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Does Strategic Ambiguity Have a Place in the WTO Dispute Settlement Understanding?

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The notion of strategic ambiguity is deemed by some as beneficial to the WTO Dispute Settlement Understanding (DSU). However, strategic ambiguity does not complement or support the rule based rationale that underpins the WTO Agreements as a whole. Analysis of the WTO DSU provisions indicate that it was intended to be a rule-based mechanism. When viewed from a practical perspective in relation to the final outcome of the *US-Shrimp* case, the damaging aspects of strategic ambiguity to the DSU can be fully appreciated.

Keywords: WTO, Dispute Settlement Understanding, strategic ambiguity, *US-Shrimp*

Introduction

The notion of strategic ambiguity in the World Trade Organisation (WTO) Agreements is often offered as an explanation to why some elements of the Agreements fall short of providing clear, enforceable rights (Carmody, 2002). The provisions relating to special and differential treatment for developing members are notoriously famous for falling under this label (Martin, 2013). However, an often overlooked area of "strategic ambiguity", namely in the dispute settlement mechanism contains a similar weakness that has the potential of causing even greater injury to the forum and its ability to provide a stable platform to support the multilateral trading system (Martin & Shadman-Pajouh, 2019).

Eisenburg (1984) believed strategic ambiguity enables expression in a way that allows freedom to alter operations that have become less useful over time. Marshall however goes on to state that the difficulty or challenge is to know the difference between being ambiguous and being strategic about your ambiguity[1].

The term "strategic ambiguity" can be defined as the art of making a claim using language that avoids specifics. Yet with this definition, it is difficult to see how a claim/assertion can be successful if its objective is left unclear. Supporters of strategic ambiguity say that it will to promote unified diversity by taking advantage of diverse meanings people can give to the same message. However, it is said to preserve those in a privileged position by shielding those in power from lose scrutiny by others. Therefore, the general literature on strategic ambiguity seems to focus on its strategic use where ambiguity is necessary to promote discussion and

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[1] See https://www.marshallstrategy.com/think-big-understanding-the-value-of-strategic-ambiguity/.

negotiation (Bronckers, 1999), and that those in a privileged position, in the context of negotiation the more powerful, are advantaged by such ambiguity (Eisenburg, 1984).

In international law, strategic ambiguity refers to an approach that seeks to inject uncertainty of outcome into diplomatic dialogue to destabilise a nation's enemies or competitors (Hendriz, 2018).

It is submitted that the value of strategic ambiguity needs to be understood within the context that it is being applied, and often, it can be more damaging than not when applied in the wrong context. This is best explained by a quote from Troitskiy (2018), "ambiguity contributes to global uncertainty and risks, but can be a force for good when practiced consensually". This suggests that there must be an agreement by parties accepting the use of ambiguity in order to achieve a negotiated outcome. When such a consensus is absent, ambiguity will not serve everyone's interest (Centre for Strategic and International Studies [CSIS], 2012). This can be seen from the confusion as to who succeeded control over Taiwan after Japan relinquished sovereignty over Taiwan as part of the U.S.-Japan Peace Treaty in 1951, but the treaty was silent as to whom the sovereignty was relinquished (D'Amato, 1996). So, there are times when the context calls for clarity, and certainty will benefit all concerned.

In the WTO Dispute Settlement Understanding (DSU), strategic ambiguity takes particular effect at the back end of the dispute settlement process. Whether a dispute is regarding a clear, direct violation of the rules or not, if an infraction is found, the Dispute Settlement Body (DSB) will make a ruling in the form of a "recommendation", for the infringing member to "bring the measure into conformity" with that agreement. This is notwithstanding that everywhere else in the DSU there is clear emphasis on clarity of process and timelines.

