Revisiting US – Shrimp: Unveiling the Ambiguity Surrounding Evolutionary Interpretation and the Complexity of Unilateralism

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Abstract

In the complex world of international trade, decisions rendered by adjudicatory bodies, including the Appellate Body ("AB") of the World Trade Organization ("WTO"), hold a significant position in ensuring a balance between the competing interests of Member-states. Among these decisions, the case of US – Shrimp has been celebrated as an achievement in recognizing environmental protection alongside free-trade objectives of the WTO. However, it comes with its shortcomings. This paper embarks on a critique of the judgement on two grounds. First, it questions the application of evolutionary interpretation and its implications using the oversight of the AB as a starting point to highlight the flaws inherent in its use of the tool. Second, it explores the controversial aspect of allowing extraterritorial unilateral measures, the intrinsic element of coercion, which is often glossed over, and how such measures disproportionately affect Southern countries. By dissecting these issues, the paper sheds light on the complexities of the concepts referred to in the judgement that require to be addressed, lest they shall have untoward ramifications in WTO jurisprudence, and invites scholarship to sufficiently address or potentially rectify the fallacies by considering the broader implications of the judgement on the balance between unencumbered international trade and environmental conservation.

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1. Interpretation of Treaties, Evolution & Changing Obligations

The AB has *ad nauseam* reiterated that it operates within the framework of Article 3 (2) of the DSU[i] which mandates interpretation of WTO Agreements using "customary rules of public international law", which themselves are enshrined in Articles 31 and 32 of the Vienna Convention.[ii] However, the task of the AB is not as mechanical as it seems – the above articles provide for diverse techniques of treaty interpretation. Essentially, these articles allow for three possible methods – textual, which interprets a term in its ordinary meaning as it is most likely to reflect the intention of the parties; contextual, which considers any subsequent agreement and the objects and purpose of the treaty; and pragmatic, which allows consideration of *travaux préparatoires* and supplementary means.[iii] However, their aim is a holistic, teleological interpretation, not strictly sequential, with a preference for the literal, textual approach, as is inferred from the fact that words cannot be given "ordinary meaning" without considering the context and the objects and purpose.[iv] Thus, where the AB is not expected to give ordinary meaning to words by referring to a dictionary, it can, without much hindrance, import the use of evolutionary interpretation, overlaying contemporary concerns over antiquated provisions[v] – in fact, that is exactly what the AB sought to do by declaring that "natural resources" is a generic term, not static in nature and meaning but capable of evolutionary interpretation.[vi]

One would ask, then, what exactly is evolutionary interpretation? It is best understood as a function of two elements – time and change. With time, things change, and as things change, how one understands something can either remain attached to the meaning accorded in the past or to the present, the former being historical interpretation and the latter being evolutionary interpretation. It involves casting away a historical understanding of a concept in favour of a contemporary one.[vii] But not every word is capable of evolutionary interpretation – singular or general terms, which refer to a singular phenomenon or a group of phenomena respectively,[viii] are temporal, and their meanings are fixed in the time in which they have occurred.[ix] Generic terms, on the other hand, belong to "an indeterminate class of referents with unlimited referring possibilities", a class of specific phenomena[x] and can undergo evolution.[xi] The complexity of this argument, and how a solution regarding the applicability is found within this understanding is later expressed in this section. However, it

is crucial to infer that when AB seeks to interpret "natural resources evolutionarily", it must first establish that this term is generic and has indeed undergone evolution to be interpreted as such.[xii]

However, the AB, in US-Shrimp, exercises no effort in clarifying substantively why evolutionary interpretation must be conducted. It merely declares that based on the "perspective embodied in the preamble" to the Marrakesh Agreement regarding the "objective of sustainable development, seeking both to protect and preserve the environment", "natural resources" is, by definition, evolutionary, before embarking on a justification for such interpretation through references to other agreements including the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity.[xiii] In doing so, it fails to recognize that in case of a lack of proper justification and reasoning, any term may be argued as being "generic", and therefore evolutionary. It does not justify why it considers "natural resources" a generic term, nor lays down any test for determining whether a term is generic, nor does it draw a link between "exhaustible natural resources" being generic, and why it must be interpreted evolutionarily.

