**A REGULATORY MOSAIC RESTING ON A TRIPOD: THREE OPTICS OF
THE GOVERNANCE OF DEVELOPING COUNTRIES IN THE UNFOLDING
TRADE ARCHITECTURE**

by

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ABSTRACT

This thesis seeks to examine the regulation of trade of developing countries by the World Trade Organization from a theoretical, institutional historiographical and a judicial standpoint. In doing so, it attempts to develop a theoretical scaffolding, relying on aspects of the theoretical trajectories of Michel Foucault and Jurgen Habermas to reflect on what that regulation might entail for developing countries. The institutional historiographical perspective eschews, as much as possible, a descriptive narrative but is rather thematic examining key issues affecting developing countries from a broad to a narrow mosaic. The judicial perspective involves an analysis of a case concerning a developing country in the World Trade Organization exploring the dimensions of judicial regulation. Each standpoint, though addressing different dimensions of that trade regulation of developing countries in the current trade regime, is nevertheless to be considered one part of a tripod on which a lens for examining such regulation rests.

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TABLE OF CONTENTS

ABSTRACT

ACKNOWLEDGMENTS

INTRODUCTION

I	THEORETICAL CONCEPTS AS GOVERNANCE: A SOUTHERN LOCATION OF FOUCAULT AND HABERMAS IN THE UNFOLDING TRADE ARCHITECTURE	1
I	INTRODUCTION	1
II	SECTION A: FOUCAULT ON POWER	2
(i)	On Knowledges and Methodology	2
(ii)	Struggle As a Metaphor	5
(iii)	Juridical Forms and Power	6
(iv)	Discipline and Normalization	9
(v)	On the Specifics of Power and Power Relations	10
III	SECTION B: LOCATING A SOUTHERN TRADE PERSPECTIVE WITHIN THE FOUCAULDIAN PROJECT	12
(i)	On Knowledge and Power	12
(ii)	The Permeation of Power and the Metaphor of Struggle	14
(iii)	Gramsci's Hegemon and the Expulsion of Law	15
(iv)	Of Masks and Concealment	16
(v)	Disciplinary Power and the Subject	17
IV	SECTION C: REFLECTIONS ON LAW AS A MEDIUM: JURGEN HABERMAS ON LAW AND THE PROCEDURALIST LEGAL MODEL	18
(i)	Background and Overview	18
(ii)	Juridification and Juridificatory Thrusts	18
(iii)	From Law as Medium to a Proceduralist Legal Model	21
(a)	Law as Medium and Law as Institution	21
(b)	Proceduralist Legal Model	23
(iv)	Reification	24
V	SECTION D: A SOUTHERN LOCATION OF HABERMAS	25
(i)	The Law as a Functional Tool	25
(ii)	Rationality and Law as Institution	26
(iii)	Proceduralist Legal Model	27
(iv)	Juridification, Post-Colonial Law and Counter Strategies	28
VI	SECTION E: SUMMING UP	32

II	INSTITUTIONAL HISTORIOGRAPHY OF TRADE GOVERNANCE: AN EMBEDDED EVALUATION OF THE LEGAL REGIME OF DEVELOPING COUNTRIES IN THE INSTITUTIONAL REGULATION OF TRADE	33
I	INTRODUCTION	33
II	SECTION A: THE FUTURE MEDIATED BY THE PAST	34
III	The Evolution of Trade Regulation	34
IV	The 19 th and Early 20 th Century Developments	35
(i)	The Cobden-Chevalier Treaty	35
(ii)	The Design of the Bretton Woods Institutions	37
V	SECTION B: THE INSTITUTIONAL REGULATION OF TRADE	40
VI	The Still-born ITO	40
VII	The GATT	43
(i)	Application of the GATT	43
(ii)	Decision-Making by Consensus under the GATT	44
(iii)	Formation of the United Nations Organization and its influence on the GATT	46
(iv)	The United Nations Conference on Trade and Development and the GATT	47
(v)	Key Developing Country Legal Provisions under the GATT	48
(a)	Article XVIII of the GATT	48
(b)	Part IV of the GATT	49
(c)	The Enabling Clause	50
VIII	SECTION C: SOME REGULATORY DIMENSIONS OF DEVELOPING COUNTRIES UNDER THE WORLD TRADE ORGANIZATION	50
IX	Threshold Issues	50
(i)	The Connection Between the GATT 1947 and the WTO	50
(ii)	The Meaning of a Developing Country	52
X	Decision-Making by Consensus under the WTO Agreement	53
XI	A Hard-look at Developing Country Legal Provisions	57
(i)	Special and Differential Treatment of Developing Countries Under the WTO Agreement	57
(ii)	The Legal Nature of Developing Country Provisions	59
XII	Imprints of the Past and New Beginnings	62
III	THE DECISION IN THE <i>INDIA-QUANTITATIVE RESTRICTION CASE</i> AS JUDICIAL GOVERNANCE: THE DEVELOPING COUNTRY AS A SUPPLICANT BEFORE THE DISPUTE SETTLEMENT PANELS	64
I	INTRODUCTION	64
II	The Normative Framework for the Imposition of Quantitative-Restrictions by a Developing Country	65

III	<i>The India-Quantitative-Restriction Case</i>	66
A	Background Facts	66
B	The Arguments of the Parties to the Case	67
(i)	India	67
(ii)	The United States	68
(C)	The Decision	70
(i)	The Decision of the Panel	70
(ii)	The Decision of the Appellate Body	71
IV	Situating the Developing Country as a Supplicant Before the Dispute Settlement Panels	72
(A)	Judicial Nullification and Impairment or Judicial Enhancement	72
(i)	Institutional Competence	72
(ii)	Special and Differential Provisions Accorded to Developing Countries under <i>Article XVIII: B of the GATT 1994</i>	77
(iii)	The Revelation of the Technique of Inversion	80
(B)	Distributed Governance in the Context of Judicial Governance: The Role of the Fund in making Determinations on Members Balance-of-Payments Position	80
(i)	The Finality and the Weight to be Attached to the Fund's Determinations	80
(ii)	Echoes of the Bretton Woods	85
IV	CONCLUSION: GOVERNANCE DEFICITS AND THE PROSPECTS OF A NEW DAWN	86

BIBLIOGRAPHY

INTRODUCTION

Two related considerations, mainly, motivate the subject matter of this thesis. The first seeks to engage with the notion of the unfolding trade architecture as being one shaped by law. A theme that resonates repeatedly in it argues, that the absence of law in that enterprise could mean the enthronement of power in inter-state trade relations. To avoid that, therefore, the law, as an arguably impartial arbiter, could be employed as an antidote to the malady of power. The second stems from an impulse to pause from the somewhat obscuring rationality fostered by law, to scrutinize its critical nodal themes concerning developing countries in the trade system.

The thesis deals with subjects seemingly different from each other thereby giving an impression of discontinuity. However, the thesis seeks to elucidate an overarching objective, namely, to develop, from the perspective of developing countries in general, a more profound imagery of key themes in the regulatory trade architecture. Towards that end, the thesis adopts a methodology that anchors its examination of the regulatory trade system on a tripod encompassing seemingly disparate themes, albeit having the same objective. The approach here bears close resemblance to Michel Foucault's methodology of genealogy.

This thesis is comprised of four Chapters exploring the governance of the trade of developing countries from a theoretical, institutional historiographical and a judicial standpoint. Each Chapter contains a brief introductory note of objectives thus diminishing the need for a lengthy introduction of them here. Chapter One builds on the theoretical resources of Michel Foucault and Jurgen Habermas in a project of examining what the unfolding rules-based system of trade might mean for developing countries. Chapter Two

attempts to locate developing countries in the institutional historiography of trade regulation and proceeds from a broad thematic examination to a narrower context. Chapter Three engages in a case analysis involving a developing country, to focus on the dispute settlement panels, heralded as a harbinger of the rule of law in the trade relations of Member countries of the World Trade Organization. The final Chapter of the thesis sums up the arguments in the others.

This thesis does not canvas the argument that developing countries should withdraw from the multilateral system of trade. On the contrary, it remains perhaps, a surer route towards securing trade benefits in what seems to be a rapid legal spatialization of trade spheres. However, the arguments raised here should inform and contribute to the scholarship of developing country issues in the trade system.

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I THEORETICAL CONCEPTS AS GOVERNANCE: A SOUTHERN LOCATION OF FOUCAULT AND HABERMAS IN THE UNFOLDING TRADE ARCHITECTURE

I INTRODUCTION

Much has been made of the fact that the emergent system of trade architecture is shaped by a system of legal rules.¹ It is as if the mere usage of law² as the pertinent motif for such construction should assure all participants to the emergent trade construct and settles other incidental questions raised by that approach. This Chapter proposes to develop, a theoretical scaffolding for re-conceptualizing the perspective of law as an instrument shaping the emergent trade architecture particularly from the perspective of what that might mean for the South. That objective is informed by what is perceived to be the South's inattention to the other roles law plays, owing to its undue preoccupation with the function of law as a limiting tool against the exercise of power. For example, the law also conditions,³ constitutes and arguably reveals a quality indicating that it hardly ever completely rids itself from the company of power. Law as a tool for change, secures, contains, and could perpetuate the expression of power albeit retaining a semblance of

¹ Petersmann, Ernst-Ulrich, somewhat the most dedicated enthusiast of trade constitutionalism in: The GATT/ WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Boston, Martinus Nijhoff Publishers, 1997; Petersmann, Ernst-Ulrich, ed., International Trade Law and the GATT/ WTO Dispute Settlement, vol. II, Studies in Transnational Economic Law, Boston, Martinus Nijhoff Publishers, 1997; Petersmann, Ernst-Ulrich, The GATT Dispute Settlement System and the Uruguay Round of Trade Negotiations on its Reform, in Sarcevic, Petar, and Van Houtte, Hans, (eds.), Legal Issues in International Trade, London, Martinus Nijhoff Publishers, 1990, p.53; and, Petersmann, Ernst-Ulrich, How to Promote the International Rule of Law: Contributions of the WTO Appellate Review System, in Cameron, James, and Campbell, Karen, (eds.), Dispute Resolution in the WTO, London, Cameron and May Publishers, 1999, p. 75.

Hilf, Meinhard, Power, Rules and Principles-Which Orientation for WTO/GATT Law, JnL. Of Inter. Econ. L., (2001), vol. 4 p.111.

Lacarte-Muro, Julio, and Gappah, Petina, Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench, JnL. Of Inter. Econ. L., (2000), vol.3 p.395.

² Law should not be understood as being necessarily limited to any of its particular branches but perhaps as one indivisible entity for analysis.

³ For a leading account of the constitutive theory of law, see, Hunt, Alan, Explorations in Law and Society: Towards a Constitutive Theory of Law, New York, Routledge Publishers, 1994.

neutrality. This Chapter is therefore concerned, not necessarily with the obvious benefits of an increasingly legalized system of trade rules, but more with the not so obvious- the constitutive potential of law and its alliance with power. The Chapter seeks to advance that project mainly by employing aspects of the theoretical insights of Michel Foucault and Jurgen Habermas. It should however be noted at the onset that the Chapter does not attempt a comprehensive engagement with the works of those theorists but merely seeks to reflect on aspects of their work deemed relevant to the expressed objective here. Consequently, the Chapter will attempt to locate emergent trade patterns in the trajectory of both theorists' works. Furthermore, the Chapter does not attempt a comprehensive roadmap of what the dimensions of both theorists might mean, but only seeks to delineate the contours of what those theoretical insights might entail in terms of trade for countries in the South.

II SECTION A: FOUCAULT ON POWER

(i) On Knowledges and Methodology

In a key text adopting a thematic schema for presenting Foucault's works and publications, James Faubion reminds us that 'Power was not the rubric of a separate compartment in Foucault's work'.⁴ This requires that Foucault's treatment of the subject of power be excavated from the range of his works.

In one such work, Foucault notes what he refers to as 'subjugated knowledges'.⁵ By that Foucault means:

A whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive

⁴ Faubion, James, ed., *Michel Foucault: Power*, in *Essential Works of Foucault, 1954-1984*, vol. 3, New York, The New Press, 2000, p. xi (hereinafter, '*Essential Works*').

⁵ Gordon, Colin, ed., Foucault, Michel, *Power/knowledge: Selected Interviews and Other Writings, 1972-1977*, London, Harvester Press Limited, 1980, p. 79 (Hereafter, '*Power/Knowledge*').

knowledges, located low down the hierarchy, beneath the required level of cognition or scientificity.⁶

Foucault's intentions are fairly evident. He seems more concerned with how to pay attention to those systems of knowledges obscured by reason of their lack of elaboration, and perhaps, their lack of conformity with dominant notions of scientificity. Those disqualified knowledges, Foucault seeks to elevate, and to reflect on how they may be given more consideration. What seems instructive in this attention Foucault seeks to pay those subjugated knowledges is that for him, they reflected crystallized forms of an historical knowledge of struggles. Understood in that way, therefore, Foucault further explains:

In the specialized areas of erudition as in the disqualified, popular knowledge, there lay the memory of hostile encounters which even up to this day have been confined to the margins of knowledge.⁷

An inquiry into such subjugated knowledges thus illuminated for Foucault, the struggle and conflict between, on one side, the subjugated knowledges, and on the other, the knowledges that became entrenched. This approach by Foucault bears close resemblance to another concept of his, namely, genealogy.

'Genealogy,' wrote Foucault, is 'the union of erudite knowledge and local memories which allows us to establish a historical knowledge of struggles'.⁸ In that vein, Foucault wrote:

What it really does is to entertain the claims to attention of local, discontinuous, disqualified, illegitimate knowledges *against* the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true

⁶ *Power/Knowledge*, *supra*, note 5, p. 82

⁷ *Ibid.* p. 85

⁸ *Ibid.* p.83

knowledge and some arbitrary idea of what constitutes a science and its objects.⁹ (Emphasis added)

A Foucault scholar has observed that his genealogical approach appears in turn to borrow from the concept of ethnology in the social sciences. He defines ethnology in the following terms:

Ethnology is that discipline within the social science to which, according to its theoretical origins, falls the task of investigating, *apart* from the coordinated horizon of understanding characterizing its own scientific culture, the culture of an archaic civilization which is foreign to it.¹⁰

A common theme to both genealogy and ethnology seems to be a deep skepticism of an intrinsically unifying and centralizing approach that is a historical evaluation of the emergence of knowledge paying little heed to the knowledges subjugated in that process. In its place, therefore, Foucault prefers to deploy a genealogical approach since, as that adopted in ethnology, it affords us the requisite analytical tools to dwell on the present formation of knowledges - for by adopting such an approach, the interplay of competing power relations becomes manifest. Foucault poses the following set of questions to demonstrate what he seeks to highlight in the competition he alludes to:

Is it a science... which subjects of experience and knowledge do you want to 'diminish' when you say. 'I who conduct this discourse, am conducting a scientific discourse... which theoretical *avant garde* do you want to enthrone in order to isolate it from all the discontinuous forms of knowledge that circulate about it?'¹¹

Foucault asserts that a privileged posture is usually adopted in a discourse of what becomes a scientific knowledge. Foucault notes that it is that adopted posture that

⁹ *Ibid.*

¹⁰ Honneth, Axel, (Baynes, Kenneth, transl.), *The Critique of Power: Reflective Stages in a Social Theory*, Cambridge, Massachusetts, Mass. Inst. Tech. Press, 1991, p.85 (hereafter, '*Critique of Power*').

¹¹ *Power/Knowledge*, *supra*, note 5, p.85

assumes a standard for filtering what knowledges become accepted and those deemed incoherent or insufficiently elaborated, and therefore, relegated and not recognizable.

(ii) Struggle as a Metaphor

The metaphor of struggle already alluded to by Foucault in connection with subjugated knowledges, assumes more prominence in this aspect of his work. Before adopting that metaphor, Foucault observed a certain preoccupation with what he regarded as an economism in the theory of power. Karl Marx, undoubtedly, was the chief protagonist of that theoretical strain, drawing attention to the role economics played in an unfolding power dynamic. Whilst Foucault acknowledges the imprints of economics in power relations, he nevertheless sought to extend his inquiry beyond that trajectory.¹² Deducing the repressive quality of power, Foucault wishes to re-envision the problematic of power in terms of 'struggle, conflict and war'.¹³ Foucault achieves that by an inversion of Clausewitz's aphorism that war is politics by other means. And, if that were so, Foucault contends that *Power is war, a war continued by other means*.¹⁴

One significance of that assertion as Foucault notes, is that it implies that the relations of power that function in a society such as ours essentially rest upon a definite relation of forces that is established at a determinate, historically specifiable moment.¹⁵ That is to say, at war and by war. Foucault goes further to highlight other implications of this approach:

If it is true that political power puts an end to war, that it installs, or tries to install the reign of peace in civil society, this by no means implies that it suspends the effects of war

¹² 'What means,' Foucault asks, 'are available to us today if we seek to conduct a non-economic analysis of power?' *ibid.* p. 88.

¹³ *Ibid.*

¹⁴ *Ibid.* p. 90.

¹⁵ *Ibid.*

or neutralizes the disequilibrium revealed in the final battle.¹⁶

To sum up, the following points are pertinent in the method Foucault wishes to advance here. First, power relations are dependent on a relation of forces. Second, those relations of force may in fact be viewed as crystallized points in warfare. And third, *political power does not suspend or neutralize the inequilibrium revealed in battle*. The highlighted portion is important because it perhaps captures the sinister role of political power in sustaining the asymmetries observed in the final battle. It is against that background that Foucault warns of the role of political power as being:

[P]erpetually to *re-inscribe this relation through a form of unspoken warfare*; to re-inscribe it in social institutions, in economic inequalities, in language, in the bodies themselves of each and every one of us.¹⁷

We are thus afforded by this brilliant inversion of the Clausewitz aphorism, a rare glimpse into the episodic nature of power viewed, in Foucault's words, as factions and displacements in the same war. There will be low points and points of ascendancy in the relational system of those forces. In addition, Foucault warns of the role political power plays for it does not really suspend the inequalities observed in battle, but rather, sustains them through an unspoken form of warfare.

