Recent Development

THE AMERICANIZATION OF THE INTERNATIONAL ECONOMIC ORDER AND ITS NORMATIVE BOUNDARIES

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ABSTRACT

This article focuses on the challenges of integrating an economically powerful State in the International Economic Order (hereinafter "IEO"). As such it identifies the process of the Americanization of the IEO focusing firstly on the relationship between economic power and the rule of international economic law in the context of decision-making in international organisations and adjudicative decisions in international trade. Secondly, it focusses on the responsibilities that a State has and/or should have in the engagement of trade wars.

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KEYWORDS: *international law, sovereignty, rule of law, trade wars, decision-making, dispute settlement, international humanitarian law, state responsibility*

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I. INTRODUCTION

Since the dawn of the Bretton Woods era, discourse in International Economic Law (hereinafter "IEL") has been preoccupied with international economic organisations. These institutions have been evolving, yet the legal focus has continued with the formal institutions *qua* institutions, rather than their underlying drivers, viz., the principal member State stakeholders in these organisations. Either the perceived realpolitik has been pushed to the realms of International Political Economy; or there has been a delusional, almost aspirational focus on the institutions qua institutions. Indeed, a consideration of the legal systems of these member States concerning foreign economic practice has been understood as domestic case studies and therefore either beyond the ambit of Public International Law, or partaking of comparative law.

In the case of the United States (hereinafter "US") in particular, such characterisation is inappropriate, as it has been a major influence in the development of the international economic order (hereinafter "IEO"). A focus on it cannot be marginalised as a case study, and/or not commanding a Public International Law analysis. A candid focus that contextualises the role of the United States in the development of the IEO as its primary underlying driver is important for clarity, completeness and addressing the challenges of the specific genre of issues it poses—both constitutional and substantive—for the IEO. Fragmented approaches in legal scholarship have now been discarded and several approaches have pushed at the self-imposed disciplinary boundaries viz., law and policy, law in context, critical legal studies and interdisciplinary approaches to law.

The recent trade war between China and the US has brought to the fore several fundamental questions concerned with the challenges of reigning in the naked use of economic power. These challenges can be conceived, at a general level, in terms of the relationship between on the one hand economic capacity, and on the other the rule of law. And at a specific level the relationship between international disciplines and the use of instruments of economic power (trade/currency wars). Indeed, it is even possible to consider the very thrusting of international trade in goods and services into another market—as a manifestation of economic power—given that goods and services traded also partake of certain values and cultural traits that are introduced into another society. They can be threats to national security, values and culture. In short, there is here the need for a normative analysis of economic capacity. Such an evaluation needs to take on board the fact that normativity and economic capacity can take different forms.

This normative approach can be contextualised in terms of the US-China trade war, as follows. First and foremost is the relationship between economic capacity/power and the rule of IEL. This has been, in one form or

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another, the subject of much discourse in international relations and legal philosophy; and remains a fundamental challenge in the ordering of disciplines for economic superpowers. Specifically, the processes of decision making and dispute settlement in international economic organizations have been the subject of focus hitherto from the perspective of the participation of developing countries in these institutions—but perhaps not enough with reference to the super power/s in such circumstances. Second, the US-China trade war is premised on the equation between fair trade and parity in trade balances as between countries, along with unemployment concerns. The international trading order has hitherto been underpinned doctrinally by the theory of comparative advantage; whilst trade liberalization in the World Trade Organization (hereinafter "WTO") has been conceptualised mainly through the negotiation of a reciprocal market access process. The theory of comparative advantage has hitherto blunted the economic power/capacity premise under which the parity in the balance trade argument is premised. Third, the availing of a "trade war" as a vehicle for bringing about change not only calls into question the legitimacy of the methodology but also invites scrutiny in terms of the responsibilities of the State during the "trade war". Are there international disciplines akin to International Humanitarian Law during such "wars"? Are there questions of distributive justice that need to be explored? Trade wars call for ethical scrutiny and invite parallels with the way International Law has developed in relation to the use of force by States. What have been the failings of the Bretton Woods institutions, if any, in the precipitation of such a state of affairs in the international economic system? Finally, the justification of national security so freely used for the imposition of economic measures in violation of accepted multilateral norms raises not only concerns about the integrity of international disciplines but also the very nature of the goods and services internationally traded. National security in terms of the WTO has been the subject of only recent WTO litigation. Moreover, the national security perspective draws a focus on the intrinsic nature of a good (or service) not only in terms of its national security aspects but also as an express or implicit vehicle of influence and imposition of non-trade values.

