Intellectual Property Disputes and the Supercourt of the World Trade Organisation: The Case for a New Model of Dispute Resolution

GAIL E. EVANS

ABSTRACT *The closing decade of the 20th century witnessed the emergence of a WTO 'supercourt' having the power to review states' intellectual property legislation. This article challenges the use of law as an instrument of global economic integration without a commensurate growth in legitimacy and public accountability to accompany the process. The recent case of United States and* India—Patent Protection for Pharmaceutical and Agricultural Chemical Products *provides a focal point for an analysis of key issues of legitimacy in the dispute resolution process. The article concludes that matters would be best remedied with an appropriate theoretical model in mind. To this end, having reviewed various models of trade legalism, the author endorses the stakeholder model as best suited to underpin the necessary reforms.*

Keywords: intellectual property, legalism, legitimacy, stakeholder model, 'supercourt', World Trade Organisation.

Introduction

In 1994 with the conclusion of the Uruguay Round Agreement, international disputes concerning intellectual property were brought within the jurisdiction of the World Trade Organisation (WTO). Legally, this event was doubly significant in that previously intellectual property had effectively lacked an international tribunal and secondly, the WTO dispute resolution system itself was juridicised in a manner analogous to the domestic legal system. The legalistic character of the dispute settlement system has been strengthened by the addition of a standing Appellate Body[1] or trade 'supercourt'[2] and binding 'judicial' decision-making, to be enforced by monitoring, and if necessary, by trade sanctions. Panel and Appellate Body decisions will automatically come into force as a matter of international law in virtually every case.[3] Although member states, through the Dispute Settlement Body (DSB), continue to have the last word as a formal matter, in a practical sense the last legal word in reality now lies with the panels and the Appellate Body.[4] They may yet lack the authority to prosecute or issue summons, but increasingly they bear a striking resemblance to courts.[5]

As India recently found in its patent dispute with the US,[6] the new trade court has jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk the imposition of trade sanctions.[7] Considering that the WTO now comprises over 130 members, what we have in effect is a form

0810-9028/98/030395-16

of judicial review of states' intellectual property legislation in order to ensure its conformity with the WTO charter. In short, in the closing decade of the 20th century we have witnessed the emergence of a trade supercourt, a quasi-judicial forum that has the power to review states' intellectual property legislation.

The emergence of such a phenomenon prompts us to ask questions such as: why have states consented to an increasingly judicial and binding system of law enforcement? Who will use the dispute resolution system and to what end? Given the nature of the international political economy, will the most powerful states manipulate the dispute settlement system to their own ends? In disputes concerning intellectual property what kind of justice can the parties expect? What approach should the new 'judges of international trade'[8] take in matters of 'statutory interpretation'? More broadly, how should they approach the task of adjudication? Whose or which interests are likely to be given priority: the interests of the rich nations or those of the poor nations; those of the proprietor or those of the client and consumer; those of the socially privileged or those of the socially disadvantaged? Should individuals have standing before the WTO? Should the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) have direct effect so that private individuals can bring an action in their national courts? What is the prevailing philosophy of the trade court? In addressing these questions, I advance the thesis that as far as the resolution of intellectual property disputes is concerned, the trade court in its present elemental form lacks legitimacy, in the sense that it is not yet capable of meeting the needs and interests of potential disputants, without further reform. If there is one theme we can discern behind these questions, it is that of the legitimacy of the WTO dispute resolution mechanism and by implication, the legitimacy of its decision-making about the kinds of laws that will apply worldwide. Here, I use the term 'legitimacy' broadly, as it touches both procedural aspects of dispute resolution as well as the substantive issues of justice.

Legitimacy, Consent and the WTO Dispute Resolution Mechanism

As part of a liberal international economic order established after the destruction of two world wars, the GATT was premised on the Hobbesian notion that law is both an indispensable restraint upon the forces of destruction and the best means of attaining international social harmony.[9] An important part of the model postwar international legal order was to comprise rules governing the conduct of international trade. The origin of the legalism or rule-based nature of the current Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), can be traced to the Havana Charter. The use of law as an instrument of international economic reconstruction was evident in the Havana Charter. In the event of a breach of its rules or the nullification and impairment benefits[10] it referred disputants to arbitration[11] to the Executive Board of the International Trade Organisation (ITO) for investigation and recommendation or to the International Court of Justice.[12] For the US Congress, the loss of sovereignty involved in third party adjudication outweighed any gains from the state submitting to the international rule of law. Consequently, as excised, the GATT of 1947 contained little more than rudimentary provisions empowering some body such as the UN Economic and Social Council to assist the contracting parties in solving the dispute.

As little as 40 years later the kinds of problems attendant on the growth of a global business civilisation require global coordination. The WTO Charter provides that the law of each state should contain the provisions necessary to maintain the administration of government along lines which recognise its submission to rules provided in it. In signing the Charter, each member state has implicitly consented to a proposition

inherent in the rule of law: that if justice is to be done in the process of harmonising the opposing notions of state sovereignty and international public order—that will be achieved by the continued development of the international legal system. However, the apparent consent of member states to the judicial review of their legislation by an international organisation must continue to raise issues of political and legal legitimacy. Democratically elected parliaments and the citizens who elected them should still be concerned for the autonomy of their decision-making, because, in the absence of a unified image of global sovereignty, a clear chain of representative political action is not discernible between member states and the WTO.

