisation. While the harmonisation of tariffs is vital to the priorities of the GATT, the implementation of the HS is neither a requirement of the WTO/GATT Agreement, nor is it administered or enforced by the WTO. It is independently and separately administered by the WCO. It has, however, by now become amongst the most universally harmonised system of trade description and forms an integral part of global trade cooperation. The WTO, its’ member countries and even non-member countries use the HS as a ‘common language’ for trade purposes and trade negotiations. Although used primarily for the administration of Customs tariff rates and collection of duties, governments negotiate for tariff concessions under Free Trade Agreements using HS codes. In some cases, a change in tariff classification can be used to determine origin, preferential or non-preferential, depending on the agreement.⁷³

Signatories to the Harmonised System Convention commit themselves by agreement to the adoption of the Harmonised System (HS) system of tariff classification by rectifying the Convention which sets out a nomenclature of classification codes entering into force on 1 January 1988, some forty-one years after birth of the GATT. Today, more than 200

⁷² International Convention on the Harmonised Commodity Description and Coding System, Signed in Brussels, 16 June 1983.

⁷³ See for example, the Rules of Origin of the ASEAN – India Free Trade Agreement.

countries and Customs and Economic Unions use the System as a basis for their national tariffs.⁷⁴ The HS Classification Handbook, the WCO's official guide to using the HS, describes it as a "multipurpose goods nomenclature use, [amongst other things], as the basis for Customs tariffs and for the compilation of international trade statistics".

On administrative matters, separate Harmonised System Committee undertakes the day to day responsibilities⁷⁵ and is empowered to consider disputes and make recommendations for settlement.⁷⁶

4.6 Evolution and Incorporation Into The WTO

The GATT 1947 was the product of multilateral negotiations for the regulation of international trade, in particular, the exchange of preferential tariffs, elimination of trade barriers, and the settlement of disputes. It was the surviving result of negotiations to establish an International Trade Organisation, the organisation which would have enforced the GATT had it not collapsed in the final stages of negotiations. Even in the absence of an international law equivalent of formal enforcement agencies that enforce domestic laws, the regulation of international trade matters remained guided by the GATT until the WTO was eventually established in 1994.

All the principles that the GATT set out to uphold in the beginning continue to be upheld today after the agreement establishing the WTO was signed in 1994. The WTO agreement

⁷⁴World Customs Organisation, *HS Classification Handbook*, Ref. CH/AS4 – November 2004.
⁷⁵Article 6, International Convention on the Harmonised Commodity Description and Coding System 1983
⁷⁶Ibid, Article 10.

is an umbrella agreement covering many other agreements attached as Annexes, known also as the “WTO Agreements” – amongst these is the GATT. The GATT, in this regard, did not vanish. It was updated and incorporated as Annex 1A of The Agreement Establishing The World Trade Organisation 1994 and exists as the treaty for trade in goods. Today, the trade in goods portion of the WTO agreements is referred to as the “GATT 1994”.⁷⁷ For the purposes of this thesis therefore, the evolution of the GATT to the WTO refers to evolution of the 1947 agreement to its incorporation into the WTO in 1994.

Because the signatories to the GATT commit themselves to enter into ‘reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce’,⁷⁸ these “mutually advantageous arrangements” must truly be mutually advantageous. The role of the WTO is broadly to ensure that contracting parties meet their obligations under the WTO Agreements, and in enforcing the GATT, to ensure that contracting parties’ domestic policies do not nullify or impede benefits under the Agreement from accruing to other parties. The WTO in itself does not possess the competence or expertise to administer all its numerous subsidiary Agreements, in particular the technical and administrative aspects.

The WTO, itself a product of many rounds of negotiations in the years following the GATT 1947 now assumes the responsibility of monitoring compliance with the Agreements at the

⁷⁷ Official Website, The World Trade Organisation, available at: www.wto.org (last accessed on 29 March 2013).

⁷⁸ Preamble, General Agreement to Tariffs and Trade (1947)

national level on matters that relate to international trade.⁷⁹ In summary, the modern 1994 WTO version of the GATT operates on a set of rules, which in actual fact are a set of agreements, negotiated and signed by the bulk of the world's trading nations.

⁷⁹About the WTO, available at http://www.wto.org/english/thewto_e/thewto_e.htm (last accessed on 17 March 2013).

PART III

CHAPTER 5. THE RULE OF LAW AND GATT/WTO JURISPRUDENCE

At the turn of the new millennium, Mike Moore, the former WTO director-general hailed as an achievement of the Uruguay Round and establishment of the WTO, the Rule of Law in the multilateral trading system, calling it “a cornerstone of the WTO”.¹ The sixth director-general of the WTO expressed that:

‘Indeed, one of the essential functions of the WTO is to ensure that the rule of law, not force or power, presides over the conditions of international trade. In the WTO, as elsewhere, the rule of law is of fundamental importance in guaranteeing the effectiveness of negotiated results. This is particularly true for less powerful trading partners, who can perhaps benefit most from the protection of a rules-based system. The importance of the rule of law finds a constant expression in many aspects of the WTO’s work, through Members’ commitment to abiding by the principles and disciplines negotiated in the WTO framework. But the most visible expression of the rules-based character of the multilateral trading system is probably to be found in its dispute settlement mechanism.’²

Moore does not go on to provide an explanation of what he meant by the notion of the rule of law within the context of international trade. This is, however, not the only time the notion is freely used with little explanation of what the user meant by it. The Report of the European Commission For Democracy Through Law had pointed out that the Statute of the

¹ Moore, ‘The WTO, Looking Ahead’, 24 *Fordham Int’l LJ* (2000) 1, at 2.
² *Ibid.*

Council of Europe and European Convention on Human Rights³ all make reference to the rule of law without a definition of the expression. Moore's thoughts are reiterated by Robert Wolfe in a philosophical paper whose concluding statements are:

'The WTO is part of the rule of law, therefore, but it is not in itself the Rule of Law in the trading system. The goal is neither hierarchical control nor mechanical "legalisation" but creating a system of trade "law" that is part of "an enterprise of subjecting human conduct to the governance of rules."'⁴

To conclude that Moore and Wolfe might have had Dicey in mind would be interpreting too much. To dismiss it as a self-congratulatory rhetoric would be to neglect the fact that a monumental transformation did occur as the flexible diplomat-centric GATT made way for the rules-based WTO in 1995. One thing which is for certain, however, is that "it is essential to recognise that Dicey was writing at a particular historical period but, perhaps more importantly, he was writing from a particular political perspective that saw the maintenance of individual property and opposed to any increased in State activity in pursuit of collective interests."⁵ That Dicey's political prejudices influenced his legal theory is widely known. Jennings held nothing back in his accusations of Dicey's political biasness, saying that Dicey, a supporter of the Whig party "wanted nothing which interfered with profits, even if profits involved child labour, wholesale factory accidents, the pollution of rivers, of the air, and of the water supply, jerry-built houses, low wages, and other incidents

³J. Jowell *et al.*, *European Commission For Democracy Through Law Report On The Rule of Law*, (2011), at 5, paras 17-18.

⁴Woolfe, 'See You in Geneva? Democracy, the Rule of Law and the WTO,' Working Paper 16, School of Policy Studies Queen's University Kingston, Ontario, (2001), at 22

⁵See G. Slapper and D. Kelly, *The English Legal System*, 7th Ed, Cavendish Publishing Limited (2004), at 15

of nineteenth-century industrialism.”⁶ That the Dicey version of the Rule of Law is not universal and cannot appropriately be taken literally in other contexts, is for the purpose of this paper, a monumental finding. What then is the Rule of Law in WTO parlance?

5.1 Some Missing Elements of the Rule of Law in WTO Jurisprudence

In the absence of an outright definition, Moore does, however, imply three elements which, he argues, demonstrate the rule of law in WTO jurisprudence. Firstly, he expresses, the WTO introduced a *rules based* multilateral trading system. The ITO, which never materialised, left the GATT as a general trade agreement with no institution or regulatory body to enforce it. The multilateral dispute settlement procedures that were negotiated as part of the ITO (not the GATT) were not ratified. The signing of the WTO Charter, therefore, achieves a twofold milestone. Firstly, by introducing legal order to the multilateral trading system, it restores the multilateral trading system to the position it would have been had the ITO been ratified at the same time as the GATT in 1947 – 1948.

The second element is one which only evolved to full maturity with the establishment of the WTO and the ratification of its subsidiary agreements. It was pre-mature during the lifetime of the GATT and its procedures were very much ad-hoc. The element in question is an established dispute settlement mechanism in the form of the Dispute Settlement Understanding (DSU) (Annex 2 to the Agreement Establishing The WTO) which sets out a rules based approach in relation to how disputes should be settled. An independent Dispute

⁶See W.I. Jennings, *The Law and the Constitution* (1933), at 309 – 310, cited in Jowell, ‘The Rule of Law and Its Underlying Values’, in J. Jowell and D. Oliver, *The Changing Constitution*, 6th Ed (2007), at 8.

Settlement Board (DSB) was also set up to administer the rules and procedures of the DSU.⁷

Moore's argument raises obvious questions from a legal perspective. Does it follow that a rules based system of multilateral trade and an established dispute settlement automatically equate the rule of law? Moreover, does the facade of legal order in a system mean that system observes the principles of the rule of law? These questions are both practical and philosophical and to answer these, some distinct values of WTO/GATT jurisprudence need to be measured against the values of the rule of law. There may be more features which further research may identify and develop, but three unique and perplexing features of GATT/WTO jurisprudence demonstrating that its approach to the rule of law is much looser in comparison to the rigid Diceyan model advocated by Steyn, Bingham Jowell et al have been identified in this dissertation. Two of these three features were subjects of recent of research. The first feature, appraised by Chua (1998), is that the legal status of panel decisions under the DSU remained controversial.⁸ His observations and findings arrive at no conclusive evidence that the doctrine of *stare decisis* or binding precedent applies in GATT/WTO dispute settlement jurisprudence.⁹ The second, and more striking feature of the two, frequently debated but surprisingly not as frequently visited by legal researchers, is still at the time of this dissertation, being appraised in a research that began in May 2012 by Staiger and Sykes.¹⁰ This perplexing feature surrounds the application of Article XXIII (1)(b) of the GATT 1947, incorporated into the GATT 1994 under the WTO umbrella,

⁷ Article III(2), Agreement Establishing The WTO (1994): The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement. See also Art. 2, Annex 2, Understanding on Rules and Procedures Governing The Settlement of Disputes.

⁸ Chua, 'Precedent and Principles of WTO Panel Jurisprudence', 16 *BJIL* (1998) 171

⁹ *Ibid.*

¹⁰ See R. Staiger and A. O. Sykes, *Non-Violations*, Preliminary and Incomplete, May 2012, available at: <http://www.ssc.wisc.edu/~rstaiger/nonviolation051112.pdf> (last accessed 11 March 2013)

which allows “non-violation” complaints to be actionable under the DSU, ie. action by one contracting party that “nullifies and impairs” another party’s enjoyment of the benefits and concessions agreed to under the Agreement, is sufficient cause for complaint under the DSU even if that action does not violate any substantive provisions under the Agreement.

The third feature is not quite so unique to the WTO alone but to international law in general. It is that the multilateral trade agreements are deliberately vague and open-ended in its substantive provisions, leaving clarification to be sought via channels of negotiation and discussion amongst Members on a need to, *ad hoc* basis, giving the GATT/WTO a character of flexibility and pragmatism. Unlike other instruments of international law (such as those that regulate human rights and war crimes) which are often more rigid, there are a number of obligations which a Member can implicitly or explicitly deviate from, ie. there are rules which a Member can legitimately break if supported by consensus. Theoretically, a Member can even contract itself out of its obligations (although this is rare because doing so would cause more damage than benefit to that Member and it makes little sense for a Member to invest in painstaking negotiations only to contract itself out of it), but the fact remains that GATT/WTO law is soft.