In sum, this current episode in the history of international economic relations underscores the Americanization of the IEO. The US-China trade war, howsoever it pans out, has a dimension that partakes of the Americanization of the IEO. In this paper two strands of this focus on the Americanization of IEL are followed viz., the relationship between economic power and the rule of IEL; and economic power and responsibility in its exercise. The objectives in this paper are modest, namely to suggest that there is scope for a normative discussion (both *lex lata* and *lex ferenda*) here that needs to be taken further. This paper is not intended to be exhaustive of

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all aspects of this discourse—nor to provide a conclusive basis for a normative framework. Hence a discursive approach has been taken.

Americanization and the Importance of Focusing on It

The description "Americanization" has been used in several contexts. Indeed, it has even been used in connection with International Law generally;[1] including specifically with reference to certain disciplines in IEL,[2] and legal systems wherein American legal concepts/ideas and laws have been transplanted.[3] Legal discourse however is sparse, and not comprehensive in terms of IEL. Some of the analysis is positive, for example attributing American legal transplantation to European Legal Systems to the American lead as an industrialised nation.[4] Some of the analysis is negative, partaking of Marxist analysis of International Law.[5] There is however, a fair amount of non-legal literature that focuses on the *consequences* of the Americanization of law and/or globalisation attributing to the US cultural hegemony and the homogenization of the global economy.[6]

The Americanization of the IEO involves a consideration of several aspects of US involvement in international economic relations. First, the way changes are brought about by the US in the international economic system that are in the interest of the international economic community in its vision —for example the US was a key architect of the Bretton Woods institutions which have served the international community for decades now. Second, the US has brought about changes to the IEO that are of specific interest to the US—for example, ensuring only a limited scope for the Special Drawing Rights created under the auspices of the International Monetary Fund

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[1] *See generally* Apoorva Anubhuti, *Americanization of International Laws*, SSRN 1 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1712286.

[2] *See generally* Roger P. Alford, *The American Influence on International Arbitration*, 19(1) OHIO ST. J. DISP. RESOL. 69 (2003); Wolfgang Alschne, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5(2) GOETTINGEN J. INT'L L. 455 (2013).

[3] *See generally* Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, *in* LEGAL CULTURE AND THE LEGAL PROFESSION 137 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996); R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58(1) INT'L ORG. 103 (2004); Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese law*, 23(2) U. PA. J. INT'L ECON. L. 269 (2002).

[4] *See generally* Robert A. Kagan, *Globalization and Legal Change: The "Americanization" of European Law?* 1(2) REG. & GOVERNANCE 99 (2007).

[5] *See generally* Anubhuti, *supra* note 1.

[6] *See generally* MARK RUPERT & M. SCOTT SOLOMON, GLOBALIZATION AND INTERNATIONAL POLITICAL ECONOMY: THE POLITICS OF ALTERNATIVE FUTURES (2005); Jones Michael Jaja, *Globalization or Americanization: Implication for Sub-Saharan Africa*, *in* GLOBALIZATION: TODAY, TOMORROW 113 (Kent G. Deng ed., 2010); Ruth Oldenziel, *Is Globalization a Code Word for Americanization? Contemplating McDonalds, Coca-Cola, and Military Bases*, 4(3) TIJDSCHRIFT VOOR SOCIALE EN ECONOMISCHE GESCHIEDENIS 84 (2007).