According to proponents of this type of "recommendation", the ambiguity of such decisions is strategic, in that it is purposefully unclear to bring parties to the negotiating table (Carmody, 2002). The rational given is that it allows members to deliberate without outside interference where parties could fashion the relief and the job of the decision-maker is only of legal interpretation rather than material remediation (Carmody, 2002). Taking up this point with regard to the plethora of issues a developing country has to weigh when considering to commence a dispute procedure against a more powerful country, then it is not too safe an avenue, due to the imbalance in economic power between members of the WTO. Notwithstanding the lack of wisdom for this kind of deliberations to fashion the relief for the purposes of discussion so far under this view should be, and is already provided for under Article 4 of the DSU requiring consultations.[2] This is a clear indication that the notion of strategic ambiguity has been preserved in the WTO DSU. The objective of this ambiguity is agreed by members to be undertaken and only where it has failed to deliver an agreed settlement would the adversarial process begin. The requirement for consultation further emphasizes the weakness in the consultative process where a powerful member would benefit from delaying the discussions to the last stage of the dispute settlement process, whilst continuing the application of the inconsistent measure.

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

[2] Japan and EC submissions TN/DS/W/32 and TN/DS/W/38. As the DSU provides sufficient avenue for consultations within the dispute settlement process, additional consultations would eat away at the already sensitive issue of the duration of a dispute settlement process.

According to this approach, to achieve compliance of the wrongdoer rather than correction of the plaintiff's injury would seek to prohibit the reinstitution of an offending measure, but not forbid measures of equivalent effect, provided they are implemented in a WTO-consistent manner (Carmody, 2002). In *U.S. Superfund*,[3] a case involving a tax differential on petroleum products refined in the United States (U.S.), the panel explained that the respondent had three remedial options and that it was not the role of the panel to dictate any particular one. Accordingly, the three options included lowering the tax on foreign-refined crude or raising the tax on domestic crude or harmonizing the rate applicable to both domestic and foreign refined at some third point (Carmody, 2002). Given the General Agreement on Tariffs and Trade (GATT's) objective of lowering trade barriers, the panel should have noted the three options but recommended the best one in line with the objectives and spirit of the Agreement. The ability to make suggestions on how to bring measures into conformity with WTO rules is a powerful tool that should be used more often (Pauwelyn, 2000) to suggest a specific measure for implementing WTO dispute settlement decisions. Defendant countries taking the suggested implementing measure would benefit from a legal presumption of WTO consistency and would dispense with the problems and concerns regarding ambiguity in the dispute settlement process has caused, which in turn would only make the dispute settlement mechanism (DSM) better, providing credibility for the DSU and strengthening the multilateral trading system.

The question to follow is what did the members want from a DSM when the WTO agreements were being negotiated? To answer this, it is important to appreciate the historical development of the multilateral trading system (MTS) in order to understand what it was that members were seeking from such a system, to be able to judge if the WTO is a context where strategic ambiguity would be damaging or a force of good.

The GATT 1947 accommodated seven rounds of multilateral trade negotiations. The first five negotiating rounds focused on tariff reductions. However, at the end of the fourth round, there was an indication for the need address non-tariff barriers. In the sixth round, one of the goals was the negotiation of non-tariff measure obligations. The seventh round was more devoted to non-tariff measures than tariffs, indicating the international trading environment required a broader regulatory base resulting from a changing international trading environment. The sixth and seventh rounds of negotiation also went beyond the one year duration of preceding rounds. Issues under discussion were getting more complex. The necessity was to ensure that the interest of developing countries was addressed. No longer was it viable or possible to side-line their concerns as they have become the majority of the membership and their role in the MTS had grown greatly since 1947.

The GATT dispute settlement system was criticised for being flawed. However, what was the purpose of the system in the first place? There are two views in this regard. Firstly, that dispute settlement was orientated towards conciliation and negotiation. The second view is that it was oriented towards rule integrity. The answer will lie in the power-diplomacy or rule-based discussion. According to a draftsman of GATT, at the preparatory meetings, the focus was to deal with the subject matter in precise detail so that obligations of member governments would be clear and unambiguous. The original intention was for the GATT to be eventually absorbed into and be part of the ITO which was premised on clear, strict rules. Further, the shift in the WTO from working party to a panel with some stress on third party impartiality provides strong evidence that it was mean to be a rule-oriented system. This has led some authors to conclude that the rationale of the WTO was the establishment of a rule-based as opposed to a power-based system of trade relations.

