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*A Review of* KATI KULOVESI, THE WTO DISPUTE  
SETTLEMENT SYSTEM: CHALLENGES OF THE  
ENVIRONMENT, LEGITIMACY AND FRAGMENTATION  
(*Kluwer Int'l* 2011)

**SAGNIK SINHA\***

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## I. THE PREMISE: THE LEGITIMACY OF THE WORLD TRADE ORGANIZATION

Legitimacy is the underlying theme of *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* by Kati Kulovesi and the book could not have come at a better time. The Appellate Body reports in *US-Clove Cigarettes*<sup>1</sup> and *US-Tuna Dolphin II*,<sup>2</sup> have reignited the debate on the WTO's role in balancing the rights of the sovereign to regulate health or environment within its domestic domain, with the need to maintain the sanctity of the multilateral trade order.

Since the inception of the World Trade Organization [WTO] in 1995, much has been written of its legitimacy. As the author notes, the academia has proposed<sup>3</sup> and the academia<sup>4</sup> has criticized the various proposals put forth by their peers. The debate has, without doubt, enriched and shaped our perspectives on the role of the WTO. From a practitioner's perspective, beyond the scholarly debate, legitimacy plays a vital role in ensuring that the multilateral trade order stands firm with the unequivocal support of member states, when it could just as easily have perished. Worse, it could stand in a sense like the GATT, as a symbol of aspirations which did not find sufficient international acceptance.

It is important to mention here that the legitimacy of the WTO *may not* necessarily stand on the shoulders of sovereign actors alone. Indeed, there could be a case to argue that the WTO has the unenviable role of finding legitimacy across its economically and culturally diverse constituencies, prominent among which are environmental and human rights activists, regardless of their national or cultural affiliation or origin. While from a theoretical perspective, it could well be argued that the will of the people is expressed through the will of the sovereign, a realist may well take such a view with a pinch of salt. Kati Kulovesi argues that a

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<sup>1</sup> See generally, Report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *US – Clove Cigarettes* AB Report]; see also, Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (Sept. 2, 2011) [hereinafter *US – Clove Cigarettes* Panel Report].

<sup>2</sup> See Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012).

<sup>3</sup> KATI KULOVESI, *THE WTO DISPUTE SETTLEMENT SYSTEM: CHALLENGES OF THE ENVIRONMENT, LEGITIMACY AND FRAGMENTATION* 39 (Kluwer Int'l 2011) [hereinafter *KULOVESI*]. The author documents the proposals made by Ernst Ulrich Petersmann.

<sup>4</sup> KULOVESI, *id.* at 50. The author notes that Petersmann's proposals have been classified as "highly controversial" and documents the views of different scholars who have critiqued his proposals.

“state-centred understanding of legitimacy”<sup>5</sup> can “no longer be taken for granted”<sup>6</sup>. She, however, also notes that the growing interest in the legitimacy and accountability of international organizations “is coupled with reinvigorated interest in democracy at the inter-state level”<sup>7</sup>. In the relevant parts, she documents the thrust towards accountability of a state to its people,<sup>8</sup> though it must be mentioned that she presents a very balanced assessment of the present status of the debate.<sup>9</sup> So if we look to the future, and if states are increasingly accountable to their people, directly or indirectly, would the author be more willing to accept a state centred system of legitimacy, on the presumption that a state represents the will of the people? It is perhaps relevant to note that a positive answer to that question will change the dynamic of the entire debate on legitimacy. However, the book does not delve into that question.

The question is important because if one were to adjudge legitimacy from the standpoint of the sovereign, the WTO has arguably done a commendable job. While in contemporary times, for reasons right or wrong, sovereign states have preferred to withdraw from organizations such as the International Convention on Settlement of Investment Disputes,<sup>10</sup> the membership of the WTO has only increased.<sup>11</sup> Such are the benefits associated with the WTO that some countries

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<sup>5</sup> *Id.* at 14.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 32.

<sup>8</sup> *Id.* at 33. The author highlights a change in the ideological climate at the world stage at the end of the Cold War and in the 2000s, and notes, for instance that then UN Secretary-General, Kofi Annan, welcomed a decision by the Organization of African Unity to not admit at its summit meetings, African leaders who had come to power through unconstitutional means.