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(hereinafter "IMF"), as an internationally exchangeable currency medium. Third, changes that transplant US domestic practice into the international system, and emulated in the domestic practices of various countries, for example anti-dumping practices in the world trading order under the GATT 1947 and then the WTO, which also involved several countries modelling their legislation on the US anti-dumping legislation. Fourth, changes brought about in foreign economic relations through US domestic legislation applying extraterritorially—a classical example here is the extraterritorial application of US anti-trust laws. Fifth, changes brought about bilaterally and regionally—in particular, through trade agreements, for example US practice set in Section 230 of the Communications Decency Act under which US provides for permissive regulation, to govern and shield US corporations involved in online platforms such as Facebook, Twitter and YouTube from litigation abroad.[7] Finally, changes brought about through economic sanctions to achieve non-economic goals but which nevertheless have systemic consequences for the IEO—for example sanctions on Iran. Individually and cumulatively these effects are informed by US ideological political/economic/cultural and strategic preferences.

This Americanization of the IEO can be constructed as having two dimensions. First, the internal dimension—a perspective from the recipient country's stand-point. This internal perspective captures the nature of the reception of the Americanization in foreign countries, viz., whether the Americanization is voluntary, solicited, informed, or "coerced". The external dimension focuses on the "apparatus" of the US, on the way in which it should engage in international economic relations involving the Americanization of the IEO. It addresses questions of responsibility to the international community, introspection, and generally the lenses through which the US apparatus conceives and engages with the rest of the world.

There are several reasons for the importance of the focus on the Americanization of the international economic order. First, the US is one of the few countries which in the different ways outlined herein, for example, has historically and continually proactively engaged in the shaping of the IEO. This has been possible because of the way its domestic system has developed for this purpose over the years, including the international formal and informal institutions which the US has assisted in crafting. This is to be contrasted with China which has less of such a historical tradition and contribution to the IEO. In the case of the European Union (hereinafter "EU") it has a record of working within the international institutions, with a

[7] *See, e.g.*, David McCabe & Ana Swanson, *U.S. Using Trade Deals to Shield Tech Giants from Foreign Regulators*, N.Y. Times (Oct. 7, 2019), https://www.nytimes.com/2019/10/07/business/tech-shield-trade-deals.html.

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softer approach and capacity to international economic relations, as a regional grouping.

Second, the size of the US economy, its political stature in international relations, and its increasingly strategic nationally oriented economic endeavours gives such weight and notice to the influence of the US, that an understanding of the way the IEO is really driven is called for. In this context of note is the fact that the US has publicly declared that it will not allow any other country to be superior to it in the nuclear armaments field.[8] On one view this goes beyond a mere concern with the defence of the country and raises a presumption that the same design underlies its approach to international economic relations. This is a shift from an endeavour to create level playing fields for all non-state entities in the global market, to a national strategic endeavour for global dominance in the economic sphere. Moreover, the US has taken the path of a trade war to engage in the deconstruction/ construction of the IEO. This *modus operandi* along with its liberal use of the national security justification for imposing trade restrictions is consistent with the characterisation of its ambitions as being not just about fair trade. In this respect, it needs to be acknowledged that similar ambitions of world dominance in the economic sphere have been ascribed to China arising from its 2025 Vision.[9] Indeed, the US is said to be responding to this which further reinforces the point being made here. Certainly, in certain sectors considered strategic the State in both market and non-market planned economies is steering the development of the concerned sectors to the State's advantage thus blurring the distinction between planned and market economies. But in any event whether these inferences are persuasive the critical point here is not whether it is the case but that it is quite possible for a State to have such dominance designs. Therefore, international discourse must engage with such possibilities, as there are here systemic issues that concern the sustainable design and functioning of the IEO.