The Emergence of the Trade Supercourt as a Response to Unilateral Action

Legal systems develop when societies take steps to control private retaliatory activities. Judicial litigation began in ancient Greece and Rome with the efforts of the community to restrict the self-help activities of its citizens.[13] In the decade prior to the conclusion of TRIPS, by the use of Special 301, the United States aggressively pursued those countries with the highest level of unauthorised copying and under threat of trade sanctions coerced the enactment of the laws necessary to protect its intellectual property.[14] In the process of reforming the dispute resolution system, unilateral action under section 301 served as both thesis and antithesis. In the former sense it served as the model for a more legalistic system of dispute settlement, imposing strict time limits, legislative demands, and even trade sanctions, in the event those demands were not met. Section 301 provided a prototype for an enhanced legalistic model of dispute settlement under the trade regime. Indeed, a strict timetable for submissions and decision-making as well as provision for retaliatory measures have since become part of the WTO dispute resolution system.

Equally, I would argue that Special 301 served as antithesis in the sense that its use provoked governments to react against the threat to the international legal system posed by unilateral action. The use of Special 301 galvanised support for a rule-based multilateral system of dispute settlement, which, in the circumstances, seemed a preferable alternative to the tyranny of might inherent in unilateral action. Prior to the WTO Agreement, in differing ways and degrees, both the Paris and Berne Conventions[15] and the former GATT system of dispute settlement demonstrated reluctance on the part of member states to secure the enforcement of international law at the expense of their national sovereignty. In view of the sustained use of unilateral action, the debate concerning national sovereignty and states' consent to adjudication became less significant. The only remedy which would, prima facie, lend strength to the weaker nations was to restore the rule of law by means of a multilateral mechanism for dispute settlement.

The Legal Refinement of the WTO Dispute Resolution System

The DSU and TRIPS encompasses the whole procedural apparatus of the law, a procedural process whereby proceedings are instituted, regulated, adjudicated upon and orders are made in respect of which the forces of a supernational organisation may be brought to bear upon designated individual states. The new mechanism therefore, begins to approximate the municipal legal system. First, in contrast with the former fragmented GATT system, the WTO dispute resolution system is integrated. This means that the rules and procedures of the DSU apply to the settlement of disputes brought pursuant to all the agreements contained in the WTO Charter.[16]

In the matter of process, the defects in the former system, in particular the opportunities for delay and obstruction, have been met with greater legalism. Thus, the parties must now agree on the choice of panelists within 20 days from the panel's establishment, panel reports are to be submitted within 6 months[17] and both panel and Appellate Body reports are subject to an automatic adoption rule. The DSU attempts to eliminate the possibility of blockage by providing in article 16 that a panel report shall be adopted at the second meeting on which it appears on the DSB's agenda, unless there is a consensus not to adopt it.[18]

A Strengthened System of Law Enforcement

Prior to the WTO Agreement, the consensual adherence of the contracting parties to the agreed rules of the GATT was the primary means of enforcement. In contrast, the WTO is now the primary enforcer of its rules.[19] In this regard, a monitoring process is provided to secure the timely implementation of panel and appellate recommendations. Secondly, the DSU provides for automatic retaliatory action against a member state which fails to bring its laws into conformity with panel and appellate recommendations.[20]

Judicial Settlement by a Standing Tribunal

Given the position and function of the new Appellate Body, states have in effect, accepted binding 'judicial' decision-making by a standing tribunal.[21] The Appellate Body, composed of seven members, appointed for 4-year terms, now supervises the work of all dispute resolution panels, making decisions on all issues of law or legal interpretation arising under the Charter.[22]

Formerly, panel recommendations acquired legal status and force only if, and when the GATT Council adopted them. However, the new 'judges of international trade'[23] have jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk imposition of trade sanctions. For example, in the recent case of *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the panel recommended the DSB request India bring its legislation for the patent protection of pharmaceutical and agricultural chemical products into conformity with TRIPS. The Appellate Body subsequently upheld the recommendation. The decision demonstrates the power of judicial review under the trade regime. After thorough audit of India's relevant municipal law, the panel and Appellate Body held that it had failed to put in place the administrative measures necessary to the enforcement of a mandatory law.

Issues of Legitimacy

GATT literature does not debate the question of effective law enforcement directly as such, but in terms of the diplomatic versus the legalistic method of dispute resolution as the most appropriate.[24] The formation of the WTO dispute resolution system brings an added dimension to the debate, which must now focus on the legitimacy of the dispute resolution system. This much is clear from the recent case of *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* which concerned a complaint by the United States that India had failed to comply with certain patent provisions of TRIPS.

The Case of India—Patent Protection for Pharmaceutical and Agricultural Chemical Products 1997

In May 1996 the United States lodged a complaint claiming that India had failed to comply with article 70 of TRIPS. As of January 1995, Article 70.8 required every country, including developing countries, to have a means by which patent applications for pharmaceutical and agricultural chemical products could be filed. These applications go into a box, known as a mailbox, and if a patent is eventually granted, the patent term 'will be counted from the filing date'. Article 70.9 provides that when such a patent application has been received, exclusive marketing rights shall be granted for a period of 5 years.[25]

India argued that under Article 1 of TRIPS states were free to determine the means by which patent applications could be filed. Accordingly, it had complied with article 70.8 using administrative not legislative means. However, the panel took the view that in this case the administrative means provided did not constitute adequate compliance. It concluded that:[26]

- India had not complied with its obligations under article 70.8(a) to establish 'a means' that adequately preserves novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional periods provided for in Article 65 of TRIPS.
- India had not complied with its obligations under Article 70.9 of TRIPS with respect to the grant of exclusive marketing rights.

The Panel's Approach to the Adjudication of Intellectual Property Disputes

A key focus for new debate must be issues such as the constitution of the trade court as well as the distinguishing features of its new legalism. I will therefore begin with an examination of the panel's approach to the adjudication of intellectual property disputes.