<sup>9</sup> *Id.* The author notes that the International Court of Justice in the *Admissions* Case ruled that a state’s internal affairs should remain untouched by the United Nations apart from the Security Council acting based on its powers defined in Chapter VII of the UN Charter. She documents arguments of scholars who assert that western liberal democracy is the sole remaining credible political philosophy. She also elaborately documents the counterarguments and the critiques of such theories.

<sup>10</sup> *See* Bolivia Submits a Notice under Article 71 of the ICSID Convention, ICSID News Release, May 16, 2007, available at: <http://icsid.worldbank.org/ICSID/Servlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>; *see also*, WILLIAM BURKE-WHITE & ANDREAS VON STADEN, THE NEED FOR PUBLIC LAW STANDARDS OF REVIEW IN INVESTOR-STATE ARBITRATION 689, 697-698 (Stephan W. Schill ed., Oxford Univ. Press 2010), where the authors, upon an examination of ICSID tribunals, note “in light of these and other cases, the legitimacy of investor-state arbitration has been questioned both from within the ICSID system itself and by states subject to its jurisdiction”.

<sup>11</sup> *See* DOHA WTO MINISTERIAL 2001: Briefing Notes, Members and Accession,

have agreed to join the WTO on terms far less preferential than those that were available in 1995.<sup>12</sup> Some have even agreed to resolve political and associated disputes for the privilege of entering this club.<sup>13</sup> Moreover, members have willingly implemented WTO decisions, when the alleged weak compliance system<sup>14</sup> may not have provided sufficient incentive for compliance.<sup>15</sup> To the author, seemingly, the fact that those in favour of a state-centred understanding of legitimacy of international organizations do not see a problem with the WTO system,<sup>16</sup> does not immunize the system from justifiable criticism.

In the aforementioned context, I feel the reader could have benefitted from her views on why the focus of much of the legitimacy debate should be directed towards the WTO as an institution, and not towards the states who came together to create the rules of the WTO. While the drafters may claim helplessness in cases of judicial activism, is there a case to say that some of the systematic failures are attributable to the nature of the rules drafted by the negotiators? For instance, *US-Clove Cigarettes*<sup>17</sup> is a case in point on how the failure to draft an exception clause

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*Becoming a member of the WTO, available at:* [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief19\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief19_e.htm). 29 members have joined the WTO since 1995, while 30 members are undergoing the accession process.

<sup>12</sup> See generally, Transitional Product-Specific Safeguard Mechanism, Protocol of Accession of The People's Republic of China, WT/L/432 (Nov. 23, 2001), at art. 16. Among other concessions, China has agreed to a special safeguard rules designed to specifically target surge in import of goods of Chinese origin into the territory of a WTO member.

<sup>13</sup> See Russia to join WTO, WALL ST. J. (EUROPE), Nov. 10, 2011, *available at:* <http://online.wsj.com/article/SB10001424052970204224604577027810930153038.html>.

<sup>14</sup> See for example, Gregory Shaffer, *How to make the WTO Dispute Settlement System work for Developing Countries: Some Proactive Developing Country Strategies* (Towards a development-supportive dispute settlement system in the WTO, ICTSD Resource Paper No. 5) (Mar. 2003), at 37, *available at:* [http://ictsd.org/downloads/2008/06/dsu\\_2003.pdf](http://ictsd.org/downloads/2008/06/dsu_2003.pdf). Shaffer notes that developing countries face major challenges in making effective use the WTO dispute settlement system.

<sup>15</sup> See William J. Davey, *The WTO Dispute Settlement System; The First Ten Years*, 8(1) J. INT'L ECON. L. 17, 47 (2005). Davey notes, for instance, that the compliance rate with WTO panel/Appellate Body decisions is as high as 83% though he also notes that in cases the complainants have settled for less than full implementation.

<sup>16</sup> KULOVESI, *supra* note 3, at 14.

<sup>17</sup> *US – Clove Cigarettes* Panel Report, *supra* note 1, ¶ 7.290. In this case, the Panel noted as follows:

We are not saying that the United States is not allowed to adopt measures such as Section 907(a)(1)(A) to regulate products for public health reasons; on the contrary, that is permitted provided it respects the boundaries set forth in Article 2.2 of the *TBT Agreement* such as not being a measure more trade restrictive than necessary to fulfil a

under the WTO TBT Agreement resulted in a strict liability standard under the agreement.

