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Analysing World Trade Organization through the Lens of Global Justice

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ABSTRACT

In his writing, "World Poverty and Human Rights", Thomas Pogge argues that the economic order is shaped by the better off by imposing it on the worst off.[2] He continues it further and says that there are two kinds of obligations- First, being the negative moral obligation that one should refrain from doing anything which inflicts pain or suffering on others for one's lesser advantage. Second is the positive obligation to help someone who is in need. Of the two obligations mentioned, the first one is the most basic and agreeable by everyone around the globe. Taking this theory forward author wants to analyse the multilateral trading institution- World Trade Organisation through the lens of global justice. It is often argued that this institution is unjust and manoeuvred by the powerful nations who decide the course of future action. In the light of the recent deadlock in the form of a trade war between the US-China and the deadlock created by the US in the appellate body of the dispute settlement understanding, this paper will analyse the bargaining power of the developing and least developed nations in the trading regime. The researcher will deal with the three major issues surrounding the WTO through this paper. i) Is developing or the least developed countries equipped to bargain in the world trading platform? ii) How far the "world court" has been able to reinforce justice without discriminating between the powerful and less powerful nations? iii) What is the mechanism for enforcement, and how far has it been successful in maintaining equitable justice?

I. INTRODUCTION

The integration of the world is a recent phenomenon that is strongly felt after industrialisation and growth in transport and communication. With the expanding horizon of trade and changing dynamics of international relations, a "just world" has become indispensable. But, what is a 'just world' and how can there be a formation of a just world was/is/ and would be a perplexing question for the nation-state.

The modern conception of justice is not limited to Hobbes formula of collective self-interest

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[2] Thomas Pogge, "World Poverty and Human Rights (Cambridge: Polity Press,2002).

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and the choice of attachment with the just institution, which is majorly an election by that individual nation-state rather, it talks about the imposition of some limits on the sovereign power. It strives towards fairness and equality in the working of the institutions and the treatment of the member countries in a just manner not only politically but also economically and socially.[3] Emphasising the importance of Global Justice, Prof. B.S Chimni writes that justice has to be achieved globally and not just locally. "The choice in many ways is now reduced to either global justice or domestic injustice of one kind or another."[4]

II. THE AFTERMATH OF SECOND WORLD WAR

After World War II, the policymakers realised the need for a stable international order and hence had negotiation over four bodies UN, IMF, IRBD, and ITO. United Nations for promotion of peace and security, International Monetary Fund for economic stability, IRBD for helping countries recover from the losses suffered from the war preceded along with economic development and lastly for the promotion of International Trade. Clearly, the last organisation could not see the daylight due to the protectionist behaviour of the countries and failure to have a consensus on similar points. Hence, the liberalisation of trade fell upon GATT, which was not agreed for adjudication of the trade dispute or administrating the trade as it did for almost 50 years till the time of the Marrakesh Agreement, which led to the formation of the World Trade Organisation. During the Uruguay round of conference, another significant development in this field was the formation of the DSU.

The first Director-General, Renato Ruggiero, has, in fact, considered this development as an "important guarantee of fair trade for less powerful countries."[5] However, his vision has not turned into reality which can be witnessed from the deadlock created in the ministerial conferences in Seattle as well as the Doha round of multilateral trade conferences. Doha Round is a significant conference for highlighting the obstacles faced by the developing and least developed nations among a host of other issues. It is the argument from the third world countries that these institutions are largely managed and controlled by the western states either through the suitable design and architecture created by them or through their predominant economic power. [6]

[3] Nagel, T. (2005). The Problem of Global Justice. Philosophy & Public Affairs, 33(2), 113-147. Retrieved February 23, 2020, from www.jstor.org/stable/3558011

[4] Chimni B.S. "A Just World Under Law: A View From the South. "American University International Law Review 22, No.2 (2007): 199-220.