All three features somewhat interlinked. Chua describes the DSU as a mechanism that ‘does not simply codify the dispute settlement procedures under the General Agreement on Tariffs and Trade (“GATT”) regime, but represents a significant shift to a rule-based model of dispute settlement.’¹¹ Each feature is broken down and examined individually in greater detail in the subsequent sub-chapters of this chapter and the findings of this examination,

¹¹ See Chua *supra* at 171, see also Moore *supra* at 2-3.

supported by appropriate case study, is expected to answer the prime research question of whether a lack of one or more established values inhibits the rule of law in reality.

5.1.1 Precedent and Legality of WTO Case Law

In order to discuss this topic at length, an understanding of the WTO's dispute settlement mechanism is necessary. In conventional constitutional systems where the common law is observed, the doctrine of *stare decisis* is deeply embedded within. This is especially so in the British¹² and Commonwealth legal systems. Notwithstanding doctrinal arguments over whether judges make law or merely interpret them, the fact remains that it is a general rule rather than an exception that like cases should be treated in a like manner unless exceptional circumstances require otherwise, and that precedent cases are binding on subsequent courts. As the doctrine is applied, if a precedent has been set by a court of equal or higher status to the court deciding the present case, then the judge in the present case is bound to observe the decision established by the court in that earlier case and not decide differently.¹³ The WTO's dispute management system on the other hand, does not have a hierarchy of courts and judges comparable to that of a civil or common law system.

1. The WTO Dispute Settlement Process

The first course of action in WTO dispute resolutions procedures is the initiation of consultations. This means of dispute settlement is a common feature in public international law under which most international conflicts are settled.¹⁴ Aggrieved WTO Members are,

¹² Slapper and Kelly, *supra*, at 75.

¹³ *Ibid.*, at 75.

¹⁴ Van der Borcht, 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate', 14 American University Int'l LR (1999) 4, at 1232.

under a legal obligation pursuant to Article 4 of the DSU, to initiate negotiations as a first step to resolving a dispute. The responding Member is under a similar legal obligation to “accord sympathetic consideration and afford adequate opportunity for consultation regarding any representations made by another Member.”¹⁵ If the parties mutually agree, they may request and accept the good offices, conciliation and mediation of a third party including the Director-General¹⁶ as a means of amicably settling a dispute. Unlike a common law system where a court settlement is sometimes desirable for the precedent, legal certainty and formal equality it creates, the multilateral trade institutions aim to avoid action at all costs and the DSU is designed as such. At the outset, the DSU’s message to its members is that before bringing a case, they “exercise judgement as to whether action under these procedures would be fruitful.”¹⁷ The success of consultations as a dispute settlement tool cannot be undermined. Between 1995 and 2011, 452 requests for consultations were made to the DSB.¹⁸ Comparatively, only 185 requests to establish a panel were subsequently made.¹⁹ The fact that adjudication accounts for only 41% of dispute resolution suggests that the alternative is successful 59% of the time. The success of such a mechanism in keeping legal order proves Dicey’s distrust of arbitral tribunals to be unfounded and the need for law to stem from precedents of positive adjudication is in my opinion falsely set up as a component of the rule of law.

Only if consultations fail to settle a dispute or the responding Member fails to respond to the complaining party’s request for consultations within the stipulated timeframe²⁰ will, at

¹⁵ Art. 4(2), Annex 2, Agreement Establishing The WTO, DSU (1994)

¹⁶ See *supra* Art. 5

¹⁷ See *supra* Art. 3.7

¹⁸ Torres, ‘Use of The WTO Trade Dispute Settlement Mechanism By The Latin American Countries – Dispelling Myths And Breaking Down Barriers’, (Staff Working Paper No. ERSD-2012-03 on file at WTO Economic Research and Statistics Division) (2012), at 3.

¹⁹ *Ibid.*

²⁰ See *supra* Articles 5(3) and (7).

the complaining party's request, the DSB establish a panel, unless the DSB decides by consensus not to establish a panel²¹. A WTO panel functions much like an arbitrator, set up on an ad-hoc basis to deal specifically with the complaint at hand. Unlike a judge whose role is to hear a case and to decide in favour of one party of the other based on submissions of law and fact, a panel's role is to undertake "an objective assessment of the case before it", in other words, to review the case on its facts and assess whether or not the object of complaint is in conformity with the WTO agreements in question (covered agreements)²². What the panel then does is presents its findings in the form of a report to the DSB which makes recommendations to the parties of the dispute for a solution.²³ A panel report does not automatically bind the responding party(ies) to bring their domestic policies into compliance with the covered agreements - the parties to the dispute must first adopt the report. Under the old GATT system, a positive consensus was required, ie. all parties to the dispute must adopt the report. As a means of minimising the incidence of unresolved cases, the adoption procedure is the reverse under the DSU. Under the current system, the report is automatically adopted at a DSB meeting within 60 days of its circulation to the Members unless one of the parties raises an objection and makes an appeal.²⁴

Should the panel's findings fail to achieve the desired result, parties to the dispute can appeal a panel report. This process is called the appellate review²⁵. The Appellate Body, as opposed to the panel's composition of members appointed on an ad-hoc basis, comprises of seven full time members who serve four-year terms on a rotation basis. Three of the seven members serve on one case at any one time. Very much like an appellate court, the

²¹ See *supra* Article 6(1).

²² Covered Agreements are Agreements of the WTO which are covered by the DSU. They are set out in Appendix 1 of the DSU.

²³ See *supra* Article 11.

²⁴ See *supra* Article 16.

²⁵ See *supra* Article 17.

Appellate Body's review is limited only to issues of law.²⁶ Unlike a panel report, an Appellate Body report must be adopted by the DSB and unconditionally accepted by the parties unless the DCB decides by consensus not to accept the Appellate Body report.²⁷

2. *The Legal Status of WTO Panel and Appellate Body Jurisprudence*

It has been established earlier in this paper that the dispute resolution process in the WTO consists of two stages. The first stage is the consultation stage where parties are expected to exhaust all conciliation means before proceeding to initiate a request for positive adjudication. The second stage is the adjudication stage where a party to the dispute, should conciliation efforts prove unsuccessful, may request the establishment of a panel to assess the case on issues of facts and law. Panel reports may subsequently be appealed for review by the Appellate Body (AB). As a *de facto* principle of *res judicata*, the report of the Appellate Body must be unconditionally accepted. There are provisions in the DSU and covered agreements for dealing with rare situations where a party or parties either refuse to adopt an AB report, or more commonly, adopt it as a political facade and subsequently fail to implement the AB's recommendations to bring the offending domestic policy into compliance with the covered agreements. These are outside the control of the DSB and will not be addressed in this section of the dissertation (it will instead be considered as part of the broader WTO legal philosophy in analysing Hudec's "diplomat's jurisprudence" in the next chapter).

The interest of this section of the dissertation is on the second stage of dispute resolution procedures, the legal status of the WTO's adjudicative jurisprudence. It would be recalled from sub-chapter 3.3 of this dissertation that one of Jowell's five values of the Rule of Law

²⁶ See *supra* Article 17(6).

²⁷ See *supra* Article 17(14).

is consistency in the manner in which the law is applied. By consistency, it is meant that like cases should be treated alike, what Jowell equates to formal equality.²⁸ Jowell describes the value of legal consistency at length:

‘The application of policy through rules promotes even-handed application of standards. Like cases can then be treated alike. In contrast, discretionary powers may be applied selectively. In contrast, discretionary powers may be applied selectively.’²⁹

Jowell and his fellow proponents of this element of the rule of law might possibly be disappointed that the common law principle of *stare decisis* does not manifest itself in WTO jurisprudence. One legal scholar observed that “until recently, the answer to the question of whether there exists a rule of binding precedent in the WTO legal order was a fairly clear “not really”, at least certainly not one in the sense of the rather strict common law doctrine of *stare decisis*.”³⁰ Before jumping to the conclusion that there is therefore no predictability and consistency in the way WTO DSU panel and Appellate Body case law are applied, which therefore runs counter to one of the fundamental principles of the notion of the Rule of Law, David’s subsequent observation that “previous decisions could not be ignored, due their persuasiveness, but did not have any binding force except as between the parties to a particular dispute”³¹ warrants closer scrutiny. Having reviewed David’s research, it is hard to conclude otherwise than that an element of certainty does exist. Like cases even if not followed, are not, or at least not supposed to be ignored. The panel/AB case law empirically demonstrate that divergence is an exception rather than a norm. The Appellate Body, in *Japan – Alcoholic Beverages II*, while stating as a matter of fact that

²⁸ See Jowell, *supra*, at 11.

²⁹ *Ibid*.

³⁰ David, ‘The Role of Precedent in the WTO – New Horizons?’, (Working Paper on file at the Maastricht Faculty of Law) (2009), at 3.

³¹ *Ibid*.

adopted panel reports were binding between parties to that particular dispute, stressed that panel/AB reports constitute:

‘...an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore should be taken into account where they are relevant to any dispute.’³²

Similarly, the Panel in *Brazil Desiccated Coconut* expressed that while Panel Reports do not constitute formal precedent that subsequent Panels must follow, where relevant they constitute useful and persuasive guidance”.³³

David’s analysis of the *US - Stainless Steel* case demonstrates that the AB’s position in relation to “taking account” of past cases has strengthened over time. In *US – Stainless Steel* the AB reiterates that it is “well settled that Appellate Body Reports are not binding, except with respect to resolving the particular dispute between the parties”.³⁴ The AB then sharply points out that even though its reports are not binding, this:

‘...does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body Reports that have been adopted by the DSB.’³⁵

A more quantitative finding of precedent being highly valued and respected within the WTO DSB is presented by Professor Zhu Lanye that:

‘If we regard precedents as decisions furnishing a basis for determining later cases involving similar facts or issues we can say without hesitation that large amounts of such precedents exist in the WTO dispute settlement system. Every one of the published Panel or AB Reports cites previous Panel

³² Appellate Body Report, *Japan-Alcoholic Beverages II*, WT/DS8/AB/R, WTDS10/AB/R, WT/DS11/AB/r, (adopted 1 November 1996), at paras. 107-108.

³³ Panel Report, *Brazil-Measures Affecting Desiccated Coconut*, WTO Doc. WT/DS22/R, (adopted 20 March 1997), at para. (VI)(A)(1)(b)(iii)(258)

³⁴ See David, *supra*, at 9, see also Appellate Body Report, *US-Stainless Steel*, WT/DS344/AB/R (30 April 2006), at para. 158.

³⁵ *Ibid*.

and/or AB Reports. At present, all except two Panel/AB Reports have been cited in other Reports. The Panel and AB Reports on *Japan Alcohol* have been cited eighty-three other Panel and AB Reports, while Panel and AB Reports on the U.S. Gasoline, EC Banana, and EC Hormone cases have been cited in more than sixty Panel and AB Reports.³⁶

If divergence is the exception rather than the norm, then why not simply embed the doctrine of binding precedent into the DSU? This itself, has been an issue of long standing debate at the DSB and the subject of at least one academic book.³⁷ To understand, however, why DSU case law is not binding in the manner that legalists traditionally argue all cases should be for the preservation of legality and certainty, it is important to understand the underlying legal theory by which the DSB operates. Firstly, the doctrine of *stare decisis*, even in common law systems, is not vested in legislation or constitutional documents. It was simply a development from long standing practice. Secondly, the DSU was established as a mechanism to resolve conflict and mitigate litigation – rather than investigate, apply then create a principle of law like a judge or barrister in a courtroom does. For this reason, I agree with Zhu that the DSB distances itself from putting itself in situations that may be seen as ‘judicial activism’. Zhu observes that ‘except for resolving specific trade disputes, a Panel/AB Report’s function does not include interpreting provisions of WTO agreements and the Reports are not binding over later Panel/AB Reports.’³⁸ The attitude towards adjudication is underscored by the Members’ own lack of appetite for adjudication, or

³⁶ Zhu, ‘The Effects of The WTO Dispute Settlement Panel and Appellate Body Reports: Is The Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent At The Same Time?’, 17 Temp. Int’l & Comp. L.J (2003) 221, at 230.

