Malaysia: A Silent Voice in World Trade Organization Dispute Settlement – Some Legal Considerations for Future Involvement in Renewable Energy Disputes

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Abstract: In the World Trade Organization (WTO), disputes of relevance for the market for equipment producing renewable energy, like solar panels, are increasing. Such cases can be important for Malaysia as one of the World leading producers of solar panels. The article addresses Malaysia's engagement in WTO disputes from a legal perspective and finds that Malaysia is only engaged to a limited extent in WTO disputes. The limited extent of Malaysia's engagement in WTO disputes can turn into a problem for Malaysia as the article claims that WTO law is developed through the WTO Dispute Settlement System and that the disputing parties and third parties can have an impact on that development. In order to help shaping WTO law related to renewable energy in a preferred direction, Malaysia should become more involved in WTO dispute settlement.

I. Introduction

In the World Trade Organization (WTO) dispute settlement system (DSS) there is an increase in the number of cases concerning renewable energy and trade obstacles. For example, Canada's measures concerning its feed-in tariff program for equipment for renewable energy generation facilities have been tried in the WTO DSS,[1] and India's measures relating to production of solar cells and solar modules have been tried.[2]

As one of the world leading exporters of solar panels,[3] Malaysia should take the opportunity to influence on the interpretation of WTO law in disputes concerning measures related to production of solar panels and other technologies for renewable energy in favour of its domestic producers. Recent studies show that participation in WTO disputes as a disputing party or a third party is likely to influence on the rulings by the dispute settlement bodies; panel and Appellate Body (AB) of the WTO.[4]

The aim of the article is to examine Malaysia's role in WTO disputes from a legal perspective. The article demonstrates that disputing parties and third parties have a role to play in the development of law in the WTO DSS, and it provides an overview of all the cases which Malaysia has been involved in as a disputing party and a third party. There has to the best of my knowledge not been provided an overview in literature of Malaysia's involvement in WTO cases as a disputant or a third party from a legal perspective. The article shows that Malaysia has only been involved in the WTO DSS to a limited extent but has been influential in certain aspects of the development of WTO law. With the increase in cases concerning products related

[1] Combined cases; *Canada — Renewable Energy*, WT/DS412/AB/R, and *Canada — Feed-In Tariff Program*, WT/DS426/AB/R, adopted by the DSB on 24 May 2013.
[2] *India — Solar Cells*, WT/DS456/AB/R, adopted by the DSB on 14 October 2016.
[3] Keith Bradsher, "Solar Rises in Malaysia during Trade Wars over Panels", *The New York Times*, Dec. 11, 2014; Joy Lee, "A Growing Solar Industry", *The Star Online*, 19 June 2017, http://www.thestar.com.my/metro/smebiz/focus/2017/06/19/a-growing-solar-industry/ retrieved on 29 July 2017.
[4] Mark Daku and Krzysztof J. Pelc, "Who holds Influence over WTO Jurisprudence?, *Journal of International Economic Law* (2017), Vol. 20, No. 2, pp. 233-255 at 254.

to renewable energy, and with the development of WTO law in that specific area, Malaysia should engage more in the WTO DSS in order to influence on that development.

The article takes a legal approach.[5] The legal approach clarifies rights and obligations under WTO law in order to enhance predictability of the legal system. However, the legal approach is faced with choices between various interpretations of law where the WTO dispute settlement bodies are better equipped to make *a* correct decision if they are presented with various angles to the interpretation by the WTO Members.[6] WTO law provides that the disputing parties have

[5] There is literature concerning third party intervention from political economy perspectives which is not dealt with in this article. Some of these perspectives can also provide answers to the ultimate finding about the low engagement by Malaysia in WTO dispute settlement. Such discussions are relevant but beyond the scope of this article.
There can are several reasons why states should exercise their third party rights to intervene in cases. At the consultation stage, third parties can protect their interests. Johns and Pelc suggest that there are private benefits to gain at this stage. "Private" as the benefits result from negotiations between the disputing parties and third parties which 1) leave out other WTO Members and which 2) generally are not transparent thus keeping the trade negotiations concealed from other WTO Members; see Leslie Johns and Krzysztof J. Pelc, "Fear of Crowds in World Trade Organization Disputes: Why Don't More Countries Participate?", Journal of Politics, 2015, Vol. 78 No. 1, pp. 88-104, at 90.
If a case goes into panel/AB stage, Bechtel and Sattler have suggested that there are positive spill-over effects of WTO litigation which will benefit third parties. Not only will the outcome of a case often result in easier access for third parties to world trade in the respondent's country but third parties will avoid the costs of litigation which are carried by the complainant; Michael M. Bechtel and Thomas Sattler, "What is Litigation in the World Trade Organization Worth?", *International Organization*, 2015 Vol. 69, 375-403. The avoidance of complainant costs is also a reason why the initiation of a case by a complainant is considered as a public good as countries with export or other interests, including third parties, will benefit from it; Leslie Johns and Krzysztof J. Pelc, "Fear of Crowds in World Trade Organization Disputes: Why Don't More Countries Participate?", *Journal of Politics*, 2015, Vol. 78 No. 1, pp. 88-104, at 91.
There can also be reasons for not participating in dispute settlement even though a case can have specific trade interests for a potential third party. Especially for least-developed and developing countries, even though they have trade interests in a case, they might not have sufficient resources to participate. Studies demonstrate that lack of resources is the main obstacle for participation on all levels of WTO dispute settlement by developing and least developed countries in WTO dispute settlement; Marc L. Busch, Eirc Reinhardt, and Gregory Shaffer, "Does legal capacity matter? A survey of WTO Members", *World Trade Review* (2009), Vol. 8, No. 4, pp. 559–577. Elsig and Stucki have argued that developing and least developed countries can free ride on other states' participation in dispute settlement, and thus avoiding irritating a powerful trade partner; Manfred Elsig and Philipp Stucki, "Low-Income Development Countries and WTO Litigation: Why Wake up The Sleeping Dog", *Review of International Political Economy*, 2012, Vol 19, No. 2, pp. 292-316. In addition, it has been suggested that the more third parties participating, the less likely it is of an early settlement at the consultation stage between the disputing parties and the case will go to panel and potentially AB stage. As mentioned above, there can be private benefits at the consultation stage of a dispute. These private benefits are likely to be ruined the more states participating in the dispute. As the private benefits seem to be eliminated by the crowded room of participants, a third party can be regarded as a "spoiler" of such benefits. Thus, according to Johns and Pelc, the "fear of crowds" make states from abstaining in exercising their third party rights; Leslie Johns and Krzysztof J. Pelc, "Fear of Crowds in World Trade Organization Disputes: Why Don't More Countries Participate?", *Journal of Politics*, 2015, Vol. 78 No. 1, pp. 88-104.
[6] See Bruno Simma and Andreas L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in International Conflict: A positivist View", *American Journal of International Law*, (1999), 93, pp. 302-316, at 316; who defends a traditionalist approach to law; "The use of traditionalist methodologies makes such individual

a right to present their arguments, which must be addressed by the panel and the AB, but also third parties have right to submit their views on the interpretation of the WTO treaties to the panel and the AB.[7] By addressing the questions and the suggested interpretations by the disputing parties, and to some extent the third parties, the panel and the AB clarify the unclear elements of WTO law and create legal expectations for the future.[8]

The article is divided into 6 parts. After this introduction (part I), part II makes a brief introduction to general solar panel and renewable energy issues in the context of WTO law. In part III, the article addresses the WTO DSS. It provides an overall overview of the procedures for disputes before discussing the claim that WTO law is developed through the WTO DSS by the panel, the AB, the disputing parties, and third parties. The article turns thereafter in part IV to Malaysia in the WTO DSS. First there is a brief introduction of Malaysia and its general approach to international law before focus shifts to Malaysia as a disputing party and third party in the WTO. The finding that Malaysia only has a limited engagement in the WTO DSS, but nevertheless provided some important arguments as disputant which have forced the AB to clarify certain aspects of WTO law, serves as basis for part V; the development of WTO law in the field of renewable energy with a few examples of recent developments, before the article concludes in VI.

value choices visible. Thus, the professional ethics of a lawyer requires the impartial mediation of attitudes, ideologies or conflicts. But in this process it is standards derived from legal sources deemed to be representative of the attitude of the community that provide the yardsticks for finding *a* - not *the* - correct solution to a legal problem." (their emphasis, p. 316).

[7] It will be addressed in more details below.

[8] The panel and Appellate Body reports are technically only binding between the disputing parties, and only the WTO Members through the Ministerial Conference and General Council can make interpretations which are binding on all WTO Members and its institutions, cf. Art. IX.2 of the WTO Agreement and established by the AB in *Japan — Alcoholic Beverages II*, WT/DS8, 10 and 11/AB/R, adopted by the DSB on 1 November 1996. . However, in practice the reports are creating legal expectations, and the AB has established that absent cogent reasons, panels are expected to follow previous AB reports in order to provide security and predictability in the WTO system. See *US – Stainless Steel (Mexico)*, WT/DS/344/AB/R, adopted by the DSB on 20 May 2008, paras. 149-162.