Kulovesi uses the debate surrounding environment and trade as the foundation of her scholarly work, and rightly so. The linkages of trade are not limited to the environment alone. However, unlike issues such as national security<sup>18</sup> or human rights,<sup>19</sup> which have been treated more deferentially by the WTO members, the WTO is no stranger to trade and environment or trade and public health disputes. To the cynic, this may well be a sad commentary on the importance attached to the environment or public health issues. Regardless, Kulovesi's focus on trade and environment brings out far more clearly the issues surrounding the legitimacy of the WTO dispute settlement system. Legitimacy in international relations is *everything*. International organizations like the WTO can function effectively only if the sovereigns and stakeholders, directly or indirectly through their representatives, perceive it as legitimate. Therefore, the book explores a very fundamental and important issue facing the multilateral trade system.

## II. OVERVIEW

*The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* is highly referenced and documents a wide array of academic literature, scholarly debates and rulings of the WTO system as well as other international systems such as the International Court of Justice, which influence the debate on trade and environment. Kulovesi divides the substantive narration

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legitimate objective. We are saying that if the United States chooses to do so, it must not accord less favourable treatment to imported clove cigarettes than that it accords to the like domestic menthol cigarettes for reasons of avoiding potential costs.

The Panel ruling does seem to indicate that the WTO TBT Agreement provides no flexibility to justify national treatment violations through an exception; *see also US – Clove Cigarettes* AB Report, *supra* note 1, ¶ 101, where the Appellate Body explicitly noted that “the TBT Agreement does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX”.

<sup>18</sup> *See for example, United States – The Cuban Liberty and Democratic Solidarity Act* (World Trade WT/DS38/1, G/L/71, S/L/21), which did not get adjudicated before a WTO panel, was the only case which arguably dealt with the security policies of a WTO member. Since the United States was a Respondent, in the absence of a formal WTO panel proceeding, there was no occasion to put forth an Article XXI – security exception defence.

<sup>19</sup> *See Agreement reached on WTO waiver for “conflict diamonds”*, WTO NEWS, Feb. 26, 2003, *available at*:

[http://www.wto.org/english/news\\_e/news03\\_e/goods\\_council\\_26fev03\\_e.htm](http://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm).

into four parts. In Part II, Chapter 1, she first documents the scholarly debate surrounding the question of legitimacy and proceeds to discuss in Chapter 2 the relevant developments at the WTO, including those under the Uruguay Round and the Doha Development Round. Through some of the most notable cases decided under the WTO and the GATT, she highlights in Chapter 3 the nature of the challenges faced by the multilateral trade order and their response to such challenges. True to the theme of her book, she explores the role of international law in the WTO dispute settlement system and in her words, describes “the competence of the WTO dispute settlement system to consider non-WTO rules of international law”.<sup>20</sup>

In Part III, she takes the arguments in Part II a bit further by discussing the WTO cases in the specific context of international environmental law, and also takes on the challenge of providing an insight into the much debated role of the WTO in the climate change debate. In Part IV she provides her final thoughts on the debate.

In the interest of structural convenience, this review shall present the core narrations, instead of engaging in a chapter by chapter review. The fundamental contribution of any academic literature may be adjudged by the manner in which it adds to or alters the shape of contemporary debates. Such an endeavour is sometimes achieved by sensitizing the community at large of the possible lacunae in an existing system. It may also be an endeavour which is achieved through suggestions and proposals which influence, sometimes slowly, but definitely surely, the “way we do things”. In such context, the purpose of this review shall be to examine the manner in which *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* influences the future of the WTO dispute settlement system. Academic debates, no doubt, contribute towards shaping the future of the multilateral system. However, in the present system, the WTO panel or the Appellate Body has the final word, a fact that the author acknowledges as much.<sup>21</sup> Therefore, this review shall also examine the book from a practicability standpoint.

### III. LEGITIMACY AND FRAGMENTATION: MAKING A CASE THAT THE WTO IS NOT AN ISLAND

The author spends considerable time discussing the notions of legitimacy.<sup>22</sup> The underlying purpose of engaging in such an extensive analysis is to emphasize, in the author’s words, that “traditional arguments for overlooking legitimacy

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<sup>20</sup> KULOVESI, *supra* note 3, at 7.