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

Historically major nations participated in conferences between the two world wars to solve concerns around international economic relations and law. It is claimed that two aspects of the interwar conferences were of great value. Firstly was the realisation that in the past there was a tendency to be satisfied with sweeping, unspecific statements on best principles, which always led to often a meaningless outcome without hard and fast commitments. The second was their episodic character. These can be grouped as gaining insight from past mistakes where agreements of a vague nature did not serve to attain the requirements of the trading environment of the day. Further, without any long term framework, it was easy for trading partners to slip back to mercantilist based policies.

It is also said that two lessons were evident from the above. Firstly, future initiatives will have to avoid the lack of clarity arising from unspecific sweeping statements that led to unclear, non-binding outcomes. Resulting from this, clear specific details in binding form were essential and needed to be worked out. Secondly, the resulting binding commitments would require a body or institution to maintain and administer the resulting rights and obligations. It becomes clear that the philosophy behind international economic law appreciated the need for a rule-based relationship between nations.

Even today, it is said that the essential argument for trade international trade agreements is the establishment of a fair and equitable trading system based on binding rules (Martin, 2013). When evaluating the effectiveness of existing international rules, there are several important policy issues which do not often get addressed. Firstly, should the legal system be improved to make rules more efficient? And second, should new rules be added? Another way of looking at this is a situation when it arises that rules can/should be breached; this is when reform is badly needed.

One way to explore the question of power-oriented diplomacy as opposed to rule-based diplomacy is to compare these two techniques of modern diplomacy. In peacefully settling international disputes, there are two types approaches. Firstly, settlement by negotiation and agreement based on inevitably the relative power status of the parties and alternatively, settlement based on rules to which both parties had previously agreed on. Where agreed rules for governing the economic relationship between parties exist, as in the WTO, a system that requires adherence and implementation of those rules is preferred. However, it is said that rules alone are not enough. Should parties come to a stale-mate where interpretation of such obligations arises? A DSM that is capable of producing a fair interpretation of the rules is necessary. If this is not the case, then parties are left to rely upon their relative power positions for a solution. As a result, the power-oriented negotiating process becomes increasingly difficult to pursue and hence, the rule-oriented system becomes the preferred route towards the sought after stability and predictability. To achieve this, obligations had to be clearly demarked in agreements to create enforcement of rights through the rule-based system. Hence, an efficient, effective, unambiguous, and fair dispute settlement mechanism becomes extremely important.

In this regard, upon a close reading of Article 3 of the DSU entitled “General Provisions” provides an appreciation of what the WTO DSU seeks to achieve. Article 3:4 requires that there should a “satisfactory settlement of the matter” (of disputes) in accordance with rights under the understanding and covered agreements. Article 3:7 states that a mutually acceptable solution is preferred, and where this is not possible, upon a finding that a measure is inconsistent with a members WTO obligations, three outcomes are provided, in order of priority: (1) the withdrawal of the measure found to be inconsistent; (2) compensating the complainant where the responding member cannot withdraw the offending measure immediately; and (3) as a “last resort” the suspension of the non-complying member’s concessions under the WTO Agreements. This is to address the

requirement of Article 3:2 DSU for the need to provide security and predictability to the multilateral system. According to Article 3:2, this will include an outcome which must not add or diminish rights under the agreements. Article 3:3 of DSU further requires a prompt settlement of disputes as being "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Article 3:5 of DSU stresses that all solutions resulting from the dispute settlement process must be consistent with the covered agreements in accordance to rights and obligations under the DSU and the covered agreements. Article 3:8 lends further support for the rule-based underpinning of the WTO agreements as it requires that where a measure complained against leads to nullification and impairment, the burden of proof is on the respondent to rebut the charge. Article 3:10 of DSU requires good faith engagement of the parties concerned to resolve the dispute.