Interpreting TRIPS. The panel addressed the general interpretative issue, that is, the standards applicable to the interpretation of TRIPS. The panel argued that in accordance with Article 31(1) of the Vienna Convention[27] as well as GATT jurisprudence, an interpretation in 'good faith' requires the protection of members' legitimate expectations derived from the protection of the intellectual property rights provided for in TRIPS.[28] Based upon the context and the purpose of the Agreement, this means that exporting members can legitimately expect that market access and investments would not be frustrated by the actions of importing members.[29] In support of their argument the panel further noted that the protection of legitimate expectations of members regarding the conditions of competition is a well-established GATT principle underlying the national treatment obligation.[30]

The panel acknowledged that the disciplines formed under GATT 1947 were primarily directed at the treatment of international trade in goods, whereas TRIPS is mainly concerned with the treatment of the nationals of other members. Nevertheless, the Panel had no difficulty in finding that the notion of protecting members' legitimate expectations could also apply by analogy, in so far as TRIPS was concerned, with the competitive relationship between the nationals of the various member states.[31] In support of this contention the panel referred to the preamble to TRIPS, which recognises the need for new rules and disciplines concerning 'the applicability of the basic principles of GATT 1994 ...'. The panel boldly concluded that, when interpreting the text of TRIPS, the legitimate expectations of WTO members concerning TRIPS must be taken into account, as well as standards of inter-

pretation developed in past panel reports laying down the principle of the protection of conditions of competition flowing from multilateral trade agreements.

Framing the inquiry and selecting the terms of reference. Applying these principles to Article 70.8(a), the panel framed its inquiry in terms of whether the current Indian system for the receipt of mailbox applications could sufficiently protect the legitimate expectations of other WTO members as to the competitive relationship between their nationals and those of other members, by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications.[32] The panel found that in order to achieve the object and purpose of Article 70.8 India had to have a mechanism to preserve the novelty of pharmaceutical and agricultural chemical inventions, for the purposes of determining their eligibility for patent protection.[33] The panel then returned to the broader question of whether the current Indian system for the receipt of mailbox applications could sufficiently protect the legitimate expectations of WTO members by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications. In finding against India, it emphasised that predictability in the regulation of intellectual property was essential not only to protect current trade but also to create the conditions necessary to the planning of future trade and investment.

Freedom of Trade as a Theoretical Underpinning

It is the application of these interpretative principles, which reveals the theoretical and philosophical basis of the panel's reasoning. What does the dominance of the notion of legitimate expectations therefore say about the way in which the panel approached the task of adjudication? The reasonable expectations theory is generally attributed to the classical economics of Adam Smith as expounded in *The Wealth of Nations* (Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Vol. 1, Liberty Fund Inc., 1981, Book I, *i*, at 22–33, and Book II, v, at 371–375). According to this school of thought the economic agent acts out of self-interested motives in the pursuit of his/her own utility. A free individual will act for the benefit of others by seeking to please them and so obtain their custom. Given the right institutions of justice this competition is economically efficient because it maximises the consumable wealth of all societies provided, of course, there is free trade among nations. Utilitarianism is closely connected with wealth maximisation, which was the dominant political ideology during the formative period of the GATT.[34] Therefore, the notion that the protection of legitimate expectations is central to creating security and predictability in the multilateral trading system reveals the persistence of classical economic liberalism and free trade theory as the basis of law and decision-making in the WTO.

Although unsuccessful in its appeal,[35] the Appellate Body nevertheless accepted India's argument that the concept of predictability of competitive relationships could not be unquestioningly imported into TRIPS in respect of Article 70.8. Their reasoning was based primarily on the ground that, by invoking the concept of the 'legitimate expectations', the panel had incorrectly fused the legally distinct bases for 'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into one uniform cause of action. The doctrine of protecting the 'legitimate expectations' of contracting parties was developed in the context of 'non-violation' complaints brought under Article XXIII:1(b) of the GATT 1947. However, the case in question concerned a violation complaint.[36]

Adjudication or Economic Management?

Why do adjudicators tend to adopt economically efficient rules? Generally speaking, is this an appropriate and adequate basis for decision-making? In the first place, since adjudicators are not in a position to engage in wealth distribution, they are far more likely to address goals which they can achieve such as wealth maximization. As adjudicators they have little power to alter the distribution of wealth that the various nations, transnational entities and groups in international society receive. Secondly, what Adam Smith referred to as a nation's wealth, and what economists such as Posner refer to as efficiency,[37] has always been an important social value. This was particularly so in the immediate postwar period when the creation of the Bretton Woods institutions laid the foundation for the development of modern international economic law. It is not surprising therefore that this value is influential in the decisions of WTO adjudicators. It is especially influential perhaps because the competing goals involved in decision-making are both controversial and difficult to achieve with the limited tools that adjudicators have at their disposal.

These competing goals concern controversial ideas about the distribution of income and wealth in international society—ideas about which no meaningful consensus has yet been formed, despite the call by postcolonial nations for a new international economic order and the growth of a considerable body of development law. Such competing goals are just as real for international adjudicators as they are for judges at the municipal level. In this regard, it is not surprising that India, as a developing nation might perceive the US demand for the patent protection of its pharmaceutical and agricultural products in India as yet another manifestation of colonialism. As to the question whether efficiency is the only value the WTO judges should pursue—in my view the answer is self-evident. The legitimate expectations theory bases the obligation to honour an agreement on the reasonable expectations induced by the undertakings therein and the disappointment of those obligations by breach. However, the raising of reasonable expectations *per se* is neither sufficient nor necessary for the existence of the agreement.