<sup>21</sup> KULOVESI, *supra* note 3, at 135.

<sup>22</sup> See generally, KULOVESI, *supra* note 3, at Ch. 1.



considerations in the context of international law and organizations are disappearing”.<sup>23</sup> Kulovesi does successfully capture most of the debates and criticisms surrounding the legitimacy of the WTO. Such an extensive analysis helps the reader build up a baseline against which the performance of the WTO may be adjudged, or as she puts it, provides “useful criteria for analysing the legitimacy of the WTO dispute settlement system”.<sup>24</sup>

Chapter 2 provides further context for the discussions which follow by focusing on the issue of trade and environmental linkages. The chapter also outlines one of the important aspects of the debate brought out in the book: fragmentation of international law.<sup>25</sup> The book does highlight that at the conclusion of the Uruguay Round in 1994, trade and environment remained a highly sensitive topic. Upon evaluation of current academic literature on the subject, the author notes that a reference to sustainable development in the WTO preamble, the establishment of the WTO Committee on Trade and Environment [CITE], the conscious jurisprudence of the WTO Appellate Body and the inclusion of environmental issues in the negotiating mandate for the Doha Development, have played a role in alleviating the tension surrounding the trade and environment linkage.<sup>26</sup> Such a background further contributes in shaping a sense of expectation, based upon which the actions of WTO panels or the Appellate Body itself, may be adjudged in the future.

One cannot but wholeheartedly agree with the author that the underlying reason for the tension is that the WTO dispute settlement system, even if less than ideal, is the only international forum available for settling trade–environment disputes.<sup>27</sup> Since in a sense, the WTO is perceived to provide a *solution* through its dispute settlement system, it is the logical choice to resolve environmental disputes, as long as they have a trade linkage. In this context, the focus of the debate continues to be on the application of non-WTO law in WTO disputes rather than the application of WTO law in non-WTO disputes.

Four of the scholarly views cited by the author shape the debate on fragmentation and its impact on the WTO dispute settlement system. Therefore, it needs some elaboration. J.N. Bhagwati argues that the WTO is incapable of

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<sup>23</sup> *Id.* at 37.

<sup>24</sup> *Id.* at 52.

<sup>25</sup> KULOVESI, *supra* note 3, at 56.

<sup>26</sup> *Id.* at 57.

<sup>27</sup> *Id.* at 59, where the author highlights that “institutional discrepancies are partly responsible for the legitimacy challenges confronting the WTO dispute settlement system” adding further that “in terms of institutions and enforcement mechanisms, international trade law is more developed and stronger than international environment law”.

managing complex issues such as the right to unionize.<sup>28</sup> Jeff Dunoff highlights that the WTO adjudicating body should simply refuse to decide any disputes which are too political for judicial resolution at the WTO.<sup>29</sup> For John H. Jackson, the concepts of sovereignty and subsidiarity are tools through which linkages disputes should be decided.<sup>30</sup> Ernst Ulrich Petersmann, on the other hand, argues in favour of incorporation of principles such as human rights into the body of WTO law as “context” for interpretation of WTO law.<sup>31</sup>

In this regard, we may note that the WTO Appellate Body in *Mexico-Soft Drinks*<sup>32</sup> has made it clear that it will not make any determination as to whether a WTO member has violated non-WTO law.<sup>33</sup> The limited role of the WTO dispute settlement system is to test violations from the standpoint of WTO law. Therefore, the logical question that arises is whether the WTO panels and the Appellate Body, when interpreting the provisions of WTO laws, should refrain from engaging in an analysis simply because of its political ramifications or because of its linkages with the environment? The fundamental question that arises in this context is whether the legitimacy of the WTO dispute settlement system will be compromised if it is seen to shy away from contentious disputes? Kulovesi brings out the problem very well, pointing out that neither of the alternatives is cost free<sup>34</sup> and that the legitimacy dilemma facing the WTO dispute settlement system is much like a “two headed dragon”.<sup>35</sup> For instance, she notes that Dunoff’s “hands –off” approach may well present as much a challenge to the system’s legitimacy as Petersmann’s integration approach<sup>36</sup>

While acknowledging both sides of the debate, the author seemingly refrains

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<sup>28</sup> Jagdish N. Bhagwati, *Introduction*, in FAIR TRADE AND HARMONIZATION Vol. 1 (Jagdish N. Bhagwati & Robert E. Hudec eds., MIT Press 1996), referenced in KULOVESI, *supra* note 3, at 63.