³⁷ See David, *supra*, at 6, in that sense, see also opinion of Bhala in relation to the *de facto* status of *stare decisis* in R. Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 Fl. St. U.J. Transnat’l. L. & Pol (1999).

³⁸ Marrakesh Agreement Establishing the World Trade Organisation, GATT Doc. MTN/FA (Dec. 15, 1993), art 9.2, 33 I.L.M. 1, 19., cited by Zhu, *supra*, at 227.

litigation as some legalists prefer to call it as the WTO Economic Research and Statistics Division's research suggests³⁹.

David's analysis of the *US – Stainless Steel* case seems to suggest the DSB might possibly be heading towards adopting a *stare decisis* approach in judicial reasoning in the light of one particular statement of the AB which states that the panel:

'...observed that although the DSU does not attribute a binding effect to adopted panel or Appellate Body Reports, the Appellate Body de facto expects panels to do so to the extent that the legal issues addressed are similar.'⁴⁰

This however, does not change the fact that the institution of the WTO continues to affirm through its formal channels that Panel and AB reports, as with other areas of international law, are not binding precedent. The WTO recently developed a Dispute Settlement System Training Module which emphasises that "a panel is not obliged to follow previous Appellate Body reports even if they are now at issue before the panel. Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases."⁴¹ Matter of factly, the training module continues to explain that "if the reasoning developed in previous report in support of the interpretation given to a WTO rule is persuasive", then, the Module states, "it is very likely that the panel of the Appellate Body will repeat and follow it."⁴² It is obvious from the context that no way does the WTO allow itself to be seen as suggesting that the panel or AB should find itself bound by precedent.

³⁹ Torres, *supra*, at 3.

⁴⁰ See *US – Stainless Steel*, *supra* at para. 7.170.

⁴¹ Dispute Settlement System Training Module, Chapter 7.2, Legal Status of Adopted/Unadopted Reports In Other Disputes, available at: www.wto.org (last accessed 17 February 2013).

⁴² *Ibid.*

Several conclusions can be drawn from these findings. The first has been reaffirmed repeatedly - that adopted reports of the DSB's Appellate Body and Panel are binding on the parties to the specific dispute in question but are not binding on future panels. The second is a matter of principle. When faced with a situation similar to a previous case, Members have a "legitimate expectation" that panels will not ignore principles of law established in previous cases. In a substantive context, it does not appear that the WTO legal system formally guarantees consistency or predictability through its body of case law. The normative position taken by DSB jurists apparently makes up for this absence of formal consistency. The case law themselves demonstrate the consistent professional respect DSB jurists generally have for case law developed by their predecessors and where divergence is unsubstantiated, this has been frowned upon and on occasion, sharply criticised. Where the AB has had opportunity to overturn Panel findings which were inconsistent with established case law, it has done so (such an opportunity presumably only arose if the Panel report was appealed), thereby creating a set of standards as to consistency and predictability by which it binds itself to follow.

5.1.2. Non-Violation Nullification or Impairment Disputes

It will be recalled that Dicey's first meaning of the Rule of Law was that "no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."⁴³ In no uncertain terms, it means that no person should be penalised for breach of a rule which

⁴³ A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), 9th Ed., Macmillan (1945), at 188.

was not known or could not be known to him, or conjured to him by an official in order to convict him. Dicey's specific emphasis on establishment before "ordinary courts of the land" underlines his distrust of tribunals set up by the government which were not independent jurors. This aspect of Dicey's first meaning will be ignored for the purpose of this dissertation because there is no such worry in an international system of law such as the WTO's DSB where the composition of its members are selected by consensus of the Member States.

Jowell had expanded on this concept of formal certainty, calling the 'essence of Dicey's Rule of Law' is that the law should be 'certain and predictable'.⁴⁴ In making his point, Jowell refers to the work of Maitland who wrote that 'Known general laws, however bad, interfere less with freedom than decisions based on no previously known rule'.⁴⁵ He also brings to the fore the work of Hayek who says:

'It does not matter whether we all drive on the left or the right-hand side of the roads so long as we all do the same. The important thing is that the rule enables us to predict other people's behaviour correctly and this requires that it should apply in all cases – even if in a particular instance we feel it to be unjust.'⁴⁶

Dicey and his fellow proponents prefer a rules based system to discretion 'largely because rules allow affected persons to know what they are required to do – or not to do – in advance of any sanction for breach of the rule'.⁴⁷ In effect, the conclusion that Dicey et al are drawing, whether intentionally or otherwise, is that where a person's action is determined to be permissible or impermissible not by prospective rules, it is therefore

⁴⁴ Jowell *supra*, at 10.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

determined by discretion, and therefore fails as a condition of the Rule of Law. This is likely the case in a constitutional system where rights and freedoms can be measured.

The GATT/WTO legal philosophy does not function on such simple logic. The principle of reciprocity lies at the heart of the WTO Agreements – one benefit in exchange for another. WTO Members are under a legal obligation to ensure that their domestic policies do not “nullify or impair” another Member’s benefit under the agreement. The “nullification and impairment” clause is contained in Article XXIII(1) of the original GATT 1947 which provides that:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any situation.

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

Article XXIII(2) provides for recourse to the dispute settlement process in the event of unsuccessful “adjustment of the matter”. In assessing Article XXIII, Staiger and Sykes identified that the three “causes for action” provided by Articles XXIII(1)(a), (b) and (c)

could be invoked either for “nullification and impairment” of benefits or where “attainment of any objective is being impeded.”⁴⁸ In effect, according to Staiger and Sykes, six distinct causes were actionable under the Article.⁴⁹ The same research also discovered that all action brought for dispute settlement under the modern WTO DSU concerned “nullification and impairment” while the impeding “attainment of any objective” clause has since ceased to be invoked.⁵⁰ Of the “nullification and impairment” complaints, the most common are violation complaints under Article XXIII(1)(a), with only a handful of “non-violation” complaints brought under XXIII(1)(b) and none at all under XXIII(1)(c).⁵¹

The conventional “violation” cases are covered by Article XXIII(1)(a), under which most cases are brought.⁵² It is the “non-violation” cases with respect to Article XXIII(1)(b), specifically non-violation nullification and impairment cases which some critics find contentious for the fact that it defies the commonly accepted standards of the rule of law and good governance. The admissibility of “non-violation” complaints makes the scope of WTO dispute settlement much wider than that of other international dispute settlement systems which only adjudicate cases of violation.⁵³ In order to understand what can constitute non-violation nullification and impairment, it is important of course to first understand what action constitutes violation, more specifically, what constituted “nullification and impairment” and how the notion is applied.

⁴⁸ Staiger and Sykes, *supra*, at 1.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.* see also The Secretariat of The WTO, *A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication* (World Trade Organization Dispute Settlement Reports) (2004), Cambridge University Press, at 30.

⁵² *Ibid.*

⁵³ *Ibid.*

What is more perplexing is that such a principle notion to the GATT as “nullification and impairment” was never defined in the GATT. Even when the WTO was established, the GATT 1994 incorporated understandings on the interpretation of Articles II:1(b), XVII, XXIV and XXVIII, but not of Article XXIII. Much of the understanding of the nullification and impairment concept are derived from case law and submissions by negotiators. According to Davies, the term nullification and impairment was first used interchangeably with infringement.⁵⁴

In theory, nullification and impairment occurs when one Member’s national trade policy impedes another Member from the enjoyment of benefits under the covered agreements. The exact nature of benefits depended on the provision in question. A violation complaint would therefore need to cite a provision (eg. Article I of the GATT 1994) of the covered agreements which was infringed. While the subject of remedies is outside the scope of research of this dissertation, broadly the most common remedy sought once nullification or impairment is established is for the respondent Member to withdraw the offending policy or domestic legislation at the earliest possible date. Compensation and retaliation are rarely resorted to and have been throughout the history of the history of the GATT, remedies of last resort. There is no clearly identifiable methodology how the DSB identifies nullification or impairment, but there are generally accepted principles applied to each case on its merits. Clarity of what Panels consider when applying the “nullification and impairment” clause was provided by the AB in the case *EC – Bananas III*, concluded on 8 November 2012. The issue at hand was the European Communities’ trade regulation⁵⁵ which accorded preferential tariff rates on bananas produced by African Caribbean and

⁵⁴ Davies, ‘The DSU Article 3.8 Presumption That An Infringement Constitutes A Prima Facie Case of Nullification and Impairment: When Does It Operate And Why?’ 13(1) *JIEL* (2010) 181–204, at 182.

⁵⁵ Reg. 404/93 (OJ L 47 of 25 February 1993).

Pacific (ACP) countries which were former colonies of European countries. The United States and several Latin American countries complained. The AB established that:

‘...considering that ‘WTO rules are not concerned with actual trade effects, but rather with competitive opportunities’, the United States, as a potential exporter of bananas, had suffered nullification and impairment because of the European Communities’ inconsistent measures. The Panel also referred to the statements made by the panel and the Appellate Body in the original proceedings that, even if the United States did not have a potential export interest, “[t]he internal market of the United States for bananas could be affected by the EC bananas regime by its effects on world supplies and world prices of bananas.”⁵⁶

The WTO Secretariat highlights that in order for a violation complaint to succeed, only two conditions needed to be proven⁵⁷:

- i. The respondent fails to carry out its obligations under GATT 1994 and or the other covered agreements, which results;
- ii. Directly or indirectly in nullification or impairment of a benefit accruing to the complainant under these agreements

In practice, a heavier burden of proof lay on the complainant to prove “failure to carry out obligations”, or the respondent’s national policy had “violated” the covered agreements because nullification and impairment is presumed once violation was established by virtue of Article 3.8 of the DSU which provides that:

⁵⁶ WTO Appellate Body Report, *European Communities – Regime for The Importation, Sale and Distribution of Bananas*, Second Recourse to Article 21.5 of the DSU by Ecuador, Second Recourse to Article 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA (2008), para 466.

⁵⁷ WTO Secretariat Handbook, *supra*, at 31.

'In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.'

Davies observes that the language of Article 3.8 is attributed to a 1962 case in which the Panel in *Uruguayan Recourse to Article XXIII* (1962) provided its view of how the substantive provision was to be applied⁵⁸:

14. In most cases Uruguay claimed that the maintenance of the trade measures by the other contracting parties had nullified or impaired benefits accruing to Uruguay under the General Agreement. The Panel thought it essential to have a clear idea as to what would constitute a nullification or impairment. In its view, impairment and nullification in the sense of [GATT] Article XXIII does not arise merely because of the existence of any measures; the nullification or impairment must relate to benefits accruing to the contracting party 'under the General Agreement'.

15. In implementing the compensation provision of Article XXIII:2 [dealing with suspension of concessions] the CONTRACTING PARTIES would therefore need to know what benefits accruing under the Agreement, in the view of the country invoking the provisions, had been nullified or impaired, and the reasons for this view. In cases where there is a clear infringement of the provisions of the General Agreement . . . the action would, *prima facie*, constitute a case of nullification or impairment and would *ipso facto*

⁵⁸ Davies, *supra*, at 186.