In Search of A Broader Theoretical Base for Decision-making

The character and tenor of the reasoning in *India—Patent Protection* throws into sharp relief the vocational nature of the trade court. Its interpretation of the provisions in question is dominated by the theoretical underpinning of free trade, the doctrine of comparative advantage and wealth maximisation.[38] At the same time, the limits of legalism and of the current procedural framework also become clear. One of the serious disadvantages of a strictly formalist approach is that the outcome is obtained only by a conscientious application of legal rules. Substantive conceptions of justice may thereby be excluded from legal reasoning.

Yet, as the legal realists and critical legal scholars tell us, political considerations nevertheless attach to judicial decisions and may motivate those decisions at the margin. With regard to intellectual property, we are dealing with private rights that have a social dimension. Yet there is no theoretical underpinning that either reflects the impact of patenting on a predominantly rural society or gives any consideration to questions of cultural relativity. Adjudicators are constrained by the demands of the received legal reasoning and discourse. The choice before them as to the correct 'legal' outcome is clear. The weight of text and precedent, the requirements of precision, clarity, and determinacy in rule interpretation, tend to leave little space for sufficient consideration

of the potentially serious social or political consequences attendant on one of the proposed readings of a textual provision.

For the time being, the combination of an economic approach to problem-solving and a legalistic style of decision-making helps the trade court and member states alike avoid problems of accountability. However, a testing time must come when the actions of the trade court are no longer legitimated by results. Professor Hudec has previously referred to the risk of so called 'wrong' cases having the effect of bringing the dispute settlement system into disrepute.[39] A 'wrong' case being one that is initiated in respect of an issue on which the international community has either not yet reached a consensus or on which past consensus has broken down. Past examples of such cases include contentious agricultural trade practices, such as those of the EC. In such cases the parties show extreme reluctance to accept the Panel's decision. It is then that the paucity of the trade court's theoretical underpinning will be revealed. Nonetheless, that is not to say that there can be any regression in conceptual thinking about the international legal system. The power of the WTO as a law-making body and the new-found legalism of its 'supercourt' call for new ways of thinking about international dispute settlement.

Issues of Due Process

The legitimacy of the dispute resolution mechanism also depends on less visible but equally important questions of due process or procedural fairness. Did India have adequate opportunity to meet the case that had been brought against it by the United States? Did India have an equal opportunity to put the necessary evidence before the panel? More specifically, what kind of legal representation did the Indian government have in preparing and presenting its case? Did it have equal access to legal expertise? Why was the hearing not open to public scrutiny? Were the factual aspects of the case adequately established? When the United States adduced evidence, did India have adequate opportunity to test it? These questions raise issues of legal representation, access to legal resources, time limitations, the capacity of the panel to deal with factual disputes and the transparency of dispute settlement proceedings.

Greater Legitimacy through Private Participation in the Dispute Resolution Process

The trade court presently lacks legitimacy with respect to a fundamental aspect of its constitution—in so far as private participation is extremely limited. The present provisions of the DSU do not provide for a means of address proportional to the scope and volume of WTO law which now touches individual rights. The Uruguay Round Agreements do not grant individuals the right to initiate or participate in the dispute settlement mechanism even if they are directly affected by the dispute at issue. Under Article 13 of the DSU, the dispute settlement procedures may include 'information and technical advice from any individual or body ... deem[ed] appropriate', but it is up to the panel to request information from a private person and, thus, to involve the individual. Although international trade law has succeeded in freeing itself from some of the boundaries of traditional international law given developments within the new corpus juris of the WTO, the principle of the state as the primary actor under international law still dominates international litigation.

Traditionally, international agreements on the protection of intellectual property render the state the vehicle for individual complaints. Thus TRIPS contains obligations to establish enforcement mechanisms for its rules in the domestic legal systems

of member states. However, there exists a range of alternative forms of private participation in international litigation. Another method is to allow the individual to take action under domestic trade laws. Thus, nationals of the US and EU are also able to access the WTO dispute resolution mechanism, albeit indirectly, by recourse to domestic legislation. Nevertheless, while each instrument provides a more expedient procedure in ensuring conformity with due process for private complaints, the carriage of the process at each stage remains with the government.

The prohibition on the participation of individuals in international dispute resolution can no longer be justified on the basis that states are the primary subjects of international law. In the latter 20th century a transnational society, representing the spectrum of business, environmental and social welfare organisations and interests, demands a voice in law and decision-making. Similarly, recent developments in the law of human rights also demonstrate that individuals are being increasingly recognised as participants and subjects of international law. When the WTO legislates for intellectual property rights, individuals are directly affected. In this regard, the impact of TRIPS on Australian legislation was significant, its implementation requiring reforms to the Copyright, Patents and in particular to the Trade Marks Act. In the case of patents and trademarks individuals found the scope of their monopoly rights in ownership considerably increased. Moreover, those in industry and business with valuable intellectual property are the ones to best observe the contravention of their rights. In as much as such individuals have become the 'subjects' of international law, so they should also have a right to participate in enforcement proceedings where their interests are affected.

In view of the changed circumstances, to deny individuals the right to enforce their intellectual property rights at the international level lacks legitimacy. It permits the state to rely on the traditional principle prohibiting individual participation as a means of protecting its sovereignty and its power to ensure its citizens have no other recourse against the law than the state itself. The difficulty with this arrangement is that the interests of government do not always coincide with those of the individual. Moreover, the indirect method of taking legal action tends to exacerbate the politicisation of the issue of enforcement since individuals must persuade their government to take up the dispute with another state. It is with the aim of avoiding these political obstacles, that international law in the areas of both commerce and human rights has granted certain limited procedural rights to individuals.[40]

Alternative Methods of Allowing Private Participation in the International Legal Process

A private party may be given the right to initiate a cause of action in the domestic courts challenging any municipal enactment that fails to comply with the Uruguay Round Agreements. Certainly, the ability of citizens of the EU to challenge the inconsistency of domestic legislation suggests that individual complainants benefit from the strengthening of judicial power.[41] Moreover, the possibility of challenging WTO-illegal governmental acts in municipal courts need not exclude a right of direct access to the WTO as an alternative means of private participation.