<sup>29</sup> Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT’L L. 733 (1999) et seq., referenced in KULOVESI, *supra* note 3, at 66.

<sup>30</sup> John H. Jackson, *Afterword: The Linkage Problem – Comments on Five Texts*, 96 AM. J. INT’L L. 122 (2002), referenced in KULOVESI, *supra* note 3, at 64.

<sup>31</sup> Ernst Ulrich Petersmann, *Time for United Nations “Global Compact” for integrating Human Rights into the Law of the World Trade Organization*, 13 EUR. J. INT’L L. 633 (2002), referenced in KULOVESI, *supra* note 3, at 67.

<sup>32</sup> Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (adopted Mar. 24, 2006) DSR 2006:I, 3.

<sup>33</sup> Robert Howse & Ruti G. Teitel, *Beyond the Divide: The International Covenant on Economic, Social and Political rights and the World Trade Organization*, in THE WORLD TRADE ORGANIZATION AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES 44 (Sarah Joseph, David Kinley & Jeff Waincymer eds., Edward Elgar Publishing 2009).

<sup>34</sup> KULOVESI, *supra* note 3, at 69.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

from taking sides in this debate. She does conclude that the WTO dispute settlement system alone is ultimately unequipped to handle the kind of controversies that could arise from a conflict between organizations such as the WTO and UNFCCC,<sup>37</sup> a position which is best reviewed separately, as I have done below. With the Doha Round failing, the debate on linkages has become a casualty of the failed negotiations. Of course, as the author notes the Doha mandate is limited to the role of Multilateral Environmental Agreement (MEA) parties and not to the role of non-parties.<sup>38</sup> Therefore, negotiations are unlikely to make the WTO dispute settlement system's job any easier. Since the challenges cannot be wished away, Chapter 3 of the book rightly reviews the WTO dispute settlement system's response to such difficult challenges through some of the most notable and controversial decisions.

#### IV. RESOLVING FRAGMENTATION CHALLENGES THROUGH LEGAL PRINCIPLES

Kulovesi approaches the challenges arising out of fragmentation at two levels. In Chapter 4, she identifies the realm of legal options to which the WTO may take recourse to, in order to incorporate non-WTO law. In Chapter 5, she critically examines the incorporation of international environment law into the WTO system through an analysis of existing jurisprudence. Three sources are identified in the book: (a) incorporation through connecting provisions in the WTO Agreements such as Article 3.2 of the WTO DSU;<sup>39</sup> (b) Article 31.3(c) of the Vienna Convention on the Law of Treaties; (c) international law as factual evidence. The reader benefits from the fact that the author analyses the academic discourse pertaining to each of these sources and also provides an overview of the relevant WTO cases. Besides the academic value, such an approach will help practitioners identify, in a very useful and time efficient manner, the position of WTO jurisprudence on the subject.

One aspect, however, where a reader feels more analysis could be forthcoming is the issue of differentiation of international principles from the standpoint of whether such principles conflict with WTO law or not. The author does raise issues of conflict and highlights the importance of principles of *lex specialis* or *lex posterior* in addressing such situations.<sup>40</sup> But the analysis does not seem to go beyond that. An example which comes readily to mind is the reference to the Convention on International Trade in Endangered Species (CITES) in *US-Shrimp Turtle*, to highlight the importance attached to the protection of turtles. It

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<sup>37</sup> *Id.* at 267.

<sup>38</sup> *Id.* at 80.

<sup>39</sup> *Id.* at 145.

<sup>40</sup> *Id.*

was not argued in this case, that CITES obligations were in conflict with WTO obligations. The sole purpose of recourse to CITES was to emphasize on the magnitude of the dispute that the panel or the Appellate Body was called upon to address.