II. Solar Panel and Other Renewable Energy Issues

Malaysia has one of the biggest productions of solar panels in the World. Only China and the EU have bigger productions of solar panels than Malaysia,[9] but also Canada, India, South Korea, Japan and Taiwan are important solar panel producers on a global scale.[10] Besides the economic strategies taken by companies to improve their market performances, like improved efficiency of solar panels,[11] states are interfering in the market by increasingly using import and export measures to protect their domestic producers of solar panels from foreign competition. For example, the US has resorted to section 201 of the 1974 Trade Act after one of its solar panel producers went into bankruptcy due to the increased import of foreign solar panels.[12] Section 201 of its 1974 Trade Act provides that safeguards measures can be applied if there is an increase in the import of products and it threatens or causes serious injury to the US industry. The result is increased tariffs on imported solar panels.[13] Such safeguards may hit the Malaysian producers of solar panels as they export 80% of their productions to the markets in Europe, US, and Asia.[14] The question is whether the safeguards imposed by the US are in conformity with WTO law on safeguards; Art. XIX of GATT 1994 and the Safeguard Agreement.

[9] Hafiz Amin and Jennifer Tan, "Malaysia's solar energy market outlook", *The Malaysian Reserve*, 31 March 2017; https://themalaysianreserve.com/2017/03/31/malaysias-solar-energy-market-outlook/ retrieved on 19 November 2017.

[10] See for an overview of largest companies producing solar panels; The Renewable Energy Hub; https://www.renewableenergyhub.co.uk/solar-panels/manufacturers-of-solar-pv.html retrieved on 19 November 2017

[11] Travis Hoium, "How Leading Solar Panels Stack Up Against the Competition", *The Motley Fool*, 29 April 2017, https://www.fool.com/investing/2017/04/29/how-leading-solar-panel-manufacturers-stack-up.aspx retrieved on 19 November 2017.

[12] Ed Crooks, "ITC says foreign competition damaging US solar panel industry", *Financial Times*, 22 September 2017, https://www.ft.com/content/4befb0b6-4d74-37c4-bddd-4debca2bcb8e retrieved on 19 November 2017.

[13] Ed Crooks, "ITC says foreign competition damaging US solar panel industry", *Financial Times*, 22 September 2017, https://www.ft.com/content/4befb0b6-4d74-37c4-bddd-4debca2bcb8e retrieved on 19 November 2017.

[14] Joy Lee, "A growing solar industry", *The Star Online*, 19 June 2017, https://www.thestar.com.my/metro/smebiz/focus/2017/06/19/a-growing-solar-industry/ retrieved on 19 November 2017.

There has been an increase in cases in the WTO about products related to renewable energy. Cases have concerned subsidies to producers of solar panels and wind energy; investment measures discriminating between national and foreign products; and violation of the general principle of national treatment in Art. III.4 of GATT 1994.[15] The dispute settlement bodies of the WTO are faced with the task of balancing the potential breach of the general trade rules with their potential exemptions, like the protection of the environment and compliance with international environmental obligations. That balance is not solely set by the panels and the AB. They must in their interpretation of WTO law, and in striking that balance, answer to the claims and defences by the disputing parties, and may also to some extent rely on arguments provided by third parties. That will be elaborated on in the next part which addresses the WTO DSS and provides an overview of some overall law developments through the panel and the AB, as well as the influence by the WTO Members in that development.

III. WTO and Its Dispute Settlement System

A. *The Dispute Settlement System of the WTO*

The DSB of the WTO was established in 1995 when the WTO replaced the General Agreement on Tariffs and Trade (GATT). GATT was a power-oriented system where political and economic powers could be decisive in disputes. If consultation had failed, disputes could be brought before a panel which would provide a recommendation about the interpretation of GATT 1947. That recommendation would only become a binding rule between the disputing parties if *all* the GATT members, including the disputing parties, accepted the recommendation.[16]

[15] See more about the cases in part V.
[16] Ernst-Ulrich Petersmann, *The GATT Dispute Settlement – International Law, International Organizations and Dipsute Settlement*, Kluwer Law International, The Hague, 1995, chapter 5.

The WTO and its DSB, which consists of all the WTO Members, is a more judicialized system where the veto from the GATT era is abandoned. If a disputing party is not satisfied with the panel recommendation, it can appeal to the AB which has authority to overrule the panel on all aspects of law.[17] Panel and AB recommendations can only be rejected if there is full consensus among the WTO Members in the DSB,[18] which makes decisions in all areas of dispute settlement, including procedures for dispute settlement, adoption of panel/AB recommendations, and it monitors the implementation of panel/AB reports.[19]

The first stage of the dispute settlement process is the *consultation stage* where the disputing parties are aiming at reaching a mutually satisfactory agreement. The complainant can choose to file a case to the DSB under either Art. XXII or Art. XXIII of GATT 1994.[20] By choosing Art. XXII the complainant opens up for third party intervention at the consultation stage if the third party has "substantial trade interests" in the consultation.[21] Joining the consultation does not make a third party a disputant but it will have certain third party rights at this stage. If the complainant files a complaint under Art. XXIII, the complainant can prevent the participation of third parties at the consultation stage.

If the disputing parties cannot reach a mutually satisfactory agreement at the consultation stage, the dispute moves into panel stage with the potential for appeal to the AB. At the panel/AB stage, "any Member having a substantial interest in [the] matter" can join the case as a third

[17] Art. 17 of the DSU. The AB has 7 Members who sit in their position for 4 years with possibility for one renewal. Malaysia has never had any Members in the AB although Malaysia on a few occasions has proposed Malaysian candidates. In 2016 Malaysia proposed the former Chairman of the DSB, Ambassador Muhamad Noor Yacob.
[18] Art. 16.4 and Art. 17.14 of the DSU.
[19] Malaysia has had some significant positions in the DSB. Ambassador Muhamad Noor Yacob from Malaysia was chairman of the DSB in 2006. Chairing the DSB implies *inter alia* the right to be consulted by the WTO Director-General, if parties disagree on the composition of panels
[20] For cases concerning trade in services, see similar rules in the General Agreement on Trade in Services, Art. XXII and Art. XXIII.
[21] A request of third party participation at the consultancy stage may be rejected if there is no such substantial trade interest. However, it is only rarely that a request to join consultation is rejected, cf. Yang Guohua, Bryan Mercurio, and Li Yongjie, *WTO Dispute Settlement Understanding – A Detailed Interpretation*, Kluwer Law International, The Hague, 2005, p. 45.

party which gives it the right to be submit a written statement and to provide oral statements before the panel/AB.[22]

B. *Development of WTO Law Through WTO Case Law*

The development of WTO law is not only attributed to the WTO Members when they make new WTO treaties, amend treaties, or make final interpretations of WTO law through the Ministerial Conference or General Council.[23] The WTO panels and the AB have a significant role in the development of WTO law. Even though they have no law making mandate, they nevertheless through the interpretations of the WTO treaties fill in gaps in the WTO treaties.[24]

The legal basis for the interpretation of WTO treaties is Art. 3.2 of the Dispute Settlement Understanding (DSU) which provides that; the DSS must provide security and predictability; it serves to preserve the rights and obligations of the WTO Members under the covered agreements; it must clarify the provisions of the agreements in accordance with customary rules of interpretation of public international law; and the panels and the AB cannot add to or diminish the rights and obligations provided in the covered agreements.

In *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, the International Court of Justice (ICJ) stated that Art. 31 and Art. 32 of the Vienna Convention on the Law of Treaties (VCLT) reflect customary rules of international law.[25] The AB referred to this case in *US — Gasoline*,[26] and has consistently applied Art. 31 and 32 of the VCLT as guiding the interpretation of WTO law.[27] The interpretation rules of the VCLT leave discretion to the

[22] Art. 10 and Art. 17 of the DSU. The requirement to reserve third party rights at this stage is "substantial interest" in the case whereas at the consultancy level it is "substantial trade interest".
[23] Art. IX.2 of the WTO Agreement.
[24] That is subject to criticism by some scholars. See for example John Ragosta, Navin Joneja and Mikhail Zeldovich, "WTO Dispute Settlement: the System is Flawed and Must Be Fixe", *International Lawyer* (2003), Vol. 37, No. 3, pp. 697-752.
[25] *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad),* (1994), I.C.J. Reports p. 6, para. 41.
[26] *US — Gasoline,* WT/DS2/AB/R, adopted by the DSB on 20 May 1996, p. 17.
[27] See for example AB case law; *Japan – Alcoholic Beverages II,* WT/DS8, DS10, and DS11/AB/R, adopted by the DSB on 1 November 1996, p. 11; and *US – Gambling*, WT/DS285/AB/R, adopted by the DSB on 20 April 2005, para. 164.

interpreter to give meaning to a text in its context and in light of its purpose. The context shall include relevant rules of international law, and thus opens up for the inclusion of non-WTO treaties and principles of international law as context for the interpretation of the WTO treaties.