[5] 1995-99 SPEECHES - RENATO RUGGIERO, FORMER DG 30 October 1998, https://www.wto.org/english/news_e/sprr_e/chat_e.htm

[6] Brian Frederking and Paul F. Diehl, Economic Issues, "The Politics of Global Governance International Organisation in the Interdepedent World. Fourth Edition, Lynne Rienner Publishers.

III. DSU: LEVEL PLAYING FIELD OR AIR OF DESPONDENCY FOR WEAKER ECONOMIES

After introducing a rule-based mechanism for resolving trade-related disputes, it was believed that there would be an impartial system for the member countries that would bring an effective solution. DSU was a marked improvement over the earlier GATT regime, which was suffering from the vices of negative consensus. Negative consensus means the losing country in most of the cases vetoed the adoption of the panel or appellate body report at the DSB level, which essentially meant the decisions had no value. It was cured with the introduction of the DSU, which is a two-stage process- Panel and Appellate Body. Decisions of the panel can be appealed to the appellate body after notifying about such intention to appeal to the DSB. Further, DSU came up with sanctions meant to give teeth to its vigour. Former Director-General has regarded it as a 'Crown's Jewel'. Having said that and even admitting the resounding track record of compliance compared to other international forums, it has posed some difficult problems and challenges as well.

(A) Crown Jewel or Thorn in the Crown

DSU, which was talked about so highly, has almost been doomed due to blockage of appointment by the USA in the appellate body. So, the rule-based system, as envisaged in his speech by Renato Ruggiero, has almost reached its abysmal demise. A minimum of three judges are required to hear the dispute in the appellate body, and right now, the trading organisation has just one judge, which essentially cannot rule in any of the proceedings. Also, the panel reports cannot be adopted in case the losing party notifies to appeal. So, essentially global rule, which was created by the world powers, has been almost reduced to ashes by them itself. Weaker economies were a mute spectator in the absence of global administrative order.

(B) From Seattle to DOHA: No substantial progress

From the Tokyo round, the participation of developing countries during the negotiation was enhanced. However, they still faced excessive pressure from the developed nations to follow the standard norms and reduce the protection, which in most cases is essential for the existence of small economies. Taking the example of India, it is a fact that farmers in the agricultural sector are subsidised and allowed exemption from paying taxes. It is challenging for largely populated countries like India not to protect their farmers and go for no subsidies in the farm sector as demanded by the big powers like the US. If we trace the historical timeline, we witness the how US economy was one of the most protected economies till 1945.

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Again in bi-lateral and multi-lateral ties, the US argue for enhanced protection of IP rights with limited scope for an exception, which becomes difficult for the developing economies[7] that will need to have some exception from the rigid and enhanced IP rights. Both during Seattle and the DOHA round saw a stiff battle between the lobbies of the developed and the developing nations. The heated debate on reducing subsidies on agricultural and fisheries products [8]was the top reason for the drift between the two sides.[9]

(C) Accessibility Crisis

DSU provides an equal opportunity for the member countries to approach the institution for remedies. However, it has been noticed that weak economies are less found or, in fact, have not been seen as any of the complainants in more than 20 years of DSU. From the African continent so far, only Egypt has appeared as a respondent in one of the cases, and South Africa has two appearances. While giving a speech at the 50th anniversary of the GATT in Geneva, Switzerland, Nelson Mandela said, "In the end, we must remember that no amount of rules or their enforcement will defeat those who struggle with justice on their side. When there are manifest inequalities, then special and thoughtful measures have to be applied. It is time for us to be frank in our assessment of the outcome of the Uruguay round. The developing countries were not able to ensure that the rules accommodated their realities."[10]

The fees of the proceedings of the WTO is so high and time consuming that the weaker countries are not in a position to fight against the large economies. They weigh the repercussions and the return of filing such dispute and, in the process absorb the exploitation done by the powerful nations for want of no expertise in the trade field or, in fact, not a strengthened economy to sustain the burden of such a costly process. For the Arab countries WTO is inaccessible not because they do not have a share in the volume of world trade. They have more share in the trade than their counterpart Switzerland. But, still, they have least or no appearance in any of the disputes filed so far. [11]

The mechanism of DSU has come to a level wherein the strong nations can direct its course not only at the time of negotiation of the process but also during the time of the adjudication

[7] Moerland, A. Do Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU. *IIC* 48, 760–783 (2017). https://doi.org/10.1007/s40319-017-0634-6.