Two regional models of transnational litigation those of the EU and North American Free Trade Agreement (NAFTA) provide a possible third way forward in allowing private litigants to enforce substantive norms. In the former instance, Article 173 of the Treaty of Rome gives individuals the right to directly file a complaint in the European Court of Justice (ECJ) against every legally binding European Community law.[42] By contrast, the more conservative approach of NAFTA limiting private participation to anti-dump-

ing law and investment disputes, requires the government must initiate the dispute settlement procedure at the request of nationals.

Those individuals whose rights are directly affected by law-making under the trade regime are equally entitled to access the enforcement system. To increase the number of actors can only improve compliance. The debate therefore is not whether, but rather by what means, should individuals participate and what is to be the nature of that participation. An intermediate step could be to provide for a private right to participate in the panel proceeding as *amicus curiae*. However, unlike the parties to a dispute, an *amicus* cannot control the course of the action—she is neither served documents in the case nor can she offer evidence or examine witnesses. The amicus role therefore lacks the essential components to ensure private parties' efficient and unrestricted access to WTO dispute resolution.

It is submitted therefore that individual entitlement would be best realised if direct private party access to dispute resolution complements but does not exclude the traditional form of citizen representation by the government. To do otherwise would preclude from WTO participation private parties who are unable to afford the cost of those proceedings.

The Case for a New Model of Dispute Resolution

Throughout the course of this article I have identified areas where reform of the dispute resolution mechanism is necessary in order to retain the legitimacy and therefore the confidence of both states and their citizens if they are to bring their intellectual property disputes to the WTO. Outwardly, it would be a simple enough matter to remedy procedural matters such as legal representation, transparency and even the standing of private individuals, in an *ad hoc* and piecemeal fashion. However, in any consideration of the trade court's approach to adjudication, the broader issues of theory and philosophy cannot be avoided. If reform of the trade court is to occur, it must be undertaken with an appropriate theoretical model in mind. Conceptions of justice and democracy change with the times. This means we must also re-evaluate the role of non-elected institutions and their ability to serve the underlying values of the democratic process. The DSU fails to recognise that international trade law has implications outside the public sphere, affecting the lives of individuals. It makes little allowance for giving individuals a role in matters that directly affect them. In this, the present international trade regime accords with a realist perspective on international affairs, focusing on states as the supreme players in global affairs. This obviously disadvantages individuals and NGOs who may be powerless to persuade their government to take action.

The technological revolution has fractured the nation state. It can no longer pretend to represent or fully express the interests of its constituents in the international arena. Denying full participation to non-state actors fails to recognise the reality of the new transnational society composed of powerful corporations, financial institutions, as well as influential producer associations and interest groups. In these circumstances, it is often those in an industry who impose conditions on outsiders, not the state.[43] Yet the decision whether to initiate a WTO action is at the state's discretion, and individual actors must rely on their respective governments to pursue their legal interests. States cannot possibly initiate action to protect the varied and conflicting interests of all its citizens. In cases such as *India—Patent Protection*, private interests are involved at the municipal level whether local business or communities—yet neither of these interests have a voice in the decision-making process.

Three Models of Trade Legalism

The foregoing case study reveals a weakness inherent in the present dispute settlement system that over time it may gain a technical autonomy, operating more or less independently of the governments that established it. In order to enhance its legitimacy the trade court needs a blueprint for future jurisprudential developments and systemic reform. Richard Shell offers three models of trade legalism: the regime management model, the efficient market model and the trade stakeholder model.[44]

The regime management model? The regime management model, as the name suggests, derives from regime theory. Regime theory sees states, the primary actors in the international legal system, motivated by self-interested goals, such as wealth enhancement, power, and domestic political control.[45] This model views trade agreements as 'contracts' among sovereign states which help them resolve potentially conflicting interests over these diverse goals. Legalists, favouring the regime management model, see the WTO legal system as a means to generate legitimate normative standards around which states will bargain with one another to gain wealth through more open trade—while retaining the control they need to achieve the domestic political objectives that call for limiting trade. Regime-oriented legalists assert that international legal rules can induce states to negotiate 'in the shadow of the law' rather than purely on the basis of power relationships.[46] The WTO's authority to announce binding trade standards backed by a credible threat of economic retaliation will, the legalists argue, level and order the playing field of international trade between states.

The efficient market model? The efficient market model of legalism derives from a combination of the international relations school of liberalism and the application of neoclassical free trade theory embodied as rules of law.[47] Under this form of liberalism nations are not conceived of as autonomous, self-maximising actors, nor are they the ultimate subjects of international law. Rather, private actors are the essential players in international societies who, in seeking to promote their own interests, influence the national policies of states. For its part, pure free trade theory posits that business firms, consumers, and workers all benefit most when states subject themselves to the competitive rigours of the global market under the economic doctrine of comparative advantage.[48] As seen by the efficient market model, the WTO is part of an emerging 'global business civilisation'[49] that transcends states and requires its own, semi-autonomous legal system to operate effectively.[50] Legalists advocating the efficient market model see binding international trade rules as instruments with which to achieve efficient international capital and consumer markets by eliminating needless government interference and intrusion in international trade.[51] Ideally, this model would give businesses direct access to both supranational and domestic dispute resolution machinery in order to enforce international trade rules and reduce the legal transaction costs of global trade.