The analysis of Article 3 of DSU requirements are very clear in that it requires good faith participation, for a settlement that is consistent with the WTO agreements that cannot add or diminish existing WTO rights and obligations of the disputing parties. This informs us that breaches of obligations cannot be resolved by means that are not in line with the WTO Agreements; it becomes clear therefore that the WTO supports the rule-based approach to legal relations of WTO members.

Included in the clear objectives of the WTO DSU as contained in Article 3 are the parameters for the role of the extent of the strategic ambiguity element in the WTO Agreements. This has been maintained through Article 4 which requires consultations before the adversarial aspect of the WTO DSU begins. It is compulsory for members to engage in consultations to try and settle any dispute. Such consultations must be undertaken within the requirements of Article 3, as it sets out the objectives to be achieved through dispute settlement. Therefore, disputing parties must undertake consultation is good faith to try and arrive at a mutually acceptable solution and where this is achievable it must be in accordance with rights under the understanding and covered agreement which cannot add or diminish rights under the DSU and the covered agreements. It is only when consultations do not achieve such a solution will the dispute escalate into a case which needs to be argued before a panel. When the panel finds that the measure complained against is inconsistent with the offender's WTO obligations, Article 3:7, list of priorities, will engage.

The much argued basis for ambiguity by proponents of the concept substantiate their claims by stating that Article 19:1 states that where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned to bring the measure into conformity with that agreement. However, they ignore the second half of Article 19:1 that goes on to state that "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations". Therefore, when read with Article 3 objectives, particularly when there is a nullification or impairment directly affecting the rights of a member as a result of a breach of the covered agreements, the way forward is for the panel or Appellate Body to require the withdrawal/removal of the offending measure by the member concerned. Due to the emphasis on a rule-based relationship between members especially in relation to dispute settlement, there is no place for strategic ambiguity at this stage of the dispute settlement process.

The outcome of the *U.S.-Shrimp*[4] case requires some consideration in regard to the above discussion. The U.S. unilaterally enforced its domestic laws against a number of WTO members via an embargo on the export of

[4] *United States-Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R.

Shrimp into the U.S. The U.S. used every possible delaying mechanism within the WTO DSU not to remove its measure which was found to be inconsistent. When the U.S. had not done anything in relation to the inconsistent measure, one of the complainants, Malaysia decided to request for an Article 21 panel to be established as part of the surveillance of implementation of recommendations and rulings mechanism of the WTO DSU. The U.S. argued that notwithstanding the lack of compatibility of its actions/measures as sea turtles were a "shared resource" it would be possible to bring its offensive measure into conformity with its WTO obligations by initiating a multilateral turtle conservation programme of which Malaysia must be a part of. This was accepted by the Article 21 Panel as being sufficient to bring that measure into conformity with the WTO. The outcome of the case could be seen as a legitimization of unilateralism, and would further contribute to the exclusion of developing countries in participating in dispute settlement procedures due to the resulting increased uncertainty of what conformity may entail. It is submitted that the contention that implementation in the *Shrimp* case is a multilateral concern and that it illustrates that compliance will probably go far beyond the original complainants to involve all those interested in supplying the relevant market (Carmody, 2002) is flawed for a number of reasons. Firstly, the negotiation of a multilateral turtle conservation agreement should not be made a criterion for conformity as the WTO offers the forum to initiate new multilateral agreements, and the DSU as an avenue to do so is incorrect. The effect of allowing this interpretation of conformity also impeaches on the sovereignty of a member nation in interfering with its choice of whether to agree to negotiate a new endeavor. Further, as in this case[5], the pressure by environmental lobbyist was the driving force to the U.S. administration enforcing a law that was in existence for some time but never applied extraterritorially for obvious reasons.[6] Secondly, members conduct themselves based on negotiations already concluded. Accepting negotiations on a separate agreement as part of conformity is akin to asking members to negotiate on something where negotiations have already concluded and rights and obligations already exist, ignoring the doctrine of *pacta sunt servanda* in general international law and disrupting the already existing negotiated balance of rights and obligations (Charnovitz, 2001). The fact that there was a lack of consideration on the complainant's persistent assertion that the negotiation of a multilateral turtle conservation agreement and the conformity obligations of the U.S. for the case at hand were separate issues, sacrifices the main aims of the DSU[7] in favor of strategic ambiguity. Thirdly it puts market access (for the complainant) in a worst position then before the new negotiations and the burden of obligations are operationalised before an agreement is reached, hence adding obligations upon the complainant, and diminished the U.S. responsibility to adhere and not violate its obligations under the WTO agreements. Finally it ignores the issue of intentions of parties when adopting the agreement.