(iii) Juridical Forms and Power

Foucault perceived the discourse of power as being pre-dominantly coloured by what he calls a juridical edifice. In other words, power is spoken of either as being coterminous with the concept of sovereignty or to demonstrate the importance of imposing limits upon

¹⁶ *Ibid.* In other words, even the ensuing pseudo-peace is also about the continuing warfare for as Foucault notes: Even when one writes the history of peace and its institutions, it is always the history of this war that one is writing. *Ibid.*

¹⁷ *Ibid.*

sovereign power. Foucault however argues that that strand of discourse is misleading, for it not only conceals other intrinsic aspects of power, it also does the following:

[W]hen we say that sovereignty is the central problem of right in Western Societies... *the essential function of the discourse and the techniques of right has been to efface the domination intrinsic to power in order to present the latter at the level of appearance...* the system of rights is centred entirely upon the King, and it is therefore designed to eliminate the fact of domination and its consequences.¹⁸
(Emphasis added)

Once again, by employing the inversion technique observed in connection with the Clausewitz aphorism, Foucault prefers - rather than focusing his analysis of power based solely on a rights discourse - to give due weight to the concealment of domination intrinsic to power by the rights discourse. In other words, Foucault seems worried that the undue tenor of rights discourse in the analysis of power deliberately obscures a no less crucial quality of power, namely, its intrinsically domination enterprise. If viewed in that way, Foucault concludes that such tenor of rights discourse is indeed complicit in disguising the other domination aspect of power. In that regard, Foucault opines:

I then wanted to show, not only how right is, in a general way, *the instrument of this domination, but also to show the extent to which and the forms in which right (not simply the laws but the whole complex of apparatuses, institutions, and regulations... responsible for their application) transmits and puts in motion relations that are not relations of sovereignty, but of domination.*¹⁹ (Emphasis added)

Now, the word, 'domination' understandably evokes the notion of a single dominating force wielding or exercising undue influence. Not necessarily in the Foucauldian sense. What domination means for Foucault would be how the various forms in which counter

¹⁸ *Power/Knowledge*, *supra*, note 5, p. 95

¹⁹ *Ibid.* Thus Foucault observes: What we need, however, is a political philosophy that isn't erected around the problem of sovereignty or therefore around the problems of law and prohibition. We need to cut off the King's head.

forces in opposition to forms of expression of power is overcome, and thereby, subjugated. It is also in that context that the phrase, micro-physics of power may be situated. That is to say, rather than dwelling on an analysis of power that is descending, employing the leviathan model or kingly methodology, it would be more illuminating, in Foucault's view, if the analysis is conducted at what he terms to be the de-centred or localized points of articulation. The advantage of such a micro-examination of power, according to Foucault, would be that:

[T]hey define the innumerable points of confrontation, focuses of instability, each of which has its own risk of conflict, of struggles, and of at least inversion of power relations.²⁰

It follows that the analysis of power should be conducted, not in a descending order, but (using the inversion technique yet again) in an ascending order. If so conducted as Foucault suggests, the pitfalls inherent in the following labyrinthine question may be avoided, that is: Who then has power and what has he in mind? In addition, adopting this ascending method of power analysis enables Foucault to draw attention to the fact that:

*The system of right, the domain of law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation. Right should be viewed, I believe, not in terms of the legitimacy to be established but in terms of the methods of subjugation that it instigates.*²¹ (Emphasis added)

Implicated as one technique of subjugation of counter forces in opposition to the various forms of the expression of power is the system of rights or the domain of law. The law, in combination with other agents, fosters a system of subjugation.

²⁰ *Ibid.* p. 96.

²¹ *Ibid.*

(iv) Discipline and Normalization

Foucault discerns that we are in an age of ‘social orthopedics,’²² otherwise called, a disciplinary society. Embedded in the disciplinary society are mechanisms of power that Foucault refers to as disciplinary power. Foucault considered disciplinary power as one of the great inventions of bourgeoisie society. In Foucault’s view, this disciplinary power falls outside the realm of the usual strain in analyzing the problematic of power, namely, the rights discourse already highlighted. In this connection, Foucault notes:

Modern society, then, ... has been characterized on the one hand, by a legislation, a discourse, an organization based on public right... and on the other hand, *by a closely linked grid of disciplinary coercions whose purpose is in fact to assure the cohesion of this same social body.*²³ (Emphasis added)

Foucault discerns in contemporary times what appears to be the expression of power by a dual combination of sovereign and disciplinary powers. On one side, there is, the juridico-legal discourse representing one aspect of the trajectory of power. On the other, there is, and hardly visible, the disciplinary power/coercions representing another trajectory. Both modes of exercising power are complimentary to each other because disciplinary power sustains or assures the system of rights, and in turn, the system of rights/law, sustains the disciplinary coercions that characterize disciplinary power.²⁴

Foucault points out that although the discourse of discipline may embody rules, the rules here are those of ‘nature’ or a ‘norm’. The codes they (disciplinary coercions) define are not those of law but those of normalization. Affording us some insight into this process of normalization underpinning disciplinary power, it has been observed:

²² *Essential Works, supra*, note 4, *Truth and Juridical Forms*, p. 57.

²³ *Ibid.* p. 106.

²⁴ *Ibid.*

The concept of the 'norm' represents the most general expression that Foucault chooses for the goal of that method of power that assumes *not repressive functions but rather productive ones*. Techniques of power of this kind, as said, do not aim at suppressing, directly or indirectly, the objectives of the strategic opponent's action. *Their purpose is to routinize the modes of behaviour of the social opponent through constant disciplining, and through that, to allow them to solidify.*²⁵ (Emphasis mine)

This 'routinization' of modes of behaviour is a defining aspect of that power beneath that ascribed to the power intrinsic to a juridico-legal discourse. In that wise, disciplinary power is more productive in nature than superstructural given that it conditions and creates the requisite fertile soil for sovereign power to thrive and endure.²⁶ Further, routinization also raises the specter of governance of conduct, a theme to be explored in the following section. Habit may then be said to be the result of the conditioning process that such routinization engenders.

(v) On the Specifics of Power and Power Relations

In an insightful commentary, Foucault wrote:

What defines a relationship of power is that it is a mode of action that does not act directly and immediately on others. Instead, it acts upon their actions: an action upon action.²⁷

Foucault appears to distinguish between, a notion of power that does not act directly on the actions of its subjects, but entails the subject enjoying some discretion on the one hand, and on the other, the notion of power that acts directly and repressively usually employing various modes of violence. The distinction is hardly satisfactory because even

²⁵ *Critique of Power*, *supra*, note 10 p. 166

²⁶ See, also, on this aspect of complementary roles, *Essential Works*, *supra*, note 4, *Truth and Power*, p. 123: 'The state is superstructural in relation to a whole series of power networks that invest the body...True, these networks stand in a conditioning-conditioned relationship to a kind of 'meta-power' structured essentially around a certain number of great prohibition functions; but this meta-power with its prohibitions can only take hold and secure its footing where it is rooted in a whole series of multiple and indefinite power relations that supply the necessary basis for the great negative forms of power'.

²⁷ *Essential Works*, *supra*, note 4, *The Subject and Power*, p. 340.

Foucault recognizes that the exercise of power allowing some freedom on the part of the subject may nevertheless, ultimately resort to violence and consent as a means of furthering its aims. Nevertheless, that is not necessarily the type of power that Foucault is concerned with - the type employing raw violence, with 'passivity' being its only opposite aspect.

What is material for Foucault in this respect is that the person/subject on whom power is exercised retains some discretion to act on a field of possibilities *instructively to be determined by power relations*. The kernel of Foucault's message here then seems to be that the field of opportunities be structured in such a way that the subject 'inscribes' itself to those 'possibilities' and not beyond them. Anything, beyond those already 'structured possibilities,' is therefore not a tenable 'possibility'. For as Foucault notes:

The exercise of power is a 'conduct of conducts' *and a management of possibilities*. Basically, power is less a confrontation between two adversaries or their mutual engagement than a question of 'government.' ... Government... designated the way in which the conduct of individuals or of groups may be directed... *It covered not only the legitimately constituted forms of political and economic but also the modes of action, more or less considered and calculated, that were destined to act upon the possibilities of action of other people. To govern, in this sense, is to structure the possible field of actions of others.*²⁸ (Emphasis mine)

The 'discretion' enjoyed by the subject, argues Foucault, is an illusion. The illusion of discretion, however, is crucial to the notion of power that Foucault wishes to convey in the message above.

²⁸ *Ibid.* p. 341. Earlier Foucault notes that power: operates on the field of possibilities in which the behavior of the active subjects is able to inscribe itself. It is a set of actions on possible actions; it incites, it induces, it seduces, it makes easier or more difficult...it constrains or forbids absolutely'. *Ibid.*

III. SECTION B: LOCATING A SOUTHERN TRADE PERSPECTIVE WITHIN THE FOUCAULDIAN PROJECT

(i) On Knowledge and Power

In the first place, greater vigilance and consciousness is required particularly in connection with discourses that legitimate and (de)legitimate. Foucault's warning of an historical body of knowledge that sets itself up as a filter either admitting knowledges into a charmed circle of orthodoxy - a privileged body of knowledge that is transcendental; or marginalizing others, clearly resonates here. In light of that, Foucault's attention to those subjugated knowledges which in themselves are crystallized points of contestation is useful if it affords the South a framework for understanding contested trade paradigms between the North on one hand and the South on the other. The contest is usually an uneven one since, as Foucault notes in effect, a privileged paradigm is employed as an arbiter for determining what becomes admitted as knowledge. One possible meaning of that would be that if the competing paradigm is not recognizable by the privileged paradigm, it is unlikely to emerge as knowledge. Foucault's perspective calls for a consideration of those alternative paradigms subjugated in that process. The importance of the contention for recognition of the subjugated knowledge is, at the least, twofold. First, the privileged filter is not value neutral and in that context is not unlikely to recognize knowledge that reinforces its own values to the exclusion of others. Second, the ensuing knowledge from the process just described further legitimates the preceding filter thus making it more difficult to be disregarded or set aside.

By way of example, under the current regime of Trade Related Aspects of Intellectual Property (TRIPS), neither is traditional knowledges recognized nor is the possibility of Communal Patents. Local communities engaged in the development of say, medicinal

plants from periods in antiquity, and in no less rigorous circumstances than their western counterparts are denied the right to the enjoyment of their intellectual innovations. The rationale for such denial is perhaps because the science of those local communities is not recognizable in the coherent unity of Western science anchored in the concept of laboratories. This notion that innovation could only occur in the context of a laboratory or a research institute competes or marginalizes an alternative notion that it could occur in a no less different cultural context. That situation is certainly exclusionary and would be a clear instance where such subjugated knowledge should be given consideration.²⁹

In making that argument, this thesis is not unmindful of the famous critique of Foucault which draws attention to the inadequate criteria for determining what should be privileged and what should not be - the so called danger of privileging the knowledge of the Ku Klux Klan or that of the Orange Lodge for that matter.³⁰ It is conceded that Foucault insufficiently elaborated the point of criteria for what knowledge should be privileged or not. However, to use that inadequacy of elaboration in Foucault's argument to obscure the danger that he draws attention to in the formation of knowledge - that of the potential for a rationalized knowledge excluding some contrasting paradigms of knowledge not deemed rational is not particularly helpful. This author submits that those two aspects, insufficiency of elaboration and the danger Foucault draws attention to, should not be conflated. Inadequacy of criteria is one point. The potential for some knowledges to be marginalized being another indeed important point.

²⁹ Mgbeoji, Ikechi, *Patents and Plants-Rethinking the Role of International Law in Relation to the Appropriation of Traditional Knowledge of the uses of Plants*, Doctoral Dissertation, 2001, on file with the author.

³⁰ Cited in White, Stephen, K., *The Recent Works of Jurgen Habermas: Reason, Justice and Modernity*, Cambridge, Cambridge University Press, 1988, p. 114.

Further fortifying the point made above is the specter of multi-culturalism in the construction of knowledge.³¹ A uni-dimensional trajectory in the construction of knowledge is certain to obscure, and exclude other forms of knowledge emanating from other cultures that it is not configured to recognize.

(ii) The Permeation of Power and the Metaphor of Struggle

Foucault somewhat presciently discerns that we are able, by adopting an ahistorical methodology in the analysis of power, to determine when power permeates the base and to use his terms, where power is 'capillary'. 'We must,' Foucault reminds us, 'conduct an ascending analysis of power'. That backdrop serves some benefit if placed alongside Foucault's metaphor of warfare. For if so understood, Foucault's implication of the law as one of the techniques of subjugation becomes animated. That is so because it is at the capillary site that the contest of 'struggle, conflict and war' is engaged. The entire gamut of Southern demands, from the right to drugs and public health, to the intractable agricultural issues, could be embedded in the context of that metaphor. Those discourses assume manifold dimensions. The right to the retention in the various trade agreements of punitive anti-dumping measures, the right to protect inefficient agricultural industries with massive subsidies as against the right to market access for agricultural imports, the right to measures reflecting a recognition of inherent economic inequalities as against the right to equal treatment of all Members of the World Trade Organization and unrestrained market access based on the concept of equal competition. All are various forms of warfare, or struggles of a different kind than implied in the ordinary connotation

³¹ For a leading account of this concept, see, Kymlicka, Will, Multicultural Citizenship, London, Oxford University Press, 1995.

of that word. In the end, Foucault suggests that what we have is a pseudo-peace because the role of political power in such a situation is to sustain inequalities.

(iii) Gramsci's Hegemon and the Expulsion of Law

Professor Hunt has raised two key points regarding Foucault's entire project.³² First, he notes its lack of an hegemonic account in the Gramscian sense and that in its absence 'the resistance that power engenders is forever doomed to remain localized and fragmented'. Second, he submits that Foucault sought to expel the law from his project. The first point noted surely exposes an inadequacy in Foucault's project on power. Foucault's lack of an hegemonic account somewhat constrains him in articulating with sufficient clarity, the question of who wields power and if so, with what purpose. However, Foucault himself appears not to have been unmindful of that question for he considered questions of that tenor as, to use his term, a 'labyrinthine question'.³³ As a result, Foucault consciously it seems, pursued a methodology in the analysis of power eschewing the model of the leviathan. This Foucault does by choosing rather to conduct his analysis of power in an ascending pathway-in the belief that it sheds more light on how power permeates the base. It is submitted that both accounts- an analysis of power in the Gramscian sense, and that in which attention is focused on the atomics of power, are useful in the project of analyzing power. In an analysis of power, the question of who wields power is certainly important since it could shed light on strategic objectives. However, that route in the analysis might not really sufficiently illuminate how relations of power permeate the subject of power, which Foucault seeks to capture by his methodology. On a final note on this aspect, it is somewhat difficult to see how, as Professor Hunt asserts, a fragmented

³² Hunt, Alan, *Foucault's Expulsion of Law: Towards a Retrieval*, in Hunt, Alan, *supra*, note 3, p. 267-300.

³³ *Power/ Knowledge*, *supra*, note 5, p. 97.

and localized resistance is doomed. Professor Hunt fails to advance reasons in support of that view. At all events, Foucault seems more concerned with analyzing the attributes of power than with the success or failure of counter strategies. It is against that approach that the utility of Foucault's project might be measured.

On the second issue, this author disagrees with the submission of Professor Hunt to the effect that Foucault sought to expel the law in his enterprise. In the first score, although Foucault does not seem to dwell on law as a specific issue, he nevertheless clearly implicates the law in the role it plays in subjugating counter strategies in opposition to the exercise of power.³⁴ In that connection, Foucault identifies the law as being one of the *permanent agents of these relations of domination, these polymorphous techniques of subjugation*.³⁵ In addition, Foucault notes that the system of rights/law discourse is complicit in 'effacing' the strategic objective of domination. Perhaps, a better word, say, 'relegation' and not 'expulsion' might have been employed. The word 'expulsion' seems too strong when compared to the role Foucault assigned the law.

(iv) Of Masks and Concealment

An important aspect in the warfare is the fact that its accoutrements are not brazen but surreptitious, cloaked and designed to mislead. Axel Honneth in his masterly examination of Foucault draws our attention to this aspect when he wrote:

In the *perpetual staging of social struggle*, in which a social order of power to a certain extent has its being, legal norms and moral attitudes assume the *sole function of*

³⁴ Turkel, Gerald, in *Postmodernism, Community, and the Changing Rule of Law*, in Turkel, Gerald, Law and Society: Critical Approaches, Massachusetts, Allyn & Bacon, 1996, p.221.

³⁵ 'I then wanted to show, not only how right is, in a general way, *the instrument of this domination*, but also to show the extent to which and the forms in which right (not simply the laws but the whole complex of apparatuses, institutions, and regulations... responsible for their application) transmits and puts in motion relations that are not relations of sovereignty, but of domination'. *Power/ Knowledge, supra*, note 5, p. 95

*hiding strategic objectives and veiling the everyday situation of conflict.*³⁶ (Emphasis mine)

So, the South should realize that the struggle is perpetual and relentless. Furthermore, the rights/law discourse effaces a strategic dominating enterprise inherent in power. Put differently, the rights/law trajectory is phenomenological given that it conceals an on going project of domination. If that is so, the lesson for the South is that it should be deeply skeptical of the increasingly rules-based system, notwithstanding all its promises because, implicit in it, is its potential to mask a relentless enterprise of domination in a seductive garb of legality.

(v) Disciplinary Power and the Subject

The normalization that is intrinsic to disciplinary power ensures an ideal condition for the system of law to thrive. By such methods as for example, the trade policy review mechanisms and annual reports, a system of ‘compliance’ and ‘policing’³⁷ is engendered to minimize the likelihood of actual infractions occurring in the World Trade Organization. This is achieved through a routinization of actions confined to the areas delimited by law. In other words, Members of the World Trade Organization are legally, and importantly, socialized to trade in a tailored manner. If that is juxtaposed to the phrase ‘conduct of conduct,’ it would mean that the field of ‘possibilities’ is already structured by power relations, for as Foucault points out, ‘*the exercise of power is a ‘conduct of conducts and a management of possibilities’*’.³⁸ Therein lies the subtlety of the power dynamic. The possibilities of action open to a participant is already structured by power relations. Accordingly, positions are not expressly ruled out, and the participant

³⁶ *Critique of Power*, *supra*, note 10, p. 162.

³⁷ The concept of ‘Policing’ bears close relation to his theory of ‘Pastorship,’ See, *Essential Works*, *supra*, note 4, *Omnes et Singulatim: Towards a Critique of Political Reason*, p.300.

³⁸ *Essential Works*, *supra*, note 4, *The Subject and Power*, p.341

retains that semblance of discretion to act solely on those possibilities determined by a power dynamic.

IV SECTION C: REFLECTIONS ON LAW AS A MEDIUM: JURGEN HABERMAS ON LAW AND THE PROCEDURALIST LEGAL MODEL

(i) Background and Overview³⁹

Jurgen Habermas in this aspect of his work draws attention to the influence the medium of law could have in society. Habermas posits that law, as an instrument for achieving strategic objectives, may produce undesirable results. Habermas's shift to a proceduralist legal model is also highlighted briefly. Further, Habermas's observation to the effect that the increasing employment of law as a design tool seems to capture an unfolding trend in the trade sphere. The Habermas project therefore forms a second plank in the re-conceptualization project advanced in this thesis.