The Insufficiency of Existing Models

At present, WTO dispute resolution procedures, jurisprudential techniques and the choices made by adjudicators, are based on a combination of the regime management model and the efficient market model. On the one hand, the regime management model—with its emphasis on state standing, international law as a source of binding norms, and the mixed motives brought by states to the WTO—offers the most plausible explanation of the existing WTO legal system.[52] On the other hand, both the consensus

voting rule for overturning WTO dispute resolution decision-making and the political dynamics that led to the adoption of the reforms of the WTO Agreement, attest to the importance of the efficient market model.[53] The dominance of these two models indicates that governments, as the primary political actors, seek whenever possible, to monopolise the means by which disputes over economic growth and allocation are resolved.

This is not a situation that private interests having direct stakes in global trade—multinational corporations,[54] financial institutions, exporters and others—will long endure. Equally, as the substantive provisions of the TRIPS Agreement touch the lives of all individuals, not simply those with a proprietary interest, all of the transnational political forces with a stake in trade policy deserve 'places at the table'—including standing to litigate cases—in the WTO dispute resolution system. A choice will have to be made between an efficient market model system in which states interact only with private commercial interests in solving the problems of global economic integration and a system in which a broader array of social interests will have a voice in the process of dispute resolution.

A Trade Stakeholder Model?

A third and new model for trade governance presages greater legitimacy. The trade stakeholder model offers an alternative vision of the interplay between trade and other social policies. This model emphasises broader participation in trade adjudication, democratic processes for resolving trade conflict, and open dialogue regarding the goals of economic trade. Like the efficient market model, the trade stakeholder model is based on the insight of the international relations school of liberalism that individuals, not states, should be the primary subjects of international law. Unlike the efficient market model, which seeks to promote trade over other domestic and transnational values, the trade stakeholders model sees trade legalism as an opportunity for a wider variety of domestic and transnational interest groups to participate with states in the activity of constructing common economic and social norms.

Conclusion

The decision-making in *India—Patent Protection* indicates that the resolution of such disputes is increasingly likely to test the legitimacy of the trade court as a forum that is cognisant of due process and representative of private interests concerned in the dispute. Given the normative weaknesses inherent in both the regime management and the efficient market models, it is arguable that the trade stakeholder model is the preferred model for delivering greater legitimacy to the system of dispute resolution.[55] In the first place, it would grant broad participatory rights to diverse constituencies affected by trade policy, similar to the rights accorded individuals within the European Union and by the ECJ. Secondly, the trade stakeholder model would also address the need to develop distinctive and innovative political mechanisms to complement the WTO's dispute resolution procedures.

While it appears that the trade court is experiencing an initial period of unquestioning approbation, the history of European Court of Justice (ECJ) scholarship indicates that this will not last. Increasingly, scholars will challenge the use of law as an instrument of global economic integration without a commensurate growth in legitimacy and political accountability to accompany the process. The stronger the call for supranational institutions acting above and, if necessary, against the nation state, the more we have to deal with, and to agree on, a concept of legitimacy and a process of legitimisation for such a new power.[56]

Notes and References

1. Article 17, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Final Act, Part 2, Annex 2, reprinted in 33 ILM (1994) at 1226-4 and at 1236-37.
2. Arguing against a proposal to create a trade 'supercourt' within the GATT see P. R. Trimble, International trade and the rule of law (1985) 83 *Michigan LJ*, 829 at 1016, 1019 and 1025.
3. Article 16, DSU.
4. The Dispute Settlement Body (DSB) composed of all WTO member countries, oversees the dispute resolution process: Agreement Establishing the WTO, art 4(3), reprinted in 33 ILM (1994) at 1145. The DSB will have the power to reverse decisions of the Appellate Body, or of dispute panels if no appeal is taken, but only by unanimous vote: Articles 16(4), 17(14) DSU, reprinted in 33 ILM at 1235, 1237.
5. D. Palmeter, 'The need for due process in WTO proceedings', (1997) 31 *Journal of World Trade* 1, February, 51 at 57.
6. See *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel, 5 September 1997, WT/DS50/R. Appellate Body Report, 19 December 1997, WT/DS50/AB/R.
7. While compliance with the measure in question is the primary aim, under the DSU, losing respondents may attempt to negotiate a settlement involving payment of compensation to winning complainants rather than change their trade policies. If no such mutual agreement can be reached, the winner may seek approval from the DSB to withdraw treaty benefits in the amount of the nullification and impairment it has suffered: Article 22(2), 33 ILM (1994) at 1239. The amount and form of trade sanctions is subject to a separate WTO dispute resolution procedure: Article 22(6)(7), 33 ILM (1994) at 1240–1241.
8. S. Jarvin, 'The sources and limits of the arbitrator's powers', in J. D. M. Lew (ed.), *Contemporary Problems In International Arbitration*, School of International Arbitration, London, 1986 at 50, 67. The DSU mandates that panelists serve in their individual capacities and not as representatives of any government or organization: Articles 8.9 and 8.11, DSU.
9. Hobbes, Leviathan, Part I, Chs. 6, 8, 11 and 12.
10. Havana Charter, Article 93, para 1.
11. *Idem.*, Articles 93 and 94.
12. *Idem.*, Articles 94 and 96.
13. 'Law and Force' in D. Lloyd, *The Idea of Law*, Penguin, Harmondsworth, 1985, Ch. 2.
14. The Special 301 provisions of the Trade Act of 1974 as amended by the US Omnibus Trade and Competitiveness Act of 1988 (the Trade Act) were designed to provide a statutory framework within which to assess the adequacy of protection of intellectual property rights and market access overseas: 1988 Trade Act section 1302 102 Stat 1176-79 (1988) codified as amended at 19 USC section 2420(a)(1) (1988). On the goals of section 301 see J. C. Bliss, 'The amendments to section 301: an overview and suggested strategies for foreign response' (1988–89) 20 *Law & Policy in International Business* 501. The EC has a similar trade policy instrument that is designed to afford private petitioners the opportunity to complain of foreign unfair trade practices. However, Reg. No. 2641/84 primarily seeks to protect the Common Market against foreign unfair trade practices and securing access to export markets for Community industries appears to be a secondary concern: see Council Regulation 2641/84 EEC OJ Eur Comm (No. L252) 1 (1984).
15. The Berne Convention for the Protection of Literary and Artistic Works, 1886. The Paris Convention for the Protection of Industrial Property, 1883.
16. Article 1.1 DSU provides that the '[the] rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement rules and procedures' under the 'covered agreements' which include those for GATS and the TRIPS Agreements listed in Appendix 1 to this Understanding, hereinafter referred to as the 'covered agreements'. Complementary provisions reinforce Article 1, DSU, in the covered agreements. Thus, Article 64 of the TRIPS Agreement mandates the application of 'the provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding ... to consultations and the settlement of disputes' arising under it. For example, on 2 July 1996, the United States requested India to hold consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 64 of the Agreement on