[8] Introduction of Fisheries Subsidies in the WTO, available at, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm

[9] Some Issues Raised, available at, https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm.

[10] Address by President Nelson Mandela at the 50th Anniversary of the GATT, Geneva- Switzerland, available at http://www.mandela.gov.za/mandela_speeches/1998/980519_gatt.htm

[11] Angshuman Hazarika and Pieter Van Vaerenbergh, "'One Rule to Rule Them All': Rules for Article 25 DSU Arbitration', in Maxi Scherer(ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2019, Volume 36 Issue 5) pp. 595 - 628

process and lastly at the enforcement level. During the adjudication process, the losing party have enough opportunity to delay the process. After the report of the appellate body or the panel as the case may be, the losing party has the option to implement the decision within a reasonable period of time. What is reasonable period of time can be either decided by the parties mutually or by the binding arbitration process within 15 months? The compliance can either be satisfactory or not will be again decided through the arbitration process. [12] After all this process, the winning party is left with authorisation for retaliation which is also of a temporary form till the time such measures are brought into compliance with the direction of the adjudicatory body.

(D) Enforcement and Remedial Mechanism under DSU

DSU does not provide monetary compensation for the violation of its provision to the countries. At best, an authorisation for retaliation can be issued by the DSB. Countries can go for retaliation by increasing the tariffs on the products coming from the losing country. However, there is a three-pronged problem in this kind of arrangement. First, the countries like Antigua and Barbuda cannot retaliate against bigger economies like the US as they are dependent on the essential product supply from the US. Secondly, retaliation would do more harm than good for weaker countries- as retaliation would increase and badly affect their economies. They could not, in most cases, survive by closing down their economies. Thirdly, even if they go for retaliation, it would have a minuscule effect on the larger economies like the USA and EU.

This has happened in the case of US Gambling, wherein Antigua and Barbuda won the case against the USA, appellate body declared the provisions of IHA Act in violation of GATS. The US decided to not comply with the order of the Appellate Body, knowing pretty well even if they retaliate, it will have the least effect on the huge US economy. Till now, these countries did not go for retaliation. Hence, it is often criticised that winning a case in the WTO is merely a symbolic victory that could not result in any benefit or restore the loss suffered by the country due to such violation.[13]

Similarly, Ecuador did not go for retaliation against European Community in the EC Banana dispute, being fully aware that EC is not in a mood to comply and it will have no effect on EC to retaliate rather, Ecuador will suffer harm resulting from such retaliation.

On the other hand, large economies like the US and EC are in a privileged position to follow

[12] Article 22.6 of the Dispute Settlement Understanding
[13] J. H Jackson, International Law Status of WTO Dispute Settlement Reports, Obligation to Comply or Option to Buy Out, 98, A.J.I.L 2004 at 109.

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stringent protectionist measures to save their economies. US did not abide by the decision delivered in US Sunset Review Case, and the EU has refrained to change its position in the EC Hormones case. US has gone ahead to have followed the zeroing method in measuring Anti-Dumping even when the appellate body has held it wrong in a series of cases, including the EC Bed Linen Sunset Review case.

The procedure of enforcement is somewhat designed to promote arm twisting of the less powerful. Somewhat in the name of global order, justice has not reached the den of all the member countries. Although we are able to jot down the rules of the game, if all the players are not equipped with the knowledge, expertise and capacity to play, this game will not be played fairly, whether with or without a referee, would be an important consideration only afterwards.