The panels and the AB have developed constitutional traits by reviewing national law's compliance with WTO law. For example in *US – 1916 Act* the panel found, and later upheld by the AB, that the US 1916 Act could be challenged "as such" regardless of its actual application against the complaining parties, the EU and Japan.[28] Not only are national legislations under review but also decisions from national courts are reviewed. For example in *US – Shrimps*, the AB stated that "[t]he United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciaries."[29] The AB referred here to a decision from the US Court of International Trade. In *US – Shrimps*, the AB also emphasised due process in the administration of trade rules and used Art. X:3 of GATT 1994 as context in the interpretation of "arbitrary discrimination" of the *chapeau* of Art. XX of GATT 1994. Stone Sweet and Brunell have suggested that even though the AB technically is a quasi-tribunal, it works as a Trustee Court which implies that it is "empowered to enforce the law against states themselves. States, as principals, delegated to courts in order to help them overcome the acute commitment problems associated with (…) the liberalization of trade."[30] Furthermore, in the relationship between panels and the AB, the AB has made the legal value of its reports clear; although they are not *de jure* binding precedent, they are *de facto* binding as panels are expected to follow previous AB recommendations unless there are cogent reasons to depart from them.[31] The legal

[28] *US — 1916 Act*, WT/DS136/AB/R and WT/DS162/AB/R, adopted by the DSB on 26 September 2000.
[29] Para. 173
[30] A. Stone Sweet & T. L. Brunell, Trustee Courts and the Judicialization of International Regimes the Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization, *Journal of Law and Courts*, 2013 Vol.1, No. 1, pp. 61-.88 at 62 and 81-85.
[31] This was a result of a consistent rejection by the panels to follow AB recommendations in the "zeroing of reviews" cases concerning antidumping which were overruled by the AB; *US – Zeroing (EC)*, WT/DS294/AB/R, report adopted on 11 June 2009, paras. 124-133, and *US – Zeroing (Japan)*, WT/DS322/AB/R, report adopted on

value of AB recommendations is in practice reflected by the WTO Members' legal approach as they refer to panel and AB recommendations in their legal arguments.[32] The constitutional trait of the AB is also stressed by former Members of the AB by their reference to the development of the rule of law by the AB.[33] That is exemplified by the AB's approach to the WTO treaties where law is regarded as the highest authority and cannot be reduced by economic arguments.[34]

Furthermore, it has also been established in case law that WTO law is not static. As the AB held in *US – Shrimps*: "the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary"",[35] and made reference in a footnote to the ICJ which in *Namibia (Legal Consequences)* stated: "where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law … . Moreover, *an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation*."[36] (my emphasis). As law is evolutionary, it can be subject to new interpretations if the interpretative context changes. For example, Art. 31(3)(c) of the VCLT refers to other rules of international law as context if they are relevant between the parties to a dispute. As WTO Members make bilateral and multilateral treaties in social, economic, environmental, criminal etc. areas of the international community, the interpretative context of WTO law is subject to such changes. The disputing parties and the third parties can provide

23 January 2007, para. 155, until the AB in *US – Stainless Steel (Mexico)* made it clear that panels are expected to follow previous AB reports, *US – Stainless Steel (Mexico)*, WT/DS/344/AB/R, adopted by the DSB on 20 May 2008, paras. 149-162.

[32] See for example Henrik Andersen, "China and the WTO Appellate Body's Rule of Law", *Global Journal of Comparative Law*, 2016, Vol. 5 No. (1). pp. 146-182.

[33] It is not the aim to discuss the various categories of rule of law; formal or substantive. It is debated in literature also in the context of international law and WTO law. See for different approaches; Henrik Andersen, "China and the WTO Appellate Body's Rule of Law", *Global Journal of Comparative Law*, 2016, Vol. 5 No. (1). pp. 146-182.

[34] See AB in *EC – Fasteners (China)*, WT/DS397, adopted by the DSB on 28 July 2011, paras. 367-370.

[35] Para. 130

[36] *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31.

panels and the AB with information about the relevant context – and its changes – for the interpretative exercise of WTO law.

C. *The inclusion of Arguments from Disputants, Third Parties and Others*

As mentioned in the introduction, panels and AB must find *a correct* interpretation of law which depends on establishing a context of various sources which can serve as support for the interpretation of the specific WTO legal concepts in accordance with the VCLT. The disputing parties deposit written submissions to the panel and the AB where they provide their interpretations of law.[37] The panel and the AB must in general address the legal arguments forwarded by the disputing parties.[38] That forces panel and the AB to establish legal methods which can serve to establish the answers to the disputing parties' claims; answers which have a basis in law and which will create expectations among the WTO Members about the scope of specific provisions of WTO law. As mentioned above, WTO law is not static but under development depending on its context. The expectations to the interpretation of WTO provisions must be seen in light of potential changes in the context.

Third parties benefit from "*voicing* their interests".[39] Third parties provide the panel/AB with suggestions of interpretation and relevant contexts to the interpretation which might otherwise be missed. In *US – Shrimps*, the AB stated third parties have under WTO law a legal right to make submissions to panels, and that they have a legal right to have their submissions taken into considerations by the panel.[40] Panels and the AB have referred to third parties' legal arguments in several cases.[41] To give a few examples:

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[37] Art. 12.6 of the DSU.

[38] Not all claims and arguments need to be addressed if the panel or AB exercise judicial economy. See for example, *Korea — Various Measures on Beef*, WT/DS161/R and WT/DS169/R, adopted by the DSB on 10 January 2001, para. 780.

[39] Leslie Johns and Krzysztof J. Pelc, "Fear of Crowds in World Trade Organization Disputes: Why Don't More Countries Participate?", *Journal of Politics*, 2015, Vol. 78 No. 1, pp. 88-104, at 91.

[40] *US – Shrimp*, WT/DS58/AB/R, adopted by the DSB on 6 November 1998, para. 101.

[41] See reference to early WTO case law in Marc L. Busch and Eric Reinhardt, "Three's a Crowd: Third Parties and WTO Dispute Settlement", *World Politics*, Vol. 58, No. 3, pp. 446-477 at 455, with reference to the panels in

- In *US – Shrimps*, the AB referred to the disputing parties and third parties' positions and policies, that sea turtles are endangered species and that they should be protected and conserved, when the AB analysed a link between the contested US measures and legitimate policies for such measures.[42]
- In *US – Stainless Steel (Mexico),* the AB took into consideration the third parties' positions concerning the panel's rejection of following case law established by the AB. The AB criticized the panel's approach and stated that absent cogent reasons, a panel is expected to follow previous recommendations from the AB.[43]
- In *US – Stainless Steel (Mexico),* the AB relied solely on the third party complaint by the EU; that the respondent, the US, had submitted its appellee's submission three hours after the deadline. That procedural issue was not raised by the complainant, Mexico. The AB agreed with the EU although it still considered the submission for filed in time.[44]
- In *US – Anti-Dumping Methodologies (China),* the AB referred to the EU's argument in support of its own interpretation of the purpose of Art. 2.4.2 of the Antidumping Agreement.[45]
- In *EU – Biodiesel*, the responding party, the EU, requested additional time to make its oral statement to the AB as, according to the EU, third parties had in their written submissions raised issues which the complainant, Argentina, had not in its submission, and which the EU needed additional time to address at the oral hearing. As pointed out by one of the third parties, China, third parties often raise issues which are not raised

Canada – Aircraft, WT/DS70/R, adopted by the DSB on 20 August 1999; *Chile – Alcoholic Beverages,* WT/DS87/R, adopted by the DSB on 12 January 2000; and *Canada – Pharmaceutical Patents*, WT/DS114/R, adopted by the DSB on 7 April 2000.

[42] *US – Shrimps*, WT/DS58/AB/R, adopted by the DSB on 6 November 1998, para. 135.

[43] *US – Stainless Steel (Mexico),* WT/DS/344/AB/R, adopted by the DSB on 20 May 2008, paras. 149-162.

[44] *US – Stainless Steel (Mexico),* WT/DS/344/AB/R, adopted by the DSB on 20 May 2008, paras. 163-164.

[45] *US – Anti-Dumping Methodologies (China),* WT/DS471/AB/R, report adopted by the DSB on 22 May 2017; Footnote 287 in the AB Report.

by the disputants.[46] This indicates that third parties can have an influence beyond the issues raised by the disputing parties in a case. In addition, in its legal analysis, the AB referred to the third parties' arguments. For example, it referred to China's third party submission in support of its own interpretation of the antidumping agreement,[47] and it took note of third parties' views in its discussion of whether the EU measures were inconsistent "as such" with WTO law.[48]

- In *EU – Poultry Meat (China),* the panel referred to responses from third parties, Canada and Brazil, to questions about the concept of "principal or substantial supplying interest" under Art. XXVIII of GATT 1994 which implies that WTO Members with such interests have a right to be part of the negotiation with a WTO Member who is amending its WTO concessions.[49]

These are just a few examples of cases where third parties have had explicit influence on panels' and AB's legal arguments. The influence by third parties on finding the correct interpretation of WTO law should not be ignored although the degree of that influence is lower than the influence by the disputing parties.[50]

Having established that the panels, the AB, and the WTO Members can influence on the development of WTO law in general, the next part will address Malaysia's role in the WTO DSS.