Third, from a practical legal perspective, States and private actors need to organize their affairs not only through the formal Bretton Woods institutional lenses but also against the background of what is termed herein the Americanization of the IEO. Thus, rightly or wrongly, a resident of a State trading in goods and services needs to have an understanding not just of the rights accorded under WTO law, but also those rights as affected by the Americanization of the IEO. In the same vein, US edicts can be directed

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[8] "We will never allow anybody to have anything even close to what we have . . . ." President Trump's statement on March 21st 2018. Andrew Osborn & Steve Holland, *Trump Congratulates Putin on Election, Leaders Look to Meet Soon*, REUTERS (Mar. 20, 2018, 11:05 PM), https://www.reuters.com/article/us-russia-election-usa-trump/trump-congratulates-putin-on-election-leaders-look-to-meet-soon-idUSKBN1GW22C.

[9] *See, e.g.*, James McBride & Andrew Chatzky, *Is "Made in China 2025" a Threat to Global Trade?*, COUNCIL ON FOREIGN RELATIONS (May 13, 2019), https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade.

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at foreign States directly thus requiring State actors to understand US law. For example in 2019 South Korea passed legislation to amend its Distant Waters Fisheries Development Act to combat illegal fishing because the US had designated it as an illegal, unreported and unregulated fishing country (IUU). [10] Finally, and importantly by specifically setting the Americanization of the IEO as such, it is possible to bring to bear a critical eye to the phenomenon of economic hegemony generally—be it American, Chinese or Russian—so as to ensure its management in a manner that is conducive to the development of the IEO for the interests of the international community as a whole.

Against what background is this phenomenon to be evaluated critically? As a preliminary point "critical" here is not to be equated with anti-Americanism. Simply put it calls for an objective unbiased evaluation. It is not anti-American to focus on the Americanization of the IEO from the perspective of the development of the IEO in the interest of the international community. The background of evaluation is complex involving a variety of considerations that are informed by the spectrum of possibilities and attributes that characterise the global economy and the community it serves. One objective is to trace US influence in relevant decision-making processes: relevant from the view point of the development of an IEO that could nurture diverse possibilities in the attainment of community goals. There are here several definitional and methodological issues. What is meant by development? How is the causal link between the US practice and policy to be discerned? What is meant by the IEO? Be that as it may, such an enquiry implicates economic analysis including tracing contributions towards the achievement of internationally recognised goals, such as sustainable development, freer borders and the maximisation of individual liberty. More specifically, it involves the extent to which the US involvement creates a democratic deficit or asymmetry in the decision making for the development of the IEO. This is a human rights and self-determination focus, raising due process and constitutional questions. A second substantive objective involves a consideration of the extent to which the US has inculcated "American traditions and values" in the normativity of the international economic system, and through that further facilitated Americanization of the global economy. This is the cosmopolitan, cultural (in the wide sense) diversity reflection. A third objective involves a consideration of the extent to which the US involvement has prioritised developed country preoccupations, for example emphasis on trade and intellectual property protection, as opposed to transfer of technology and development of developing countries, in the goals that drive the international economic system. This is about the

[10] *See US Welcomes Passage of South Korean Bill Aimed at Fighting Illegal Fishing*, KOR. TIMES (Nov. 2, 2019, 5:31 PM), https://m.koreatimes.co.kr/pages/article.asp?newsIdx=278081.

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arrogation of agenda setting by developed States, and the arrogation of the direction of the development of the IEO. A fourth objective focuses on the contributions to the building blocks of the international economic system—systemic and technological—the US has paved the way for—through its long traditions and technological leads including its push for a liberal market system in the global arena. In sum, the canvas for a critical and objective evaluation of the Americanization of the IEO is wide—indeed, in some respects posing challenges to an objective evaluation.