IV. CONCLUSION

After breaking from the shell of the nation-state and entering into the borderless world with the aspiration to gain from the improvements made by our counterparts, we have placed ourselves in an unknown sphere. It was realised that institutional structure could be formed to place the rules of the game, which needs to be abided by and not circumvented for reducing the other into ashes as was the case previously in times of the power-based system. The world moved to a positivist approach. It was realised that there has to be a differential treatment given to the developing or least developed nations, which are still progressing and hence cannot afford to liberalise the economy in the same manner as the developed counterparts can do. Although in almost all the covered agreements, the provisions for technology transfer, differential treatment for compliance with the global norm, preferential treatment has been given. But, in reality, it has hardly fructified.

The growing divide between the developed and the developing nations can be witnessed in various ministerial conferences, which are resulting in a deadlock as countries cannot reach a common point. The zeal for applying unilateral sanctions by the powerful countries on the basis to protect their national interest, even when the bulk of nations complain, it to be not for the global good.

The time has come to realise the importance of inclusion and creating a just world by creating the terms of the institution by the creation of just terms for this institutional framework.[14] As according to John Rawls, "Justice is the first virtue of social institutions, as truth is of systems

[14] John Mandel, "Globalisation and Justice", The Annals of the American Academy of Political and Social Science, Vol. 570,Dimensions of Globalization (Jul., 2000), pp. 126-139

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of thought. A theory, however elegant and economical, must be rejected or revised if it is untrue; likewise, laws and institutions, no matter how efficient and well-arranged, must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."[15] He further went on to say that truth and justice are the first virtues that cannot be compromised.

The author believes that the area of trade and communication has become quintessential for the survival of the economies in the integrated world. Hence, trade-related negotiation at the bilateral or multilateral level trade is bound to happen. The problem of unilateral sanctions by the powerful economies can be curtailed by collective retaliation. In the recent phase of emerging economies with the China, Brazil, India coming steadily in competition would create a multi-polar world, and in these circumstances, the might of one country would not work in the fear of collective retaliation.

Meanwhile, there is a need for enhanced cooperation and sharing of technology to make a level playing field for the weaker economies. WTO as an institution shall be more accessible to these countries. One of the great developments is the creation of a group in Geneva that will work for helping the nations which are facing difficulty in understanding the complex laws of WTO.

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[15] John Rawls, "Theory of Justice"

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V. BIBLIOGRAPHY

(A) Books Referred

1. John Rawls, Theory of Justice

(B) Articles Cited

1. Thomas Pogge, "World Poverty and Human Rights (Cambridge: Polity Press,2002).
2. John Mandel, "Globalisation and Justice", The Annals of the American Academy of Political and Social Science, Vol. 570, Dimensions of Globalization (Jul. 2000), pp. 126-139
3. J. H Jackson, International Law Status of WTO Dispute Settlement Reports, Obligation to Comply or Option to Buy Out, 98, A.J.I.L 2004 at 109.
4. Angshuman Hazarika and Pieter Van Vaerenbergh, ''One Rule to Rule Them All': Rules for Article 25 DSU Arbitration', in Maxi Scherer(ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2019, Volume 36 Issue 5) pp. 595 – 628
5. Moerland, A. Do Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU. *IIC* 48, 760–783 (2017). https://doi.org/10.1007/s40319-017-0634-6.
6. Introduction of Fisheries Subsidies in the WTO, available at, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm
7. Some Issues Raised, https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm.
8. Address by President Nelson Mandela at the 50th Anniversary of the GATT, Geneva-Switzerland, http://www.mandela.gov.za/mandela_speeches/1998/980519_gatt.htm
9. Brian Frederking and Paul F. Diehl, Economic Issues, "The Politics of Global Governance International Organisation in the Interdepedent World. Fourth Edition, Lynne Rienner Publishers.

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