The trade impact of such a situation as in the *Shrimp* case is obvious. Recovery of losses suffered resulting from the loss of market share and earnings are however, under the WTO different from that of state responsibility under general international law as expounded by the *Chorzow Factory*[8] case, being to wipe out all the consequences of the illegal act. Reparation in WTO is first and foremost achieved by cessation of the violation. Compensation is a temporary measure only when cessation cannot be undertaken immediately. In the *Shrimp* case, the lack of compensation during the time the U.S. takes to negotiate a multilateral shrimping agreement for

[5] S. 601 of the U.S. Endangered Species Act.
[6] Paragraph 2(a) of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations encumbers upon members to have submitted the WTO Agreement to their respective authorities for approval, therefore ideally there should never be such an application of a domestic law extraterritorially in violation of WTO rules.
[7] Article 3(6) DSU.
[8] *Charzow Factory* (1927), PCIJ, Series A, No. 9, p. 29.

losses the complainant continues to suffer goes unappreciated.

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

The Article 21(5) panel in this case referred to the good faith efforts to reach a multilateral agreement is satisfied, compliance was deemed justified[9]. The U.S. government never approached the Malaysian Government before instituting the shrimp embargo. It only referred to the multilateral turtle conservation agreement after the finding of non-conformity by the Appellate Body in the original action. The Malaysian government's response before and during the Article 21(5) panel proceeding was that compliance and the proposed multilateral turtle conservation agreement were separate and distinct issues. The manner in which the panel was able to read good faith from this adds even greater uncertainty and lack of faith of developing countries in the DSU. According to some authors' Malaysia's ability to demand another Article 21(5) panel is open-ended and that WTO conformity by the U.S. may be reassessed at any time (Kearns & Charnovitz, 2002). It is submitted, that for a developing country that has had to endure an embargo in excess of seven years, it is highly unlikely that Malaysia would seek another Article 21(5) panel unlike Canada in the case of *Brazil-Aircraft*[10], for at least two reasons. Firstly, it might be circumspect of what the panel rule, and secondly there has been irreparable damage to its shrimping industry. The impact of the 21(5) panel report was also to indirectly to create a reasonable period of time in perpetuity. Time can never run out as long as there are "good faith" efforts, the impact of such rulings are very obviously outside the competence of the DSU. It has been held that there are three key features that set the WTO DSU apart from the rest. One of these is its ability to render binding decisions (McGivern, 2002). Binding decisions that are ambiguous enough to accommodate the declaratory view, is not worth the financial and political costs for a weaker nation to be willing to utilize the dispute settlement system. An interesting note is that the matter of progress of the multilateral turtle conservation agreement has never been investigated by the WTO.

Conclusion

The preceding discussions demonstrate the centrality of the dispute settlement mechanism, especially in a multilateral trade agreement. Without an efficient, fair, and effective dispute settlement mechanism supporting the objectives of the system, its regulations would cause the system to collapse in favour of alternative means to settle a dispute, not always necessarily for the benefit of all those involved, especially the weaker developing countries.

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[9] WT/DS58/RW.

[10] *Brazil-Export Financing Programme for Aircraft* WTO Doc WT/DS46/ARB.

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