Inevitably this focus must be somewhat interdisciplinary—economic, political and legal. It is however a focus ultimately intended to facilitate greater legal analysis from the perspective of International Law and policy. "In some measure" this International Law perspective partakes of the New Haven School of law as a process of decision making.[11] The New Haven School focuses on predicting how relevant decision makers make decisions. In international economic relations there are grounds for suggesting that there are times when the US is where ultimately the relevant decision-making in international economic relations is taking place. "In some measure" because the perspective taken here is essentially steeped in the idea of the rule of law, the sovereign equality of States, the right to self-determination, non-intervention in the internal affairs of another State, and the challenge of designing an international economic order that serves the interest of the international community as a whole delivering on distributive justice objectives.[12] Indeed, in some respects this compendium of principles is antithetical to the New Haven School particularly in its emphasis on the rule of law. The closest theoretical framework to this perspective is a development perspective where development is defined to include the development of all nations—developed and developing. However, a normative approach grounded in any particular theoretical paradigm can suffer from dogma and be blinkered. Therefore, an eclectic analytical approach best serves the objectives of this focus. This International Law perspective therefore focuses on where the real decision-making in international economic relations is really set but querying also how the Americanization of the IEO is compatible with International Law; how the genre of problems associated with a major power in international economic relations can be addressed; what lessons can be learnt from history and the nature of the potential abusive involvement of a super power in the IEO. Finally, as a preface to what follows ultimately, power that is overwhelming can only be immediately confronted with difficulty. However, such force can over a continuum be inhibited through a range of "soft inhibitors", checks

[11] *See generally* W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981).
[12] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

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and balances, conditioning, education and mechanisms for the mobilisation of collective pressure. In this paper they are only alluded to but certainly such a consideration is important and needs to be elaborated.

II. RELATIONSHIP BETWEEN ECONOMIC POWER AND THE RULE OF IEL

Certainty, predictability and level playing fields in international economic relations at the level of residents of one State, engaging in economic relations with those of another, are critical to the functioning of the IEO. In the same vein, the de-politicization of economic relations both as between States and its people is important. Such considerations are underlined in the IEO by for example non-discrimination prohibitions in multilateral and bilateral trade and investment agreements, including fundamental principles in International Law that protect the sovereign rights of a State over its resources. This implies also that there should not be the interplay of power relations in the economic sphere including the infusion of political considerations in economic relations. In sum, herein is set the rule of law in the framework of the IEO. The application of the rule of law at the international level however can be challenging. To some extent this does turn on the meaning of the rule of law in the international context.[13] However, if the fundamental principle of the rule of law is the application of law to all concerned—in IEL there is no exception to this. Thus, in the current trade war the US has not arrogated to itself the power to act arbitrarily. It has on the one hand justified its actions albeit controversially by anchoring them in some legal basis, viz., national security. Equally, the US has demanded various reforms in the WTO within but also outside the WTO, such as the reform of the WTO dispute settlement system, and the status of China as a developing country in the WTO. The reality therefore on one view may be understood differently, namely that the US is acting outside the normal bounds of the international normative framework, albeit consistently with its own interests and reform agenda. This is a consequence of the weight the US gives to its stature in international economic relations. It comes from the weight of its economic power, which the existing international economic order has to some extent failed properly to address. Both the WTO and the IMF lack effective mechanisms to manage the US. The IMF has however survived an existential threat because of the palliative of the weighted voting system which gives the US a measure of an upper hand. This has not been the case however in the WTO.

[13] *See generally* Jeremy Waldron, *The Rule of International Law*, 30(1) HARV. J. L. & PUB. POL'Y 15 (2006); THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE? (Heike Krieger et al. eds., 2019).

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In the circumstances, there is that perennial question that needs to be addressed, namely how a normative regime can manage a powerful subject without alienating it, or creating an existential threat to its continued existence? This question is considered here in terms of dispute resolution, and decision making in international economic relations. It can also be addressed through the raising of consciousness with respect to the impact from the very nature of international trade and investment. The latter considerations are not set in the rule of IEL as such but nevertheless are integral to its subject matter.