How, then, does one approach evolutionary interpretation? How shall it be determined whether evolutionary interpretation may be used in a particular case? The principle of effectiveness in treaty interpretation, which governs national and international jurisprudence[xiv], and which has been accepted by the Permanent Court of International Justice and its successor as the "governing canon of interpretation"[xv], offers some insight. The principle states that the primary aim of interpretation is to reveal the intention of the parties, and any consideration that relegates this aim to secondary importance has a deleterious effect on the true purpose.[xvi] Where the intention of the parties is the law, obscuring this intention is detrimental as it amounts to the judge usurping the function of the lawmaker.[xvii] Thus, the principle of effectiveness seeks to ensure that the treaty is interpreted in such a way that the intention of the parties is given effect. Bjorge proposes this principle as a possible answer to the question asked immediately above. The problem of evolutionary interpretation arises whenever the original meaning of a concept that is fundamental to a treaty is seen to have evolved; the answer to whether such a concept must be interpreted as originally meant or in the context of changed situations lies in the intention of the parties to the treaty.

Acknowledging that the intent may not always be discernible[xviii], Bjorge implies that whether a concept ought or ought not to be interpreted evolutionarily depends upon the original intention of the parties – if it is found that the parties intended for the concept to be interpreted evolutionarily, it must be so by the principle of effectiveness.

Linderfalk adds further nuance to this argument by proposing a sequential approach to evolutionary interpretation. He posits that what must be checked first is whether the contended term is a singular, general, or generic reference. A singular or general reference, as defined before, may be either definite or indefinite but is temporal in that the expression is fixed in the time in which it occurs. On the other hand, a generic expression is of a nature such that the referent is assumed to be alterable or remain unaltered with time, and evolutionary interpretation only occurs in the former case, for in the latter, just as a singular or general reference, the expression is fixed when it occurs.[xix] Essentially, Linderfalk's argument works on lines similar to that proposed by Bjorge using the principle of effectiveness with minor changes: that if the term used is a generic reference, referring to a class of phenomena, and it was originally intended by the parties to use the term such that the thing it refers to is liable to change, evolutionary interpretation, i.e., the term being interpreted using the conventions prevalent at the time of interpretation, may be allowed for such a term, but not otherwise.

Returning to US-Shrimp, it then becomes imperative to establish what the original intention of the parties in using the words "exhaustible natural resources" was. As highlighted by Charnovitz, there is no record of a "legislative history" for Article XX of the General Agreement on Tariffs and Trade ("GATT"), but since Article XX (g) is largely identical to its corresponding provision in the International Trade Organization ("ITO") Charter's approved Geneva Draft, some insight may thus be drawn from deliberations of the ITO Charter in this regard.[xx] Through a perusal of the transcripts of the preparatory meeting, it is noticed that discussions revolving around the above exception were always made by referring to "natural resources" as raw material or minerals.[xxi] Thus, "exhaustible natural resources" was meant to refer to stock resources like metals, and not flow resources like animals. Charnovitz makes a compelling case in this regard by stating that categorizing such flow resources, which in certain circumstances may be "exhaustible", as so would rob the term of its meaning for if that be done, what would "inexhaustible" even mean.[xxii] And where it is deducible that the

original intention of the parties was for a concept to mean a specific thing/s, as is also inferred from India, Pakistan and Thailand's averments in US-Shrimp[xxiii], original intention cannot be obscured, nor can a new one be superimposed over it. Obscuring this intention using the crafty tool of evolutionary interpretation would be disallowed, but that was the recourse adopted by the AB in US-Shrimp: it did not restrict the meaning of "exhaustible natural resources" to what was originally intended to be meant by it – finite resources such as minerals. By referring to the obsolescence of the provision of the GATT, mentioning obiter that they had been "crafted more than 50 years ago" and should be interpreted in light of contemporary concerns, the AB avoided delving into any analysis of the original intention of the drafters of the GATT. It employed evolutionary interpretation, which affected Member-states decried as a "recipe for adding to and diminishing the rights and obligations of Members"[xxiv], which was specifically disallowed under Article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The use of evolutionary interpretation not only widened the scope for judicial activism to creep in[xxv] but also undermined the security and predictability of the multilateral trading system[xxvi] by creating ambiguity in the future interpretation of terms and conditions that a member-state agrees to bind itself by. Effectively, "exhaustible natural resources" could have meant one thing in 1947, if circumstances allowed and the AB is satisfied that an evolutionary interpretation is necessary in light of "contemporary concerns", it could mean something contrary to what was originally intended when interpreted in 2023. Herein evolutionary interpretation fails to give effect to the intention of the parties.