Trade-Related Aspects of Intellectual Property Rights (TRIPS) regarding the absence in India of either patent protection for pharmaceutical and agricultural chemical products or formal systems that permit the filing of patent applications for pharmaceutical and agricultural chemical products and that provide exclusive marketing rights in such products (WT/DS50/1).

17. The period in which the panel shall conduct its examination, from the time the composition and terms of reference of the panel have been agreed upon to the time when the final report is provided to the parties to the dispute, shall, as a general rule, not exceed 6 months. In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties to the dispute within 3 months. The interim review stage shall be conducted within the time period set out in para. 12.8
18. Within 60 days panel reports will be deemed to have been adopted unless the DSB decides by consensus not to adopt the report, or one of the parties notifies the DSB of its intention to appeal. A consensus will occur if no member lodges a formal objection to the decision within 60 days. Appellate Body decisions are also binding on states unless all members vote unanimously to overrule them. The Appellate Body's report is subject to the same automatic adoption rule as regular panel reports. It is to be adopted (absent consensus to the contrary) with 30 days of its circulation to DSB members: Article 17.14.
19. Where the Appellate Body or panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that Agreement: section 19.1.
20. Such retaliation can consist of increases in bound tariffs or other actions. Moreover, there are specific procedures for determining the level or extent of suspension if no agreement can be reached. The level of retaliation is to be equivalent to the economic damage sustained by the complaining state as a consequence of the original illegal measure. When the panel or appellate report is implemented, the retaliatory action shall cease: Article 22.1.
21. For the advantages and disadvantages of permanent tribunals and a comparison to ad hoc arbitral tribunals see, H. Mosler & R. Bernhardt (eds), *Judicial Settlement of International Disputes*, Springer, Berlin, 1974; H. Steinberger, 'Judicial settlement of international disputes', in R. Bernhardt (ed.) *Encyclopedia of Public International Law*, Elsevier, North-Holland 1981 Instalment I at 120ff.
22. Article 17, DSU.
23. S. Jarvin, 'The sources and limits of the arbitrator's powers', in J. D. M. Lew (ed.), *Contemporary Problems In International Arbitration*, School of International Arbitration, London, 1986 at 50, 67.
24. J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, MIT Press, Cambridge, Mass. (1989) 85–88; cf. R. E. Hudec, *Enforcing International Trade Law: The Evolution of The Modern GATT Legal System*, Butterworth, Salem, NH, 1993 at 364–365. See also O. Long, stating that 'the primary objective of [the GATT] dispute settlement procedure's is not to decide who is right and who is wrong ... but to proceed in such a way that even important violations are only temporary and are terminated as quickly as possible': *Law and its limits in the GATT Multilateral Trade System*, M. Nijhoff, Hingham, MA, 1985 at 71 and that 'legalism does not contribute to trade liberalization': *idem.* at 73.
25. Article 70.9 provides that when such a patent application has been received, exclusive marketing rights shall be granted ... for a period of five years after obtaining market approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that ... a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such Member'.
26. Para. 8.1.
27. Article 31(1), Vienna Convention provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.
28. The panel cited the report of the Appellate Body in *Japan—Alcoholic Beverages*, to the effect that adopted panel reports 'create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute': Appellate Body Report on 'Japan—Taxes on Alcoholic Beverages', adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS13/AB/R, p. 14.
29. The panel based its view on *Underwear* panel report: Panel Report on 'United States—Restrictions

on Imports of Cotton and Man-made Fibre Underwear', adopted on 25 February 1997, WT/DS24/R, para. 7.20.