[46] Paras. 1.08-1.10 and the related footnotes.
[47] *EU – Biodiesel*, WT/DS473/AB/R, adopted by the DSB on 26 October 2016.
Footnote 226 in the AB report.
[48] Para. 6.270.
[49] *EU – Poultry Meat (China),* WT/DS492/R, adopted by the DSB on 19 April 2017, para. 7.217 and its footnotes.
[50] Mark Daku and Krzysztof J. Pelc, "Who holds Influence over WTO Jurisprudence?, *Journal of International Economic Law* (2017), Vol. 20, No. 2, pp. 233-255 at 241.

IV. Malaysia in the WTO Dispute Settlement System

Malaysia has been a silent voice in WTO Dispute Settlement. Malaysia has expressed that dialogue and consultation are better means to solve trade disputes between WTO Members than the use of panels and the AB.[51] However, as a Member of the WTO, Malaysia must apply the procedures for dispute settlement in the WTO, which implies that if Malaysia cannot stop a potential dispute at a pre-DSB stage through informal, diplomatic means, the DSB procedures with consultation, and potentially dispute settlement by panels and the AB, will take over.[52]

Furthermore, Malaysia has indicated that the costs of participating as a disputant or third party can be a hindrance to participate. In *Canada – Pharmaceutical Patents*,[53] Malaysia stated to the DSB that it had an interest in the case and would have liked to participate as a third party. However, due to limited resources, it had been too costly for Malaysia to participate.[54] Malaysia expressed the same financial concerns in *EC – Tariff Preferences*,[55] where Malaysia could not participate as a third party although it had interest in the systemic issues of the case.[56] Furthermore, Malaysia has expressed concerns about certain procedural requirements under WTO law which will make the use of the AB more difficult for members with limited resources.[57]

This part will first provide an overview of Malaysia and its relations to international courts in general which will serve as an overall context of Malaysia's approach to international courts.

[51] See Malaysia's statement in the DSB; DISPUTE SETTLEMENT BODY, 27 JANUARY 2003, MINUTES OF MEETING, WT/DSB/M/142, circulated on 6 March 2003, para. 32, concerning *EC – Tariff Preferences*, WT/DS246/R and WT/DS246/AB/R, adopted by the DSB on 20 April 2004.
[52] See Art. 3 of the DSU and Art. XXII and XXIII of GATT 1994.
[53] *Canada – Pharmaceutical Patents*, WT/DS114/R, adopted on 7 April 2000.
[54] DISPUTE SETTLEMENT BODY, 7 April 2000, MINUTES OF MEETING, WT/DSB/M/78, circulated on 12 May 2000, para. 68.
[55] *EC – Tariff Preferences*, WT/DS246/R and WT/DS246/AB/R, adopted by the DSB on 20 April 2004.
[56] DISPUTE SETTLEMENT BODY, 27 JANUARY 2003, MINUTES OF MEETING, WT/DSB/M/142, circulated on 6 March 2003, para. 32.
[57] DISPUTE SETTLEMENT BODY, 19 May 2004, MINUTES OF MEETING, WT/DSB/M/169, circulated on 30 June 2004, para. 71.

Next, Malaysia as disputant in the WTO will be discussed, and finally Malaysia as a third party in WTO cases will be discussed.

A. *Introduction to Malaysia and International Courts and Tribunals*

Malaysia comes from a multi-legal tradition combining common law, English law in commercial matters, Islamic law and secular Malaysian law at State and Federal level.[58] The common law features are expressed with reliance on *stare decisis*. For example, in *Co-Operative Central Bank Ltd (in Receivership) v Feyen Development Sdn Bhd* the Federal Court stated that; "we should like to deal with a point of wide ranging importance and this concerns the principle of stare decisis, *which is a cornerstone of our system of jurisprudence*."[59] (my emphasis).

The reliance on courts as framing, creating, and interpreting law at national level is less obvious in Malaysia's international relations. *Firstly*, Malaysian courts have mostly adopted a dualist approach to international law where it will only be applied by national courts if the international law has been implemented by the Parliament. However, in some situations Malaysian courts seem to recognize customary rules of international law without such implementation if they can link it to principles of English common law.[60] *Secondly*, Malaysia has some reservations towards international courts. As a member of the United Nations (UN), Malaysia is *ipso facto* a party to the ICJ,[61] but has not made a declaration recognizing the jurisdiction of the ICJ as compulsory.[62] Malaysia is a party to the International Tribunal for the Law of the Sea (ITLOS)

[58] Sharlfah Suhanah Syed Ahmad, "Introduction to the Sources of Law in Malaysia", *International Journal of Legal Information*, 2012, Vol. 40.1-2, 174-190.
[59] *Co-Operative Central Bank Ltd (in Receivership) v Feyen Development Sdn Bhd*, [1997] 2 MLJ 829, para. 8.
[60] Abdul Ghafur Hamid and Khin Maung Sein, "Judicial Application of International Law in Malaysia: An Analysis", *Asia-Pacific Yearbook of International Humanitarian Law*, 2005, Vol. 1, pp. 196-214.
[61] Art. 93.1 of the Charter of the United Nations.
[62] Art. 36.2 of the Statute of the ICJ.

but seems to prefer arbitration to litigation. Furthermore, Malaysia is not a member of the International Criminal Court and has not signed the Rome Statute.[63]

Malaysia has traditionally not resorted to the use of international courts or tribunals on international level. Historically, Malaysia has preferred "quiet diplomacy" as means to settle disputes.[64] According to Katsumata, "quiet diplomacy" implies that potential issues between states can be overcome through dialogue before they turn into tensions without publicly criticizing other states' policies.[65] International courts or tribunals should only be a last resort as a case before an international court would bring the tensions between states into the public sphere. The same would apply if Malaysia exercises its third party rights in WTO cases and submits its perspectives on a case; it would indicate tensions between Malaysia and other WTO Members, and it would become public knowledge. "Quiet diplomacy" fits with the Malaysian statement, which was mentioned above, to the DSB that dialogue is a preferred means to settle disputes between the WTO Members.

Malaysia has been involved in two cases at the ICJ; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia),*[66] and *Sovereignty over Pedra Branca/Pulau Batu Puteh,*

[63] Malaysia is also active in international arbitration and host the Kuala Lumpur Regional Center for Arbitration which has been proposed as a main institution to solve disputes among the states involved with the "one belt one road" Chinese investment programme with more than 60 states; Prashanth Parameswaran, "China, Malaysia Mull Dispute Resolution for 'Belt and Road' Countries", *the Diplomat,* 20 September 2016; http://thediplomat.com/2016/09/china-malaysia-mull-dispute-resolution-for-belt-and-road-countries/ retrieved on 11 August 2017.
Malaysia is also a member of the International Centre for Settlement of Investment Disputes (ICSID) and has been respondent in 3 cases; In *Philippe Gruslin v. Malaysia,* (ICSID Case No. ARB/94/1), an agreement was settled between the claimant, Philippe Gruslin, and Malaysia and the Tribunal was discontinued. However, in 1999 new issues arose between Philippe Gruslin and Malaysia and a new Tribunal was established. The Tribunal declined jurisdiction in the case, cf. *Philippe Gruslin v. Malaysia,* (ICSID Case No. ARB/99/3). In *Malaysian Historical Salvors, SDN, BHD v. Malaysia,* (ICSID Case No. ARB/05/10), the Tribunal found that it had not jurisdiction as the contract between the Claimant and Malaysia was not an "investment" in the sense of the Art. 25(1) of the ICSID Convention and thus the claimant's claim failed *in limine.*
[64] C. L. Lim, "The Uses of Pacific Settlement Techniques in Malaysia–Singapore Relations", *Melbourne Journal of International Law* (2005), Vol. 6 No 2, pp. 313-341.
[65] Hito Katsumata, "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"", *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* (2003), Vol. 25, No. 1, pp. 104-121 at 107.
[66] *Sovereignty over Pulau Ligitan and Pulau Sipadan (IndonesialMalaysia),* Judgment, I. C. J. Reports 2002, p. 625.

Middle Rocks and South Ledge (Malaysia/Singapore).[67] Malaysia has also been party to a case concerning UNCLOS before the ITLOS; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore).*[68] In addition, Malaysia was granted third party rights in *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* dispute.[69] "Quiet diplomacy" has a limit, and there can be situations, like in these cases with territorial issues, where Malaysia will take the step to use international courts and tribunals. As the article will show in the following sub-part, Malaysia has also used the WTO DSS to a limited extent to settle disputes.