Of course, this leads to several concerns, the foremost being regarding the extent to which evolutionary interpretation may be used – How much colour, texture and shading[xxvii] can evolutionary interpretation enable to be added to a phrase being interpreted? Can evolutionary interpretation be used to an extent that substantially changes the rights and obligations of WTO Members such that it is violative of Article 3(2) of the DSU? Even more concerning is the use of the Preamble in informing the provisions of the GATT 1947: in 1994, post-adoption but before enforcement of the Marrakesh Agreement, GATT Contracting Parties, together with the Preparatory Committee, decided to acquiesce into the newly formed WTO through a combined decision which terminated the instruments through which GATT

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1947 is implemented after a transitory period.[xxviii] Simultaneously, provisions of the GATT 1947 were incorporated into the Agreement via Article II (2). Can it then be said that where a multilateral agreement has been previously concluded, and where its provisions are made unimplementable in its older regime and implementable in a new one, that a preamble to the agreement establishing the new regime would inform the interpretation of the former? The answers to these questions being outside the scope of what this paper seeks to do, any inquiry into them may be deferred to the wisdom of other authors. However, it must be noted that concerning the last question, Van Damme, in acknowledging that evolutionary interpretation first requires determination of the original intention of the parties, and that in the case of WTO Agreements, it may be difficult to determine it, vehemently argues that WTO Members had not reacted against the interpretation given by the AB in reports before the adoption of the Marrakesh Agreement[xxix] by amending the relevant provisions to clarify the inclusions and exclusions of "natural resources", and that instead, members had included sustainable development in the preamble to the Agreement.[xxx] She thus argues for the question asked immediately above to be answered in the affirmative by relying on Marceau to emphasize the necessity of evolutionary interpretation in the WTO system because of the Agreement that "combines long-standing provisions with other, more recent ones".[xxxi] This use of the preamble undoubtedly raises even more questions regarding the legitimacy of the use of the preamble in treaty interpretation.[xxxii] and the use of a preamble of a subsequent agreement for interpretation of terms of a priorly concluded agreement, but those shall be deferred for a later study, and will not be answered in this paper.

2. Unilateralism, Extraterritoriality & Coercion

Unilateralism ordinarily has a pejorative connotation. Akin to a game of football, the state guilty of unilateralism prioritizes personal interest over collective interest, which "plays personally" and disregards all other players.[xxxiii] It has two primary facets – action and inaction. While unilateral inaction is problematic in cases where collective action is necessary[xxxiv], even more problematic is unilateral action. Bilder theorizes unilateral action as any action taken by a state "solely on its own, independent of any express cooperative agreement with any other state"[xxxv] to state that international law places nominal, if any

constraints on a nation's sovereign power over its territory, and to determine domestic policy. However, unilateral action may extend beyond the territorial boundaries of the acting state in certain specific cases, creating some impact outside its territory. Traditional theories of international law allow states to unilaterally regulate extraterritorial actions – (1) in case of the "nationality principle", of its citizens, (2) in case of the "protective principle", of aliens to protect their governmental interest, and (3) in cases where such actions produce a substantial effect within its territory, including the degradation of the global commons.[xxxvi]

Care must be had to not confuse unilateralism and extraterritoriality as synonymous – "unilateral" expresses the policy preference of one state not supported by consensus of all or some other states; "extraterritorial", on the other hand, is a matter of jurisdiction and the territorial link between the acting state and the impact of its action.[xxxvii] Insofar as unilateral action has an effect outside the territory of the acting country, it involves imposition by one state of its will over another; this is the converse of fairness, as states affected by a measure are denied participation in the decision-making process, thus making such unilateral action "presumptively illegitimate".[xxxviii] However, this paper does not seek to launch into an in-depth analysis of the legitimacy of extraterritorial action, and thus, is limited to two things – unilateral extraterritorial environment-related trade measures and the element of unilateralism, and the potentiality of coercion.