XXIII(1)(b). In practice, it does not appear any Member has attempted this, but there certainly is an absence of substantive safeguards against the possibility of this happening, save for Article 3.7 of the DSU which requires members to before bringing a case, “exercise its judgments as to whether action under these procedures would be fruitful.” It is clear that the multilateral trade agreements are premised on mutual trust that Members will exercise judgment to not attempt anything that would conflict with the spirit of the agreements. It is on this premise that the “non-violation” and “other situation” causes of action were not removed from the GATT 1994.

While Staiger and Sykes express that drafters of the GATT conceived Article XXIII as a “broad and flexible mechanism to ensure that the balance of negotiated concessions would not be upset by unforeseen circumstances”, their work also uncovers the fact that not only are “non-violation” disputes are rare. Of the non-violation complaints that reached the Panel for a definitive decision, there were six successful ones occurring before the establishment of the WTO and all three occurring after the WTO were not successful.⁶¹ All the successful complaints occurred before the WTO which raises another observation that the evolution from the GATT to the WTO is not only from a flexible “diplomat” based jurisprudence to a primarily rules-based one but in tandem with it, there is also a transformation in judicial reasoning.

The first such complaint brought before a working party of the GATT (as they were known before panels were subsequently introduced) in 1947 involved a tariff concession on two types fertiliser which Chile secured from Australia. Some time after the negotiations were concluded, Australia ceased subsidies on one of the types of fertilisers and was under no

⁶¹ Staiger and Sykes, *supra*, at 5-15.

legal obligation to continue subsidies, ie. its measure was not in conflict with the GATT. The working party report adopted during the 1954-55 GATT review session took the view (presumably in the complainant's favour) that 'a contracting party which has negotiated a [tariff] concession under Article II may be assumed... to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired... by the subsequent introduction or increase of a domestic subsidy on the product concerned.'⁶²

In the case of *Germany – Treatment of Imports of Sardines* (panel report adopted in 1952)⁶³, the Panel again found in favour of the complainant (Norway). The case involved a tariff concession which Norway secured from Germany on its exports of sprats and herrings. Germany subsequently accorded more favourable tariffs on sardines (a competing specie with sprats and herrings), exported mainly by Portugal. Norway initially brought the case as a violation dispute arguing the more favourable tariffs accorded to Portugal were discriminatory and violated the MFN principle under Article I of the GATT. The Panel did not accept Norway's argument that sardines, sprats and herrings were "like products" pursuant to Article I(1) but ruled in Norway's favour on non-violation grounds, expressing that the more favourable tariff on a competing specie from another country "could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff concessions".

⁶² WTO Panel Report, *Australia – Subsidy on Ammonium Sulphate*, GATT/CP.4/39 II/188 (adopted 3 April 1950).

⁶³ WTO Panel Report, *Germany – Treatment of Imports of Sardines*, G/26 - 1S/53 (adopted 31 October 1952).

Likewise, in the case of *EEC – Production Aids on Canned Fruits and Dried Grapes*⁶⁴ (Panel report issued in 1985 but not adopted), the Panel used the same ‘could not have been reasonably anticipated’ reasoning in deciding in favour of the complainant (the United States) who had complained that the subsequent granting of production subsidies by the EEC to its domestic producers had nullified and impaired earlier negotiated tariff concessions. The *Oilseeds* case⁶⁵ in 1988 again involved the US as complainant and the EEC as respondent, although this case involved both a violation (of Article III) and non-violation complaint. The US had negotiated and secured tariff concessions from the EEC. The EEC then introduced a subsidy programme which effectively protected its domestic oilseed producers from external competition. On the non-violation portion of the claim, the Panel again ruled in favour of the US, reasoning that ‘the United States may be assumed not to have anticipated the introduction of subsidies which protect Community producers of oilseeds completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds’. In two other GATT Panel cases, *Germany – Import Duties on Starch* (1954) and *EEC – Tariff Treatment on Citrus Products* (1982), the Panels also took views that favoured the complainant. The earlier was not adopted because the case was settled, and the latter was blocked for adoption because of the Panel’s controversial decision owing to the facts of the case which might open the floodgates to ‘widespread nullification and impairment within the system due to numerous preferential arrangements, the legality of which were never definitively adjudicated.’⁶⁶ Both cases were eventually settled.

⁶⁴ WTO Panel Report, *EEC – Production Aids on Canned Fruits and Dried Grapes*, L/5778 (Panel report dated 20 February 1985)

⁶⁵ *EEC – Oilseeds*, *supra*.

⁶⁶ See Staiger and Sykes, *supra*, at 8.

Non-violation causes of action have not only been preserved in the WTO but given procedural clarity in Article 26 of the DSU which sets out how the DSB would apply the principle, distinctly differentiating its application from violation complaints. Where in a violation case a complaining party was required to identify “a clear infringement of the General Agreement”, Article 26.1(a) of the DSU requires the complaining party to “present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement”. Where in a violation case, the withdrawal of the measure found to nullify or impair benefits under the covered agreements was required, Article 26 (1)(b) requires the panel or Appellate Body to “recommend that the Member concerned make mutually satisfactory adjustment”.

In practice, post-WTO Panels are much more careful than its predecessors in applying the non-violation nullification and impairment principle. In the case of *Japan – Film*, the Panel explicitly expressed its observation that even in the days of the GATT, non-violation cases had been few, before proceeding to set out its view that:

‘This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the EEC – Oilseeds case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.’⁶⁷

⁶⁷ WTO Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (adopted 22 April 1998).

In the case of *Korea – Government Procurement*, the complainant was again the United States. While the Panel ruled against the US for failing to prove non-violation because Korea's offending domestic legislation had been in place and the US had been notified of it prior to the Government Procurement concession Negotiations between the two countries, the Panel went on to provide one of the most detailed exposition of the application of the non-violation remedy throughout the history of GATT/WTO dispute settlement history. The Panel remarked that:

'...the basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. This has traditionally arisen in the context of actions which might undermine the value negotiated tariff concessions.'

The Panel goes on to emphasise that:

'The non-violation doctrine goes further than just respect for the object and purpose of the treaty as expressed in its terminology. One must respect actual provisions (ie. concessions) as far as their material effect on competitive opportunities is concerned. It is an extension of the good faith requirement in this sense.'

The vast majority of actions taken by Members which are consistent with the letter of their treaty will also be consistent with the spirit. However, upon occasion, it may be the case that some actions, while permissible under one set of rules (eg. The Agreement on Subsidies and Countervailing Measures is a commonly referenced example of rules in this regard), are not consistent with the spirit of other commitments such as those in negotiated Schedules. That is, such actions deny the competitive opportunities which are the reasonably expected effect of such commitments.'

The Panel and Appellate Body also rejected the non-violation claim of the complaining party in the case of *EC – Asbestos* on the ground that the complainant, Canada had failed to meet its burden of proof but reiterated the Panel's caution in *Japan – Film* that non-violation claims should be "approached with caution and treated as an exceptional instrument of dispute settlement". What then, about the question of the legality of the notion? One will notice through perusal of the case law the questions of legal propriety, rights or equity were almost never addressed. Panels instead paid uncanny attention to the notion of "reasonable expectation". The answer lies in the fact that the notion is not one of law but of diplomacy. This notion can be found richly enshrined in the GATT's early history and in the negotiations. A trade expert report at the 1933 London Monetary and Economic Conference recommended the inclusion of a general consultation and adjustment clause into international trade agreements:

'If, subsequent to the conclusion of the present treaty, one of the Contracting Parties introduces any measure, which even though it does in an infringement of terms of the treaty, is considered by the other Party to be of such a nature as to have the effect of nullifying or impairing any object of the treaty, the former shall not refuse to enter into negotiations with the purpose either of an examination of proposals made by the latter or of the friendly adjustment of any complaint preferred by it.'⁶⁸

Another example of such diplomatic inclination (upon which the very language of Article XXIII(1)(b) is based) is found in the 1942 Reciprocal Trade Act between Mexico and the United States which provides that either party

⁶⁸ Negotiating Group on Dispute Settlement, 'Non Violation Complaints Under GATT Article XXIII:2, MTN.GNG/NG13/W/31 of 14 July 1989, available at: <http://www.worldtradelaw.net/history/urdsu/urdsu.htm> (last accessed on 27 February 2013), at para. 5.

‘should consider that any measure adopted by the other Government, even though it does not conflict with the terms of this Agreement, has the effect of nullifying or impairing any object of the Agreement. such other Government shall give sympathetic consideration to such written representations or proposals as may be made with a view of effecting a mutually satisfactory of the matter.’⁶⁹

In summary, the non-violation principle is here to stay, only that the WTO DSB is very much more careful in applying it. My criticism is that there has been a lack of concerted effort on the part of the Members to agree on an understanding of the circumstances under which a measure constitutes a non-violation infringement actionable under the DSU, leaving it to the DSB (panels and Appellate Body) to set the parameters for its application. It is understandable that the vague and open ended nature of the notion was intended as a mechanism for recourse by Members whose benefits were infringed by measures that are not in conflict with the provisions of the multilateral agreements. Logically, it would be difficult to negotiate an understanding to clarify a notion which deliberately lacks clarity. This is, however, in my view neither undesirable nor inconceivable considering that understandings of the interpretations of Articles II: 1(b) (Schedules of Concessions), XVII (State Trading Enterprises), XXIV (Territorial Application, Frontier Traffic, Customs Unions and Free Trade Areas) and XXVII (Withholding or Withdrawal of Concessions) had already been negotiated and concluded.

While it is perfectly understandable that Members are expected to exercise their rights under the covered agreements in good faith and there is no doubt that in most cases they do (otherwise the diplomatic consequences would be monumental, hence the relatively few non-violation complaints), it does not support the WTO’s case for a rules-based system that

⁶⁹ *Ibid.*

a notion which potentially penalises a Member for a perfectly legal measure should continue to lack certainty and predictability in its interpretation and application. Leaving to the DSB to set the parameters of implementation and application indeed accords the advantage of flexibility given that the notion exists to preserve the spirit of the WTO whose rules are “not concerned with actual trade effects, but rather with competitive opportunities”⁷⁰ and therefore resolve problems that fall outside the rule-book. On the other hand, the DSB whose precedent case law are not binding on future panels have demonstrated the risk of setting inconsistent and unreliable parameters that are not very helpful as a mechanism for ensuring the predictability and coherence of not only the dispute settlement system but of the WTO legal system as a whole.

5.1.3 Vagueness of the Substantive Law of The Agreement and The Relative Ease In Which Members Can Contract Out of It

It is clear that the GATT struggled with its legal identity from the very beginning. Jackson arrived at the conclusion that:

‘It is difficult to formulate generalisations about this phenomenon in GATT, but an argument can at least can at least be made that for the last decade GATT procedures have become looser, the legal

⁷⁰ EC – Bananas III (Article 21.5 – Ecuador II), EC – Bananas III (Article 21.5 – US), above n 1, para 466.

norms of GATT less respected, and countries in GATT more of the opinion that they can depart from those legal norms without either concrete consequences or moral approbation.⁷¹

Trebilcock and Howse also add to the depth of this observation of the GATT's unusual legal identity, recognising that there was indeed a vacuum left by the failed ITO negotiations which the GATT did not adequately fill. These are summarised by Trebilcock and Howse:

'From the beginning, then, the GATT was characterised by temporary measures and *ad-hoc* solutions to emerging problems. Administrative services for the GATT were provided by the Interim Commission of the ITO and responsibility for oversight and direction was taken on by regular meetings of the Contracting Parties, with Geneva as the *de facto* site.