B. *Malaysia as Disputant in the WTO*

The First Respondent in WTO Dispute Settlement

Malaysia — Prohibition of Imports of Polyethylene and Polypropylene is the first case in the WTO system. It is the *only* time where Malaysia has been a respondent which indicates that Malaysia manages to stop potential claims of violations of WTO law at an early stage before the WTO dispute settlement procedures are applied.

The case concerned a complaint by Singapore about Malaysian measures prohibiting import of polyethylene and polypropylene. The case did not reach Panel stage. At a meeting in the DSB, the representative of Malaysia explained that Malaysia was ready to enter into bilateral negotiations with Singapore. Malaysia further stated that notwithstanding the dispute between Malaysia and Singapore, "ASEAN remained committed to one common bond, namely the

[67] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore),* Judgment, I.C.J. Reports 2008, p. 12.
[68] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore),* Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10 and *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore),* Permanent Court of Arbitration, Case 2004-05, Award on Agreed Terms 1 September 2005.
[69] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Permanent Court of Arbitration, Case 2013-19, Final Award on 12 July 2016, para. 50.

confidence and belief in the multilateral Dispute Settlement System."[70] The Representative hoped that the bilateral negotiations would resolve the issue.[71] Malaysia later modified its disputed licensing system for polyethylene and polypropylene,[72] and Singapore withdrew its complaint.[73] It seems that Malaysia used diplomacy to find a solution with Singapore although it was not quiet diplomacy as the case had reached a public stage where the tensions between Malaysia and Singapore about Malaysia's measures concerning polyethylene and polypropylene were in the open.[74] As the case did not progress to panel stage, there was no development or clarification of WTO law concerning the specific issues related to GATT 1994 and the Agreement on Import Licensing Procedures.

US – Shrimp: Malaysia's Contributions to the Development of WTO Law

Malaysia has been complainant in one case; *US – Shrimps*, which is one of the most cited cases in WTO case law. It concerned jurisdictional and procedural issues as well as issues about the balance between trade and non-trade rules in the WTO.[75] Malaysia, together with India, Pakistan and Thailand, filed a complaint against the US for its ban on the importation of shrimps and shrimp products which had not been harvested with tools using turtle excluder devices (TED). Malaysia *et al* claimed that the US violated Art. XI of GATT 1994 and that the exceptions in Art. XX did not cover the specific measures. The case went through both a panel and the AB, and the result was that the US measures were inconsistent with Art. XI of GATT

[70] DISPUTE SETTLEMENT BODY, 10 February 1995, MINUTES OF MEETING, WT/DSB/M/1, circulated on 28 February 1995, p. 6.
[71] DISPUTE SETTLEMENT BODY, 10 February 1995, MINUTES OF MEETING, WT/DSB/M/1, circulated on 28 February 1995, p. 6.
[72] *Malaysia - Prohibition of Imports of Polyethylene and Polypropylene*, Communication from Malaysia, WT/DS1/3, 31 March 1995.
[73] DISPUTE SETTLEMENT BODY, 19 July 1995, MINUTES OF MEETING, WT/DSB/M/6, circulated 28 August 1995, p. 9.
[74] It can be noted that Malaysia and Singapore also had a case in the ICJ and the ITLOS, as mentioned above. See more about Malaysia and Singapore in C. L. Lim, "The Uses of Pacific Settlement Techniques in Malaysia–Singapore Relations", *Melbourne Journal of International Law* (2005), Vol. 6 No 2, pp. 313-341.
[75] See also Henrik Andersen, "Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions", *Journal of International Economic Law* 2015, Vol. 18, pp. 383–405.

1994. Even though the protection of sea turtles is a policy which falls within the legitimate policy objectives of Art. XX of GATT 1994, the US had applied its measures in a manner which constituted arbitrary and unjustifiable discrimination.[76]

Malaysia made some important contributions to the development of WTO law concerning the scope of Art. XX of GATT 1994. Malaysia contested that the US measures were necessary to protect sea turtles under Art. XX (b) of GATT 1994 and added that the US prohibition on import of shrimps harvested in violation of their TED requirements had the effect of forcing Malaysia to change its domestic policies, regardless of the fact that other methods than TED could serve to conserve sea turtles.[77] The AB held in its assessment of unjustifiable discrimination by the US that;

> *[p]erhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers.*[78]

The AB did not refer explicitly to Malaysia's argument from the panel stage but it followed a similar type of argument concerning the jurisdictional issues of Art. XX of GATT 1994. The question has raised discussions in literature as to the scope of Art. XX of GATT 1994 if national measures can have the effect of forcing other states to change their domestic laws and practices

[76] *US – Shrimps*, WT/DS58/R and WT/DS58/AB/R, adopted by the DSB on 6 November 1998.
[77] Para. 3.220 of the panel report.
[78] Para. 161 of the AB report.

concerning internal production methods, or in this case harvesting methods, in order to export their products to the state in question.[79] Unless there is an obligation under international law which can justify such requirements as provided in US law to production methods in other states, WTO law must tread a fine line between upholding principles of WTO law on market access and its exceptions;[80] a legitimate concern for conservation of animals;[81] and states' sovereign rights to choose the level of protection of such animals in their production processes.[82]

Malaysia also contested the US' reference to both Art. XX (b) and Art. XX (g) of GATT 1994 as justification for its measures.[83] According to Malaysia, Art. XX (g) was meant for *non-living* natural resources, whereas Art. XX (b) could be applied for *living* natural resources. The AB disagreed with Malaysia and found that Art. XX (g) is applicable to sea turtles. In the analysis of "exhaustible natural resources" of Art. XX (g), the AB demonstrated that the interpretation of WTO law cannot be made in a vacuum. The AB referred to a number of international treaties in support of its argument.[84] Even though Malaysia's argument did not convince the AB, it had an impact on WTO law as the AB clarified that other international treaties can serve as context

[79] See for example about jurisdictional aspects of WTO law; Robert Howse, "The World Trade Organization and Protection of Workers' Rights", *The Journal of Small and Emerging Business Law* (1999) Vol. 3, p. 131; Henrik Andersen, "Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions", *Journal of International Economic Law* 2015, Vol. 18, pp. 383–405.
[80] As generally expressed in WTO treaties and case law.
[81] As expressed outside the WTO context in various international treaties, like Convention on the Conservation of European Wildlife and Natural Habitats 1979 ("Bern Convention"); UNCLOS; Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) which all can serve as relevant context to WTO law. But besides the legal dimension, a legitimate concern for wildlife can have basis in environmental and animal protection and welfare considerations.
[82] The traditional basis of public international law is that states are sovereign and no other states can interfere into a state's internal affairs. That principle is expressed in Art. 2.4 of the UN Charter, and in the UN General Assembly Resolution 2625(XXV) of 24 October 1970, "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations," A/RES/25/2625.
[83] Art. XX (b) concerns measures "necessary to protect human, animal or plant life or health," while Art. XX (g) concerns measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."
[84] Paras. 127-134 of the AB report.

for the interpretation of WTO law. Furthermore, as mentioned above in part III, the AB also found that WTO law is not static but evolutionary depending on the context.[85]

Finally, Malaysia contested the panel and AB's acceptance of *amicus curiae briefs* from NGOs.[86] A view which Malaysia at later meetings in the DSB has reaffirmed.[87] The use of *amicus curiae briefs* has been clarified in WTO case law and is a part of the tools available to panels and the AB.[88] In line with the argument above, it is only by questioning certain procedural practices that those areas of WTO law, which are unclear in the WTO provisions, can be clarified by panels and AB. That is where the disputing parties and third parties can raise their voices in WTO disputes. Panels and the AB are generally required to provide answers to the claims by the disputing parties unless they exercise judicial economy.[89]

C. *Malaysia as a Third Party*

Malaysia has only exercised its third party rights in a few WTO disputes. The first time Malaysia notified its interest as a third party was in *Brazil – Desiccated Coconut*.[90] The Philippines complained about Brazil's imposition of countervailing duties on imports of desiccated coconut milk from the Philippines, Côte d'Ivoire, Indonesia, Malaysia, and Sri Lanka. According to Brazil, the countervailing duties were protecting its own industry against

[85] The approach by the AB is also in conformity with Art. 31(3)(c) of the VCLT where any relevant rule of international law, which is applicable to the parties, shall be taken into account.
[86] DISPUTE SETTLEMENT BODY, 6 November 1998, MINUTES OF MEETING, WT/DSB/M/50, circulated on 14 December 1998, pp. 6-7.
[87] See for example in respect of the use of amicus curiae briefs in the AB in *US – Lead and Bismuth II*, WT/DS138/AB/R, adopted by the DSB on 7 June 2000, and comments by Malaysia at the meeting in the DSB; DISPUTE SETTLEMENT BODY, 7 June 2000, MINUTES OF MEETING, WT/DSB/M/83, circulated on 7 July 2000, para. 23. See also comments by Malaysia at DISPUTE SETTLEMENT BODY, 23 October 2003, MINUTES OF MEETING, WT/DSB/M/134, circulated 29 January 2003, para. 69.
[88] See for example *EC — Sardines*, WT/DS231/AB/R, adopted by the DSB on 23 October 2002, paras. 166-167; *US — Lead and Bismuth II*, WT/DS138/AB/R, adopted by the DSB on 7 June 2000 paras 39-42.
[89] For example, if a panel or the AB has found a violation of WTO law by a WTO Member in one area, they can exercise judicial economy by not examining other claims against that particular WTO Member. See for example *Korea — Various Measures on Beef*, WT/DS161/R and WT/DS169/R, adopted by the DSB on 10 January 2001, para. 780.
[90] *Brazil – Desiccated Coconut*, WT/DS22/R and WT/DS22/AB/R, adopted by the DSB on 20 March 1997.

subsidies in the abovementioned states. Malaysia later withdrew as third party and did not have any part at the panel and AB stage,[91] where the Philippines' claims against Brazil were rejected.