Several arguments lie in favour of such unilateral extraterritorial measures, which may prima facie seem to influence conduct in a territory over which a foreign state has jurisdiction[xxxix], because the intention behind them may not be to influence behaviour abroad and may be justified on some other grounds. For example, the contended measure in US-Shrimp might not have been intended to influence the shrimping policy of shrimp-exporting countries but may have had genuine reasons such as reducing domestic demand for turtle-unfriendly shrimp, or dissociation with a product, the production of which involves the killing of an endangered species[xl]. Whatever may be the intention, it cannot be denied that a unilateral extraterritorial measure impinges non-consensually on the sovereignty of the regulated Member-state, and affects its independence vis-à-vis internal decision-making, especially with regard to domestic environmental conservation policy. Moreover, very rarely does international law provide the right to a singular state to unilaterally determine what is a global

concern, and act unilaterally and extraterritorially to regulate the degradation of the concern so determined. There are several other concerns too: unilateral extraterritorial action may discourage international cooperation in the field of environmental conservation by either promoting similar unilateral action by other states[xli] or by creating dissatisfaction that a cooperative approach was not preferred[xlii]; it may also be ineffective in addressing a concern that requires collective action[xliii]. Most importantly, it also undermines the multilateral trading system for the balance of corresponding rights and obligations between Contracting Parties is seriously impaired. If the imposition of unilateral extraterritorial measures to protect the environment were to be allowed, the multilateral framework would collapse, only providing "security" and "predictability" for those Member-states having identical environmental policies. This is not an unfamiliar, ground-breaking understanding – Panels have been cognizant of this danger and their apprehensiveness is reflected in the unadopted Reports in US-Tuna I and US-Tuna II.[xliv]

Now, talking specifically in terms of trade-restrictive unilateral extraterritorial measures, very often the intent behind such a measure is oversimplified: Regan takes the example of a US measure which prohibits import of non-dolphin-safe tuna to state that such a measure amounts to nothing more than a mere refusal to purchase tuna that has been fished at the expense of dolphin lives. This refusal cannot be conflated with coercion the same way refusal to purchase something one does not want does not amount to coercion but is a part-and-parcel of the normal operation of a market economy.[xlv] He also adds that merely because the US has a huge collective consumer base, and a very high degree of market power, it cannot be said that its ban on the import of non-dolphin-safe tuna is exploitative; when foreign producers are required to choose between changing technology, which they may be too poor to adopt, or losing out market share, this is just normal operation of the market economy.[xlvi] However, this is a crude reductionist approach in assessing the impact of such measures. Conditioning market access on the adoption by a foreign producer of the same or a comparable method of production exhibits an element of coerciveness; it amounts to leveraging a benefit one is free to provide to another, and that the other requires, by making its grant conditional on compliance with the imposed conditions, i.e., coercion.

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For example, imagine a country that is the second-largest consumer of shrimp. In global trade, such a country will have undeniable economic weight, and producers of shrimp-exporting countries will be majorly dependent on this country for earning their livelihood – where else will they sell their shrimp if not in the open market, and if a country is the second-largest consumer, it cannot be argued that it will not have any influence on the operations of the market and subsequent equilibrium price and volume determinations. Thus, where such a country enacts a measure that requires even the producers, who are situated outside its jurisdiction, to adopt some environmental standards identical or comparable to those adopted by the country itself, dependent producers will have no choice but to adopt identical environmental standards to those of such dominant market actors[xlvii]; the alternative is losing the capacious market of shrimp in that country, which may not be the most economical choice for a producer. The market force, when such a measure is enacted, is not direct, but shrouded, but its existence cannot be denied. It creates a disproportionately adverse impact on dependent producers in other countries, and this impact cannot, as argued by Regan above, be disregarded as normal market operations in the pursuit of market efficiency as the presence of force itself indicates coercion.