In contradistinction to the ITO draft charter, the 1947 GATT made no provision for formal, juridical dispute settlement, nor was there any explicit provision for recourse to the International Court of Justice in resolving disputes. The emphasis was on diplomatic methods of consultation and consensus.⁷²

The GATT's diminutive legal identity has somewhat advanced and made progress as the WTO came of age, giving diplomats like Moore the confidence to emphasises that:

'The rule of law finds a constant expression in many aspects of the WTO's work, through Members' commitment to abiding by the principles and disciplines negotiated in the WTO framework.'⁷³

⁷¹ J.H. Jackson, *World Trade and The Law of GATT* (1969), at 757.

⁷² M.J. Trebilcock and R. Howse, *The Regulation of International Trade*, 2nd Ed (1999) at 51.

⁷³ Moore, *supra*, at 3.

The role of legality in the WTO today is obviously very different from when it was in the days of the GATT and the provisions of the substantive law are certainly much clearer or more precise than they were with the introduction of understandings on the interpretations of several Articles standing as evidence, but “*ad hoc* solutions” have not diminished in their significance as open ended concepts like the interpretation of “nullification and impairment” remain not interpreted in the substantive law. Interestingly however, Moore attributes Rule of Law in WTO jurisprudence to the dispute settlement mechanism which has somewhat taken the *de facto* role of ensuring legal consistency of WTO jurisprudence as sub-sections A and B of this paper suggest. A quantitative report by Torres⁷⁴ concluded that the majority of the 231 cases between 1995 and 2012 where the Member was found to be in breach of its WTO obligations, efforts were made to bring its measures into compliance. It is clear here that the evolution from the GATT to the WTO is visible from the point of view that the DSU/DSB has taken on the role of maintaining legal order in the multilateral trading system. It will be noted that the strength of the WTO “judiciary” is the one thing lauded by Moore in his exposition of the role of the rule of law in the context of international trade. Inciting members good faith in compliance is arguably one of the successes of the DSB in creating legal order but the DSU has also demonstrated its limitations.

5.2. Concluding Comments

In summary, certainty, predictability and consistency in the substantive law as well as the protection of rights and the minimisation of officials’ discretion are among the commonly accepted standards of the notion of the rule of law. Three observations of unique

⁷⁴ Torres, *supra*, at 22.

GATT/WTO jurisprudence were raised that are in contradistinction to these commonly accepted standards which draws the inference that either the GATT/WTO legal system is not strictly speaking a rule of law based system, or that these commonly accepted standards are simply not universal (the fact that Dicey's model of the rule of law is not universal has already been established). The first of these observations is that precedent DSU cases are not binding on future panels in the manner that the doctrine of *stare decisis* is applied, raising the question of predictability and what the value of the rules-based system truly is. The second is that non-violation cases are actionable, raising the question of whether rights and obligations really are protected under the system. The third observation is that the substantive laws are open ended and vague, leaving interpretation of key concepts like "nullification and impairment" to the DSB.

In all three cases, the empirical evidence shows that while the substantive law was liberal, the Panels and Appellate Body representing the DSB had limited themselves by general principles of law. Where the doctrine of *stare decisis* explicitly does not apply, panels have not allowed themselves to ignore precedent simply because they were not binding. Where non-violation infringement was actionable, the panels ever since the establishment of the WTO have been cautious in applying it. Where there is a lack of a source of certainty in the substantive law, the DSB has stepped in to take the *de facto* role of maintaining legal order.

My criticism is that while this has worked, there are weaknesses in putting too much burden on the DSB to maintain legal order which I highlight in two points. My first point is that the DSB is not a judiciary and not all its members are trained in the law and therefore would not have the same interest or responsibility in setting legal principles right (although in the majority of cases they do) as a judge in a common law system would. The DSB

functions on the premise that “for the most part we settle things first and understand them later”.⁷⁵ My second point is that because a doctrine of binding precedent does not exist, inconsistent application of the substantive provisions of the covered agreements can go unchecked and this does nothing to contribute to the body of law which a system which upholds the rule of law is expected to. Already this is visible in the case of *EC – Asbestos* where the panel decided that the French ban on asbestos occurring 50 years after tariff negotiations was something in which “negotiators should recognise that things are likely to change over such a lengthy time horizon” which seems at odds with the whole purpose of the non-violation clause. In the *EC – Oilseeds* case, the tariff concessions in question were more than 25 years old, yet the panel did not use the logic in *EC – Asbestos* to deny the claim. The logic remains unexplainable.

The concluding remark is straightforward. The introduction of the DSU does in fact move WTO jurisprudence one step towards the rule of law. The DSU/DSB alone is, however, not well equipped to maintain legal order in the multilateral trade system because of its inherent limitations and it is certainly a mistake to say that the DSU represents the rule of law in the WTO. And while the DSB has consistently demonstrated that it observes the fundamental principles of the rule of law, it has done so on its own accord. The rule of law therefore is a feature in WTO jurisprudence, but the over-reliance on the DSU/DSB shows there is still clearly work to be done in areas of clarifying the substantive law to which many jurists would agree, or on the contrary, be content with the conclusion that a strict rule of law will

⁷⁵ See in this sense, M. Arnold, *Culture and Anarchy. An Essay in Political and Social Criticism* (London, Smith Elder, 1869), p. 233, reproduced by Philip Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press, 2002).

not benefit the multilateral trade community, to which most diplomats and economists would readily agree.

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CHAPTER 6. THE 'TECHNIQUES OF THE DIPLOMAT'S JURISPRUDENCE' AND THE WTO TODAY

Robert E. Hudec probably deserves full credit for having coined the term 'techniques of the diplomat's jurisprudence' in his 1975 essay of the same title.¹ The essay in essence highlights the highly flexible, diplomatic nature of the GATT in its early days and the manner in which some of its negotiators strongly opposed governance by a strict rules based system. It makes sense at this juncture to go back and re-visit how and why, conceptually, the GATT was negotiated and why it looks the way it does, although most of the historical elements were already examined at length in Chapters 4 and 5. In Chapter 5, unique features of the WTO/GATT legal system that appeared to contravene the conventional concept of the Rule of Law and the safeguard measures put in place by components of the institution were examined, in particular the Dispute Settlement Body, to ensure that at least the fundamental principles of the rule of law such as consistency in the treatment of dispute resolution decisions and the management of non-violation complaints so that action against perfectly legal impairments were kept to a bare minimum. In short, Chapter 5 examined the substance of the multilateral trade agreements. Chapter 6 on the other hand, examines not the substance but the conceptual properties of the agreements and organisation, in particular, what its negotiators intended for and perceive it to be. The conceptual development is followed from the time the ITO and GATT were negotiated in the 1940s to the establishment of the WTO. Where Chapter 5 appraised whether the substance of the WTO agreements' substantive and procedural law are consistent with

¹ See R.E. Hudec, *The GATT Legal System and World Trade Diplomacy* (1975), at 26.

standards of the rule of law as some scholars and diplomats have proclaimed, this chapter appraises the attitudes and behaviours of the diplomats who created the multilateral trade agreements and established the organisation for whether the rule of law is an ingredient at the conceptual stage.

It will be recalled that Bingham, in his assessment of the rule of law in international law, brought up a brief but very powerful point about the GATT. The three Bretton Woods agreements, he states 'were serious, effective and strictly controlled international schemes to promote development, relieve poverty and raise living standards.'² Indeed, the GATT came about as an instrument of peace and security in the advent of the disruption of economic activity and massively tense international trading relationships caused by the first and second World Wars. The period of wars and the Great Depression in between led to a general outbreak of 'beggar-thy-neighbour' economic policies amongst the European powers characterised high, protectionist tariffs, exchange rate devaluations and other trade restrictions.³ The three Bretton woods agreements were to be exact, designed work in tandem in laying the foundations for rebuilding efforts following the wars, in particular for countries whose economies were most affected. Broadly speaking, the IMF undertook the role of maintaining exchange rate stability and creating access to funds so that states did not have to resort to protectionist measures, the World Bank was designed to create capital to assist economies devastated by the wars, and the ITO/GATT would 'oversee the negotiation and administration of a new multilateral, liberal world trading regime.'⁴ The multilateral co-operation on restoration and legal order was speedily necessary because:

² See above, Chapter 3, n. 68.

³ See Trebilcock and Howse, *op cit.* at 20.

⁴ *Ibid.*

'The foundations of economic liberalism, badly shaken by the First World War, were all but demolished by the Great Depression. The gold standard disappeared; currencies were thrown into chaos; exchanges were subjected to national controls. There was a sharp contraction in the volume of the world's trade... [E]ach for himself and the devil take the hindmost became the general rule...

Intensive economic nationalism marked the rest of the decade. Exports were forced; imports were curtailed. All the weapons of commercial warfare were brought into play: currencies were depreciated, exports subsidised, tariffs raised, exchanges controlled, quotas imposed, and discrimination practiced through preferential systems and barter deals. Each nation sought to sell much and buy little. A vicious restrictionism produced a further deterioration in world trade.⁵

Reparation and restoration was the language of the GATT. Its existence was to make sure that the situation in which the world was during the World Wars and the Great Depression, and the events immediately after, would not recur. In this respect, it is submitted that GATT cannot be seen as a legal failure simply because the multilateral trading system does not focus on the enforcement of rigid, binding rules and procedures. Instead, it is submitted that, as a 'diplomat's jurisprudence', order is maintained not by authoritative enforcement of rules but by the institution's indirect role as an economic peace keeper and a multilateral 'moral gauge'. The situation of the diplomat's jurisprudence in relation to the WTO today is examined in section 6.4 of this chapter – particularly in relation to Hudec's philosophy who was, with John Jackson, widely regarded as one of the founders of international trade law as a discipline.⁶

The one key theme of Hudec's philosophy which will recur over and over again in this study is that a legal institution governing international trade would have to be sensitive to

⁵ League of Nations. Commercial Policy in the Interwar Period: International Proposals and National Policies, at 22 (Official No. : 1942.II.A.6), see Hudec, *The GATT Legal System and World Trade Diplomacy* (1975), at 4-5.

⁶ Daniel Altman, *The New York Times Online*, 31 March 2003, available at <http://www.nytimes.com/2003/03/31/business/robert-e-hudec-68-expert-on-global-trade-law-dies.html> (last accessed on 28 March 2013).

political and diplomatic considerations – ‘even allowing them to supersede its authority in some circumstances – to avoid itself becoming so inflexible as to render itself harmful or irrelevant.’⁷ The one observation about Hudec’s philosophy in general is that his ideas and propositions tended to be very GATT-centric even though he lived to see eight years of the WTO coming into being (Hudec passed away in 2003, still actively lecturing in the area of international trade law at the time). This section of the dissertation in no way attempts to undermine or challenge Hudec’s philosophy, but rather to assess its position and relevance in a time where the WTO has now been in existence for 18 years.

6.1 The GATT as an Economic Peace Keeper

Gerald Meier conjured the term ‘economic peace-keeping’ as a reference to the roles which the two and a half Bretton Woods organisations were designed to play that would see a transition from a global economic climate undermined by the use of force to one which would be increasingly rules based. Meier summarised the need for peace-keeping as a need to check nations against playing the retaliatory game – the general tendency displayed during the pre-war years of countries to retaliate against another’s restrictive trade policies with restrictive policies of their own.⁸ Trade warfare, Meier stresses is ‘in essence a zero-sum game: one country’s gain is another’s loss’.⁹ Many governments understood this in theory but could not bring themselves immediately to actually accept it in practice as one League of Nations report publishes in 1942:

⁷ *Ibid.*

⁸ Meier, *op cit.* at 3.