(ii) Juridification and Juridificatory Thrusts

The expression, 'juridification,' (verrechtlichung) refers to the 'tendency towards an increase of written law which can be observed in modern society'.⁴⁰ That situation may be distinguished from the term 'densification'-densification of the law referring to the 'specialized breaking up of global statutory definitions (Rechtsathestande) into more individuated legal definitions'.⁴¹

³⁹ For a comprehensive account of Habermas's theoretical preoccupation here, see, Habermas, Jurgen, (McCarthy, Thomas, trans.) The Theory of Communicative Action, Boston, vol.1, Beacon Press, 1984; For a leading exposition of that theory, see, Honneth, Axel, and., Joas, Hans, (eds.), Gaines, Jeremy, and Jones, Doris, L., Communicative Action, Cambridge, Polity Press, 1991; See, also, Habermas, Jurgen, (Rehg, William, trans.) Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, Boston, Mass. Inst. Of Tech. Press, 1999. ('*Between Facts and Norm*'). A helpful compilation of the discussion of various aspects of the works of Jurgen Habermas is contained in Rosenfeld, Michel, and Arato, Andrew, ed., Habermas on Law and Democracy: Critical Exchanges, Berkley, University of California Press, 1998.

⁴⁰ Habermas, Jurgen, *Law as Medium and Law as Institution*, in Teubner, Gunther, ed., Dilemmas of Law in the Welfare State, Berlin/ New York, Walter de Gruyter, 1986, pp. 203-220 ('*Dilemmas of Law*').

⁴¹ *Ibid.* p. 204.

In studying this trend of an increase in written law, Habermas identifies four historical epochs in its evolution, what he calls, juridificatory thrusts. Habermas locates the first juridificatory thrust in a period of the bourgeoisie state, which for Western Europe was characterized by the European state system; the second thrust led to the constitutional state; the third, to the democratic constitutional state and the last stage, (till date) led to the social and democratic constitutional state.

By way of summary, the following may be noted regarding the various juridificatory thrusts Habermas identifies. The first thrust, seemingly insufficiently elaborated, finds expression in Thomas Hobbes (Hobbes) *Leviathan*. Here, Habermas posits that because Hobbes adopts the concept of the *Leviathan*, meaning, the concentration of powers in a single individual, he abstracts the role of the lifeworld substratum in the emergence of legal norms.⁴² The lifeworld substratum is a key anchor on which the legal powers concentrated in the *Leviathan*, must derive its legitimacy. Accordingly, Habermas in this first thrust seeks to bring to the fore, the legitimating role that the lifeworld substratum plays regarding legal provisions that Hobbes apparently glosses over. Regarding the second period, the thrust was exemplified in the constitutional regulation of executive authority. In that wise, the rule of law became a central preoccupation and citizens were accorded rights even against the sovereign. In the third thrust, Habermas notes, ‘the idea of freedom already incipient in the concept of statutory law (*Gesetzesbegriff*) as conceptualized by the natural law tradition was given constitutional force’.⁴³ In that

⁴² The concept of ‘life world’ (*Lebenswelt*) is not dwelt on in this piece. However, it has been described as ‘[U]nderstanding not just how particular actions might be judged as rational *but how* the rationality potential made available in modern culture is ‘fed into’ particular actions and thus makes possible a ‘rational conduct of life’ in general,’ White, Stephen, K., *supra*, 30, p. 97. See, also, Baxter, Hugh, *System and Lifeworld in Habermas’s Theory of Law*, (2002) *Cardozo L. Rev.*, vol. 23, no. 2, p. 473.

⁴³ *Dilemmas of Law*, *supra*, note 40, p. 207.

situation, laws were to come into place only if they accorded with the citizen's perception of satisfying the general interest. In the final thrust, epitomized by the social welfare state, the thrust was of a character of guaranteeing freedoms especially in the economic sphere.

One thing that seems to characterize those juridificatory thrusts was the fact that each increase in the number of laws (juridificatory thrusts) seemed to expand the rights of the citizenry regarding what rights they could enjoy *viz a viz* the state. It is against that background that Habermas makes a key submission regarding the juridificatory process when he submits:

Norms which contain class conflicts and shape the social welfare state have from the perspective of their beneficiaries, as well as from that of the democratic lawgivers, a freedom guaranteeing character.⁴⁴

Habermas is here highlighting the fact that a law that bears a social tension, when employed as a functional tool reveals, both from the perspective of the benefactor and that of the lawgiver, a 'freedom guaranteeing' quality. Two things may be noted in connection with that observation. First, the tension Habermas alludes to in norms containing a class conflict arises as a consequence of the *ambivalence of guarantees of and denials of freedoms*. That is to say, a tension in the law either, on one hand, to grant a right, or on the other, to deny it. Second, the phrase 'freedom guaranteeing,' seems to suggest that law retains a quality, both from the perspective of the parliamentarian and the beneficiary, that liberates by according certain rights and privileges.

However, Habermas notes, with each attempt to accord protection to the freedoms, there emerges ambivalences or tensions of another sort, namely, a tension similar to the prior

⁴⁴ *Ibid.* p. 208.

one - either to deny or to grant protection to yet another freedom. Consequently, juridificatory thrusts seem integral, as opposed to being a side effect in the juridificatory process. A legal intervention sets in motion the conditions for another legal intervention that in turn, sets in motion the conditions for another intervention.⁴⁵

(iii) From Law as Medium to a Proceduralist Legal Model

(a) Law as Medium and Law as Institution

As an empirical criterion for distinguishing legal norms guaranteeing freedoms and those denying it, Habermas preferred a socio-legal approach. A socio-legal approach - an approach combining legal and sociological dimensions of law - was preferred to that merely legal because as Habermas saw it, it shed light on two connected qualities of modern law. First, it provided insights into the quest in law for procedural regularity and second, the law's need for substantive justification.

Habermas argues that legal rationality is usually conceptualized by reference to the correct genesis of the law. Put differently, the legitimacy of a law was dependent on its antecedent legality. However, that trajectory conceptualizing the law's legitimacy only from the perspective of its antecedent legality, fails to capture another crucial dialectic of law's legitimacy problematic - that connected with its substantive justification. Habermas perceives that legal legitimacy is talked of more frequently in that rational sense because as Habermas notes in this respect 'substantive justification is not only not possible but is also, from the viewpoint of the lifeworld, meaningless'.⁴⁶ This is especially so where the law serves as a means for organizing media-controlled (examples of media being power

⁴⁵ Note, however, that Habermas seems to later repudiate the notion that juridification was integral to the welfare state. In that connection, see, Carleheden, Mukael, and Gabriels, Rene, *An Interview with Jurgen Habermas*, Theory, Cul. And Soc. (1996), vol. 13, no. 3, p.14.

⁴⁶ *Dilemmas of Law*, *supra*, note 40, p. 212.

and money) subsystems which in any case, already control their subsystems independent of the instrumentality of the law.⁴⁷ Habermas identifies the following areas of law as examples of where the question of the legitimacy of the law could be settled by its procedural regularity: economic, commercial and administrative law. In those instances, Habermas asserts, the law combines with the media of power and money in such a way that it takes the role of a steering medium. However, Habermas goes further to assert that the law as a medium is also *bound up* with law as institution. Law as institution refers to instances where reference to the procedural regularity of the law, as a mode of its legitimation, no longer suffices. In such cases, Habermas notes, such laws require substantive justification because they belong to the legitimate order of the lifeworld. Justification, here, would seem to relate to notions of whether the law in question is 'just,' 'moral,' or accords with general perceptions of 'justice'. Habermas cites as examples of laws of that nature to include principally the bases of constitutional law, the principles of criminal law and penal procedure.

The significance of this simultaneous quality of the law is that on one hand, that structure sustains the notion of deciding legal legitimacy by reference to the legality of its antecedents, what Habermas calls 'the positivistic prolongation of the methods of justificatory reasoning,'⁴⁸ and on the other, the substantive justification dialectic of its legitimacy results in its deepening affinity to the mores of the society although this occasions it (substantive justification) to shift to the base of the law, what Habermas calls

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

‘the moralizing intensification of the justification problematic’.⁴⁹ What results therefore, is that for example:

Law used as a *control mechanism* is *relieved of the problem of justification and is only connected through formally correct procedures with the body of law whose substance requires legitimation*.⁵⁰ (Emphasis added)

Where law functions as an instrument of control, it is *relieved* of questions of its justness by reference to its procedural adequacy. Only that procedural adequacy determines its legitimacy or rationality. Regarding its other attribute, law as institution, Habermas contends that law of this nature lacks constitutive power but merely performs a regulative function. Habermas adds that law, in this instance, is embedded in a broader political, cultural, and social context standing in a continuum with moral norms and remolding communicatively structured areas of action.⁵¹

(b) Proceduralist Legal Model

Habermas also grapples with the question of how normative rules achieve legitimacy especially given their mutability. ‘What grounds,’ as Habermas frames the question, ‘the legitimacy of rules that can be changed at any time by the political lawgiver?’⁵² Habermas locates the basis of normative legitimacy in ‘[t]he democratic procedure for the production of law’.⁵³ However, that leads to the further question of what confers legitimacy to the democratic process itself. Habermas suggests the following answer:

Discourse theory answers this question with a simple, and at first glance unlikely, answer: democratic procedure makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character

⁴⁹ *Ibid.* p. 213.

⁵⁰ *Dilemmas of Law*, *supra*, note 40, p.213.

⁵¹ *Ibid.*

⁵² *Between Facts and Norms*, *supra*, note 39, p. 448

⁵³ *Ibid.*

for political will formation; and it thereby grounds the fallibilist assumption that results issuing from proper procedure are more or less reasonable.⁵⁴

It is thus in this presumed discourse between actors in a political complex preceding the crystallization of a discernible political will that Habermas grounds the legitimacy of the democratic process.⁵⁵

(iv) REIFICATION

This aspect of Habermas's hypothesis dwells more on the psychological level. It relates to what Habermas refers to as the structuring of the communicative action area. By using law to intervene in areas already informally organized in the lifeworld, the law interposes in that action area.⁵⁶ The word, 'reification' figures prominently in this respect. It means a fallacy that involves 'regarding a mental entity as though it were a thing otherwise referred to as hypostatization'.⁵⁷ Habermas employs the example of the school to demonstrate the potential dysfunctional effects of reification. In that connection Habermas states:

The protection of pupils' and parents' right against educational measures (such as promotion examinations and tests, and so forth)...is bought at the expense of a judicialization and bureaucratization that penetrates deeply into the teaching and learning process...the medium of law comes into collision with the form of educational activity. *Socialization in schools becomes broken up into a mosaic of legally contestable administrative acts.*⁵⁸ (Emphasis added)

⁵⁴ *Ibid.*

⁵⁵ *Ibid* p. 450.

⁵⁶ The phrase 'informally organized' suggests the pre-existence of a governance structure in society distinguishable from governance by law. For example, a societal value system is one such compost of the governance structure that governs independent of law. *Dilemmas of Law*, *supra*, note 39, p. 220.

⁵⁷ Reese, William, *Dictionary of Philosophy and Religion*, New and Enlarged ed., New Jersey, Humanities Press International, 1996, p. 644. See, also, Habermas, Jurgen, (McCarthy, Thomas, transl.), *supra*, note 39, p.354.

⁵⁸ *Dilemmas of Law*, *supra*, note 40, p. 218.

Law is such a mental entity that by its intervention in the life world, assumes a material quality and in doing so, restructures the life world.

V. **SECTION D: A SOUTHERN LOCATION OF HABERMAS**

(i) **The Law as a Functional Tool**

The functional element implicit in Habermas's analysis of law is a starting point. The medium of law, Habermas notes, where encrusted with other media such as power and money, increasingly assumes the role of a steering mechanism-that is to say, the law serves as a tool for orienting action towards a particular direction. The law, in such a situation, yields itself as a tool for achieving strategic purposes. That situation arises arguably because the law cannot *alter fundamental structures already shaped by the media of power and money*.⁵⁹ The word, 'medium' indicates a means towards achieving an objective. The law, therefore, *is such a means for achieving strategic purposes by actors already entrenched in a power dynamic*. What lessons does this present to the South in their trade relations? First, it exposes the impotence of the law in altering fundamental structures already having a power dynamic. An organization such as the World Trade Organization would arguably fit such description of an institution bearing the imprints of a power dynamic as envisaged by Habermas. To be sure, that is not to say that the South cannot obtain benefits from that power dynamic but only insofar as such benefits do not extend to a radical departure or result in unsettling fundamental structures. Second, the Habermas thesis also exposes the fact that law, as a steering medium, when combined with other media - such as money and power - succumbs to the strategic objectives of actors already entrenched in that power dynamic. Consequently law, in such

⁵⁹ *Dilemmas of Law*, *supra*, note 40, p. 212; 'This is true of all cases where the law serves as means for organizing media-controlled subsystems *which have in any case, become autonomous vis a vis the normative contexts of action oriented towards reaching understanding*'. (Emphasis added)

a situation, merely serves as a tool for actors in that power dynamic to realize their intentions. This argument somewhat resonates with the view in the South that the rules-based system of trade unduly impedes their trade policy options in comparison to those of their developed partners in the North that at some point in their development, were free to employ such policies.⁶⁰ Given the obvious asymmetrical dimension of the trade relations between North and South Members of the World Trade Organization, the rules based system, at the least, retains the potential of being complicit in curtailing alternative Southern development paradigms.

(ii) Rationality and Law as Institution⁶¹

Habermas points to the fact that law's rationality is usually conceptualized in terms of its correct genesis. What this implies is that first, in such situations, law used as a control mechanism, is '*relieved*' of questions related to its substantive justification given that reference to its procedural regularity would suffice.⁶² Thus, the legitimacy of law, as a control mechanism is settled by reference to its correct genesis and nothing more. Second, Habermas suggests that with the 'increasing volume of positive law, modern legal subjects content themselves in actual practice with legitimation through procedure'.⁶³ These two points taken together should inform the South that the question of the legitimacy of the increased volume of trade rules, would, by and large, be determined by reference to their procedural correctness rather than by reference to their substantive justification. This situation should be troubling for the South because as

⁶⁰ See, generally, Chang, Ha-Joon, Kicking Away the Ladder: Development Strategy in Historical Perspective, London, Anthem Press Publishers, 2000.

⁶¹ See, Habermas, Jorgen, Law and Morality, The Tanner Lectures on Human Values, (vol. VIII), Salt Lake City, University of Utah Press, 1988, p.1, quoting Max Weber, '*It is the rationality intrinsic in the form of law that secures the legitimacy of power exercised in legal forms*'. (Emphasis added)

⁶² Thus, as was previously noted, this situation allows the positivistic prolongation of the methods of justificatory reasoning. See, *supra*, p. 22

⁶³ *Dilemmas of Law*, *supra*, note 40, p. 212.

Habermas clearly observed, that aspect - that is, procedural adequacy - of the legitimacy dialectic is insufficient in itself.⁶⁴

However, law as a medium, is also bound up with its institutional aspects wherein issues of socialization and morality may be raised. The affinity of the law in this instance to social and cultural components of the life world enables it to influence and in turn, be influenced by such moral norms.⁶⁵ If, to 'institutionalize' is understood to mean to enthrone a method, a custom, and a mode of doing things,⁶⁶ then the South should be wary of what seems to be the nascent stages of trade customs conditioned with the complicity of law, particularly those that may be inimical to their development.

(iii) Proceduralist Legal Model

To remedy the highlighted shortcomings of the medium of law, the model developed here is important for as Habermas notes:

[P]rivate legal persons cannot come to enjoy equal personal freedoms in the complex conditions of the welfare state *unless they use their communicative freedom in the political role as participant legislators and take part in the public debates concerning the interpretation of needs.* In this way, citizens themselves set the standards and criteria for dealing with things that are equal in the same way and with unequal ones by differentiating.⁶⁷ (Emphasis added)

It follows that unimpeded participation in a 'political role' is crucial particularly in connection with the articulation of what Habermas calls the 'interpretation of needs'.⁶⁸

⁶⁴ *Ibid.*

⁶⁵ Habermas, however, surprisingly seemingly denies the law any 'constitutive' quality, preferring to assert that the role of law was in such a context 'regulative' as if a regulative function was clinically distinguishable from the societal mores underpinning law. Prof. Alan Hunt will disagree with this view. The law certainly is a constitutive aspect of the social environment and does not merely 'de-couple' those social tools that it endows with state power. See, Hunt, Alan, *supra*, note 3, pp. 267-300.

⁶⁶ Pearsell, Judy, ed., The Concise Oxford Dictionary, 10th Rev. ed., Oxford, England, Oxford University Press, 2001, p. 734.

⁶⁷ Carleheden, Mukael, and Gabriels, Rene, *supra*, note 44, p. 14.

⁶⁸ *Ibid.*

The issue Habermas raises is important because of the persistent complaints in the South regarding limited participation in the World Trade Organization say for example, in its decision-making process. In the absence of full participation by all Members of the World Trade Organization in its decision-making process, the proper standards and criteria for dealing with things that Habermas alludes to will remain elusive. That is so because, the unequal participation would mean that ensuing rules reflect more the 'needs' of the dominant participants. This is a key issue that will be dealt with in Chapter 2 of the thesis.

(iv) Juridification, Post-Colonial Law and Counter Strategies

The furious proliferation of areas coming within the ambit of trade and trade law appears to re-inforce the Habermas thesis. The juridification process observed with particular respect to the World Trade Organization's rules is revealed in the extension of its jurisdiction to matters beyond its initial core jurisdiction of trade in goods. For example, the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) are clear examples of the legal regulation of areas hitherto beyond its jurisdictional competence. Furthermore, this trend of legal spatialization seems bound to continue if agreement is reached on other new areas of competence. These include areas such as trade and environment, and trade and competition policy. The expansion of regulation by the instrument of law is like a mutant net with an inexhaustible capacity for reproducing itself. An intervention in a particular area is itself an ideal incubator for intervention in another area. For as Habermas presciently noted, juridification thrusts do not appear as side effects, they result from the structure of the juridification itself.

Further, the juridification process highlighted by Habermas dovetails neatly with another troubling trend - though a marginalized literature - increasingly attracting the attention of scholars, namely, Post-Colonial Law.⁶⁹ 'Post Colonial Law,' says Colin Perrin, in language filled with imagery and symbols, is 'something like the excess of a modernity which persists rather than disappears in an onslaught of incredulity... or perhaps of the 'west' which, despite its deconstruction, somehow manages to elude its demise...'⁷⁰

Post-colonial law with its heavy power connotations may thus be said to persist notwithstanding that the colonial-master has withdrawn. The relics of the presence of the colonial master remain all too evident. The connection to Habermas is perhaps contained in the following lines by Habermas that juridification thrusts are '*now the very means of guaranteeing freedom which endanger the freedom of the beneficiary*'.⁷¹ There seems to be a play on the word, 'freedom' here. The law, employed as a tool for securing a 'freedom' nevertheless could be employed as tool for sustaining the 'freedom' of beneficiaries. In one sense, the law extends enjoyable rights, in another it acts as a shield protecting rights it secures. In that connection, for example, intellectual property, notwithstanding collapsing and wide spread public health crises say, in South Africa, is important for the development of new medicines; and with respect to agriculture, the World Trade Organization can only commit itself to comprehensive negotiations aimed at

⁶⁹ For a comprehensive treatment of this genre of study, see, Davian Smith, Eve and Fitzpatrick, Peter, (eds.), *Laws of the Post Colonial*, Michigan, The University of Michigan Press, 1999.