3. Eco-imperialism:

The disproportionate impact of conditioning market access through unilateral extraterritorial environment-related trade measures on the dependent countries in the previous section is key to understanding how it is even more disproportionate on the economies of developing countries. One must first recognize that there exists no colonization in world trade under the WTO regime. However, this does not discount the fact that due to the developed state of developed countries, monopoly capital in these countries has accessed other ways of obtaining governing power over developing countries, thereby replacing traditional ideas of colonialism: Fukuda makes a compelling case in favour of this.[xlviii] Irrespective, it cannot be denied that developed countries have great economic weight[xlix] as capital in these countries often holds a large market share in the global economy. Of course, corporations which hold such capital are distinct from their governments, but through close relationships with the

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government including political contributions and lobbying, such corporation do exercise their market power through the governments of their nations[1] and can be considered mostly interchangeable for our analysis. Where such nations exercise their market power for the migration abroad of their demanding and intense production norms by leveraging market access, which Scott acknowledges the EU has successfully indulged in[li], the effect is that they are ignorant of how such an exercise affects developing countries, which are uniquely positioned in the global economy. Countries of the Global North have had a much higher consumption of natural resources per capita than those of the Global South, and also generate more emissions. Ordinarily, due to their developed status, they also have the financial, technological, and political power to impose and implement strict international environmental standards. But in imposing such standards, they take no notice of the fact that Southern countries are inclined to relax environmental standards in their pursuit of development: in pursuit of their "green" agenda regarding pollution, global warming and climate change, deforestation, and biodiversity, they are blind to the "brown agenda" of developing countries regarding malnutrition, poverty alleviation, unrestricted trade, and developmental assistance, and are thereby guilty of eco-imperialism. Voon relies on Tussie to argue that developed countries highlight the needs of the future to advocate for sustainability in the long term at the cost of developing countries, who must deal with the problems of staying alive in the present.[lii] The question then is: must developing countries be allowed to develop by relaxing strict environmental policies? The answer to this question is highly debatable, but in answering one cannot be ignorant of the fact that the poor are most likely to be affected by global environmental degradation. Take the simple example of climate change – the Netherlands, being a Northern country, is likely to be better equipped at building dams to protect its coastline from the rising sea levels than a country like Bangladesh. Thus, imposition of strict environmental policies reinforces a rural status quo as a tool to limit environmental degradation, and this may be beneficial to the developed world, but may be detrimental to the ability of a developing country to cope with climate change.[liii]

Several solutions have been theorized – transfer of "green" technology and financial assistance from developed countries to developing countries[liv]; institution of a participatory (in other words, multilateral) regime[lv]; a cooperative solution emphasizing dialogue and a rewards-

based approach [lvi] ; or recognition of the principle of common but differentiated responsibilities, which develops from the principle of equity, as a rule of customary international law to acknowledge different national circumstances between a developing and developed country[lvii]. These solutions come with their advantages and problems, but their evaluation is best left to alternative scholarship to cover. However, one must not lose sight of the point being made – instead of making poverty sustainable, make poverty history, [lviii] Developed nations must refrain from imposing a trade-off between development and environmental conservation on developing countries.

4. Conclusion

This paper criticises the judgement of the AB in US – Shrimp primarily on two grounds. The use of evolutionary interpretation permits the use of extraterritorial unilateral measures while failing to address the element of coerciveness underlying it. In outlining the meaning of evolutionary interpretation, the reasoning employed by the AB is insufficient in conclusively establishing the tests regarding the use of this interpretive tool. In such an ambiguous situation, it is proposed that an application of the principle of effectiveness, or a linguistic approach to evolutionary interpretation would require determination of the original intention of the parties. However, the AB had disregarded averments regarding the original intention, justifying its position by considering it "too late in the day to suppose that Article XX (g)…[referred] to the conservation of exhaustible mineral or other non-living natural resources"[lix], but if the above tools were to be effectively applied, they would lead to a similar outcome: that the original intention meant otherwise than what was decided by the AB, that the original intention was for "natural resources" to mean minerals and raw materials. Considering this, the evolutionary interpretation which obscures such intention would be incorrect, but that is exactly what the AB did.

The paper, while steering away from extraterritoriality, also analyses the unilateral aspect of state action to outline the concerns regarding extraterritorial unilateral action, especially vis-à-vis the potentiality of coercion. Apart from the element of coercion, the disproportionate impact such action may have when wielded by countries of the Global North against those of

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the Global South is also discussed at length. What is realised is that though the judgement in US – Shrimp is often hailed by environmentalists as propelling environmental degradation as a legitimate concern alongside free-trade objectives, it does not come without its fallacies. Of course, how these fallacies are addressed or even cured is left open to future scholarship to discuss and is likely to be seen in WTO jurisprudence after the recent impasse in appointments to the AB has been resolved.

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