⁹ *Ibid.*

'[T]rade was consistently regarded as a form of warfare, as a vast game of beggar-my-neighbour, rather than as a co-operative activity from the extension of which all stood to benefit. The latter was the premise on which the post-war conferences based their recommendations – a premise accepted by all in theory but repudiated by almost all in practice. It was repudiated in practice because, as the issue presented itself on one occasion after another, it seemed only too evident that a Government that did not use its bargaining power would always come off second-best.'¹⁰

Against the backdrop of legal order, the idea of an organised legal framework which monitors the conduct of subjects within its jurisdiction is no different any legal system, which in essence exist to monitor conduct and to maintain compliance to accepted norms within that legal system. Compliance is often demanded on the premise that the costs of non-compliance to the other subjects within that system almost always adversely outweigh the benefit of allowing breach by one subject, even when in most occasions, the subject in breach can and will rationalise that his breach can be justified.

This is demonstrated by a simple analogy using drivers who knowingly drive against the flow of traffic on a one way road as an example. Most if not all such drivers will cite a need as a justification to depart from the accepted norm which that legal system in question sets out. It could be a spouse in labour, an attempt to be on time for a very important corporate board meeting or simply an attempt to circumvent a congested part of town. The consequence to the individual had he not opted to drive against the flow of traffic could range from a baby having to be delivered in the car, an potentially illustrious career in jeopardy to a very foul temper having to be caught in traffic. All indeed are very undesirable consequences for that individual. From a broader perspective, the probable consequences of that individual having driven against the flow of traffic could have been a

¹⁰ Hudec, *op cit.* at 6.

worse one both for that individual himself and for other motorists using the road at that time. In a worst case, several lives would have been lost, in addition to the cost of damage to property had his action resulted in a collision. This is not to mention the cost the police, fire, ambulance and rescue teams incur to clean up the collision, and the inconvenience to and opportunity costs forgone by other motorists caught in the congestion caused by that collision, most of whom likely need to be in a certain place at a certain time. Laws in most cases therefore, consider consequences to the broader masses and are designed both to protect the masses against deviant conduct of a few individuals and also to protect individuals from excesses of the masses or of other individuals within the subset of that legal system. Most subjects within the legal system generally also voluntarily abide by the legal norms, understanding that any attempt to upset it would upset the protection they enjoy under it.

In this same regard, the countries which agreed to the GATT and today the WTO on the understanding that mutual observation of a set of rules formulated by each signatory to align national policies is of more benefit to the masses than non-compliance of one of them even though seemingly justified. For the most part, the WTO/GATT had its process to 'economic peacekeeping' cut out easier in the sense that compliance did not need to be coerced. States acceding to the WTO do so voluntarily knowing full well what they are acceding to. The accession process is itself in fact a tedious process taking many years. National governments understand the value of an organised legal framework and a 'peacekeeping force' because the road to economic cooperation been easy. Meier understood this and elaborates that:

'Through the arduous process of economic diplomacy, the world has established since the 1930's an international trading system of multilateral, reciprocal, non-discriminatory trading relationships...

Consultative machinery and international organisation are clearly needed to maintain economic peacekeeping. But there is often a conflict in foreign policy between economic objectives such as maximising national output, and noneconomic objectives, such as national power or satisfying some interest group. Also, foreign policy objectives and domestic policy objectives are often contradictory, and there must again be some tradeoff. Somehow objectives are sought within a system of international decision-making that involve a spectrum of techniques ranging from co-operation, negotiation, bargaining, and persuasion-economic diplomacy-to the use of power and coercion. It is now clear that there is need for new and improved institutions and consultative arrangements in order to provide intergovernmental co-operation in reconciling national policies. In this pursuit, as will be seen in all the policy problems in [Meier's book], the practice of technical decision making must be supplemented with judgment and a sense of what might be administratively practicable and politically feasible.¹¹

With this model of economic peacekeeping having found its way as the GATT/WTO's consensus as to the legal order they were trying to achieve, suffice to say that the 'diplomat's jurisprudence' was designed to tread the fine line between the 'practice of technical decision making' and 'a sense of what might be administratively practicable and politically feasible.'

This balancing act between hard law and administrative or political feasibility is something that all legal systems, including domestic common law legal systems, have to consider, only to different extents. A national legislation would, for example, need to consider before passing a legislation to regulate the number of babies being born whether administratively, the anticipated push-backs from the general population would make the cost inefficient to expect the authorities to set conditions under which a baby could be born, then monitor those conditions for compliance. Politically, the incumbent executive would need to

¹¹ Meier, *op cit*, at 11.

consider the amount of friction this would cause with the opposition parties. As an additional dimension, it would need to consider whether people would voluntarily comply with such a law, and for that to happen, they must perceive it as desirable – they must first accept that they individually and collectively derive benefits from compliance with law. The difference about laws in the domestic sense is that the executive in power could push a legislation, no matter how onerous or ridiculous, through if opposition was scant. Where economic peacekeeping and the rule of law between states is concerned, diplomacy has traditionally been more of an emphasis than law because of the sovereign nature of states and the mutual exchange of benefits which states want to enjoy from each other. In any case, there is and can be no central legislative function to force a law through as much as there is no central authority to enforce its observation. In spite of this, there is no evidence to suggest that any major trade war or trade disruption had occurred since the establishment of the GATT in 1947. In fact, if anything can be said about this economic peacekeeping model even if hard enforcement has been visually absent, it has been a success. The General Council of the WTO, during its meeting on 25-26 July 2012 welcomed the accession of the Russian Federation to the WTO and was in the process of negotiating the accession of Vanuatu, adding to the growing number of Members to the system.¹²

6.2 The GATT As A Multilateral Moral Gauge

Why a gauge and not enforcement instrument? Continuing from the ‘balancing act’ analysis in 6.1 earlier, it is evident that the GATT/WTO, for the need to strike the political and economic harmony, cannot and would not go further than being a gauge. In fact, J. Michael Finger of the World Bank warns us of the risk of an ‘overly legal view of how the

¹² WTO General Council, Minutes of Meeting, WT/GC/M/137, 13 September 2012.

GATT/WTO system works'.¹³ The warning stems from his observation that negotiators, in particular those of industrialised economies, tend to have misread the historical development in the legal obligations of the multilateral trading system to be forcing changes in national policy. The research of Finger, an economist observing the GATT/WTO from the external perspective of a sister Bretton Woods institution, takes on a very different dimension because it considers many aspects of international relations other than the observation of binding legal obligations under the substantive law. As with everyone who studies the jurisprudence of the GATT/WTO, Finger too falls back on the work of Robert Hudec for support and this passage from a more recent piece of Hudec's work (1999) about the legal focus of the WTO as it evolved from the GATT therefore comes across as intriguing:

A third lesson suggested by the GATT's experience is that political will is really more important than rigorously binding procedures – that strong procedures by themselves are not likely to make a legal system very effective if they do not have sufficient political will behind them... When we ask whether or not the new system will work, therefore, we have to begin by asking what kind of political will stands behind it. The current fascination with the novel WTO procedures tends to obscure the importance of this first and most important condition of success.¹⁴

Finger makes several important findings in his article to arrive at a conclusion which resonates with Hudec. While the WTO was from the outset designed as a binding, rules based system, there is a flip side to that legally ambitious coin. Amongst the prime reasons why the 'milder' aspects of achieving and sustaining legal order between states as opposed to rigorously binding procedures, as far as multilateral trade is concerned is that the costs, especially for less developed countries, of domestic implementation of the Agreements, is

¹³ Finger, 'The WTO's Special Burden on Less Developed Countries', *Cato Journal* 19 (2000) 3, at 434.

¹⁴ *Ibid.*, at 435.

discouragingly high. Hungary, according to Finger, spent \$40 million to upgrade the level of sanitation of its slaughter-houses to meet its obligations under the Sanitary and Phytosanitary (SPS) Agreement. Mexico spent more than \$30 million to upgrade intellectual property laws and enforcement. The cost of restructuring domestic regulations to meet obligations for just three of the six Uruguay Round agreements totalled \$150 million as of the year 2000 – this cost would have no doubt escalated by leaps and bounds now. This cost, Finger stresses, is more than the annual development budget for 8 of the 12 least developed countries.¹⁵ As of 1 January 2000, Finger concluded, 80 or 90 of the 109 developing or transition economies were in violation of the SPS, customs valuation and intellectual property (TRIPS) agreements which would cost them each \$150 million, for some a full year's development budget, to implement.¹⁶ The use of the dispute settlement system in such a situation to compel a Member to bring its domestic policies in alignment with the Agreements mean nothing here, not unless that Member has the capacity to implement as such, let alone appropriately represent and defend itself at the DSU level. No amount of coercion or rigorously binding rules and procedures are going to bring any of these struggling Member economies into conformity unless they themselves take ownership of the obligations under which they are bound (and to which they lacked the capacity to negotiate) and discover the political will to voluntarily comply, which Hudec emphasises is more a necessity for success in sustaining WTO legal order than binding rules.

While industrialised countries have made their fair contribution in aiding developing and least developed economies towards conformity¹⁷ (into which this dissertation will not

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at 435.

¹⁷ In this sense, see pp 426 – 434 of Finger's work, in which the author relates that the World Bank had undertaken significant roles in assisting countries in the implementation of sanitary and phytosanitary regulations.

examine in detail), the point Finger is trying to make is that the resources spent on bringing national policies into conformity with the multilateral trade agreements would have been at the cost improving other aspects of a least developed or developing country's infrastructure, especially in areas of jurisprudence where the Rule of Law matters most, such as ensuring that women and children at least have a access to basic education, that basic human rights are at least observed, that justice can be accessed, that basic food, shelter and medicine is evenly distributed, and that actions of public officials in those countries, even if unconstitutional, are at least humane.

It has long been the bone of contention between positivists and natural lawyers the question of morality in relation to law. On the one hand strong advocates of the rule of law such as Bingham, Steyn and Jowell argue that fundamental moral principles and the rule of law cannot be segregated from general legal theory. On the other hand, jurists of the positivist school of thought pay scant regard to the question of morality as far as the legality of substantive provisions are concerned. The positivist line of argument of the validity of legal norms has traditionally been that the source and not the merits make law valid. While the arguments between the two schools of thought can continue to linger, it is submitted that in a consensus based 'diplomat's jurisprudence' like the WTO, merits are a greater determinant of validity compared to source because here conformity cannot be coerced. It can be persuaded, economic and political pressure can be applied, and reciprocal benefits can be withdrawn, but the empirical evidence demonstrates that conformity cannot be coerced. This is not to undermine the positivist legal theory or to lend strength to the moralist school of thought, but to highlight that a moral conscience and a sense of ownership are necessary for legal order in the GATT/WTO as opposed to binding laws and procedures. It is this sense of moral and ownership, in addition to the legitimate expectation

of reciprocity which has in the past driven the behaviour of its members. The consensus based multilateral legal system has thus far functioned on the mutual understanding that each Member will be guided by these principles.