This may be distinguished from a situation, in *US-Shrimp Turtle* itself, where an amicus curie made reference to the obligation on fishing states to protect the marine environment by taking into account the effects on other than target species.<sup>41</sup> A WTO panel may be more willing to consider general principles to inform the discussion and provide relevant context, and take a more “legal” approach when non - WTO norms are in direct conflict with WTO norms. Again, WTO jurisprudence has taken, albeit in a slightly different context, an extremely narrow view of conflict.<sup>42</sup> The author does not seem to emphasize much on the ramifications of this practical distinction, though she does note that legal agreements such as the Rio Declaration or the Convention on Biological Diversity seem to have been referred to as factual evidence<sup>43</sup>; a principle which provides sufficient discretion to incorporate international environment law as relevant in the WTO dispute.<sup>44</sup> She does ask the right questions, noting that:

Why did the AB in Shrimp Turtle case note that the “particular relevance” of Principle 12 of the Rio Declaration in assessing unilateral trade restrictions under the GATT while indicating in the Hormones case that the legal status of the precautionary principle was irrelevant when considering scientific risk assessment and uncertainty under the SPS Agreement.

However, she stops a little short of analysing the possible reasons behind such a distinction. It would have been interesting to hear her views on how the WTO system should shape its response, bearing in mind whether the non-WTO principles supplement or conflict with WTO norms. Regardless, the universe of a particular work is not limitless and by asking the right questions, Kulovesi does provide an important direction for future work on the subject.

In chapter 5, the author documents the response of the WTO system to demands for incorporation of specific international law principles into the WTO

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<sup>41</sup> *Id.* at 93. Also see page 157 where the author notes that the controls imposed by CITES were not directly applicable in the dispute.

<sup>42</sup> Appellate Body Report, *Guatemala – Antidumping Investigation concerning Portland Cement*, WT/DS60/AB/R (Nov. 2, 1998), ¶ 65; Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998), ¶ 14.28.

<sup>43</sup> KULOVESI, *supra* note 3, at 167.

<sup>44</sup> *Id.*

system. The author does not shy away from critically examining the role of the WTO Appellate Body and the panels in *EC-Hormones*<sup>45</sup> and *EC- Biotech*<sup>46</sup> respectively. The author does not restrict the discourse to criticism but, for instance, clearly mentions what would have been expected of the WTO Appellate Body in *EC-Hormones*. In the relevant part, she mentions that “what the AB thus should have done, in my view, is to decide whether the precautionary principle is a norm of customary law and then analyse whether, and if so, how it would affect the interpretation of the SPS Agreement”.<sup>47</sup> Now, a reader is well within his rights to disagree with the course of action suggested by the author. However, it is important for the purpose of an informed scholarly discourse that alternatives are proposed and expectations clearly specified. Therefore, in this aspect, her constructive criticism makes an important contribution to the discourse. Put simply, in the interest of legitimacy, the author seems to indicate that it is important for the system to address an issue of fragmentation head on rather than side step it through legal jugglery. As seen in chapters before, the author asks difficult questions: Why did the Appellate Body consider the Rio Declaration while not extending the same courtesy to the precautionary principle?

The author’s deconstruction of the *EC-Biotech* decision also provides an invaluable insight into her theory. She is highly critical of the Panel for not providing sufficient reasons to suitably explain why a harmonized reading of international environmental law principles and treaties with WTO laws, was not applicable in resolving the dispute.<sup>48</sup> Kulovesi does make compelling arguments which are difficult to ignore. Further, she engages in a detailed analysis of the reasons as to why dismissal of general international law principles was inappropriate.<sup>49</sup> No doubt she has presented, in very clear and cogent terms, her reasoning behind the failure of the WTO dispute settlement system to integrate non-WTO law with WTO law. By laying out such concerns before the international trade community, in a sense, she has invited a response. If the academic community, or even better the WTO system itself is to take due note of these concerns and respond to them, the system would be able to evolve into an integrated system. The legitimacy of the system will no doubt be judged by the manner in which the system responds to such concerns in the future.

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<sup>45</sup> *Id.* at 164.

<sup>46</sup> *Id.* at 171.

<sup>47</sup> *Id.* at 164.

<sup>48</sup> *Id.* at 177-78.

<sup>49</sup> *Id.* at 175-78.