In *US – Helms Burton*, Malaysia notified its interest as third party. The EU had filed a complaint against the US as the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act (Helms Burton Act) restrained EU companies from exporting to Cuba and it restricted EU vessels transiting through US ports. The EU made reference to both GATT 1994, about violation of *inter alia* the most favoured nation and national treatment principles; prohibition of quantitative restrictions, and to the General Agreement on Trade in Services concerning transparency problems.[92] Malaysia, together with Canada, Japan, Mexico and Thailand reserved their third party rights in the dispute.[93] Malaysia had an interest in the case as Cuba has attracted investments from Malaysia.[94] However, as the EU and the US found a mutually satisfactory agreement between them, the EU requested the Panel to be suspended and it later lapsed.[95] The settlement between the US and the EU resulted in changes to the Helms Burton Act while the EU assured the US that it would more thoroughly frustrate Iran's attempt to develop mass destruction weapons. Thus the negotiations had spill over effects into issues concerning Iran. In respect of Malaysia, a part of the deal was that the US would abstain from sanctioning the Malaysian company, Petronas, which had – in violation of the Iran-Libya Sanctions Act – heavy investments in Iranian gas fields.[96]

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[91] *Brazil – Desiccated Coconut*, WT/DS22/R, adopted by the DSB on 20 March 1997, para. 12.
[92] United States - The Cuban Liberty and Democratic Solidarity Act, Request for Consultations by the European Communities, WT/DS38/1 G/L/71 S/L/21, 13 May 1996.
[93] United States - The Cuban Liberty and Democratic Solidarity Act, Reservation of Third-Party Rights, Note by the Secretariat, WT/DS38/4, 24 February 1997.
[94] Kalowatie Deonandan, "The Helms-Burton Bill and Canada's Cuba Policy: Convergences with the US," *Policy and Society*, 2005, Vol. 24 No. 1, pp. 124-149 at 129.
[95] United States - The Cuban Liberty and Democratic Solidarity Act, Communication from the Chairman of the Panel, WT/DS38/5 25 April 1997; and United States - The Cuban Liberty and Democratic Solidarity Act, Lapse of the Authority for Establishment of the Panel Note by the Secretariat, WT/DS38/6 24 April 1998.
[96] Dan Balz, "U.S. Eases Stand on Cuba, Iran Sanctions", *Washington Post*, 19 May 1998; Page A15; http://www.washingtonpost.com/wp-srv/inatl/longterm/iran/stories/iran051998.htm retrieved on 3 August 2017.

It would take 16 years before Malaysia again would ask for third party rights. In 2012 Malaysia asked for third party rights in the quintuple case; *Australia – Tobacco Plain Packaging (Ukraine), (Honduras), (Dominican Republic), (Cuba), and (Indonesia),*[97] which due to the same subject matter will be treated by the same panellists.[98] The case concerns the Australian Tobacco Plain Packaging Act 2011 and the Tobacco Plain Packaging Regulations 2011 which limit the trade mark appearance of the tobacco producers on tobacco packages. The aim is to discourage purchase of tobacco in order to protect health. The complaints concern the conformity of the Australian tobacco laws with intellectual property rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Technical Barrier to Trade Agreement, and GATT 1994. The case is relevant for Malaysia as it intends to follow Australia's example with plain packaging of tobacco products if it does not violate

[97] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Ukraine)*, Request for Consultations by Ukraine, WT/DS434/1 IP/D/30 G/TBT/D/39 G/L/985 15 March 2012; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Honduras)*, Request for Consultations by Honduras, WT/DS435/1, IP/D/31, G/TBT/D/40, G/L/986, 10 April 2012; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Dominican Republic)*, Request for Consultations by the Dominican Republic, WT/DS441/1 G/L/992 IP/D/32 G/TBT/D/41, 23 July 2012; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Cuba)*, Request for Consultations by Cuba, WT/DS458/1, G/L/1026, IP/D/33, G/TBT/D/43, 7 May 2013; and *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Indonesia)*, Request for Consultations by Indonesia, WT/DS467/1, G/TBT/D/46 IP/D/34, G/L/1041, 25 September 2013.

[98] *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS434) and Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS435, WT/DS441, WT/DS458, WT/DS467)*, WT/DS434/12, WT/DS435/17, WT/DS441/16, WT/DS458/15, WT/DS467/16, 28 April 2014.
Ukraine requested the panel to be suspended due to a potential mutually satisfactory agreement between Ukraine and Australia; *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging Lapse Of Authority For The Establishment Of The Panel*, Communication from the Chairperson of the Panel, WT/DS434/16, 3 June 2016, and the panel lapsed for Ukraine but continues for the other complainants; *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging Lapse Of Authority For The Establishment Of The Panel*, Communication from the Chairperson of the Panel, WT/DS434/16, 3 June 2016.

TRIPS.[99] The case is still pending at panel level and there cannot at this point be made any claims of potential development of WTO law.[100]

Malaysia also reserved its right as a third party in *EU – Fatty Alcohols (Indonesia)* from 2012. Indonesia made a complaint about EU's antidumping measures on imports of certain fatty alcohols and their blends originating in Indonesia. It is interesting to note that the specific EU antidumping measures also target Malaysia but that Malaysia did not join the dispute as complainant.[101] Nor did Malaysia submit any written or oral arguments to the Panel as it was entitled to under its third party rights.[102] Thus Malaysia did not have a direct influence on the legal analysis by the Panel which ruled mostly in favour of the EU as Indonesia had not demonstrated that the EU acted inconsistently with WTO antidumping law in its dumping and injury determination. However, the Panel found that EU had violated certain procedural aspects of WTO antidumping law and thus had nullified or impaired Indonesia's rights under WTO law. Both Indonesia and the EU appealed the Panel recommendation to the AB which in most parts upheld the Panel's conclusions.[103]

In 2013, Malaysia reserved third party rights in *India – Solar Cells* which will be discussed below as it concerns equipment for renewable energy.

[99] Kamles Kumar, "Plain packaging boon to tobacco black market, says research group", *Malaymailonline*, 13 February 2017, http://www.themalaymailonline.com/malaysia/article/plain-packaging-boon-to-tobacco-black-market-says-research-group#3fjG1B7ZqmQdLTXP.97 retrieved on 14 August 2017.

[100] In 2016, ICSID dismissed a claim by Philip Morris against Uruguay that its investments in trademarks, as protected by the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, had been violated by Uruguayan "single presentation requirement" and prescribed health warnings on the cigarette packages. See Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7), Award of 8 July 2016.

[101] Council Implementing Regulation (EU) No 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia.

[102] India, which was also covered by the contested EU regulation, did not submit any written or oral arguments to the panel either.

[103] *EU – Fatty Alcohols (Indonesia)*, WT/DS442/AB/R, adopted by the DSB on 29 September 2017.

In 2014, Malaysia reserved its third party rights in *EU – Biodiesel*.[104] Argentina filed a complaint against EU's antidumping measures on biodiesel from Argentina and Indonesia.[105] The EU is the biggest export market of Malaysian biodiesel and Indonesia is Malaysia's closest competitor when it comes to export of biodiesel.[106] As Indonesia – although not a complainant to the case but only a third party – was subject to the contested EU regulation, Malaysia could have an interest in an interpretation of antidumping law which would favour its own export interests. The case went through both Panel and AB stage and the EU was found to violate WTO law.[107] In line with Malaysia's general approach as a third party, Malaysia did not submit any written or oral arguments at the panel stage, nor did it file a third party submission at the AB stage.[108]

D. *Some Considerations*

Malaysia has made some important contributions to the development of WTO law in *US – Shrimps* in respect of Art. XX of GATT 1994 and by questioning the use of *amicus curiae briefs.* But Malaysia has generally held a low profile in the disputes. Even though there has been a recent trend of Malaysia exercising its right to reserve its third party status in WTO cases, Malaysia does not have a direct involvement by submitting written arguments or oral

[104] The case is categorized under the general part about Malaysia's third party engagement and not under the "Renewable Energy and Some Developments of WTO Law" which follows right after. The reason is that it is contested whether biodiesel can qualify as renewable energy, see Enrique Ortega; Otávio Cavalett; Consuelo Pereira; Feni Agostinho, John Storfer, "Are Biofuels Renewable Energy Sources?", *Laboratory of Ecological Engineering, Food Engineering School, State University of Campinas (UNICAMP)*, 2007; Andrew Steer and Craig Hanson, "Biofuels are not a green alternative to fossil fuels", *Guardian*, 29 January 2015.