Hudec wraps up this angle of the analysis, commenting on the “cease or desist order” negotiation of the ITO at the end of the Havana Conference in 1948 with a conclusion that imposing rigid rules with uncompromising conditions on any contracting member, especially where they could not comply, would simply be counter-productive to the objectives of the agreements and defeat the purpose of the painstaking diplomatic negotiations. Hudec reasons that:

‘The difficulty with a “cease or desist order,” even as a semantic matter, was that it left too little room for manoeuvre. Commands expressed in such unbending terms would have put the Organisation on a collision course with the offending country in those cases when the latter simply could not comply. Such collisions would not necessarily produce any better settlements, and the necessity of backing down could well damage the Organisation’s prestige. It was better, thought the [ITO] draftsmen, to speak in a style that would allow them to modulate the pressures according to circumstances, one that would not spell failure whenever full compliance was not possible.’¹⁸

6.3 The Nature of Legal Obligations in Relation to the Diplomat’s Jurisprudence in the GATT’s Early Days

It was the debate over the role of legal obligations and the amount of legality to be injected into the regulatory system at the time of the ITO and GATT negotiations which prompted Hudec to coin the term a ‘diplomat’s jurisprudence’. The early trade negotiators (almost all

¹⁸ Hudec, *op cit*, at 29.

of whom were of course diplomats) generally made a farce of the 'crippled intellect' of judges and lawyers who could not appreciate the reality of international business.¹⁹ With the League of Nations' Economic Committee having already come to the conclusion that judicial settlement is not always the best way of settling disputes of an economic nature,²⁰ this put Hudec in a position to reason that the real problem with lawyers and judges was their failure to appreciate the need to compromise on such matters. So in 1975, and 20 years before the WTO was established, Hudec boldly proclaimed that 'the point (and the international lawyers of the day may well have missed it) was that trade agreement obligations were not meant to be enforced to the letter'.²¹

Looking in hindsight, the approach of the early ITO/GATT negotiators to legal order was not without problems. One does not need to look deep into the history of the multilateral trade agreements to be informed that the overriding concern of the agreements was for reciprocity. The "nullification and impairment" clause made consultations a default mitigating mechanism against non-compliance and the limitations of this either as a safeguard measure or an enforcement tool is without doubt visible. The government causing the impairment was simply obliged to talk, which in the latter years earned the GATT the nickname of the 'General Agreement to Talk and Talk'.²² The alternative protection against non-reciprocity, Hudec illustrates, was derived from bilateral trade agreements of the time and this was to have a termination clause which would allow the disappointed party to withdraw from the agreement.²³ This too, offered no real solution and

¹⁹ See Chapter 2, n. 41 of this dissertation.

²⁰ *Ibid.*

²¹ *Ibid.*

²² See Baldwin, *Understanding The GATT's Wins and the WTO's Woes* (2010), Centre For Economic Policy Research, Graduate Institute, Geneva and CEPR (Policy Insight No. 49), available at <http://www.cepr.org/pubs/policyinsights/PolicyInsight49.pdf> (last accessed on 27 March 2013).

²³ See Hudec, *op cit.* at 20.

probably would have undermined the prestige of the ITO had it been established for surely, as Hudec also admits, there would be a limit to the amount of pressure or restraint the other parties could apply on the non-complying party if the offending party could so easily contract itself out of agreements.²⁴ Yet, legal obligations still needed to be flexible enough to be able to deliver mutually acceptable solutions. Mindful of this ‘middle-ground’ objective, the trade agreement negotiators obviously spent considerable time trying to develop a legal system that would suit these conditions, but Hudec is adamant that they did not abandon legal obligations *per se*.²⁵

The idea of legally binding rulings and advisory opinions by various instruments set up under the auspices of the ITO were negotiated. Even the idea of a possible appeal to the International Court of Justice was considered but became a subject of much debate. While many of these propositions, including the mechanism to appeal to the ICJ, were never actually implemented, it is the mindset of the negotiators to legal obligations which is examined in this part of the dissertation and will lend support to understanding the rule of law against the backdrop of the diplomat’s jurisprudence. To the compromise that the ICJ would only act in an advisory position while enforcement would be in the hands of the ITO, where men of sound “economic judgment” could take account of the “economic facts”, the delegations of Belgium and Luxembourg demonstrated the attitude towards this envisaged compromise:

‘The delegation of Belgium and Luxembourg agrees to make this concession, as it considers that an advisory opinion procedure will facilitate the settlement of disputes by sparing the political susceptibilities of States, which can subsequently take advantage of the light thrown on a case by

²⁴ *Ibid.*

²⁵ *Ibid.*

public hearing and the opinion of the Court to arrive at a compromise among themselves by diplomatic means.

[T]he Court's action in an advisory capacity should create an "atmosphere" which will encourage the parties to seek a solution to their dispute.²⁶

Hudec goes on to explain that by "diplomatic", the objective was to assemble as much pressure as possible on the object government, and the word "atmosphere" suggested that the legal force would be derived from the diplomatic pressures applied. In summary, in lieu of any real, hard, rigid sanctions, this model of legal system emphasised corrective action stemming from the "embarrassment" to the object government following from the fact that the breach of an obligation was highlighted and brought to public attention with the hope of eventually pressuring the object government into conformity.²⁷ In true diplomat fashion, Hudec goes on to conclude that even if the central authority could not actually punish, 'it was important that it still be able to chastise' for the negation of the moral duty to abide by promises solemnly made.²⁸ If these are viewed as appropriate safeguards, then putting things in perspective, this would seem the diplomat's way of having struck that much sought after balance between legality and flexibility.

6.4 The Situation of Jurisprudence in the WTO Today

With the WTO now an established institution dedicated to the regulation of multilateral trade, complete with an advanced dispute settlement mechanism and a set of binding rules, surely an international trade lawyer would expect that the new jurisprudence would be

²⁶ ITO Negotiation Document Number E/PC/T/W/257 (July 31, 1947), quoted in Hudec, *op cit*, at 25.

²⁷ *Ibid.*

²⁸ *Ibid.*

more rules based rather than diplomat-centric. In theory, this has to be true – from a legal perspective, the WTO cannot function today like the GATT did 60 years ago for a number of reasons. Firstly, the WTO today has 159 members²⁹ (with several more negotiating accession), as opposed to the 23 who initiated the GATT. With the increased volume of membership, it is no longer possible for non-conformity to be dealt with as casually as it was in the early days with diplomatic pressures alone. Secondly, the WTO is much more diverse in its membership, consisting of states across all the continents, with a larger number of them being either developing or least developed economies. The GATT on the other hand, consisted of wealthy, developed European countries plus the United States, who already had much in common. There are now far too many opposing national values to even resolve what kind of diplomatic pressure to apply. In fact, the effectiveness of diplomatic pressure is even questionable now because it has been shown time and over again during dispute settlement cases that third parties to the dispute do take sides. Thirdly, Members acceding to the WTO accept the ‘covered agreements’ as binding law.³⁰ This, to borrow Hudec’s expression again, generates more pressure to comply simply because the “law”, being a formal set of rules and procedures, would generate the sort of respect for authority attached to legal norms.³¹ In this situation, respect the Agreement becomes in the domestic, constitutional sense “Obey the law!”. In theory therefore, flexibility is supposed to be managed in such a way that would not compromise the prestige of this image.

²⁹ Website of the World Trade Organisation – Understanding the WTO, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed on 27 March 2013).

³⁰ See generally the Preamble of the Marrakesh Agreement Establishing the WTO, available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm (last accessed on 28 March 2013).

³¹ Hudec, *op cit*, at 26.

In fact, according to Langille, the WTO is set as a benchmark by many scholars of international law as the best example of “hard law”³² at a multilateral level.³³ Most international agreements are “soft law” in nature and to many, the WTO stands out because of its well structured dispute settlement mechanism, a WTO “court” with the ability not so much to impose sanctions but to prescribe remedies, is in many ways a mechanism for one country to “take another country to court” for a breach of obligations. The ad-hoc panels and appellate bodies established to adjudicate dispute settlement complaints can “order” (the diplomatic word used in the agreements is ‘recommend’) a non-complying party to bring its domestic policies into compliance. In terms of legal obligations therefore, the WTO’s laws, as opposed to the early days of the early diplomat’s jurisprudence, are legally binding. Yet, one ambiguity still remains as what this international “hard law” actually is and what the attitude of diplomats are to the WTO legal system and whether or not it achieves its legal objectives.

The most credible source for answers to such a question needs to come from neutral observers of the WTO, observing the jurisprudence of multilateral trade from a distance as opposed to that of diplomats, scholars or subject matter experts accustomed to critique of the subject matter whose ideas would probably be biased by years of familiarity with the subject matter’s development. In this regard, the work of Keohane and Nye, analysing the legality of international institutions in general, comes to the fore.³⁴ Keohane and Nye argue that, on the macro side, the legitimacy of the WTO rests on the fostering of trade

³² A term generally used to describe domestic legal systems with a judiciary to enforce the law which are backed by force or sanctions.

³³ See generally Langille, ‘Neither Constitution Nor Contract: Understanding the WTO By Examining the Legal Limits on Contracting Out Through Regional Trade Agreements’, *New York University Law Review* (2011), Vol. 86:1482, at 1482, see also Jose E. Alvarez, *International Organisations as Law Makers* (2005).

³⁴ See Keohane and Nye, ‘Between Centralisation and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy’ (2001), Harvard University Working Paper No. 01-004, available at http://papers.ssrn.com/paper.taf?abstract_id=262175 (last accessed on 28 March 2013).

liberalisation. They further argue that ‘since trade liberalisation has been a consistent policy of most rich country governments during the last half-century – and recently a policy of many developing countries as well – WTO’s dedication to trade liberalisation probably enhances its legitimacy in general’.³⁵ At the micro level, Keohane and Nye set out the argument that the WTO builds coalitions of individuals, firms, interest groups and corporations that support it on the grounds of self-interest. It is therefore submitted that the WTO’s ‘powerful constituency’ – multinational corporations (MNCs) wishing to expand their manufacturing, trade and investment activities beyond borders, because of their significant influence, contribute heavily to the legitimacy of the WTO. Another feature pointed out by Keohane and Nye but not highlighted as strengthening the legitimacy of the WTO which I believe is one such feature, is that the WTO decides by consensus and not by majority vote.³⁶ This significantly increases the margin of representation in decision making in comparison to many other international organisations/agreements including the IMF and World Bank.³⁷

Early in the life of the WTO, Hudec expressed doubt whether in spite of the strong consensus establishing the WTO’s legal base and the stability of the DSB in the judicial role, the WTO had the ability to implement decisions that are strongly opposed by powerful states.³⁸ In Hudec’s mind, the authoritative dispute settlement procedures were a gamble. Had Hudec lived on even for two more years, he would have been comforted to learn that the gamble was one that paid off. In a study undertaken in 2005 by Davey, the empirical evidence shows that of the 61 panel cases where implementation was due as of 31 December 2005, roughly 60% of panel reports requiring implementation were promptly

³⁵ *Ibid.*

³⁶ See *supra* Article IX, Marrakesh Agreement Establishing The World Trade Organisation.

³⁷ Keohane and Nye, *op cit.* at 19.

³⁸ *Ibid.*

implemented³⁹. Another 20% were implemented, but with significant delay. In three cases (about 10%), there was dispute over implementation (ie. the matter was appealed), while in a remaining three cases (another 10%), non-implementation was admitted and there was no clear indication when implementation would take place.⁴⁰ Of the 61 cases, the USA ended up on the losing end 23 times and was responsible for four of the six non-implementation cases. The European Communities (EC) lost six times but implemented the panel's recommendations all six times.⁴¹

Interestingly enough, the GATT implementation record was equally as positive. Of the 16 GATT cases that required implementation, 12 were promptly implemented, 3 were delayed, and only one was significantly delayed. In this respect, Hudec's concern need not have been that the authority of the DSB would be challenged by the powerful states – he would himself have known better that these were the very states responsible for the orchestration of the multilateral trade agreements including the DSU. The real concern should be, as section 6.2 above identifies, that the less affluent economies are unable to comply, not because they oppose the authority of the DSB, but because they have not the resources to.

While this really is a problem, there is no evidence to suggest that the negotiating Members are not doing anything about it. In fact, former Secretary General of the United Nations Conference on Trade and Development (UNCTAD) Rubens Ricupero, shares his observation as a diplomat and negotiator that the Seattle Conference in February 2000:

³⁹ The timeframe for implementation is not set out in the DSU. Instead, Article 21.3 leaves to the parties to mutually agree on an implementation timeframe which should not exceed 15 months from the adoption of the panel or Appellate body report.

⁴⁰ Davey, 'Implementation in WTO Dispute Settlement: An Introduction To The Problems and Possible Solutions' (2005), RIETI Discussion Paper Series 05-E-013, available at: <http://www.rieti.go.jp/jp/publications/dp/05e013.pdf> (last accessed on 28 March 2013), at 9.