## V. WTO DECISIONS ON TRADE &amp; ENVIRONMENT

Notions of legitimacy cannot be discussed in the abstract. The author selects the right disputes and discusses them at considerable length. One of the primary achievements of the author is that the book delves in considerable detail on the background and the factual underpinnings of the landmark WTO decisions such as *US-Shrimp Turtle*, *EC-Biotech* and *EC-Asbestos*. Such detail is important in an analysis of contentious disputes because it helps the reader appreciate the factual background which inspired the final decision, and not focus exclusively on the decision in the abstract. Since dispute settlement is highly fact centric, judging the decision making process or the final decision without an appreciation of the factual underpinnings may present less than an accurate picture. Therefore, Kulovesi's effort to present the complete picture is very commendable.

Another significant achievement of the author is that she successfully connects the theories of legitimacy discussed in Chapter 1 with the Appellate Body report in *US-Shrimp Turtle*. She points out for instance that the Appellate Body succeeded in promoting *coherence* in matters of interpretation and improving *adherence*.<sup>50</sup> The *US-Shrimp Turtle* jurisprudence does not provide all answers, as the author rightly notes,<sup>51</sup> which is perhaps what makes her theory on the need for legitimacy a very contemporary concern. In the analysis of cases, there is often a strong temptation to derive a general notion of the WTO's approach rather than treat each case on its merits. The author does exceedingly well to steer clear from such temptation. As mentioned above, while the author is critical of decisions such as *EC-Biotech*,<sup>52</sup> she also acknowledges the positive role of the Appellate Body in *Shrimp Turtle* and its role in *EC-Asbestos* in ensuring that WTO law is not interpreted in a vacuum. For instance, she refers to the willingness of the Appellate Body in *Shrimp Turtle* to consider environmental protection objectives as well as international environmental instruments as a "groundbreaking development"<sup>53</sup> while observing that the Appellate Body's decision in the *EC-Asbestos* dispute was welcomed for providing assurances to regulators that non-protectionist domestic regulations would not be significantly constrained by WTO law.<sup>54</sup> Such objectivity is essential in an analysis of this nature, and the author maintains it.

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<sup>50</sup> *Id.* at 90.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 127-28.

<sup>53</sup> *Id.* at 100.

<sup>54</sup> *Id.* at 105, referring to Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations: A case study of the Canada-EC Asbestos Dispute*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 327 (Grainne de Burca & Joanne Scott eds., Hart Publishing 2001).

## VI. MAKING A CASE FOR PROCEDURAL LEGITIMACY

A reader may sense a slight disconnect between the strong criticism of WTO jurisprudence for its failure to clearly outline the role of non-WTO law into the WTO system, with the author's call for judicial caution in chapter 6.<sup>55</sup> "Without balancing the different concepts of legitimacy", the author mentions, attempts to "remedy one set of problems will give rise to new, equally compelling criticism".<sup>56</sup> She adds that the interaction of multilateral environment laws with WTO law should be guided by the "attitude of judicial caution".<sup>57</sup> It may be germane to ask the question: Is it not precisely a sense of judicial caution that the WTO Appellate Body in *EC-Hormones* exercised in refusing to delve in much detail on an issue which had not been clearly settled by more specialized tribunals? Is not a declaration that the precautionary principle is not a customary norm- as the author suggests the WTO could have done rather than sidetrack the issue- a course of action which discards the principle of judicial caution? For abundant clarity, it must be mentioned that both positions propagated by the author have their merits. However, are these approaches in a sense, mutually exclusive? Perhaps they are; perhaps they are not. Such concerns could be alleviated perhaps by a little more discussion on what the contours of judicial caution should be within the framework of which the author would prefer that the system work.

Moreover, Kulovesi having noted that it is difficult for the WTO to derive its legitimacy from state actors alone carefully documents the manner in which the system has responded to requests of public participation, principally through the submission of amicus curiae briefs.<sup>58</sup> The author critically examines the different approaches taken by the Appellate Body in its decisions in *Shrimp Turtle* and in *EC-Asbestos* on the subject while summarizing the state of the law.<sup>59</sup> The author is clearly in favour of the admissibility of amicus curiae submissions<sup>60</sup> and advances compelling arguments in favour of it.

Much like in everything else, Kulovesi does bring out the core concerns in the area: political balancing versus legal interpretation, standard of review and deference to national authorities, questions of transparency, public participation and amicus curiae submissions. Also like everything else, she tracks closely the academic debate and WTO developments in this area.