⁷⁰ *Ibid.*, in Perrin, Colin, *Approaching Anxiety: The Insistence of the Post Colonial in the Declaration of the Rights of Indigenous peoples*, p.19.

⁷¹ *Dilemmas of Law*, *supra*, note 40, p. 209.

substantial improvements in market access: reduction with a view to phasing out, all forms of export subsidies'.⁷²

Beyond such *unequal protections* engendered by law, there is another aspect to post-colonization laws. Susan Silbey gives us a brilliant exposition of the Habermas perspective when she remarks:

First, we have what Jurgen Habermas (1992) refers to as the colonization of the life world. This refers to the proliferation of media produced, marketed and disseminated messages that become the images and symbolic resources of ordinary people, although those images and messages are independent of and often at odds with, people's daily lived experiences.⁷³

She continues:

Law is a part of this symbolic communicative aspect of post-modern colonialism because the medium that colonizes consciousness is itself saturated with legal images and issues. The world is bathed in Law.⁷⁴

Habermas's conclusions must be disquieting to the peoples of the South by his characterization of juridification as an historical process, and thus, seemingly bound to continue. Can the South indeed avert an avalanche of laws? Gunther Teubner presents a similarly troubling perspective yet anchored on the historical theme in the following terms:

The phenomena of juridification as such is a partial aspect of societal evolution and cannot therefore be effectively reversed by delegalization strategies. The only approaches which can be taken seriously are those which seek to deal

⁷² Council of Minister Declaration at Doha Summit, Qatar, <http://www.wto.org>; see, also, Asoke, Mukeyi *Developing countries and the WTO: Issues of Implementation*, Jnl. of World Trade Law, 2000, Vol. 34, no. 6p. 34.

⁷³ Silbey, Susan, *Let them eat Cake, Globalization, Post-Modern Colonialism and the Possibilities for Justice*, (1997) Law and Society Rev., vol. 31, no. 1. p.20.

⁷⁴ *Ibid.* p.221.

with the dysfunctional consequences resulting from juridification.⁷⁵

In other words, it is futile to attempt to confront juridification and the best that can be done is to mitigate its effect. In exploring solutions to reverse this increasing legal pollution, attention has been drawn to the Hayek model. Von Hayek, its chief proponent, critiques the increasing state interventions:

[T]he connections which interventionists claim exist between market structures, market behaviours and market results are based on inadequate theoretical premises and are not empirically testable. They work from the unrealistic assumption that complicated market processes can be depicted in simple models of causal relations between a few variables, one that is bound to lead to false economic policies.⁷⁶

Von Hayek then goes on to urge for:

[C]ompetition as a process of discovery... social structures and processes are interpreted as complex phenomenon which cannot be reduced to simple so-called economic laws... the nature of the system is so self-regulating, environmentally open and evolutionary.⁷⁷

One thing to be taken away here is that the South should be skeptical of the economic data on which most juridification thrusts are premised. The empirical basis of the data should be subjected to rigorous scrutiny. However, the self-regulation implicit in Hayek's propositions may not serve Southern interests. Given the relative economic weakness of the South, a reliance on market conditions for social considerations may be too optimistic. The better view may then be, with the benefit of the insight afforded by the

⁷⁵ Teubner, Gunther, *Juridification – Concepts, Aspects, Limits, Solutions*, in Juridification of Social Spheres, Berlin, New York, Walter de Gruyter, 1987, p.3.

⁷⁶ *Ibid.* p. 31.

⁷⁷ *Ibid.*

Foucault model, to contest the localised sites of power with a view to ensuring that what becomes juridified, to a great extent reflects southern concerns.

VI. SECTION C: SUMMING UP

This Chapter attempted to present two theorists with contrasting approaches but yet, at some points, convergent themes. Whilst Foucault engages in an ahistorical methodology that presents us an opportunity to focus on the present formation of knowledge without necessarily *apriori* considerations, the Habermas project is historical for he chronicles an unsettling historical phenomenon. Both theorists, however, are not unmindful of the social contexts wherein the subjects that concern them are played out. In that connection, Foucault refers us to the coercive character of disciplinary power that maintains a conspiratorial relationship with sovereign power founded upon the concept of rights and the attendant truth that relationship fosters. Habermas, on his part, draws our attention to the reification of the law and its attendant intrusive and dysfunctional effect in the process of consensus formation, the pathological effects of legal spatialization of spheres, and the law's role in the juristic containment of social conflicts.⁷⁸

Both approaches present the South with some framework to be more skeptical of the emergent rules based trade system. The South should not be seduced to complacency by what that system of rules promises. It should be aware of its limitations and its down sides that are inconspicuous and hence, far more difficult to counter. All in all, the Chapter calls for greater vigilance and a vigorous intellectual campaign to challenge paradigms and to think beyond them completely where necessary. Only by so doing can it hope to advance a trade agenda reflecting its development aspirations.

⁷⁸ See, Habermas, Jurgen, *Paradigms of Law*, in Rosenfeld, Michel, and Arato, Andrew, (eds.), *supra*, note 39, p. 21.

II INSTITUTIONAL HISTORIOGRAPHY OF TRADE GOVERNANCE: AN EMBEDDED EVALUATION OF THE LEGAL REGIME OF DEVELOPING COUNTRIES IN THE INSTITUTIONAL REGULATION OF TRADE

I INTRODUCTION

This Chapter will examine some key aspects of institutional trade governance. Admittedly, there are a number of other institutions with policies that have a direct bearing on trade policies of most countries.⁷⁹ An examination of all those institutions is certainly beyond the scope of the present study. This Chapter, however, will proceed with its examination of trade regulation from a broad to a narrow context. In doing so, the Chapter will draw attention to early forms of trade regulation. Thereafter, the main debates in the nineteenth and twentieth century surrounding the design of the global economic regulation architecture will be highlighted. The direct institutional forebears of the World Trade Organization will also be treated not in exhaustive detail but so far as to highlight the structure they assumed for trade regulation purposes. In line with that objective, the institutional examination will be thematic, consciously seeking to locate developing countries in the context of important dimensions of institutional governance. That tradition is also carried over in the examination conducted in connection with the World Trade Organization.

⁷⁹ Notable amongst those institutions are the International Bank for Reconstruction and Development (the World Bank) and the International Monetary Fund.

II SECTION A: THE FUTURE MEDIATED BY THE PAST

III The Evolution of Trade Regulation

‘The regulation of trade,’ it has been observed, ‘is almost as old as trade itself’.⁸⁰ Thus, it was noted that:

In tracking history, if enterprise is the theme, regulation is the counterpoint. As soon as the track begins to be beaten out, established authority intervenes to control and levy tolls upon the traders.⁸¹

Early forms of trade regulation manifested themselves mainly in the nature of tolls. With increasing sophistication they took the form of tariffs and gradually, with increased international commerce, took the form of trade agreements.⁸² Even then, trade agreements are not exactly of recent origin. For example, an account of the external relations of the Egyptians and the then Babylonians bears out this point. In that connection, attention was drawn to a commercial treaty between Egypt and Babylonia dating back as far as 2500 BC indicating applicable duties on merchandise.⁸³

Without going into detail about trade agreements in general, one characteristic aspect is that they were made to secure the interests of those engaged in a particular trade - a point reflected in the following observation:

A second point to appreciate in the evolution of historic trade agreements to their modern counterparts is that trade itself has been conducted between self-interested actors that have used the regulation of trade to promote their own interests.⁸⁴

⁸⁰ Winham, Gilbert, *The beginnings of diplomacy: A Sociological Study of intertribal and International Relations*, cited in, *The Evolution of International Trade Agreements*, in Howse, Robert ed., The World Trading System: Critical Perspectives on the World Economy, vol.1, London, Routledge Publishers, 1998, p.11.

⁸¹ *Ibid.*

⁸² *Ibid.* p. 17

⁸³ *Ibid.* That treaty made provisions related to the payment of duties and shed some light on the early trade of marriageable daughters.

⁸⁴ *Ibid.*

The point to note in this brief resume is that the regulation of manifest forms of trade was done with the purpose of first, generating some form of revenue; second, establishing some order regarding its conduct; and third, for securing the interests of those that sought to regulate it. An anarchical trading structure even from those early periods was perceived as inimical to the development of trade - a theme that continues to resonate even today.

IV. The 19th and Early 20th Century Developments

(i) The Cobden-Chevalier Treaty

The developments in the nineteenth century mark a watershed in trade regulation. The Anglo-French (Cobden-Chevalier) treaty of 1860 provided that turning point. The *Cobden-Chavelier treaty* represented the signal development of that century.⁸⁵ By that Treaty, Britain abolished all duties on manufactured goods, lowered the duty on brandy to the colonial level, and reduced import duties on wines. Although the concessions of this Treaty stood to benefit other nations, France particularly stood to benefit more owing to its large trade in the products it covered. One important point to note regarding the *Cobden-Chavalier treaty* is that it spawned more developments.⁸⁶ First, it precipitated the signing of other similar trade agreements. France now signed similar treaties with Belgium and the Zollverein in 1862; with Italy in 1863; with Switzerland in 1864; with Sweden, Norway, Spain and Holland in 1865; with Austria in 1866; and with Portugal in 1867. Second, the linkage that the treaties developed led to more co-operation - the main

⁸⁵ The Repeal of the Corn Laws in Britain was another notable development. That development owed a lot to the ascendancy of the intellectual contributions of such economists as Adam Smith (Wealth of Nations), John Stuart Mill and David Ricardo. See, generally, Kenwood, A.G., and Lougheed, A.L., The Growth of the International Economy, 1820-1990, London, Routledge Publishers, 1992. For an influential account of the intellectual debates of that period, see, also, Irwin, Douglas, Against the Tide: An Intellectual History of Free Trade, New Jersey, Princeton University Press, 1998.

⁸⁶ Howse, Robert, and Trebilcock, Michael, The Regulation of International Trade, London, Routledge Publishers, 2nd ed., 2001. p.18 (Hereinafter, 'Howse and Trebilcock').

objective being that of trade expansion. In addition, many conventions, for railways, telecommunications, and postal arrangements were concluded during this period. Another notable development of this co-operation was the formation of the Latin Monetary Union in 1865. By that union, France, Italy, Switzerland and Belgium agreed to standardize the value of their coinage, which besides temporarily stabilizing the international bi-metallic standard, naturally facilitated commerce between them.

A third development was that the *Cobden-Chavalier treaty* included a most favoured nation clause.⁸⁷ On the importance of that clause, it was observed that:

[T]he encouragement it gave to trade to expand at a multi-lateral level. It prevented discrimination because reduction of duties to one country meant that they were automatically reduced to all other countries enjoying the most favoured nation treatment with the country reducing them.⁸⁸

The most favored nation principle implicit in the most favored nation clause remains a cornerstone of the current trade regime.⁸⁹ The advent of the Twentieth century, however, saw a decline of regional treaties characterizing the latter part of the nineteenth century.

Professor Howse ably points to some of the reasons precipitating that decline:

Britain found its economic hegemony rapidly diminishing, and hence its ability to impress the case for free trade on its major trading partners. The advent of the First World War massively disrupted international trading relationships, and the terms of settlement of the war in part contributed to a general outbreak of beggar-thy-neighbour policies in

⁸⁷ The most-favoured-nation clause implied a system of reciprocal trade concessions. In other words, trading parties were not expected to discriminate in the trade favours they extend but should extend them equally to all. Note, however, that the most favoured nation clause has been traced farther back to the 11th Century, where reference was made to Mantua in Italy obtaining its charter from the Holy Roman Emperor, Henry the III, on 'the guarantee that it would benefit all privileges granted to whatsoever town.' Further, the particular, 'most favoured nation' expression, 'most favoured nation' first appears at the end of the 17th Century. Cited by, Davey, William, and Pauwelyn, Joost, *MFN Unconditionality: A Legal Analysis of the Concept in view of its Evolution in the GATT/ WTO Jurisprudence with particular Reference to the Issue of Like Product*, in Cottier, Thomas, and Mavroidis, Petros, (eds.), Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, Ann Arbor, The University of Michigan Press, 2000. p. 13

⁸⁸ Kenwood, A. G., *supra*, note 85, p. 65

⁸⁹ *The General Agreement on Tariffs and Trade 1994* embodies that principle.

the 1920s, including competitive exchange rate devaluations and trade restrictions.⁹⁰

Another notable factor contributing to the increasing protectionism was the infamous Smoot-Hawley Tariffs of 1930 by which duties on imports into the United States skyrocketed to about sixty per cent. The Europeans, not unexpectedly, retaliated by raising their own tariffs on imports. The last straw deepening economic crisis of this period was of course the outbreak of the Second World War. That completely sealed all hopes that might have remained for more co-operation in the area of trade and the reduction of tariffs usually ensuing from them.

(ii) The Design of the Bretton Woods Initiative

At the end of the Second World War, the United States emerged as an undisputed industrial economic powerhouse. As noted by a leading economist, at the time, '[I]t was the source of about fifty per cent of global industrial production in the immediate post war years'.⁹¹

Three institutions were envisaged for post-war reconstruction, namely, the International Monetary Fund (I.M.F) for maintaining stability of the exchange rate mechanisms; the International Bank for Reconstruction and Development (I.B.R.D), otherwise called, the World Bank, for the provision of reconstruction capital to the devastated economies of Europe; and finally, the International Trade Organization, (the ITO) for managing related trade aspects of the world economy. However, as will be seen, the International Trade Organization did not crystallize. Only the World Bank and the International Monetary Fund eventually emerged from the Bretton Woods Conference.

⁹⁰ Howse and Trebilcock, *supra*, note 86, p. 20.

⁹¹ Kenen, Peter, and Eichengreen, Barry, *Managing the World Economy under the Bretton Woods System: An Overview*, in Kenen, Peter, ed., Managing the World Economy: Fifty Years After the Bretton Woods, Washington DC, Institute of International Economics, 1994. p. 5.

It is useful at this stage to examine the motivating factors underpinning the design of the Bretton Woods institutions. In relation to that, Professor Kenen has argued that to the initiators: '[T]he disastrous depression of the 1930s made clear the huge costs of failure to develop rules and understanding as well as organizational structures to guide the conduct of economic policies'.⁹² Accordingly, he opined:

[T]he absence of an institutional framework allowed countries to pursue opportunistic policies that compounded their neighbours' problems. The results included the deep and persistent slump, the implosion of trade, the collapse of the international monetary system, and the termination of international lending.⁹³

For Professor Kenen, therefore, there was at the time a realization by the conference promoters that the absence of institutional arrangements to manage economic relations among nations contributed immensely to the overall break-down of the entire economic system. This, Professor Kenen argues, resulted in a deleterious effect for all nations - a situation that the United States and its key ally, Great Britain, wished to rectify by the establishment of the Bretton Woods institutions.

Implicit in that conclusion, is the fact that, first, such an arrangement (the establishment of the global institutions of economic governance) could only be achieved by designing a system that was all encompassing, that is to say, a regulatory framework that was multi-lateral in outlook, and second, that the promoters, chiefly the United States and Great Britain were willing, notwithstanding their economic/political pre-dispositions, to pursue a policy that would avert the recurrence of policies leading to the breakdown of the international economic system. Some others, however, disagree with that reading of the situation.

⁹² *Ibid.* p. 11.

⁹³ *Ibid.*

In the first place, it has been argued that a multi-lateral arrangement was not even necessarily conditional to achieving multilateral economic stability. To buttress that point, the example of the ripple effect generated by the *Cobden-Chavalier treaty* was cited as a counter argument to demonstrate that it influenced many other nations into entering similar agreements.⁹⁴ Accordingly, regionalism, rather than multi-lateralism, seemed a more attractive route to follow.⁹⁵ Others refer to the imperialist interests of the United States and its partners. For them, the Bretton Woods model 'had a less than ignoble purpose, namely, to promote US political and economic interests on a global scale'.⁹⁶ These arguments reflect sharp contrasts on the factors motivating the establishment of the Bretton Woods institutions. On one end, is the notion of altruism to avoid the narrow policies precipitating the outbreak of the Second World War (like the beggar-thy-neighbour policies). At the other, is the notion of regional economic co-operation and the determination by the United States, as the emergent economic power, to design an economic order suited to its interests. Aspects of the arguments advanced by either side to the ideological spectrum remain relevant even in contemporary times.

The following points, however, may be noted regarding that conference. With the exception of Latin America, developing countries played no significant role in it; most being under some form of colonial rule. As a result, it is not surprising that issues likely to affect their interests did not form part of the discussions at the conference. The United

⁹⁴ Portes, Richards, comments in *Managing the World Economy: Fifty Years After Bretton Woods*, *supra*, note 91, p. 64.

⁹⁵ With the rapid pace of regional trade agreements emerging in the horizon, the thesis is not entirely far-fetched.

⁹⁶ Klaus, Engelen, comments in *Managing the World Economy: Fifty Years After Bretton Woods*, *supra*, note 91, p. 75; See, also, Mikesell, Raymond, *The Bretton Woods Debate: A Memoir*, International Finance Section, New Jersey, Princeton University, 1999, p. 34. Indicating that matters had already been substantially agreed prior to the meeting, he notes: 'Bretton Woods was a drafting meeting, with the substance having largely been settled before hand by the US and UK delegations supported by the Canadians'.

States and Great Britain mainly decided agreements reached at the conference notwithstanding their sometimes divergent opinions. Finally, *the Mutual Aid Agreement*, upon which the United States and Great Britain agreed on the principle of non-discrimination, later found its way into the non-discrimination exchange arrangements in the International Monetary Fund and the non-discrimination trade provisions contained in the General Agreement on Tariffs and Trade (the GATT).

V SECTION B: THE INSTITUTIONAL REGULATION OF TRADE

VI The Still-born ITO

Although a comparable organization, the International Trade Organization (the ITO) dealing with the trade related aspects of the international economic system was envisaged at the Bretton Woods conference, that organization as already noted, did not materialize. The following provides us an illuminating account of the connection between the ITO and the GATT:

The history of the preparation of the GATT is intertwined with that of the preparation of the ITO Charter. The 1947 Geneva meeting was actually an elaborate conference divided into three major parts. ...One part dealt with continuing the preparation of a Charter for a major international trade institution, the ITO. A second part focused on negotiating a multi-lateral agreement to reciprocally reduce tariffs. A third part concentrated on drafting the 'general clauses' of obligations relating to tariff obligations. The second and third part together constitute the GATT.⁹⁷

In view of that, the histories of the GATT and of the ITO are interwoven such that they cannot really be considered separately. The Preparatory Meetings for what was envisaged to evolve into a trade organization - the ITO - was actually tri-partite in nature. One part

⁹⁷ Jackson, John, The World Trade Organization: Constitution and Jurisprudence, The Royal Institute of International Affairs (Chatham House Papers), 1998, p.16.

of it concerned negotiations on the reciprocal reduction of tariffs amongst the Contracting Parties.⁹⁸ A second part concerned the drafting of actual clauses embodying those agreements on tariff reductions (both parts then incorporated in the GATT). And finally, a third part concerned the organization - the ITO - to administer agreements reached in the second and third parts of the conference.