30. Paras 7.20 and 7.30. According to the *Superfund* panel the rationale of the national treatment obligation in GATT Article III, is to protect the expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. The *Superfund* panel stated that '[t]he general prohibition of quantitative restrictions under Article XI ... and the national treatment obligation of Article III ... have the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties': Panel Report on 'United States—Taxes on Petroleum and Certain Imported Substances', adopted on 17 June 1987, BISD 34S/ 136, para. 5.2.2.
31. Para. 7.21.
32. Para. 7.34.
33. Para. 7.18.
34. The preface to the GATT 1947 calls for: '[T]he substantial reduction of tariffs and other barriers to trade and ... the elimination of discriminating treatment in international commerce'. See generally J. H. Jackson, *World Trade and the Law of GATT*, Part II, Bobbs-Merrill, Indianapolis, 1969; J. H. Jackson, W. J. Davey & A. O. Sykes, *Legal Problems of International Economic Relations*, 3rd edn, West Publishing Co, St Paul, Miss, 1995; Chs 8–11; J. H. Jackson, *The World Trading System*, Chs 5–11.
35. Appellate Body Report, WT/DS50/AB/R.
36. Subparas 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under the TRIPS Agreement for a period of 5 years from the date of entry into force of the WTO Agreement. Thus the only cause of action permitted under the TRIPS Agreement during the first five years after the entry into force of the WTO Agreement is a 'violation' complaint under Article XXIII:1(a) of the GATT 1994.
37. R. Posner, 'The ethical and political basis of the efficiency norm in common law adjudication' (1980) 8 *Hofstra LR* 487–507; *idem.*, 'Utilitarianism, economics and legal theory' (1979) 8 *J Legal Studies*, 140.
38. *The Leutwiler Report: Trade Policies for a Better Future: Proposals for Action*, GATT Secretariat, Geneva 1985. The principle of comparative advantage is open to many criticisms: for a public choice perspective see: P. B. Stephan, Barbarians inside the gate: public choice theory and international economic law, (1995) 10 *American U J Int. Law and Policy* 745. Also see: M. Trebilcock & R. Howse, *The Regulation of International Trade*, London, Routledge 1995, Ch. 2 on comparative advantage 2–4 and on public choice at 14–17; J. Bhagwati, 'Challenges to the doctrine of free trade', *NYU J Int Law and Policy*, 25, 9, 1993 at 219.
39. R. E. Hudec, *The GATT Legal System And World Trade Diplomacy*, 2nd edn, 1990.
40. The most prominent example is the institutional framework of the European Convention on Human Rights, consisting of the European Commission and the European Court of Human Rights.
41. The right of individuals to directly file a complaint in the European Court of Justice against every legally binding European Community law, under Article 173 of the Treaty of Rome, is a fundamental principle of the EU. Its application has allowed the case-law of the Court to overcome the principle of State sovereignty to the benefit of private citizens: B. Killmann, 'The access of individuals to international trade dispute settlement' (1996) 13 *Journal of International Arbitration* 143 at 145 and 163.
42. Killman *supra* note 83.
43. The earliest complaint made to the WTO, just 6 months after it took effect, involved a US complaint over Japanese measures on the automobile industry. Obviously there were large interests at stake, particularly those of US parts and accessories manufacturers and suppliers. Japanese government representatives asserted that these were privately imposed measures and not a matter for state intervention.
44. G. R. Shell, 'Trade legalism and international relations theory: an analysis of the World Trade Organization', (1995) 44 Duke L J at 829.
45. A. M. Slaughter, 'International law and international relations theory' (1993) 87 AJIL 205 at 217–219.

46. J. H. Jackson, arguing that the rule-oriented approach to resolving trade disputes involves negotiation 'by reference to what [parties] would expect an international body would conclude about the action of the transgressor in relation to its international obligations'. When parties bargain 'in the shadow of the law', they must take into account not only their relative power positions and interests, but also their predictions about how tribunals will interpret rules in particular cases: *The World Trading System: Law and Policy of International Economic Relations*, MIT Press, Cambridge, Mass, 1989 at 99ff.
47. See B. F. Fitzgerald, characterizing Ann-Marie Slaughter's theory of liberalism: 'An emerging liberal theory of international law and the non-enforcement of foreign public laws' (1995) AYIL Vol. 16 at 311–314 and at 322–324; also L. C. Reif, *Multidisciplinary Perspectives on the Improvement of International Environmental Law and Institutions* (1994) 15 Mich J Il L 723, 738.
48. See M. Trebilcock & R. Howse, *The Regulation of International Trade*, Routledge, London, 1995, Ch. 1.
49. By the end of the 1980s, a metamorphosis of the international political economy had begun: the old, close relationship between state, civil society, and economy was being replaced by a new relationship between authority and economy, and between authority and society. A global business civilization had emerged ... According to Strange, this 'civilization' is composed of millions of individual economic actors held together in a 'complex network or web of transnational, bilateral bargains—bargains between corporations and other corporations, between corporations and governments, and between governments'. Susan Strange, 'Protectionism and world politics', (1985) 39 Intl Org (1985) 233, 234.
50. M. Hilf, arguing that in an interdependent world economy '[states are beginning to loose [sic] their freedom to act as they want' and that 'international economic integration, influenced by a multitude of uncontrollable factors, entails a loss of sovereignty': 'Settlement of disputes in international economic organizations: comparative analysis and proposals for strengthening the GATT dispute settlement procedures, in E. U. Petersmann & M. Hilf (eds), *The New GA TT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, E. U. Petersmann & M. Hilf (eds), Kluwer, Deventer, 1988 at 285, 321.
51. E. U. Petersmann, *ibid.* at 210–221; J. Tumlir, stating that 'international [trade] rules represent a truer expression of the national interest of all the countries concerned than the mass of national [economic] legislation': 'Need for an open multilateral trading system', (1983) 6 *World Econ* 393, 406.
52. G. R. Shell, *ibid.* at 858–877.
53. *Ibid.* at 877–894.
54. They undermine the principle of government representation of private claims by their wealth and influence: further see M. Lukas, 'The role of private parties in the enforcement of the Uruguay Round Agreements' (1995) 29 *Journal of World Trade*, 181 at 199–200.
55. *Ibid.* at 907–922.
56. R. Seidelmann, 'The search for a new global order', D. Bourantonis and M. Evriviades (eds) in *A United Nations for the Twenty-First Century*, Kluwer, Boston, 1997, at 54.