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<sup>55</sup> KULOVESI, *supra* note 3, at 192.

<sup>56</sup> *Id.* at 180.

<sup>57</sup> *Id.* at 192.

<sup>58</sup> *Id.* at 209.

<sup>59</sup> *Id.* at 213.

<sup>60</sup> *Id.*

## VII. THE CASE OF CLIMATE CHANGE AND THE AUTHOR'S FINAL VIEW

The concerns put forth in the book are tested against a very contemporary concern of climate change which, as the author points, has evolved in parallel with the WTO.<sup>61</sup> Much has been written about the interaction of the climate change regime with the international trade order. The issue is fast moving beyond the realm of an academic debate, as WTO members actively pursue the question of using trade as a means of combating climate change concerns.<sup>62</sup> Therefore, the attempt to relate the broader questions outlined in the book to the issue of climate change is noteworthy.

The analysis itself is quite exhaustive. The section highlights the legal principles of relevance to this dispute. The importance of the long standing debate on product process methods in the climate change debate; the relevance of consumer preference for climate friendly products; the article XX (g) principles; and the scope of the WTO TBT Agreement all find mention. At the same time, issues arising out of trade in biofuels, border tax adjustment and emissions trading are also covered. Therefore, the author successfully portrays the concerns in a comprehensive manner.

In conclusion, the author does acknowledge that some of the criticisms of the WTO are based on lack of information and unfounded fears. I feel it would be fair to say that the book, through a balanced approach to the legitimacy debate, reporting and highlighting all sides of the academic debate, has succeeded in presenting a balanced analysis for the community to consider. Kulovesi does conclude that the WTO dispute settlement system is not equipped to deal with all the problems relating to the increasing specialization within international law<sup>63</sup>. It would be a relevant discourse for the future to examine if the WTO has any choice but to address all disputes brought before it, regardless of its interlinkages and its limited specialization in non-WTO law.

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<sup>61</sup> *Id.* at 218.

<sup>62</sup> *Exports to Europe may trip on carbon barrier*, ECON. TIMES, June 23, 2008. The news report noted that the European Union was considering a proposal to place a carbon tax on goods imported from advanced developing countries. Across the Atlantic, the American Clean Energy and Security Act of 2009 of the United States, which was passed by the U.S. House of Representatives but which did not become law in the absence of any affirmation from the U.S. Senate, had provisions which would have affected international trade. For an analysis of the legislation, see Elizabeth Lynch, *The U.S. Climate Change Bill: International Trade Implications & China*, HUFFINGTON POST, Apr. 1, 2012, available at: [http://www.huffingtonpost.com/elizabeth-lynch/the-us-climate-change-bil\\_b\\_278750.html](http://www.huffingtonpost.com/elizabeth-lynch/the-us-climate-change-bil_b_278750.html).

<sup>63</sup> KULOVESI, *supra* note 3, at 266.



## VIII. A STEP IN THE RIGHT DIRECTION

The right questions have been framed and highlighted. The legitimate concerns have been brought forth. Now, it is perhaps time for future discourse to take a few steps forward and think in terms of solutions. Does the WTO have a legal basis to refuse to consider disputes which may require it to venture beyond its competent domain? If not, how can the separate trade and environment regimes be synergized? When future discourse attempts to answer these difficult questions, they would do well to refer, and refer in detail to the exhaustive concerns highlighted by Kulovesi.

Perhaps one of the greatest contributions of the book is an introduction of a degree of balance in a debate which is often coloured by narrow viewpoints. While the author does express her position on several of the issues, she does very well to document, track and present a wide range of debates in the subject matter. From a researcher's point of view, the book is going to be of significant assistance considering the wide nature of literature that has been captured in just 266 pages. The practitioner and the academician alike will benefit from this discourse which puts forth well researched analysis and constructive criticism of WTO cases.

From a practicability standpoint, there are, no doubt, instances in the book when a reader is forced to ask the question: but how? For instance, how can a WTO panel take concrete decisions on fragmentation, and yet exercise sufficient judicial caution. It may be possible, but again –how? Future discourse may do well to build on these questions.

To conclude, we can say that the WTO is here to stay, and so are the questions on its legitimacy. Taking due note of the concerns expressed by Kati Kulovesi may allow the WTO to take concrete decisions, and yet retain its legitimacy.