A careful perusal of the planned organizational structure of the ITO suggests that the big economic powers were to be accorded rights reflecting their economic clout. For example, the following observation was made regarding its proposed structure:

[T]he negotiations over substantive rules soon demonstrated what everyone knew anyway... that the major economic powers (the United States, *the United Kingdom, France, Canada, the Benelux Countries, and a few others*) formed a ruling Directorate. The Directorate clearly had the power to shape the Charter to its own needs, and, more telling, it also had the power to prevent unnecessary dilution of the Charter by the majority of smaller countries.⁹⁹ (Emphasis added)

The point instructive here is that with developing countries forming the majority of the contracting parties to the ITO, its promoters nevertheless sought to structure it in such a way, in the words of the writer, 'to prevent smaller countries from unnecessarily diluting the Charter'.¹⁰⁰ Other provisions contained in the Charter were similar to the provisions contained in the other Bretton Woods Institutions- a permanent Board; two thirds voting requirements for certain escape provisions etc. Notwithstanding those safeguard provisions of the ITO to ensure that its Charter was not diluted, the ITO Charter nevertheless failed to make it through the United States Congress.

⁹⁸ The use of the term 'contracting parties' is instructive because the GATT was strictly speaking not regarded as an organization. The term was used in preference to 'Members' that would have given the impression of an organization. See, further, the section on the application of the GATT.

⁹⁹ Hudec, Robert, *The GATT Legal System and World Trade Diplomacy*, New York, Praeger Publishers, 1975, p. 22.

¹⁰⁰ *Ibid.*

Naturally, that development marked the demise of the ITO. On both sides, the protectionists on one, and on the other, the liberals in the Congress were opposed to its approval. For the protectionists, it was the usual fear that conclusion of a multi-lateral treaty would flood American markets with foreign goods and, for the liberals, the Charters prohibitions were too weak. Therefore, for this latter group that would have ordinarily supported its approval, the Charter of the ITO did not go far enough in ensuring that foreign markets would be opened sufficiently to warrant a reciprocal United States undertaking to open its markets. In particular, there was bitterness at the minimal British concessions made in connection with the ITO Charter. In the end, even the most enthusiastic promoters of the ITO were not happy, leading one commentator to observe:

[T]he two major sponsors... sought to incorporate in the Charter a detailed statement of their favourite economic doctrines...The result was an elaborate set of rules and counter-rules that offered imperfect standards for national policy. These rules and counter-rules satisfied nobody and alienated nearly everyone.¹⁰¹

As no nation could proceed with a trade treaty without United States participation, that marked the demise of the ITO. Given the connection between the ITO and the GATT, it is perhaps surprising to note that the GATT nevertheless emerged from what turned out to be the demise of the ITO.

¹⁰¹ Cited in Goldstein, Judith, *Creating the GATT Rules: Politics, Institutions, and American Policy*, in Ruggie, John, Gerald, ed., Multilateralism Matters: The Theory and Praxis of an Institutional Form, New York, Columbia University Press, 1993, p. 219.

VII The GATT¹⁰²

(i) Application of the GATT

The GATT, contrary to popular belief, was strictly speaking, not an organization.¹⁰³ The GATT owed its existence to a *Protocol of Provision Application (the Provisional Protocol) of 30th October, 1947*.¹⁰⁴ By the Provisional Protocol, the Contracting Parties agreed to apply provisionally, and after 1 January, 1948, Parts I and III of the GATT 1947. Part II of the GATT 1947 however, was to *apply to the fullest extent not inconsistent with existing legislation*.¹⁰⁵ In other words, in connection with Part II of the GATT 1947, all Contracting Parties to the Provisional Protocol were to apply its contents to the fullest extent unless such a Contracting Party had legislation on the matter pre-dating it (Part II of the GATT). In such a case, the Contracting Party's prior legislation would override that contained in Part II of the GATT 1947. Part II of the GATT 1947 contained the kernel substantive provisions. For example, it contained provisions for the

¹⁰² The GATT and the General Agreement on Tariffs and Trade of 30th October 1947 are used interchangeably to refer to the notion of GATT as an organization, and to the notion of GATT as an agreement.

¹⁰³ In actual fact, a body known as the Interim Commission for the ITO (ICITO) performed secretarial and administrative functions for the GATT Contracting Parties for a fee. The ICITO had been set up by GATT Contracting Parties to perform those functions and the ITO was expected to take them over. Failing the materialization of the ITO, the ICITO continued to perform those duties.

¹⁰⁴ The device of the Provisional Protocol employed to enable the GATT to become operational achieved a twofold objective; first, it allowed prospective signatories to avoid having to present the GATT together with the ITO Charter for domestic approval. In other words, it allowed the Contracting Parties to the GATT to 'lock in' the benefits of the tariff reduction even if the ITO encountered difficulties (which it eventually did). Second, the Provisional Protocol was deemed as a temporary measure (thus the name 'provisional') until the Charter of the ITO was ready for presentation. In that way, both the Charter of the ITO and the various negotiating agreements reached under the GATT were to be presented at the same time rather than separately.

¹⁰⁵ Called the Grandfather Clause, its precise scope was for sometimes a subject of some controversy. See, Knobl, Peter, F., *GATT Application: The Grandfather is Still Alive, Recent Panel Recognitions and Amendment Intentions*, 4 J.W.T, Vol. 25 (1991), p. 101-106. Shedding some light, however, on the nature of those clauses, he opined:

[T]he so-called Grandfather Clause and, substantially, equivalent clauses in subsequent protocols of accession, served a specific purpose *in a particular historical situation*...grandfather clauses are usually designed to prevent new regulations from affecting legitimately acquired interests in the domestic sphere...*the GATT Grandfather Clause, however, was to enable governments in 1947 to accept the GATT obligations without requiring parliamentary action adjusting domestic legislation accordingly.* (Emphasis added).

elimination of quantitative restrictions, (Article XI); restrictions to safeguard the balance-of-payments, (Article XII); Non-discriminatory administration of quantitative restrictions, (Article XIII); Security exceptions, (Article XXI) etc. Outside those provisions, the remaining ones were largely statements of principles and matters relating to procedural issues.

(ii) Decision-Making by Consensus under the GATT

To examine the decision-making by consensus process under the GATT 1947, its provision on voting is instructive and provides in part:

Each contracting party shall be entitled to have one vote at all meetings of the Contracting Parties... Except as otherwise provided for in this Agreement, decisions of the Contracting Parties shall be taken by a majority of the votes cast.¹⁰⁶

Under the GATT 1947 therefore, the votes of all Contracting Parties count equally.

However, Professor Jackson provides us an insight into actual GATT practice regarding decision-making. According to him:

[O]ften there is little or no formal voting done at the Contracting Parties sessions. Action is frequently by consensus as interpreted by the chairman, in the absence of objection from any contracting party on the floor. *In many instances the particular provision being acted upon has been negotiated to a consensus outside the particular meeting in which the formal action takes place.* The informal method of doing business enables provisional and *de facto* members of GATT to participate without much regard for their formal lack of vote.¹⁰⁷ (Emphasis added).

The following observations are instructive in Professor Jackson's commentary. In the first place, little or no voting to decide issues was, in actual practice, a feature of the

¹⁰⁶ *The GATT 1947* is relevant.

¹⁰⁷ Jackson, John, World Trade and the Law of GATT, Indianapolis, The Bobbs-Merrill Company, Inc. 1969, p. 123.

GATT Contracting Party Sessions. That situation meant that although voting on decisions was a prospect retained in its provisions, it was hardly ever resorted to. Further, our attention is drawn to how decisions were reached under the GATT. That is to say, that *in many instances the particular provision being acted upon has been negotiated to a consensus outside the particular meeting in which the formal action takes place.*¹⁰⁸

In his explanation of what likely transpired in such negotiations outside meetings, Professor Jackson suggests: *the informal method of doing business enables provisional and de facto members of GATT to participate without much regard for their formal lack of vote.*¹⁰⁹ This author disagrees with that submission. Professor Jackson fails to provide any evidence of this practice of informal method of doing business in the GATT that afforded provisional or *de facto* parties the chance to participate in decision-making notwithstanding their lack of vote. This author submits that a more plausible reading of the situation would be that such informal method of doing business operated as an indirect form of weighted voting.¹¹⁰

This submission is anchored on three reasons: First, given the potential numerical voting superiority of developing countries, it is instructive to note that although voting remained a possibility existing in GATT provisions, it was hardly ever resorted to. That situation would suggest that the theoretical possibility of developing countries wielding their superior voting strengths hardly ever crystallized since decisions were reached mainly by consensus outside formal meetings. Second, within this informal method of taking

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Professor Qureshi's view expressed in connection with consensus decision-making under the WTO is indeed supportive of this position. As will be seen, decision-making under the GATT and decision-making under the WTO are not different. Indeed, *the* WTO Agreement enjoins Members to follow the practice of decision-making by consensus under the GATT 1947. Accordingly, Professor Qureshi argues that decision-making by consensus can be a form of 'latent weighted voting'. See, Qureshi, Asif, International Economic Law, London, Sweet and Maxwell Publishers, 1999, p. 242-243.

decisions, it is more likely that the developed Contracting Parties could bring much more pressure to bear on their developing country counterparts to agree to a 'negotiated consensus'. Finally, the word, 'consensus' was not even a term used under the GATT 1947, but was a practice that merely evolved over time. At the least, one possible consequence of the absence of its express usage in the GATT would be that influential Contracting Parties could reach a decision on an issue even in the face of objections to it. Conversely, a decision on an issue may be frustrated if an influential Contracting Party opposes it.

(iii) Formation of the United Nations Organization and its influence on the GATT

The emergence of most developing countries from colonial rule increased their awareness to the fact that they had little or no input in the design of most 'multi-lateral arrangements' entered into on their behalf by their previous colonial masters. A further factor acted as an advantage. The establishment of the United Nations Organization at the end of the Second World War afforded developing countries a forum for articulating their dissatisfaction with what they perceived to be an economic order not sufficiently reflecting their interests.

Consequently, the United Nations was instrumental in the following situations culminating in influencing developments positively in the GATT: First, at its Sixteenth Session, the United Nations General Assembly unanimously adopted a resolution titled: 'International Trade as the Primary Instrument for Economic Development,' which served as the basis upon which the United Nations Economic and Social Council adopted a decision to convene a United Nations Conference on Trade and Development.¹¹¹ Further,

¹¹¹ Bhandari, Surendra, World Trade Organization (WTO) And Developing Countries: Diplomacy to Rules Based System, India, Deep and Deep Publications PVT. LTD, 2001, p.6

in 1974, the United Nations General Assembly announced the Establishment of a New International Economic Order (NIEO). Although remaining at the level of ideology, the New International Economic Order aimed to radically and fundamentally redistribute wealth between the Geo-political zones of the North and the South.¹¹² And third, the United Nations General Assembly created a Charter of Economic Rights and Duties of States with the purpose of establishing accepted norms of governing international economic relations on a just and equitable basis.¹¹³

(iv) The United Nations Conference on Trade and Development and the GATT

Of the developments in the United Nations, particularly significant for developing countries was the convening of the United Nations Conference on Trade and Development (UNCTAD). UNCTAD, an institutional body established thereafter, was to hold periodic conferences and:

[T]o promote economic growth in the developing countries through international trade, to formulate principles and policy options for international trade and economic development and to make proposals to this effect.¹¹⁴

UNCTAD succeeded in convening its first conference in Geneva in 1964 despite opposition from the industrialized nations. On the effect of that conference on GATT Contracting Parties, Professor Jackson noted:

These developments, although not directly related to the developments in the GATT, nevertheless are conceded to have had a psychological impact on national representatives to GATT, particularly the delegates from industrialized nations. *Perhaps, it was realized that the developing countries had some moral force behind their*

¹¹² Howse and Trebilcock, 2nd ed., *supra*, note 86, p.367.

¹¹³ Bhandari, Surendra, *supra*, note 111, p.7. See, in particular, *Charter of Economic Rights and Duties of States, U.N.G.A Res. 3281 (XXIX), (1974)*.

¹¹⁴ Van Houtte, Hans, *The Law of International Trade*, London, Sweet and Maxwell Publishers, 1995, p. 103.

*position, even though they had little economic force... an argument could be made that action within the framework of GATT would be more temperate and more result-oriented than might be the case in other forums.*¹¹⁵
(Emphasis added)

It is perhaps noteworthy, that it was shortly after that first UNCTAD conference, that the first significant change appeared in the GATT 1947 reflecting (not necessarily addressing) some of the peculiar concerns of the developing countries.¹¹⁶ It seemingly took the specter of an alternative forum for the industrialized countries, *to realize that the developing countries had some moral force behind their position, even though they had little economic force.* That change was reflected in a new Part IV in the GATT 1947 and marked the first amendment to the reciprocity and non-discrimination principle embodied in the GATT 1947.¹¹⁷

(vi) Key Developing Country Legal Provisions under the GATT

a) Article XVIII of the GATT

Prior to the introduction of Part IV of the GATT, the earliest legal provision in the GATT having a direct bearing on developing country Contracting Parties in the GATT was reflected in an amendment to Article XVIII of the GATT 1947. Article XVIII of GATT 1947 was titled: 'Governmental Assistance to Economic Development,' and provided to the effect that:

[A]rticle XVIII (B) was revised to include a specific provision to allow countries at 'an early stage of their development' to adopt quantitative restrictions on imports whenever their monetary reserves were deemed inadequate in terms of their long term development strategy. [Footnote omitted] Article XVIII (C) was revised to allow for the

¹¹⁵Jackson, John, World Trade and the Law of GATT, Indianapolis, *supra*, note 107, p.645.

¹¹⁶ Prior to that, however, a notable development that brought developing countries difficulties to the fore was the publication of the Haberler Report. See *ibid*, p.640, for details of the Haberler Report.

¹¹⁷ The point here will be elaborated below.

imposition of trade restrictions (both tariff and quantitative restrictions) to support infant industries with a view to improving living standards.¹¹⁸

Article XVIII marked a beginning. For the first time, it seems, a distinction was drawn on the basis of the disparate levels of development of GATT Contracting Parties. In doing so, the Contracting Parties recognised the different approaches that those developing countries could employ to address a perceived economic difficulty.

(b) Part IV of the GATT

As already noted, the first significant legal provision concerning developing countries was the provision contained in Part IV of the GATT 1947. Part IV of the GATT 1947 introduced three new Articles, namely, Articles XXXVI, XXXVII, and XXXVIII. In his commentary on the effect of the new Part IV of the GATT 1947, Oliver Long observes:

Adoption of Part IV had important legal and institutional consequences. It resulted in the first substantive reform of the basic GATT principle-the reciprocity of concessions. The developing countries are relieved of this commitment under paragraph 8 of Article XXXVI [Footnote omitted]¹¹⁹

Part IV of the GATT 1947 therefore entailed a reform of the GATT principle of reciprocity. As a result, a developed Contracting Party would not expect reciprocity for commitments made by it in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries.¹²⁰ In addition, Part IV of the GATT 1947 brought an institutional change, namely, the introduction of a new permanent organ of the GATT called, the Committee on Trade and Development (CTD). The CTD was to ensure that the provisions contained in Part IV of the GATT 1947 were being implemented.

¹¹⁸ Michalopoulos, Constantine, Developing Countries in the WTO, London, Palgrave Publishers, 2001, p.25.

¹¹⁹ Long, Olivier, Law and its Limitations in the GATT, Boston, Graham & Trotman/ Martinus Nijhoff Publishers, 1987, p. 99.

¹²⁰ *The GATT 1947*

(c) The Enabling Clause¹²¹

In its provisions, the Enabling Clause goes further than Part IV of the GATT 1947 on the treatment developed Contracting Parties to the GATT could accord to developing countries. In clear language it reads in part:

*Notwithstanding the provisions of Article 1 of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, [footnote omitted] without according such treatment to other contracting parties.*¹²² (Emphasis added)

Thus, this language of the Enabling Clause established for the first time in trade relations and international economic law, a permanent legal basis for preferences in favour of developing countries. The bar contained in Article 1 of the GATT 1947 disallowing preferential treatment of Contracting Parties ceased to apply by virtue of the Enabling Clause.

VIII. SECTION C: SOME REGULATORY DIMENSIONS OF DEVELOPING COUNTRIES UNDER THE WORLD TRADE ORGANIZATION

IX. Threshold Issues

(i). The Connection Between the GATT 1947 and the WTO

The interchangeable use of the term, the GATT 1947 under the previous legal regime and under the current legal framework of the World Trade Organization Agreement might create confusion. The GATT 1947 and the GATT 1994 remain distinct legal instruments under the WTO Agreement although applicable simultaneously.

¹²¹ Decision dated, 28 November 1979, titled, '*Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*' (the Enabling Clause). The Enabling Clause was also, in part, a response to the Generalized System of Preferences (GSP) agreed in the framework of the UNCTAD. By the GSP arrangement, developed countries agreed to grant preferences to developing countries. Going by the provisions contained in the Enabling Clause, first, those preferences hitherto agreed under the GSP, which would have constituted a violation of Article 1 of the GATT 1947, became permissible, and second, the practice of obtaining Waivers before preferential treatment could be accorded to a developing country became unnecessary.

¹²² *Paragraph 1 of the Enabling Clause.*

The World Trade Organization (the WTO) was formed, pursuant to the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement).¹²³ The WTO Agreement is a short agreement but comprises four very lengthy substantive Agreements, namely, Annexes 1, 2, and 3 (collectively called, ‘the Multilateral Trade Agreements’)¹²⁴ and Annex 4 (called ‘the Plurilateral Trade Agreements’).¹²⁵

The WTO Agreement makes provisions dealing with the relationship between the GATT 1947 and what emerged in the WTO Agreement as the GATT 1994. The relevant provision reads in part:

The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A... is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October, 1947, annexed to the Final Act ... as subsequently rectified, amended or modified.¹²⁶

In actual fact, ‘the General Agreement on Tariff and Trade 1994’ merely incorporates the GATT 1947 subject to amendments. This is so given the following provision of the WTO Agreement:

The General Agreement on Tariffs and Trade 1994... shall consist of:

(a) the provisions in the General Agreement on Tariffs and Trade dated 30 October 1947 annexed to the Final Act... as rectified, amended or modified by the terms of the legal instruments which have entered into force before the date of entry into force of the WTO Agreement.¹²⁷

¹²³ The WTO Agreement is in fact annexed to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (the ‘Final Act’)

¹²⁴ The WTO Agreement. The Multilateral Agreements are deemed ‘integral’ to the WTO Agreement. In other words, all Members of the WTO accept them as binding commitments upon Membership. This is, for example, different for Plurilateral Agreements. Agreements regarded as Plurilateral are not binding on Members except where such Members choose to be bound. The WTO Agreement is further subdivided into *Annex 1A*, *Annex 1B* and *Annex 1C*.