[105] Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia.

[106] USDA Foreign Agricultural Service, Global Agricultural Information, Biofuels Annual, 2016, GAIN Report Number: MY6004.

[107] *EU – Biodiesel*, WT/DS473/R and WT/DS473/AB/R, adopted by the DSB on 26 October 2016.
The contested EU regulation was also found to be inconsistent with EU law by the EU General Court and was declared void; *LDC Argentina SA v Council of the European Union*, case T-118/14, Judgment of the General Court (Ninth Chamber) of 15 September 2016, ECLI:EU:T:2016:502; and *PT Pelita Agung Agrindustri v Council of the European Union*, case T-121/14, Judgment of the General Court (Ninth Chamber) of 15 September 2016, ECLI:EU:T:2016:500. The latter case is currently pending appeal at the European Court of Justice, C-604/16.

[108] Footnote 38 of the AB report; *EU – Biodiesel*, WT/DS473/AB/R, adopted by the DSB on 26 October 2016.

arguments at the hearings. Malaysia misses out on the opportunity to raise its voice and to put pressure on panels and AB for desired outcomes by suggesting specific interpretations of WTO law.

The low engagement must be seen in the context of Malaysia's diplomatic approach to disputes and the costs of using the WTO DSS. However, as mentioned above, Malaysia has an interest in the export of solar panels, and should influence directly on panels and the AB in cases which are relevant for Malaysia's export. The next part will address WTO case law concerning equipment for renewable energy. It will provide some examples of development of WTO law of interest for solar panel producers and will show that some of the main competitors of solar panels are attempting to influence panels and the AB, but also that Malaysia in this field is taking a passive role.

V. Renewable Energy and Some Developments of WTO Law

There has been an increase in the number of cases concerning renewable energy. The cases have in particular revolved around issues of; violation of the national treatment principle;[109] subsidies or countervailing measures in violation of the SCM Agreement;[110] and violation of the Agreement on Trade-Related Investment Measures (TRIMs).[111]

The panels and the AB have developed WTO law in the areas of renewable energy which could be relevant for Malaysia but with the exception of *India – Solar Cells*, Malaysia has not

[109] *US — Renewable Energy*, WT/DS510, a panel has been established but not composed; *Moldova — Environmental Charge*, WT/DS421, a panel has been established but not yet composed; *European Union and certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452, request for consultation by China; *India — Solar Cells*, WT/DS456/AB/R, adopted by the DSB on 14 October 2016.

[110] *US — Renewable Energy*, WT/DS510, a panel has been established but not composed; *China — Measures concerning wind power equipment*, WT/DS419, request for consultation by the US; *US — Countervailing Measures (China)*, WT/DS437/AB/R, adopted by the DSB on 16 January 2015; *European Union and certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452, request for consultation by China.

[111] *US — Renewable Energy*, WT/DS510, a panel has been established but not composed; *European Union and certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452, request for consultation by China.

reserved its third party rights in any other of the cases referred to in this part.[112] The producers of solar panels, as well as the energy providers using sources of renewable energy, are all relevant market participants for Malaysia. Some as direct competitors due to the similar products, while others are potential buyers of solar panels from Malaysia.

The following part will provide a few examples of the development of WTO law of relevance for products related to renewable energy. It is not meant to be an exhaustive list. It only demonstrates how panels and the AB are shaping WTO law and where the disputing parties and third parties may have an impact on that development through their submissions to panels and the AB.

A. *Canada — Renewable Energy and Canada — Feed-In Tariff Program,*

In the combined cases, *Canada — Renewable Energy*[113] and *Canada — Feed-In Tariff Program,*[114] the AB made some clarifications concerning the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The AB held that the complainants; the EU and Japan had failed to establish that Canada's support of its energy sector based on sustainable energy was a subsidy within the SCM Agreement as the panel had not defined the market correctly. The issue concerned whether a *benefit had been conferred* by the Canadian government to some producers *on the market* while not allowing access to such benefit for other producers.[115] The panel had in its report found that there was a general market for electricity regardless of the manner of production, i.e. the panel did not distinguish between producers of electricity based on wind and solar power compared with producers using fossil energy. However, the panel found that the complainants had not established that a subsidy existed as the market for energy based on wind and solar power would not provide a reliable

[112] That includes the cases referred to in the footnotes just above.
[113] *Canada — Renewable Energy,* WT/DS412/AB/R, adopted by the DSB on 24 May 2013.
[114] *Canada — Feed-In Tariff Program,* WT/DS426/AB/R, adopted by the DSB on 24 May 2013.
[115] Art. 1.1 of the SCM Agreement.

electricity system with sufficient revenue to cover its costs "let alone a system that pursues *human health and environmental objectives* through the inclusion of facilities using solar PV and wind technologies into the supply-mix"[116] (my emphasis) without support from the government.

The AB disagreed with the market definition by the panel as the panel had not distinguished between different factors of the supply side but only analysed the demand side. The AB referred to its previous case; *EC and certain member States – Large Civil Aircraft*,[117] where it had stated that both demand and supply side must be taken into account when the market is determined. In that case the AB referred to its finding in *US – Upland Cotton*, where it also held – in line with the panel and the disputing parties; Brazil and the US – that " one accepted definition of "market" is "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices""[118]

Furthermore, according to the AB, the panel had used the language of the exceptions in Art. XX of GATT 1994 and Art. XIV of GATS, concerning *human health* and *environment* which is not expressed in the SCM Agreement. In its definition of the market, the AB referred to negative externalities and found that the Canadian government had created a market for energy based on renewable energy from sustainable sources which should be distinguished from a market based on exhaustible sources like fossil. Such state intervention reflected the Canadian government's attempt to internalize the negative externalities such as "the adverse impact on human health and the environment of fossil fuel energy emissions and nuclear waste disposal. Considerations related to these externalities will often underlie a government definition of the

[116] Para. 7.309 of the panel report
[117] *EC and certain member States – Large Civil Aircraft*, WT/DS316/AB/R
[118] *US – Upland Cotton*, WT/DS267/AB/R, adopted by the DSB on 20 June 2008, para. 408, referring to the panel report, para. 7.1236.

energy supply-mix and thus be the reason why governments intervene to create markets for renewable electricity generation."[119]

The AB makes it clear that the exceptions provided in other WTO treaties cannot be extended to the SCM Agreement. The AB follows here a textual approach to the interpretation of the SCM Agreement. But the market discussion in respect of the interpretation of "benefit conferred" is equally relevant; it is legitimate for a state to create a market based on renewable energy, which from the demand side might appear to be similar to one based on fossil energy, but which on the supply side is different. A state can pursue the creation of a market based on renewable energy in order to internalize the externalities deriving from fossil based energy, and support the producers of renewable energy without it is considered as a "benefit conferred" to these producers in comparison with the producers of fossil based energy. By using the economic language of the SCM Agreement, the AB finds space to consider human health and the environment as negatively affected by externalities from energy based on fossil sources. Thus where the panel took a broad contextual approach by including terms from legitimate policy objectives in GATT 1994 and GATS, the AB took a narrow approach and instead relied on the implied economic terms from the SCM Agreement. This difference has significant impact; the environmental argument cannot be applied directly under the SCM Agreement with reference to other WTO treaties if they cannot be linked directly or indirectly to the SCM Agreement.[120] Instead it is necessary to establish that negative externalities are present, by the impact on the environment or human health, before the argument can be applied. Thus the legal basis is found in the SCM Agreement itself and not on overall concerns of the environment in other WTO treaties.

[119] Para. 5.189 of the AB report.
[120] The AB has made cross-references between the WTO treaties if, for example, the terms and context resemble each other. See for example, *US – Gambling*, WT/DS285/AB/R, adopted by the DSB on 20 April 2005, paras. 291-292.

The AB does not refer to the third parties' submissions. Some of the third parties; Australia claimed that a benefit was conferred as there was one market for electricity.[121] India, on the other hand, argued that without governmental support there would not be a market for renewable energy and seems to suggest that it is a specific market in itself,[122] which seems to be consistent with the AB's findings that a specific market for renewable energy exists and should be distinguished from the market of electricity based on fossil energy. The US found that a benefit was conferred as the government by purchasing electricity based on solar and wind power created a demand.[123] Although the AB did not refer to the US, it found that a government can create a market, but by creating a market there cannot be a benefit conferred as the producers on the comparative market, here the fossil market, are operating under a different market. In all, the AB clarified the market dimension of the SCM Agreement when "benefit conferred" is interpreted.

B. *India – Solar Cells*

In *India – Solar Cells*,[124] some aspects of Art. XX (d) of GATT 1994 concerning international environmental treaties were clarified. Malaysia reserved its third party rights but did in line with the findings in part IV not submit any written or oral statement at the panel or AB stage. Malaysia is one of the biggest exporters of solar cells and modules to India,[125] thus it must be assumed that Malaysia had a substantial trade interest in the case.