⁴¹ *Ibid.*

of sustaining legal order and consistency in the discipline of customs and international trade.

6.5 Is WTO Jurisprudence Less of a Diplomat's Jurisprudence Compared To The GATT?

Without hesitating, the answer has to be a yes. This is not to say the flexibility stopped. Diplomats continue to negotiate terms that are in their best interest but in the atmosphere of the rules based system. Negotiations and consensus is very much a continuous practice which characterises the WTO, which goes in some way to demonstrate the democracy of the WTO legal system, very much like how a Parliament would legislate. As recently as the meeting of the General Council on 13 September 2012, the Philippines requested a waiver to defer its obligations under the Agreement on Agriculture in order to further extend its special treatment for rice from 1 July 2012 to 30 June 2017. Some other delegations were obviously concerned and requested clarifications and consultations. The delegations which expressed concern expressed their willingness to continue further consultations on the issue with Philippines. The request for consultations was put forward to the General Council, as a result of which the General Council would not be able to consider the waiver under the relevant Article of the Covered Agreement in question. The General Council agreed.⁴³

In considerations these characteristics after the WTO's evolution from GATT, Keohane and Nye also agree that the WTO conforms better to the Rule of Law. This expression aptly summarises the position of the WTO's jurisprudence in the modern day:

⁴³ WTO General Council Minutes of Meeting, Document No. WT/GC/M/137, 13 September 2012, para. 167.

‘Its [the WTO] Appellate Body set out detailed rules of procedure at the outset, and its opinions have included more rigorous legal analysis than was customary in the GATT. Compared to traditional diplomatic negotiations, the WTO’s procedures are perfectly lucid. Democracy is not identical to the Rule of Law, but certainly depends on it; so in the regard also, the WTO could be considered a democratic advance on its predecessors.’⁴⁴

It is difficult to conclude otherwise than to admit that the modern day WTO agreements is a body of law and does mimic a domestic legal system, even though it is a given that the result may very have been fortuitious in a sense that all its Members opted to comply. With no central authority to enforce the laws, it could still very well happen one day that one very powerful Member decides to turn the tables and ruin the legal order in the system. But the GATT had been in existence for 48 years and the WTO now approaching its 18th year and yet the historical record shows that the opposite is true and legal obligations are more often observed than breached as accountability is tightly monitored by the consensus based Membership. Hudec has indeed, rightly pointed out that the authority of formal law commands more respect than a mere agreement does and maintains the prestige and authority of the organisation so long as Members take ownership of the rules and accept the responsibility to co-operate to continue the maintenance of legal order and to be bound by the rules to which they negotiated.

⁴⁴ Keohane and Nye. *op cit*, at 20.

CHAPTER 7. CONCLUSION

This dissertation has demonstrated that the WTO's jurisprudence is, for the risk of sounding like a broken record, complex. The Organisation and its agreements are a complex legal entity. Through various legal veins, some limitations (largely relating to the MFN principle and access to the DSU) enable members to contract out of the WTO through Free Trade Agreements. The doctrine of *stare decisis* does not apply and non-violation impairments are actionable under the agreements. There is also enormous flexibility for contracting out, if the need so arises. Yet, it is rarely (if ever) done at all.

Assessing what the legal limits are on the flexibility of the rules based system in the WTO allows for better understanding of the WTO as a global system of governance, or as a legal entity as some scholars would put it. This dissertation concludes that both the rules based rule of law and flexible models are incomplete and that neither aptly describes the WTO's jurisprudence. However, there are both structured rules based and flexible elements to the WTO. There are certain core obligations that WTO law has sought to assert as non-derogable (such as observation of the MFN and non-discrimination principles) while permitting parties to form Customs unions by contracting via Free Trade Agreements. Parties are thus able to alter their WTO obligations on a bilateral or regional basis on most, but not all, issues. And while it seems that some features of the WTO contradict the conventional rule of law standard, it has been demonstrated time and over again that the Dispute Settlement Board, the judicial arm of the WTO, interprets the substantive law in a

manner consistent with the rule of law. It has been proven wrong that the authority of the WTO cowers before the might of the USA and the European Union. Rather, the real stumbling block to full compliance is that of least developing economies needing enormous amounts of funding to bring themselves into compliance.

Bingham, who developed a theory of the international law and Hudec, who is widely acclaimed for his theory of flexible law in the multilateral trading system, two theorists whose works were extensively researched in this dissertation, did not integrate both ends of the WTO's reach when developing their models. Thus, one failed to describe the WTO regime correctly, the other did not describe the rule of international law in its complete sense. The WTO is neither a purely rules based regime nor a flexible, but incorporates elements of both. This new discovery of course challenges some current understandings. First, the fact that the WTO is neither a purely rules based nor a purely flexible regime has significant consequences in legal theory. Rule of law scholars have generally understood the principle in the common law sense and tried to translate it into the realm of international with a general perception that basic legal principles of domestic should technically be the same at international level, just between states instead of between individuals. Wrong. This analysis fails to support the reality that international legal regimes can be much more complicated. They can contain elements of both public-style constitutional regimes and private-style contractual regimes.¹ The nature of a legal regime is best understood by analysing the extent to which legal obligations are non-derogable to the parties of the regime.

¹ See Langille, *op cit.* at 1517.

Second, this analysis raises questions as to how the WTO's was labeled with a reputation as a rule of law regime. It is true that it is largely consistent with the rule of law but to have it labeled a symbol as such is not quite accurate. The WTO is system of laws based on consensus at the global level, and it does possess a widely respected dispute settlement system with legally binding obligations imposed on members. Legal systems consistent with the rule of law are generally characterised for their ability to ensure compliance with legal obligations through coercive legal rules. Since the WTO is widely considered to be a rules based regime, then it must have significant authority to coerce member states into complying with its laws. However, the fact that the WTO is a rules based system may be moot, since parties either already voluntarily want to comply because they were responsible for negotiating the terms, or they can contract out of their obligations to a large extent. Those who raise the point of the DSU's success in sustaining legal order in the multilateral trading system may therefore wish to reconsider their position.

As far as the rule of law between states is concerned, Judith Shklar may have hit a few raw nerves by her provocative "ruling class chatter" allusion on the topic², but she does acknowledge there is more to it than mere ruling class chatter. At the international level, however, the concept of the rule of law can only be meaningful if a coherent and consistent meaning at the national level can be identified. The applicability of the term to power relations between States needs to then be differentiated from that between the State and the people. It is submitted that it cannot be taken for granted that the rule of law is always a useful principle. Through examining the evolution of the term, this dissertation has

² See n. xx, *supra*, Chapter 3 above.

attempted to identify and develop a “core definition”³ of “rule of law” that appropriately sets out what the term was developed for and is applicable to a legal culture which for a long time prized its flexibility and outwardly dissed the overtly legal mindsets of lawyers and judges. The price of this finding this core definition is to strip the concept of other “imported” political agendas such as democracy, freedom, access to justice, human rights, and legal clarity. Whether or not it is a price worth paying, it has become clear that these imported “virtues” which have now become commonly accepted rule of law standards may properly be seen as distinct from the rule of law.

In this sense, the core of the rule of law points at one root -- the historical of efforts to restrain sovereign power that continue in many States today, including some established liberal democracies under the guise of what many contemporary government claims to be in the interest of national security. As Chesterman points aptly points out the fallacies of extending the theory to the international level:

‘At the international level anything resembling even this limited idea of the rule of law remains an aspiration. Yet seeing the rule of law as a means rather than an end, as serving a function rather than defining a status, more accurately reflects how the rule of law developed and has been imported or imposed around the world. And for international law, this understanding appropriately highlights the political work that must be done if power is to be channeled through law.’⁴

The Rule of Law therefore, in my view, means at the multilateral trade level that the judicial (DSU), executive (the WTO) and the legislative (contracting Member states) arms should not be tugging against each other. A rule of law means there should be consensus

³ This expression is borrowed from Chesterman.

⁴ Chesterman, *op cit*, at 39.

how the law and its substantive and procedural provisions should be applied, and interpreted accordingly.

Does this then mean that the WTO can now take pride, kick of its shoes and be proud of itself that it is the most successful rule of law based international system of governance? Well, not quite. There are other, newer legal issues that have not yet been resolved – amongst them, as Ricupero shares, are the fact that participation in the decision making process is still not yet inclusive. In particular, least developed countries still find themselves being left out of key decision making processes, only to find themselves being bound by the decisions later on. Keohane and Nye call this the ‘club mentality’ of negotiators.

Critics have been emphasising that different sets of issues: direct participation, transparency and accountability still plague the WTO’s decision making processes and procedures. According to Keohane and Nye,⁵ critics continue to observe closed clubs indirectly linked to popular demands by ‘long and opaque chains of delegation.’⁶ Their study uncovered three issues which are still of concern. Firstly, there is a lack of transparency in the WTO process. Secondly, there are still barriers to the participation of interested groups (eg. NGOs and corporations), which will continue to demand for attention to be allowed in until institutional changes are made. Thirdly, ‘there is still an absence of politicians with ties both to the organisation and to constituencies’⁷. To state the fact in a manner that best describes the situation today (and it has been the situation for some time):

⁵ Keohane and Nye, *op cit*, at 25.

⁶ *Ibid*.

⁷ *Ibid*.

‘Delegates to WTO bargaining sessions, though instructed and accountable to elected officials in democracies, often act in the privacy of the clubs built around their issues and related institutions. It is difficult independently to check their claims about how hard they bargained for particular advantages. Negotiators know how to “wink” – to signal when they are only going through the motions or wish to use a demand as a bargaining chip for something else. If outsiders cannot see the winks, they have a hard time judging how well they were represented in the process. Indeed, one of the great advantages for fostering interstate cooperation is this opaque feature of the negotiations taking place among club members, behind closed doors. In representative democracies, participation is channeled and in many ways limited, but some opportunities are available to make one’s views known. In the United States Congress, for instance, hearings open to spokespeople from a variety of groups, in part satisfy demands for participation. With respect to rule-making in the WTO, only idealistic proponents of unitary democracy would demand that the public be allowed into the negotiating rooms, where deals are being made. The consequences for trade liberalization of doing this, would probably be grave.’⁸

With these having been highlighted, it is certainly hoped that further research, should it be undertaken, would pay attention to improving these matters and not leave the achievements of what the negotiators have fought so hard for to go to waste, whether from a legal, economic, or political perspective. The WTO, minus a few features here and there, is a fairly successful rule of law based international system of governance. All it takes, however, is for one dissent powerful enough to throw the system into imbalance. It has not happened yet, but there is no guarantee it would not. If eternal vigilance is the price one pays for freedom and democracy, so too the Rule of Law can never be taken for granted.

⁸ *Ibid.*

Bibliography

Books

1. Barnett, Hilaire. *Constitutional and Administrative Law* (2004), Fifth Edition.
2. Sherman, S.L & Glashoff, H. *Customs Valuation: A Commentary on the GATT Customs Valuation Code*. (1988)
3. Bingham, Thomas H. *The Sixth Sir David Williams Lecture: The Rule of Law*. (2006)
4. Mavroidis. Petros C. *Trade in Goods: The GATT and Other Agreements Regulating Trade in Goods*. (2008)
5. Hudec, Robert E. *The GATT Legal System and World Trade Diplomacy*. (1975)
6. Jackson, John. H. *World Trade and The Law*. (1969)
7. Meier, G.M. *Problems of Trade Policy*. (Oxford University Press). 1973
8. Trebilcock, M.J and Howse, R. *The Regulation of International Trade*, (1999) 2nd Ed.
9. Jowell, Jeffrey and Oliver, Dawn, *The Changing Constitution*, (2007) Oxford University Press. 6th Ed.