¹²⁵ *Ibid.* Plurilateral Agreements not considered binding on Members include: *Agreement on Trade in Civil Aircraft*; *Agreement on Government Procurement* and the *International Dairy Agreement*.

¹²⁶ *The WTO Agreement*.

¹²⁷ *Para. 1 of the GATT 1994*.

The combined reading of the provisions of Article II: 4 of the WTO Agreement and paragraph 1 of the GATT 1994 clearly bears out the point, namely, that both legal provisions are equally applicable in the current legal framework. This point is important because it means that the GATT 1947 did not cease to exist with the coming into effect of the GATT 1994.

(ii) The Meaning of a Developing Country

Curiously, the term, 'developing country' is not elaborated anywhere under the covered agreements of the WTO. As an indication of countries that may bear that term, it has been pointed out:

[S]ometimes the term is used to refer to countries where per capita income is significantly below that of the major industrialized nations. The United Nations Development Programme (UNDP) has attempted to evolve indices of human development that take into account a broad range of factors, including education and literacy, the condition of women and children and the level of social infrastructure.¹²⁸

The observation, however, does not specify the particular criteria for determining the status of a developing country assuming it becomes a contested issue. Under GATT and WTO practice, a concept of self-selection seems to have evolved.¹²⁹ In other words, once a country declares itself as being a developing country, it remains so unless objected to by another Member. That situation is hardly satisfactory because it means, for example, that:

[S]ingapore with a per capita income of \$30,170 in 1998, and Ghana, with a per capita income of \$390 [Footnote

¹²⁸ It has been noted that at least 11 of the initial GATT Contracting Parties were developing countries. These were, Brazil, Ceylon, Chile, Burma, China, Cuba, India, Lebanon, Pakistan, Rhodesia and Syria. See, Michalopoulos, Constantine, *supra*, note 109, p.23.

¹²⁹ See, Footer, Mary, E., *Developing Country Practice in the Matter of WTO Dispute Settlement*, (2001) J.W.T., vol. 35, no. 1, p. 57.

omitted], are both supposed to benefit from the same provisions.¹³⁰

It appears that this lack of clarity regarding countries that should bear that term is perhaps attributable to the previous GATT practice of negotiation and diplomacy. The dominant ethos of diplomacy prevalent at the time might have rendered it unnecessary to spell out such matters with sufficient clarity. However, in an increasingly legalized system of trade, the wisdom in retaining that anomaly is questionable. One immediate benefit of stating countries deemed to be developing countries would be to clarify the countries eligible to the special and differential treatment in the WTO.¹³¹

X. Decision-Making by Consensus Under the WTO Agreement

The provisions concerning decision-making by consensus under the WTO Agreement seem not to differ substantially from GATT practice on decision-making. Under the heading, 'Decision-making' the WTO Agreement requires that 'The WTO shall continue the practice of decision-making by consensus followed under the GATT 1947'.¹³² Accordingly, the discussion on decision-making by consensus under the GATT 1947 is also relevant here. There is, however, one noticeable difference under the WTO Agreement. Unlike in the GATT 1947, the term, 'consensus' is employed under the WTO Agreement, and further, it is also defined. The term, 'consensus' is defined in the following terms:

The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no

¹³⁰ *Ibid.*

¹³¹ Special and differential provisions contained in the WTO Agreements are provisions directed specifically at developing country Members of the WTO. See fuller discussion below of the special and differential provisions.

¹³² *Article IX of the WTO Agreement.*

Member, present at the meeting when the decision is taken,
formally objects to the proposed decision.¹³³

The question whether this introduction of the term, 'consensus' in the WTO Agreement and its definition thereunder could be considered an improvement in terms of clarity and transparency when compared to the situation observed under the GATT 1947 practice is not easy. First, the definition uses terms that are difficult to construe. For example, just what does the phrase, 'if no Member present at the meeting when the decision is taken formally objects to the proposed decision' mean? Does it mean, for instance, that a single Member's formal objection (assuming 'formal objection' is itself clear) of another Member's representation by itself suffices to defeat the crystallisation of a 'consensus'? Similarly, it is instructive to note that the term, 'consensus,' is not coterminous with 'unanimity'. If that is so, it raises the prospect that consensus on a decision may be reached notwithstanding that such decision is not unanimous - the only condition being the unclear requirement that no formal objection be raised.

Second, by importing the practice of decision-making by consensus under the GATT 1947 into the current legal regime, it (the WTO Agreement) wittingly or unwittingly incorporates the observed deficiencies under that practice. That is to say, it is apparent that although 'consensus' is now defined, Members nevertheless, as the word 'shall' connotes, are obliged to follow the practice of decision-making under the GATT 1947. As a result, this definition of consensus can only have meaning in the context of the previous GATT 1947 practice - an arrangement fraught with uncertainties and perhaps, adding little of practical value.

¹³³ The WTO Agreement.

Professor Jackson provides us an insight into the question of how a consensus might be reached by Members under the WTO Agreement when he notes:

[T]he practice in the GATT, and surely also in the WTO, is that some countries that have difficulty with a particular decision will nevertheless remain silent out of deference to countries with a substantially higher stake in the pragmatic economic consequences of a decision. Thus, the consensus practice itself involves some deference to economic power. This has certainly been the practice in the GATT, and the WTO Charter provides that the WTO shall be guided by such 'customary practices'.¹³⁴ (Emphasis added)

The observation is quite revealing and perhaps confirms the point made earlier in connection with weighted voting under the GATT 1947.¹³⁵ 'Consensus,' notes Professor Jackson 'itself involves some deference to economic power'.¹³⁶ Even if it is assumed that Professor Jackson's assertion represents an accurate description of what the term 'consensus' entails under the WTO Agreement (which is not borne out upon a textual consideration of the relevant provision), he fails to indicate just what the degree of deference to economic power should be. In addition, Professor Jackson is also silent on the range of issues that could be considered as being in the nature of substantially higher stake such that other countries having a difficulty with them would nevertheless remain silent when they arise.

Professor Qureshi disagrees with this reading of the term, 'consensus' by Professor Jackson. In a direct response, Professor Qureshi argues that Professor Jackson's views on the question of consensus are controversial and submits:

¹³⁴ Jackson, John, *supra*, note 97, p.46; Also suggesting such economic deference, see, Heokman, Bernard, and Kostecki, Michel, The Political Economy of the World Trading System, 2nd ed., London, Oxford University Press, 2001, p.58.

¹³⁵ See the section on decision-making in the GATT *supra*, p.42.

¹³⁶ Jackson, John, *supra*, note 134, p. 58.

Professor Jackson does not substantiate his claim. The reasons why members engage in certain types of decision-making is (sic) complex. To establish deference to economically powerful members as a motive for decision-making needs to actually be proven and would be difficult to substantiate. *Further, the assertion that there is the likelihood of such deference is not the same as it actually transpiring...* Finally, to suggest that the WTO Charter actually enshrines servility on the part of certain members may be offensive to those members.¹³⁷ (Emphasis added)

This author finds the view expressed by Professor Qureshi more compelling given the difficulty in reconciling Professor Jackson's argument to the effect of giving deference to economic considerations with the textual provisions contained in the WTO Agreement. In that connection, the highlighted definition of consensus under the WTO Agreement makes no such reference to deference to economic power. Furthermore, Professor Jackson's account of decision-making under the GATT does not refer to such practice of deference to economic power. As a result, it is difficult to identify the 'customary practice' that he alludes to in his submission. Professor Qureshi's arguments, however, are not an explanation of what 'consensus' in the WTO means but are merely advanced in opposition to the assertion by Professor Jackson. This lack of clarity in this decision-making process in the WTO perpetuates the notion that decision-making is made by a privileged few.

¹³⁷ Qureshi, Asif, *supra*, note 110, p. 243.

XI. A HARD LOOK AT DEVELOPING COUNTRY LEGAL PROVISIONS IN THE WTO LEGAL REGIME¹³⁸

(i). Special and Differential Treatment of Developing Countries under the WTO Agreement.

The range of provisions made for the particular benefit of developing country Members under the WTO Agreement is extensive. Rather than outline all the relevant provisions, the following helpful detailed characterization will be adopted:¹³⁹

a) Provisions aimed at enhancing trading opportunities for developing countries, including through providing more favourable access to the markets of developed countries:¹⁴⁰

b) Provisions that require developed countries to safeguard the interests of developing countries when adopting certain measures:¹⁴¹

c) Provisions giving developing countries some flexibility and policy discretion including by granting them more favourable thresholds or exempting them from obligations or disciplines that apply to developed country Members:¹⁴²

¹³⁸ The phrase, 'hard-look' is borrowed from the article by Chinkin, Christine, *A Hard Look at Soft-Law*, cited in Chinkin, Christine, *The Challenge of Soft Law: Development and Change in International Law*, (1989) Intl' & Comp. L. Q., vol. 38, p. 850.

¹³⁹ Youssef, Hesham, *Special and Differential Treatment for Developing Countries in the WTO*, South Centre, Trade-Related Agenda, Development and Equity, (T.R.A.D.E.) Working Papers, No. 2, obtainable at www.southcentre.org.

¹⁴⁰ The WTO Agreements and provisions relevant here include: *The Preamble to the WTO Agreement*, *Article IV:1 of the General Agreement on Trade in Services (GATS)* and the '*Decision on Measures in Favour of Least-Developed Countries*'.

¹⁴¹ Examples here would include provisions contained in the *Agreement on Subsidies and Countervailing Measures* and the *Agreement on Safeguards*.

¹⁴² *Agreement on Subsidies and Countervailing Measures*.

d) Provisions mandating or requesting support measures including financial and technical assistance by developed countries or by the WTO or other international organizations:¹⁴³

e) Provisions providing for some safeguard-type measures, that is, giving assurance to developing country Members that if they face difficulties they will be able to resort to policies and measures that would assist them in addressing these difficulties:¹⁴⁴

f) Provisions granting limited time derogation from the application of rules. These would allow developing countries to derogate from commitments for specific time periods with varying conditions that differ from one agreement to another and may also differ between developing countries and least developed countries. At the end of these transitional periods, in most cases developing countries will have similar obligations to developed countries.

¹⁴³ The following Agreements are instructive: *Agreement on Technical Barriers to Trade* (TBT); *Agreement on Trade-related Aspects of Intellectual Property* (TRIPS) and the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

¹⁴⁴ Both the *Agreement on Subsidies and Countervailing Measures* and the *Agreement on Safeguards* are relevant here.

(ii) The Legal Nature of Developing Country Provisions.

The question usually posed regarding the legal provisions concerning developing countries is whether they are really 'legal provisions' or whether they are merely soft-law provisions.¹⁴⁵ Professor Dupuy has described soft-law as part of the contemporary system of law-making process but, that as a social phenomenon, it evidently overflows the classical and familiar legal categories by which scholars usually describe and explain both the creation and the legal authority of international norms.¹⁴⁶ In other words, although it is acknowledged that soft-law may be part of a contemporary system of law making, it is nevertheless difficult to locate it within the accepted notion of what is accepted as being law. For his part, Professor Weil would characterize 'soft-law' as being a non-compelling legal norm.¹⁴⁷

This argument on whether soft-law is a law or not is surely unhelpful. This is so for at least two reasons. In the first place, it *ab initio* makes any reliance on those provisions problematic given that their very legal nature is a question that remains unresolved. Conversely, those provisions are handicapped in their objective of creating obligatory requirements on the part of their addressees. That is to say, in the absence of a clear and

¹⁴⁵ This is a dominant question posed regarding developing country legal provisions notwithstanding that some of the provisions are couched in hard-law terms. See, in this regard, Kessie, Edwini, *Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements*, The Journal of World Intellectual Property, Vol. 3, No. 6, November 2000, pp.955-975. Further, the word, 'may' is employed in paragraph 1 of the Enabling clause. In legal parlance, 'may' confers a discretion and therefore arguably does not create a legal obligation in contradistinction with for example, the word, 'shall'. Miguel, Montana Mori, beautifully captures this distinction between GATT developing country norms and legal norms, properly so called by the use of the term, 'Norms of Aspiration and Norms of obligation'. For him, GATT developing country legal provisions fit the former categorization. See, Mori, Montana, Miquel, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, Col. Jnl. of Trans. NtL. Law, Vol. 3, (1993) p. 103.

¹⁴⁶ Dupuy, Pierre-Marie, *Soft-law and the International Law of the Environment*, Michigan Journal of International Law, Vol. 12, No.2 Winter, 1991, p. 420, Cited in Olivares, Gustavo, *The Case for Giving Effectiveness to the GATT/ WTO Rules on Developing Countries and the LDCs*, (2001) J.W.T., vol. 35, no. 3 p. 545.

¹⁴⁷ *Ibid.* p. 548.

unequivocal determination of their 'legal' nature, it would be difficult for those provisions to create compelling commitments on the part of their addressees.

Secondly, as Olivares has argued, in the current judicialized system of resolving trade disputes, continuing to retain the softness of those legal provisions is tantamount to an anathema.¹⁴⁸ In his view, the soft-law language used may, to a certain extent, be justified under the GATT *à la carte*¹⁴⁹ trade regime given the power-based and non-enforceable character of the system.¹⁵⁰ Going further, Olivares submits that the trend had inexplicably persisted even after the creation of the WTO notwithstanding that the current system of trade is rule based with legal obligations of a mandatory character. To put the matter differently, it is difficult to reconcile the increasingly regulatory legal structure of trade with the soft-law nature of the provisions intended to benefit developing countries. With the full complement of judicial panels and an Appellate Body, developing countries are bound to encounter some difficulties should they wish to enforce those provisions.¹⁵¹

However, on the other hand, where the special and differential treatment provisions are couched in hard-law terms, it raises the prospects of its beneficial employment by developing countries. The decision of the Panel and the Appellate Body (AB) in *Brazil-*

¹⁴⁸ *Ibid.* p. 549

¹⁴⁹ Under the *a la carte* system, Contracting Parties to the GATT were not under any obligation to be bound by the agreements forming part of the GATT. However, under the WTO Agreement, the concept of 'single undertaking' applies. That is to say, Members are bound by all the agreements under the WTO Agreement (the covered agreements) except for those referred to as Plurilateral Agreements.

¹⁵⁰ Olivares, *supra*, note 146, pp.549-551.

¹⁵¹ Note, however, that soft-law provisions could be important in some respects. First, they facilitate agreement in areas otherwise difficult for parties to commit themselves in the sense of binding legal obligations. Second, the ensuing soft-law commitments govern practice in that area such that it could crystallize into hard-law commitments. In this sense, Gold, Joseph, writes: 'The usefulness of soft-law as a contribution to the growth of international law is that the application of soft-law can produce over time an accretion of firm law...' See, Gold, Joseph, *Strengthening the Soft International Law of Exchange Arrangements*, (1983) AJIL, vol. 77, p.444. For an example of this 'accretion' of soft-law to hard law with particular reference to the Basle Accord, see, Guzman, Andrew, T., *A Compliance-Based Theory of International Law*, (2002) Calif. L. Rev., vol. 90, p. 1823.

Export Financing Programme for Aircraft,¹⁵² bears out the point in this regard. In that case, Brazil sought to invoke the special and differential provisions contained in *Article 27 of the Subsidies and Countervailing Agreement*, (the SCM) claiming it could grant subsidies to a domestic company, Embraer. By that provision, a developing country could grant subsidies for a period of eight years from the time of entry into force of the WTO Agreement. Thereafter, the period of grace would no longer apply. In such an instance, a developing country, just like a developed Member, would be barred from granting subsidies to its domestic companies.

The Panel, agreeing with Brazil's submissions, held:

Clearly, on the basis of the plain meaning of the text of the provision, developing country Members falling within Article 27.2(b) that is, developing country Members (other than those referred to in Annex VII) that are in compliance with the provisions of Article 27.4- do not fall within the scope of application of the prohibition contained in Article 3.1 (a) until 1 January 2003.¹⁵³

It is instructive to note that the imperative word, 'shall' was employed in the provision of the SCM Agreement sought to be invoked by Brazil. Thus, the full legal connotation of that word apparently swung the pendulum of consideration in favour of according it legal recognition, and accordingly, raising the prospect of it being successfully invoked by other developing countries.

¹⁵² *Brazil-Export Financing Programme for Aircraft, complaint by Canada, WTO Documents WT/DS46/R (Panel) AB-1999-1, WT/DS46/AB/R (2 August 1999) (Appellate Body), adopted on 20 August 1999. (hereafter, Brazil-Aircraft).*

¹⁵³ *Ibid.* The Appellate Body also agreed with the Panel on this point.

XII. IMPRINTS OF THE PAST AND NEW BEGINNINGS

On a broad scale, the regulation of global trade remains a feature of the current trading system. Both for wealthy and poor nations, trade regulation secures trade interests of actors. Furthermore, the most favored nation treaty characterizing most trade agreements following the *Cobden-Chavalier Treaty* remains a cornerstone of the current trade system although the special and differential treatment of developing countries has introduced some modifications to it. That is so notwithstanding, as may be observed, that the treaties spawned by the *Cobden-Chavalier Treaty* were between nations of not dissimilar economic strength. The dominant economic powers that arose after the Second World War are still influential, albeit acting through economic institutions. That influence now manifests itself in the deference accorded them in the institutions that they designed.

Which leads to the narrower institutional examination. Under the ill-fated ITO legal regime, a system of weighted voting and a ruling directorate was designed by the leading economic powers to ensure they retained influence on trade policy. Under GATT, unlike provisions under the ITO manifesting a brazen deference to economic power, a more subtle deference called 'consensus' evolved as a customary practice. Under the current WTO legal regime, the practice of decision-making by consensus under the GATT continues to hold sway. In other words, the practice of decision-making under the GATT 1947 is now incorporated into the WTO Agreement with the result that nothing substantial has changed notwithstanding minimal provisions suggesting otherwise. The legal provisions introduced to ameliorate developing countries difficulties mark an important conceptual shift from the previous position that all Members were to be treated alike. Instructively, it took the specter of an alternative institutional forum, that is,

UNCTAD to generate that change. Nevertheless, the legal provisions marked a progressive step. However, the fact that the legal provisions are couched in best endeavor terms weakens, and diminishes their utility.

III: THE DECISION IN THE *INDIA-QUANTITATIVE RESTRICTION CASE*¹⁵⁴ AS JUDICIAL GOVERNANCE: SITUATING THE DEVELOPING COUNTRY AS A SUPPLICANT BEFORE THE DISPUTE SETTLEMENT PANEL.