India was found to violate Art. III.4 of GATT 1994 by its domestic content requirement on producers of electricity. The domestic content requirement limited the import of solar cells from other countries. India made reference to Art. XX (d) of GATT 1994 which provides that

[121] Para. 2.195.
[122] Para. 2.209.
[123] Para. 2.225.
[124] *India — Solar Cells*, WT/DS456/AB/R, adopted by the DSB on 14 October 2016.
[125] M. Ramesh, "Import of solar panels triples in 2015-16", *The Hindu Business Line*, 2016, 29 June, http://www.thehindubusinessline.com/economy/import-of-solar-panels-triples-in-201516/article8788743.ece retrieved on 3 August 2017.

the general trade rules can be exempted for measures which are necessary to comply with laws or regulations. India made reference to its obligations under international law which it attempted to comply with by imposing the domestic content requirements. The AB made some clarifications from its findings in *Mexico – Taxes on Soft Drinks* where it had held that international obligations can only be considered as "laws or regulations" under Art. XX (d) of GATT 1994 if they form part of domestic law by either incorporation or direct effect.[126] The AB nuanced that view by recognizing that there can be other ways than incorporation and direct effect where international law forms part of domestic law. That could for example be through administrative practices by governmental institutions. The test for determining whether an international instrument forms part of the domestic system is based on; the nature of the international instrument; the subject matter of the law at issue; and the functioning of the domestic legal system.[127] That opens up for case-by-case analyses of both the domestic systems and the international obligations when a state applies Art. XX (d) of GATT 1994.[128]

Even though an international instrument can be coupled into the domestic system, there are additional requirements as the international instruments must qualify as "laws or regulations" in itself. The panel had found that it was a matter of the enforceability of the international instrumenst. The AB disagreed with the panel and it provided a non-exhaustive list of factors which should be taken into consideration when the international instrument's character of "laws or regulation" was established. The list of factors is *inter alia*; degree of normativity; degree of specificity; enforceability; recognized by competent authority; form and title; and sanctions.[129] The qualification of an international instruments as "laws or regulations" cannot

[126] *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R, adopted by the DSB on 24 March 2006.
[127] *India — Solar Cells*, WT/DS456/AB/R, adopted by the DSB on 14 October 2016, para. 5.140.
[128] The chapeau of Art. XX provides: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."
[129] Para. 5.113 of the AB report.

be reduced to its enforceability alone. In the case, India did not demonstrate that the international instruments it referred to formed part of domestic law. Nor did the international instruments qualify as "laws or regulations" as India seemed to suggest that they only served as guidelines. However, the AB opened up for the application of international environmental treaties as a legitimate basis under Art. XX (d) of GATT 1994 for states to impose trade restricting measures in order to comply with the obligations under the international environmental treaties if they meet the coupling criteria and qualify as "laws or regulations".

The EU had in its third party submission asserted that the panel took a too narrow approach by relying on enforceability alone. According to the EU; "They may have different kinds of legal effects and need not be fully binding in all situations, yet nevertheless require various governmental bodies of the Member concerned to take compliance action."[130] The AB did not refer to the EU in its argumentation but it followed the position that enforceability cannot be the only factor to consider when it is determined whether certain measures qualify as "laws or regulations".

C. *Some Overall Considerations*

In these cases, some of the main competitors of solar panels are either disputants or providing third party submissions. It can be argued that a comparison between Malaysia and other solar panel producing states lacks the understanding of Malaysia's quiet diplomacy approach and costs concerns. Even though such an argument is both valid and should be raised, it nevertheless does not change the fact that WTO law is developed by the use of the WTO DSS with the panel, the AB, the disputing parties and the third parties providing legal arguments. By not participating, WTO law of relevance to the industry of solar panels in Malaysia might be developed in a direction to the detriment of Malaysian interests.

[130] EU's third party submission, WT/DS456/AB/R/Add.1, Annex C-2, para. 15

Even though the AB seems reluctant to refer to third party submissions, they may nevertheless play a part in the interpretation of WTO law. Third party submissions can be of particular importance if the panel or AB does not have substantial support in the sources of law but need additional support from WTO Members' perspectives. As the cases above demonstrate that even though there is not direct reference to third parties' submissions, some AB arguments resemble third party arguments.[131]

However, in *India – Solar Cells*, China, which is one of the main producers of solar panels, did not provide any third party submission to the panel or the AB although it had reserved its third party rights. But in *Canada — Renewable Energy* and *Canada — Feed-In Tariff Program,* China submitted its third party views at panel stage and at the AB stage.[132] Other solar panel producing states, like Canada and South Korea, made third party submissions at the panel stage but not at the AB stage in *India – Solar Cells*.[133] Thus, even though a state can have an economic interest in a case, it will necessarily intervene in all stages of the dispute.

There have been situations concerning renewable energy where Malaysia has threatened to complain against other WTO Members but without resorting to it. For example, Malaysia raised the potential of complaining about the EU' s Renewable Energy Directive[134] as it provided tax credits to rapeseed oil produced in the EU, which would not be granted palm oil produced in Malaysia and exported to the EU due to its higher level of greenhouse gas emitted when it burns. That can potentially be a violation of the national treatment principle of GATT

[131] See also Mark Daku and Krzysztof J. Pelc, "Who holds Influence over WTO Jurisprudence?, *Journal of International Economic Law* (2017), Vol. 20, No. 2, pp. 233-255.
[132] See WT/DS412/R/Add. 1-WT/DS426/R/Add. 1, and the AB report as mentioned above.
[133] See WT/DS456/R/Add. 1 and WT/DS456/AB/R/Add. 1.
[134] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Text with EEA relevance) amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources (Text with EEA relevance).

1994 if palm oil and rapeseed oil can be considered as "like products".[135] But the threat of making a complaint against the EU has not materialized into an actual case by Malaysia.[136] However, the EU Renewable Energy Directive is currently challenged, together with a number of other EU energy related directives, by Russia in *EU — Energy Package* which is currently pending at a panel stage.[137] Brazil, China, India, Japan, Ukraine, the US, Colombia, South Korea, and Saudi Arabia have all reserved their third party rights without Malaysia..

VI. Concluding Remarks

Malaysia is a silent voice in WTO dispute settlement. The article has taken a legal approach and has not looked into reasons why Malaysia is not more engaged in WTO disputes apart from briefly mentioning the quiet diplomacy approach and the costs of involvement in disputes. The article has instead focused on the development of WTO law by panels and the AB where disputing parties and third parties can influence on that development.

The article provided an overview of all the WTO cases where Malaysia has been involved as disputant and third party. In *US – Shrimps*, Malaysia provided some relevant questions and interpretations of WTO law which both helped and forced the panel and the AB to make some clarifications about the content of WTO law, and thus helped shaping WTO law. However, when Malaysia has reserved its third party rights, Malaysia has not provided any submissions

[135] Michael W. Meredith, "Malaysia's World Trade Organization Challenge to The European Union's Renewable Energy Directive: An Economic Analysis", *Pacific Rim Law & Policy Journal*, 2012, Vol. 21 No. 2, pp. 399-426.
[136] It should be noted that Malaysia was in trade negotiations with the EU about the potential free trade agreement as mentioned above. EU's introduction of the Renewable Energy Directive made the negotiations ending in a standstill; Michael W. Meredith, "Malaysia's World Trade Organization Challenge to The European Union's Renewable Energy Directive: An Economic Analysis", *Pacific Rim Law & Policy Journal*, 2012, Vol. 21 No. 2, pp. 399-426. Even though at this point, the negotiations has been put on hold by Malaysia, it is currently being assessed by both the Government of Malaysia and the EU whether the negotiations should resume; Ministry of International Trade and Industry of Malaysia; http://fta.miti.gov.my/index.php/pages/view/malaysia-eu Site accessed on 27 July 2017; European Commission; http://ec.europa.eu/trade/policy/countries-and-regions/countries/malaysia/ Site accessed on 27 July 2017.
[137] *EU — Energy Package*, WT/DS476. The panel report is expected at the end of 2017; Communication from the Chairperson of the Panel, WT/DS476/5, 7 April 2017.

about its suggested interpretations of WTO law which could serve as inspiration to panels and the AB.

It can be argued that with the export interest of solar panels, Malaysia should be more involved in disputes concerning renewable energy as such cases might affect the export interests of Malaysia. However, the article also showed that other states with high involvement in production of equipment for renewable energy will not always intervene into the cases as third parties.

Apart from some of the overall constitutional developments by panels and the AB, the article gave some examples of development of WTO law in cases concerning renewable energy. They served only as examples to demonstrate such developments and were by no means an attempt to make an exhaustive list of such development. The aim was to demonstrate the importance of engaging in WTO disputes, and that, at least from a legal perspective, it can be beneficial for Malaysia to increase its level of engagement in the WTO DSS.