I INTRODUCTION

Article XVIII: B of the GATT 1994 embodies one of the most far-reaching provisions of the special and differential treatments accorded to developing country Members of the WTO. It spells out exceptions to the GATT 1994 obligations that developing countries may invoke when faced with a balance-of-payment difficulty. Thus, its over-arching conceptual underpinning reflects recognition of the peculiarly difficult state of most developing countries' economy when undergoing a rapid process of development. Consequently, *Article XVIII: B of the GATT 1994* makes provisions that grants an exception to developing countries in respect of measures they may wish to adopt in reversing their balance-of-payments difficulties. Nevertheless, both the Panel and the Appellate Body in the *India-Quantitative Restriction Case* denied India the right to invoke the protection accorded to developing countries under that provision. This case analysis will do the following: First, it will present an overview of the extensive normative framework governing the imposition of quantitative restrictions by a developing country under the GATT 1994. Second, the analysis will present the relevant facts arising in the *India-Quantitative Restriction Case* and the decision delivered thereunder both by the Panel and the Appellate Body. Finally, the analysis will attempt to

¹⁵⁴ Report of the Panel, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, (Apr. 6, 1999) (adopted Sept. 22, 1999), hereafter, 'Panel Report' and Report of the Appellate Body, WT/DS90/AB, AB-1999-3, hereafter, Appellate Body Report. For the earliest commentaries on the question of balance-of-payments, the seminal work of Professor John Jackson is relevant. See, in that connection, Jackson, John, *supra*, note 106, at p. 673: See, also, Roessler, Frieder, *Selective Balance-of-Payments Adjustment Measures Affecting Trade: The Roles of the GATT and the IMF*, 9 J. World Trade L. 622, 644 (1975). For a more recent short commentary, Qureshi, Asif, *Challenging Quantitative Restrictions for Balance-of-Payments Purposes under the WTO*, (2000), Int. T. L.R., Issue 1, p. 28.

reflect on some implications for developing countries arising in the context of that decision.

II The Normative Framework For the Imposition of Quantitative Restrictions by a Developing Country.

The normative framework of provisions made in connection with the right of a developing country to impose quantitative restrictions under the GATT 1994 is extensive.¹⁵⁵ However, the kernel aspects of those provisions are contained in *Article XVIII: B of the GATT 1994*. For ease of understanding, its provisions will be summarized thus:

1. Article XVIII: 8, appearing under the heading: 'Governmental Assistance to Economic Development,' underscores the concern that developing countries tend when they are in a rapid process of development, to experience balance-of-payments difficulties arising mainly from efforts to expand their internal markets as from the instability of their terms of trade.¹⁵⁶ In such a situation, *Article XVIII: B of the GATT 1994* allows a derogation from the *Article XI of the GATT 1994* ban on quantitative restrictions by according to a developing country confronted with balance-of-payments difficulties, a right to impose quantitative restrictions on its imports.
2. The right to impose quantitative restriction on imports, however, is subject to conditions spelt out in Article XVIII: 9, 10 and 11 of the GATT 1994. They include, for example: a) that the restrictions undertaken shall not exceed those

¹⁵⁵ Aside from Article XVIII: B of the GATT 1994 provisions, other relevant GATT 1994 provisions which will also be referred to throughout this analysis include: *The Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994* (the Understanding on Balance-of-Payments); the *Declaration on the Relationship of the World Trade Organization with the International Monetary Fund: Article XV: 2 of the GATT 1994* and the *Additional Articles to Article XVIII: B of the GATT 1994* (the Ad. Article XVIII).

¹⁵⁶ *Article XVIII: 8 of the GATT 1994*.

necessary to forestall the imminent threat of, or to stop a serious decline in its monetary reserves; and b) where the restrictions relate to very low monetary reserves, the restrictions shall not exceed those necessary to achieve a reasonable rate of increase.

3. Article XVIII: 12 contains largely, the applicable procedural requirements that a Member must satisfy where it has imposed quantitative restrictions pursuant to the provisions under *Article XVIII: B of the GATT 1994*.
4. The role of the International Monetary Fund (the Fund) is not specifically mentioned under this provision. However, as will be seen, the Fund's determinations constitute an influential aspect of the conclusions that may be drawn under this provision.

III *The India-Quantitative Restriction Case*

A Background Facts

The decision in the *India-Quantitative Restriction Case* brought to the fore, for the first time, the various issues that might arise in connection with *Article XVIII: B of the GATT 1994*.¹⁵⁷ Since 1950, India had maintained quantitative restrictions on a range of products on the basis of what it asserted to be its deplorable balance-of-payments situation. These restrictions were first applied under *Article XII of the GATT 1947* and thereafter, under *Article XVIII: B of the GATT 1994*. By the time the Panel in the *India-Quantitative Restriction Case* was established, India's quantitative restrictions on imports of products fell on 2, 714 tariff lines at the eight-digit level of the HS96 for which it claimed balance-

¹⁵⁷ Another decision had raised, however, similar issues to those arising in the *India-Quantitative Restriction Case*. See the Panel Reports on *Republic of Korea-Restrictions on Imports of Beefs*, L/6504, adopted on 7 November 1989, BISD 36S/ 202, 227, para. 96; L/ 6505, adopted on 7 November 1989, BISD 36S/ 234, 265, para. 112; L/ 6503, adopted on 7 November 1989, BISD 36S/ 268, 303 para.118. However, the *India-Quantitative Restriction Case* was the first considered under the GATT 1994.

of-payments justification.¹⁵⁸ Prior to that, it had been in consultations, as required under *Article XVIII: B of the GATT 1994* with other Members under the aegis of the Committee on Balance-of Payments Restrictions ('the Committee').¹⁵⁹ However, the consultations in the Committee failed to achieve a consensus on the question of whether India should continue maintaining its quantitative restrictions or not. Whilst some Members argued, based on the opinion of the Fund to the Committee, that the quantitative restrictions imposed by India were no longer necessary, other Members argued that India's financial situation remained volatile. Accordingly, they argued, jettisoning the quantitative restrictions would exacerbate India's balance-of-payments situation.¹⁶⁰ It was against this inconclusive background that the United States invoked the Dispute Settlement procedures provided for under the WTO Agreement.¹⁶¹

B. The Arguments of the Parties to the Case

(i) India

In this case, the United States challenged the quantitative restrictions imposed by India as constituting a breach of its treaty obligations under the GATT 1994. In its reply, India anchored its arguments on three key submissions. First, India argued that the Panel could not assume jurisdiction in such a case. For that submission, India sought to rely on a distinction between, on the one hand, the 'application' of balance-of-payments measures, in which case, the Panel could assume jurisdiction, and on the other hand, the 'justification' of those balance-of-payments measures, in which case, the Committee and

¹⁵⁸ 'HS' Means the Harmonized System of Classification. Tariff rates attach to goods according to their HS Classifications.

¹⁵⁹ The Committee is a body having responsibility to supervise the consultations required of a Member initiating balance-of-payments measures. *Para. 5 of the Understanding on balance-of-payments*.

¹⁶⁰ A Record of the Committee's proceedings is contained in WT/BOP/R/ 32, 18 September 1997.

¹⁶¹ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 to the WTO Agreement (the 'Dispute Settlement Understanding').

the General Council of the WTO retained jurisdiction. As the current dispute related to the 'justification' of its balance-of-payments situation,¹⁶² India argued to the effect that it was premature for the Panel to assume jurisdiction in the current matter.¹⁶³ Second, India argued that the restrictions in question were not GATT inconsistent since they were merely sufficient to arrest its rapidly degenerating balance-of-payments problem.¹⁶⁴ In other words, it was India's contention that based on the facts, its balance-of-payments difficulties were as grave as the conditions envisaged under *Article XVIII: B of the GATT 1994* such that it could validly impose quantitative restrictions as a remedy. Third, India argued that the provisions contained under *Article XVIII: B of the GATT 1994* differed conceptually with those made under *Article XII of the GATT 1994*.¹⁶⁵ In India's view, as opposed to the provisions contained under *Article XII of the GATT 1994*, *Article XVIII: B of the GATT 1994* provisions were a clear expression of the special and differential treatment accorded to developing country Members of the WTO. Consequently, India contended that that conceptual anchor should guide the Panel in reaching its conclusions.

(ii) The United States

In meeting India's arguments, the United States contended instead that first, there was nothing, either under *Article XII of the GATT 1994*, or even under *Article XVIII: B of the GATT 1994* prohibiting it from seeking recourse to the dispute settlement provisions contained under the Dispute Settlement Understanding if it deemed that its rights under the GATT 1994 were being nullified or impaired by another Member. This was so, the

¹⁶² That was so in India's view because the Committee was yet to reach a conclusion on the matter one way or the other. At other times, however, India also argued that the Committee had exclusive jurisdiction to determine matters concerning balance-of-payments.

¹⁶³ Panel Report para. 3.69 p.24.

¹⁶⁴ Panel Report para. 3.168 p. 53.

¹⁶⁵ Panel Report para. 3.170 p. 54.

United States argued, regardless of the fact that consultations in the Committee remained inconclusive.¹⁶⁶ In the view of the United States, were the Panel to reach a contrary conclusion, it would undermine their functions, namely, to ensure the ‘security and predictability to the multilateral trading system... and to clarify the existing provisions of those agreements in accordance with customary rules of the interpretation of public international law’.¹⁶⁷ Second, on the factual question of whether India’s balance-of-payments situation could ground its continued maintenance of quantitative restrictions, the United States responded by drawing the Panel’s attention to the conclusions of the Fund in the Committee. In the light of those conclusions, the United States contended that the Panel ‘must accept as dispositive the determination of the Fund concerning whether the facts of India’s balance-of-payments and reserve situation placed India within the criteria listed in Article XVIII: 9 (a) and (b).¹⁶⁸ The United States hinged its submission on this point on the provisions contained particularly in *Article XV of the GATT 1994* that suggested that on questions of a Member’s balance-of-payments, the Panel must accept the Fund’s determination on that issue. Consequently, the United States urged the Panel to uphold as conclusive, the determinations of the Fund to the effect that India’s balance-of-payments situation could no longer ground the imposition of quantitative restrictions, and accordingly, that India should be directed to lift its measures.

¹⁶⁶ Panel Report para. 3.84, p. 29.

¹⁶⁷ *Dispute Settlement Understanding*.

¹⁶⁸ Panel Report, para. 3.310, p. 94 The United States also referred to the provision of *Article XV:2 of the GATT 1994* to buttress its argument. It contains provisions on the Fund’s role in reviewing Member’s balance-of-payments situation.

C. The Decision

(i) The Decision of the Panel

In its decision, the Panel disagreed with India's contentions and held that its quantitative restrictions were a violation of its obligations under the GATT 1994. The Panel came to that conclusion after determining the threshold question: whether, in the first place, it had jurisdiction to hear the matter given the GATT provisions on the role of the Committee on issues pertaining to a Member's balance-of-payments situation.¹⁶⁹ On this aspect, it found *inter alia*, that it would be tantamount to a misreading of the intention of Members to preclude a Member from invoking dispute settlement remedies either under Article XXIII of the GATT 1994, or under the Dispute Settlement Understanding provisions of the GATT 1994 for that matter and *a fortiori*, it came to the conclusion that dispute settlement panels indeed play a 'complementary role' to such bodies as the Committee for purposes of reviewing balance-of-payments measures undertaken by a Member.¹⁷⁰

On the Fund's role in making determinations concerning the balance-of-payments position of Members, the Panel declined to pronounce specifically on the question of whether such a determination would, without more, (that is to say, without adducing further evidence in that regard) settle the question of whether such a Member actually faced a balance-of-payments difficulty as contemplated in Article XVIII: B of the GATT 1994 provisions. 'We do not find it necessary for the purpose of this case,' said the Panel, 'to decide the extent to which Article XV: 2 may require panels to consult with the IMF or consider as dispositive specific determinations of the IMF'.¹⁷¹ Instead of going that

¹⁶⁹ *The Understanding on balance-of-payments* makes provisions concerning the role of the Committee in balance-of-payments consultations.

¹⁷⁰ Panel Report para. 5.91 p. 153.

¹⁷¹ Panel Report para. 5.13 p. 134.

route, the Panel rather chose to invoke the powers granted it under the Dispute Settlement Understanding¹⁷² to seek information from the Fund given what it considered to be its 'extensive expertise in these matters'.¹⁷³ Consequently, relying mainly on the Fund's determinations, it found that India no longer faced a balance-of-payments difficulty that could ground its imposition of quantitative restrictions pursuant to Article XVIII: B of the GATT 1994. As a result, it required India to lift the quantitative restrictions it had imposed and to thereby bring its measures into conformity with its treaty obligations under the GATT 1994.

(ii) The Decision of the Appellate Body.

The Appellate Body upheld those conclusions reached by the Panel in holding that the quantitative restrictions imposed by India amounted to a violation of its treaty obligations under the GATT 1994. It agreed that the Panel had jurisdiction to review the balance-of-payments measures adopted by a Member holding that such a conclusion, contrary to India's contention, 'would not render redundant the competence of the BOP Committee and the General Council'.¹⁷⁴ Furthermore, on the Fund's role in determining questions concerning a Member's balance-of-payments position, the Appellate Body concurred with the Panel's decision that it (the Panel) had the power to seek expert opinion that it rightly exercised by calling for the Fund's determinations. On the specific question of whether the Panel was obliged to accept as conclusive, the determinations of the Fund on a Member's balance-of-payments situation, the Appellate Body, like the Panel, declined

¹⁷² Article 13.1 of the Dispute Settlement Understanding.

¹⁷³ Panel Report, para. 5.12, p. 134.

¹⁷⁴ Appellate Body Report, para. 104, p. 25. In support of that conclusion, the Appellate Body, amongst others, drew attention to the provisions of footnote 1 to the Understanding on balance-of-payments that expressly indicated the jurisdiction of Panels to deal with matters 'arising from the application of balance-of-payment measures'.

to resolve that question holding that it was not one of the issues raised in the appeal before it. Nevertheless, the Appellate Body concluded that the Panel did not just merely rely on the Fund's determinations, but in addition to that, also sought to conduct an objective assessment of India's balance-of-payments position. In that connection, the Appellate Body cited as an example, the Panel's assessment of the opinion of the Reserve Bank of India concerning India's balance-of-payments situation to demonstrate that the Panel did not limit itself solely to the Fund's determinations. All in all, the Appellate Body considered the Panel's assessment of the factual question of whether India's balance-of payments position could entitle it to the protection provided under *Article XVIII: B of the GATT 1994*, to be adequate.

IV. Situating the Developing Country as a Supplicant before the Dispute Settlement Panels.

A. Judicial Nullification and Impairment or Judicial Enhancement

(i) Institutional Competence

The relevant question posed here is: Did the Decision of the Panel and the Appellate Body in the *India-Quantitative Restriction Case* to the effect that Panels play a complementary role to the Committee preserve or diminish the rights of developing countries enshrined in the GATT 1994 Agreements?

The Panel in the *India-Quantitative Restriction case* held *inter alia* as follows:

[W]e find that allowing dispute settlement panels to consider whether balance-of-payments measures are justified under Article XVIII: B would not render redundant or reduce to inutility either that article or related WTO provisions dealing with balance-of-payments issues. Article XVIII: B and the 1979 Declaration and 1994 Understanding taken together would continue to provide the basic instrument for review of balance-of-payments

issues, with the dispute settlement procedures playing a complementary role.¹⁷⁵

The Panel went on to conclude:

[W]e are aware of the fact that the BOP Committee and panels have different functions and *our finding is without prejudice to the role of the Committee and the General Council in reviewing balance-of-payments measures in the context of consultations under the balance-of-payments provisions of GATT 1994*. By finding that panels can review the justification of balance-of-payments measures, *we do not conclude that panels can substitute themselves for the BOP Committee*.¹⁷⁶ (Emphasis added)

In examining the Panel's conclusions, it is pertinent to refer to a crucial provision contained in the Dispute Settlement Understanding concerning dispute settlement in the WTO in general that states in part:

[T]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize *that it serves to preserve the rights and obligations of Members under the covered agreements...Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements...*¹⁷⁷ (Emphasis added)

The italicized portion of the provisions is particularly instructive. It underscores a twofold objective evident in the dispute settlement process under the WTO, namely, first, that the dispute settlement procedures serve as a tool in ensuring that Members rights and obligations under the WTO covered agreements are preserved and retained. And second, perhaps as a corollary, that the Rulings (or Recommendations) of its dispute settlement body should not 'add to or diminish the rights and obligations' contained under the various WTO Agreements.

¹⁷⁵ Panel Report para. 5.91 p. 153.

¹⁷⁶ Panel Report para. 5.114 p.159.

¹⁷⁷ Article 3:2 of the Dispute Settlement Understanding.

It is against the background of this provision that the decision of the Panel in the *India-Quantitative Restriction Case* to the effect that they (Panels) play a ‘complementary’ role to the Committee could be examined. It is difficult to see how the Panel’s eventual conclusions to the effect that, first, Panels play a ‘complementary’ role to the Committee - will not be *without prejudice to the role of the Committee and the General Council*. Second, it is not any easier to see how the Panel’s other conclusion - that ‘*by finding that panels can review the justification of balance-of-payments measures, we do not conclude that panels can substitute themselves for the BOP Committee*’ - will not ultimately result in Panels emerging as a substitute to the Committee for reviewing the balance-of-payments position of Members.

This author submits that those two conclusions, in practical terms, achieve an entirely opposite result of what the Panel seemingly sought to avoid. The effect of the Panel’s conclusion in the *India’s-Quantitative Restriction Case* undermines the role of the Committee and that of the General Council in reviewing balance-of-payments measures of Members for at least two reasons. First, the Panel by its own admission acknowledged the fact that Panels and the Committee *perform different functions*. Whilst that is so, the indisputable fact of the matter is that in respect of balance-of-payments measures, a Panel and the Committee would perform similar (but not the same) functions, namely, reviewing the balance-of-payments measures adopted by a Member. Thus, the Panel’s decision to the effect that a Member was entitled, at any time, to invoke dispute settlement procedures *irrespective of the provisions concerning the Committee’s functions*, would in fact mean that a Member could forego those balance-of payments review functions performed by the Committee since the Member could proceed straight

to initiate Panel procedures. At the least, one result of that would be to circumvent or to render the Committee's review functions redundant as India rightly pointed out. The second reason also achieves a result similar to the first. If, as suggested by the Panel, a Member would not be obliged to follow the Committee's somewhat cumbersome procedures, but could opt instead to initiate dispute settlement procedures, it is not unlikely that Panels would increasingly be seen as a convenient 'substitute' for obtaining a speedier determination of questions of the propriety of a Member's balance-of-payments measures.¹⁷⁸ This author further submits that the combined effect of both observations would be that in this instance, the conclusion of the Panel rather than being 'supplementary,' amounted to a substitution of the Committee's functions so far as a Member was not obliged to undergo its review procedures. A point that fortifies that submission apparently not adverted to by India is the fact that Members are required to give each other adequate opportunity for consultation arising between them. Towards that end, the GATT 1994 contains a mandatory requirement concerning consultations held under its provisions. That provision, titled 'Consultation,' states:

Each contracting party shall accord sympathetic consideration to, and *shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting party* with respect to any matter affecting the operation of this Agreement.¹⁷⁹

The pertinent phrase here is 'shall afford adequate opportunity for consultation'. How could this requirement of adequate opportunity for consultation be satisfied if another Member retains a right to forego it completely? Certainly, the unrestrained right implicit

¹⁷⁸ *Paras. 5-13 of the 1994 Understanding on balance-of-payments* contains rather lengthy provisions on the review of a Member's balance-of-payments measures.

¹⁷⁹ *Article XXII: 1 of the GATT 1994.*

in the Panel's decision for a Member to approach it renders the provision above of marginal utility.

Consequently, this aspect of the decision in the *India-Quantitative Restriction Case* diminishes, contrary to the highlighted requirement under the Dispute Settlement Understanding, the rights accorded to a developing country to have its balance-of-payment measures reviewed by a specialist panel of Members and the attendant benefits that process might entail. For example, the informal atmosphere of the Committee's proceedings and the right of progressive removal of quantitative restrictions envisaged under the Committee's procedures all contribute to a more conducive climate for developing country Members to seek rapprochement and amicable settlement rather than in the more hostile environment of dispute settlement proceedings.

However, for the avoidance of doubt, it is not the submission of this author that dispute settlement procedures should be denied to a Member wishing to challenge another Member's balance-of-payments measures. To be sure, dispute settlement options should remain available to any Member wishing to invoke them in circumstances including those involving questions related to balance-of-payments measures. That option, however, should not be exercised in a way that either, renders redundant provisions concerning the functions performed by the Committee, or that generally diminishes the rights accruing to developing countries under the GATT 1994. One way to achieve that result would be to require, as a condition precedent, that a Member should exhaust the provisions contained in the Committee's procedures before it could validly resort to the dispute settlement procedures by way of initiating an action before a Panel. In that way, the right of a Member to initiate Panel proceedings is not extinguished *per se* but only made subject to

the exhaustion of the Committee's review procedures. That would have the effect of retaining the quasi-jurisdictional competence of the Committee to perform its review functions and at the same time, the Panel's competence to resolve disputes arising between Members, including those concerning balance-of-payments. That approach would animate the idea of one being complementary to the other. In such a situation, the question of what 'undermines' or 'substitutes' the other would not arise because the option of dispute settlement would remain open to a Member dissatisfied with the conclusions reached by the Committee and the General Council. The deliberations in the Committee could also serve as helpful evidence that could be reviewed by a Panel in reaching conclusions on a Member's balance-of-payments measures.

(ii) Special and Differential Provisions Accorded to Developing Countries under Article XVIII: B of the GATT 1994.

Although the Panel in the *India-Quantitative Restriction Case* acknowledged the provisions of *Article XVIII: B of the GATT 1994* as being one expression of the special and differential treatment accorded to developing countries, this author submits that its eventual recommendations hardly reflected that conceptual anchor.¹⁸⁰ It seems the Panel merely limited itself to a factual determination of whether India's balance-of-payment measures could ground quantitative restrictions envisaged under *Article XVIII: B of the GATT 1994*. To be sure, that was a proper start to the required scrutiny of India's balance-of-payments measures. However, to the extent that a developing country was involved in the matter before it, this author further submits that the Panel's reading of some of the relevant provisions was unduly narrow, and thus ran counter to that conceptual anchor of the special and differential treatment of developing countries

¹⁸⁰ Panel Report, para. 5.152, p. 164.

evinced in those provisions. For example, the following two key provisions of Article XVIII: B of the GATT 1994 encapsulating the special and differential treatment of developing countries came up for consideration. The first provision states:

In carrying out its domestic policies, the contracting party concerned *shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis* and to the desirability of assuring an economic employment of productive resources.¹⁸¹ (Emphasis added)

Furthermore, an additional provision containing similar terms provides:

The second sentence in paragraph 11 *shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions.*¹⁸² (Emphasis added)

The above provisions jointly read make it abundantly clear that in resolving the question of whether a developing country properly invoked balance-of-payments measures or not, a Panel's paramount considerations should include, first, that an equilibrium position in its balance-of-payments position should be on a *sound and lasting basis*. The phrase, 'sound and lasting basis' is particularly instructive. It would mean that a crucial test of determining whether a Member applying balance-of-payments measures had attained a stable or equilibrium position should include, since the conjunctive word 'and' is employed in those provisions, not only that its position is now 'sound' but also, lasting. Accordingly, that provision arguably places a heavier burden on a Member seeking to challenge the validity of such measures particularly where employed by a developing country. Second, those provisions lay out an even stiffer test for challenging such balance-of-payments measures employed by a developing country. That is to say,

¹⁸¹ Article XVIII: 11 of the GATT 1994.

¹⁸² Ad. Article XVIII: 11 of the GATT 1994.

although those measures are not maintainable beyond a necessary period, the threat of a balance-of-payments difficulty recurring in the developing country concerned would suffice as a reason for it to retain its initial measures. Consequently, an apparent improvement in the developing countries' balance-of-payments situation would by itself be inadequate to require it to lift its balance-of-payments measures especially where such a removal would result in endangering the improved situation.

This author argues that had the stringent tests required in these provisions been given adequate and robust consideration, bearing in mind their conceptual fulcrum, the Panel in the *India-Quantitative Restriction Case* perhaps might have reached a different conclusion in its factual review of India's balance-of-payments situation. That route would have kept the Panel firmly in consonance with the beneficial conceptual anchor of those provisions. In its review, however, the Panel chose a different route. The Panel chose to emphasize more the fact that India could not maintain its balance-of-payments measures permanently, and further, that the word 'thereupon' used in *Ad. Article XVIII: B of the GATT 1994* provisions meant 'immediate'.¹⁸³ On this latter aspect, this narrow interpretation of the word, 'thereupon' had the constraining consequence of placing the burden on India to demonstrate that its lifting of quantitative restrictions would have the effect of immediately reversing what the Panel concluded to be its improved balance-of-payments situation. Of course, given the indeterminate nature of economic decisions, the requirement of specificity implicit in the word, 'immediate,' placed an unduly heavy evidential burden on India. Most importantly, the position of the Panel obscured the special and differential treatment element of developing countries contained in those provisions even though it claimed it gave consideration to this element.

¹⁸³ Panel Report para. 5.197 p.177.

(iii) The Revelation of the Technique of Inversion

The theoretical optic highlighted previously certainly resonates here. Rather than focus on who exercises power, Foucault's technique of inversion allows us to see where the agents of subjugation are at work. That is to say, how law, as one such agent, is employed in subduing opposition or counter forces. The atomics of power reveals itself in the Panel's narrow interpretation of the beneficial developing country provisions depriving them of any substantive content. The South should not be unduly preoccupied with who exercises power because it could be diversionary. The South should rather, turn its attention to the Panel decisions because, its rulings are law. One point of power's permeation of the base can be located in dispute settlement rulings.¹⁸⁴

B. Distributed Governance in the Context of Judicial Governance: The Role of the Fund in balance-of-payment determinations of Members

(i) The Finality and the Weight to be Attached to the Fund's Determinations

It was the argument of the United States that the determinations of the Fund on the balance-of-payments situation of a Member should, without reference to further evidence, conclusively settle that question. The relevant provision on which the United States hinged its submission on this point reads:

In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept... the determinations of the Fund...as to what constitutes a serious decline in the contracting party's monetary

¹⁸⁴ Decisions of the Panels and the Appellate Body set up under the Dispute Settlement Understanding would undoubtedly embody pronouncements of law applicable in the WTO. *Article 1 of the Dispute Settlement Understanding* indicates the extensive jurisdiction of those panels.

reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves...¹⁸⁵

In light of that provision, it seems to follow that in matters involving a consideration of a Member's balance-of-payments position, the WTO is required not only to seek the determinations of the Fund on such an issue, in addition, it is also required to accept those determinations once proffered.

Although the Panel refrained from making a specific pronouncement on this issue - whether the determinations of the Fund conclusively settled the question of the balance-of-payments position of a Member - choosing rather to act pursuant to its powers to call for evidence from experts, it nevertheless remains contentious and is likely to re-emerge before another Panel. Two strains of arguments have emerged in this regard. One strain posits that recourse to the Fund's determinations as required under *Article XV: 2 of the GATT 1994*, is not only clearly mandatory, but also definitely and conclusively settles the question of whether a Member is actually experiencing a balance-of-payments difficulty.

In support of that proposition, Deborah Siegel (Siegel) has argued:

The use of the term 'shall accept' is better read to mean that these determinations are to be taken as dispositive as was argued by the United States. This reading would seem to preclude allowing a variety of expert opinions on the member's balance-of-payments position; that is, the Fund's statement in this regard is not just another expert opinion to be considered or weighed against those of other experts. This interpretation not only reflects the plain meaning of the text, but also is supported by the drafting history of the GATT, which as noted by the United States, records a considered decision of drafters to reject a proposal (by Australia) to change 'shall accept the determination' to 'shall give special weight to the opinions of' of the Fund.¹⁸⁶

¹⁸⁵ *Article XV: 2 of the GATT 1994*.

¹⁸⁶ Siegel, Deborah, E., *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, (2002) 96 AJIL 561-599 p.582.

On the other hand, another strain of the argument views the matter somewhat differently.

In this regard, Dukgeun Ahn (Ahn) opines:

Considering the expertise and role of the IMF in the world economic system, a better way to balance the inputs by the IMF on BOP-related issues may be to consider the determinations by the IMF a *prima facie* case. Thus, as far as the BOP-related issues are concerned, the determinations of the IMF establishes a rebuttable presumption that a BOP measure is, or is not, justified pursuant to the IMF determination. The opposing party to the IMF determination would then have a burden of proof to refute the presumption with regard to the justification of BOP measures.¹⁸⁷

Siegel's contention, admittedly, is textually strong but should not be the accepted position for the following reasons. In the first place, the reference to the drafting history of *Article XV: 2 of the GATT 1994* is revealing but hardly helpful in settling the issue of the definitiveness of the Fund's determinations. That is so because the passage of time has brought about radical changes from the era Siegel points to especially in connection with the current dispute settlement procedures under the WTO Agreement. In the current judicialized legal framework, it would certainly be anachronistic to insist that the drafting history of *Article XV of the GATT 1994* indicates that a Panel faced with a balance-of-payments question, is obliged to accept without question or assessment, the determinations of the Fund. The reference to a previous era runs counter to what has evolved into formal dispute settlement panels in the GATT. The history is helpful to the extent that it sheds light on the provisions ancestry, but it should not supplant the current legal situation. Second, Siegel makes heavy weather of the fact that implicit in the phrase, 'shall accept,' is an obligation on the Panel to accept the determinations of the Fund on a

¹⁸⁷ Ahn, Dukgeun, *Linkages between International Financial and Trade Institutions: The IMF, World Bank and the WTO*, JnL. W. T (2000) vol. 34, no. 4 p. 25.

Member's balance-of-payments position without recourse to further expert opinion on that issue. Again, that submission is a valid textual connotation of the provisions. However, to insist on that connotation would collide with the very core objective any modern dispute settlement process is meant to achieve, as for instance, encapsulated in *Article 11 of the Dispute Settlement Understanding* in the following terms:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. *Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements and to make such other findings as will assist the DSB in making the recommendations or in giving rulings provided for in the covered agreements.¹⁸⁸
(Emphasis added)

To accept the determinations of the Fund concerning a Member's balance-of-payments measures without recourse to other expert opinion as Siegel suggests, would be tantamount to the Panel abandoning its cardinal obligation of conducting an objective assessment of the matter before it as required by the provision cited above. Consequently, this author submits that the phrase adopted in *Article XV: 2 of the GATT 1994*- 'shall accept'- if read in combination with the provisions of *Article 11 of the Dispute Settlement Understanding*, should result in an interpretation that preserves the crucial function of a Panel to conduct an objective assessment of the evidence in all matters brought before it. The evidence supplied to the Panel by way of the Fund's determinations should not be an exception to that rule. A Panel can only fulfill that requirement of conducting an objective assessment of the facts brought before it by, for example, assessing the

¹⁸⁸ See, also, *Article 13: 2 of the Dispute Settlement Understanding* to the effect that 'Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter'.

evidence supplied to it by the Fund against those of other experts.¹⁸⁹ This assessment of different expert opinions can only reinforce the purpose of an ‘objective assessment’ required under *Article 11 of the Dispute Settlement Understanding*. Indeed, both the Panel and the Appellate Body seem to have implicitly endorsed this approach of assessing the Fund’s determinations against those of other experts. The Appellate Body on this issue held:

[N]othing in the Panel Report supports India’s argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. *A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions.*¹⁹⁰ (Emphasis added)

This procedure endorsed by the Appellate Body surely conforms, not only to the textual requirements of Panels under *Article 11 of the Dispute Settlement Understanding*, it also conforms to the minimum standards expected of any Panel undertaking judicial functions. Similarly, this author further submits that the question of the Fund’s determinations in connection with a Member’s balance-of-payment position should rather go to the weight that is attached to a piece of evidence. In other words, a Panel presented with a determination of the Fund on a Members’ balance-of-payment position should attach weight to it given its acknowledged expertise on such matters. The position canvassed here differs somewhat slightly to that preferred by Ahn to the effect that the Fund’s determination should be regarded as raising a *prima facie* presumption and *a fortiori*,

¹⁸⁹ Indeed, Siegel anticipates this tension between, on the one hand, the requirement contained in *Article XV: 2 of the GATT 1994* and on the other, that contained in *Article 11 of the Dispute Settlement Understanding*. See, Siegel, *supra*, note 186, p. 582.

¹⁹⁰ Appellate Body Report, para. 149 p.35.

required to be rebutted by counter evidence.¹⁹¹ The Fund's determinations should be treated as any other evidence and not necessarily raising a presumption that in evidential terms might impose a higher burden on a Member seeking to rebut it.

(ii). Echoes of Bretton Woods

The words used in the *Article XV: 2 of the WTO Agreement* point to the deepening relationship between the WTO and the Fund. It is remarkable that what did not emerge alongside the other Bretton Woods institutions may now be located in the WTO.¹⁹² That is to say, assuming the Panel, as the United States urged it so to do, refrained from conducting an objective assessment of India's balance-of-payments position, it would have meant the wholesale delegation of such questions to the Fund. In other words, under the ostensible jurisdiction of the WTO, the Fund would, in actual terms, be assuming jurisdiction to determine matters related to a Member's balance-of-payments situation.

This distributed governance of trade intersecting issues raises some questions beyond the scope of the present paper. However, two further points should be noted here, first, the prospect of distributed governance fortifies the point made earlier regarding the governance of trade, by the leading economic powers, through economic institutions. Second, given the structural differences between those two organizations, the transparency of the Fund's determination is likely to be increasingly called into question. One example of that difference is that unlike the WTO where the votes of Members count equally, the Fund operates a weighted voting system.

¹⁹¹ Ahn, Dukgeyn, *supra*, note 187, p. 25.

¹⁹² See, for example, *The Agreement Between the International Monetary Fund and the World Trade Organization*. *Ibid.* p. 29.

IV CONCLUSION: GOVERNANCE DEFICITS AND THE PROSPECTS OF A NEW DAWN

The resulting image from the tripodal lens reveals a picture that is at best, mixed. There are aspects of the image that should be unsettling to the South. On the other hand, other aspects point towards a change. Each Chapter forms a tapestry of that image that brings us to this point.

The lessons of the theoretical optic, going by the theoretical scaffolding developed here, reveals the dual character of law in at once securing benefits for developing countries, and at the same time, concealing its instrumentality in subduing their opposition to the expression of power. This duality of the law might ultimately foster a development paradigm inimical to the economic development of the South. That is so because in one theoretical trajectory, the thesis draws attention to the clash of knowledge paradigms; the continuing warfare even in 'peaceful times'; the implication of law as a technique of subjugation and more importantly, the fact that law effaces or masks a domination enterprise; the potential for the normalization of Southern trade practices and finally, the intrinsic power structuring of the South's field of possibilities. In another, the thesis highlights the disturbing trend of juridification and its attendant dangers; the characteristic features of law as a medium; the importance of unimpeded participation in the articulation of needs and; the dysfunctional effect of the reification of law.

The institutional optic suggests, both from the broad and the narrow context, that the imprints of the past are still evident today. Rather than diminishing, trade regulation is gathering steam. Indeed, trade is increasingly viewed as a linkage machine encompassing

new disciplines.¹⁹³ The retention of the most favourable nation clause is also noted. However, the welcome introduction of special and differential provisions has ameliorated the rigidity of that clause. The decision-making provisions in the trade institutions examined are inelegantly drafted raising questions of transparency regarding such processes. In that connection, the changes introduced by the WTO Agreement on decision-making appears to deepen obscurity and do not seem to have significantly altered the 'customary practice' of giving deference to economic strength in decision-making, observed both under the ITO and the GATT. On a positive note however, the gradual acceptance of the peculiar nature of a developing country's difficulties marks a turning point in provisions extended to it to redress those difficulties. The provisions range from the Part IV 1947 GATT provisions to the extensive range of special and differential provisions contained in the WTO Agreement. However, the soft-nature of those provisions is a weakness. As the *Brazil-Aircraft Case* demonstrated, stronger wording of those provisions might yet hold out prospects for its beneficial employment. The judicial optic demonstrates, once again, the difficulties a developing country might encounter in its attempt to invoke the special and differential provisions in the WTO Agreement. Three points may be noted regarding that decision; first, the narrow interpretation of the legal provisions made to the benefit of developing countries diminished their utility. Second, the case revealed the deepening relationship between the WTO and another institution of economic governance, namely, the Fund; that deepening relationship might not bode well for developing countries given the structural differences between those two institutions and; Third, the theoretical optic of Foucault surely

¹⁹³ See, generally, Symposium edition, *The Boundaries of the WTO*, AJIL, vol. 96, no. 1, p. 1-290. In particular, Trachtman, Joel, *Institutional Linkage: Transcending 'Trade and...'* at p. 77.

resonates in the tenor of the Panel's decision. The Panel in the *India-Quantitative Restriction Case*, by judicial administrative technique, arguably subdued a form of opposition to the exercise of power.

This combined picture highlights governance deficits that should be addressed if developing countries are to see it as meaningfully addressing their economic difficulties. Hopefully, the planned trade round, termed the 'Development Round' might present such an opportunity to seriously address the noted governance deficits.

Regrettably, the thesis only presents an image but does not suggest ways of tinkering with it. However, that is, at the least, a first step. If this thesis generates some new perspective to the South's perception of the regulatory trade architecture designed by the WTO, or leads the South to reflect anew their strategies towards that trade architecture, then it would have been a modest contribution.

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