A. Economic Power and Dispute Resolution

The relationship between dispute resolution and economic power has been addressed with reference to making the dispute settlement system more effective in the WTO — provocatively and prophetically, as long ago as 2011, by a US scholar, as follows:[14] "Simply put, reforming the system to make it yet more 'legalistic' would be unwarranted, as such proposals would make it too rigid and unaccommodating and might push its more powerful members toward outright bilateralism, eventually causing it to collapse."

Colares argues that the WTO dispute settlement is increasingly judicialized, accompanied by judicial activism. Against this background he asserts efforts to strengthen the WTO compliance with judicial determinations would only result in alienating the more powerful players in the system. In Colares's discourse there are two antithetical positions with respect to the strengthening of compliance in the WTO, namely the mainstream who advocate further judicialization of the system, and those who take a more pragmatic diplomacy-oriented approach to dispute resolution. Thus, he observes, that adjudication whilst being an "egalitarian mode of interaction, is, in principle, unresponsive to the logic of power and the implications resulting from power asymmetries." A few points need to be made here. First, it is inappropriate to divide the discourse in this manner — branding the mainstream approach as "legalism" in a pejorative construct. "Legalism" involves different approaches to improving the system and does not preclude the idea of variegated methods of implementation of judicial decisions, provided the circumstances so warrant. Thus, further time and other flexibilities in the implementation process are not precluded, provided there is a reasonable basis for them. Moreover, in trade law and policy discourse, the precise balance in international trade relations between rule and diplomacy orientation has been in existence for some time.

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[14] Juscelino F. Colares, *The Limits of WTO Adjudication: Is Compliance the Problem?*, 14(2) J. INT'L ECON. L. 403, 435 (2011).

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One concern with Colares's argument is that it has intertwined two strands. On the one hand, it advances alternative methods of implementation, viz., greater time for implementation/bilateral negotiations for settlement. On the other, it clearly advances mere power on its own as a reason for preferential treatment in the implementation of judicial decisions. The latter is surely not a rational position. Moreover, on its own terms the ultimate logic of power is anchored in being sustainable for which grounding in the rule of law is indispensable. Thus, despite the realization of his prophesy, the US has not at any rate overtly justified its position in the impasse on the WTO Appellate Body (hereinafter "AB") currently, on the basis purely of its superpower status as such.

Second, Colares's conclusion of judicial activism in the WTO, whilst cogently argued, is presented as a conclusion objectively arrived at. The fact is that it is difficult to objectively evaluate decisions of the AB of the WTO, as evidencing a teleological approach to interpretation, and/or partaking of judicial activism.[15] In the final analysis, this is often a matter of judgement. Indeed, the charge of judicial activism can be the consequence of selective evaluation focussed for the purposes of serving a State's own preoccupations. Thus, the WTO Dispute Settlement Understanding (hereinafter "DSU") has no reference to whether members can avail of legal representation for themselves in WTO dispute settlement, yet current focus on judicial activism does not refer to cases which have addressed this.[16] Third, there is no mention by Colares as to why the US itself participated in the establishment of a WTO dispute settlement system that for the first time took a leap from diplomacy to a rule-oriented dispute settlement system. Was it because at the time the US perceived certain advantages in the need for such a system, as for example a safeguard for itself and of ensuring disciplines on certain others?[17] In sum, whilst Colares's predictions seem to

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[15] *See generally* ASIF H QURESHI, INTERPRETING WTO AGREEMENTS (2d ed., 2015).

[16] *See generally* Amrita Bahri, *Appellate Body Held Hostage: Is Judicial Activism at Fair Trial?*, 53(2) J. WORLD TRADE 293 (2019); Bradly J. Condon, *Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA*, 52(4) J. WORLD TRADE 535 (2018).

[17] *See, e.g.*, Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8(1) MINN. J. INT'L L. 1, 10 (1999).

> We expect such views from smaller countries, which usually believe they will fare much better under a rule-based system than they will in a world of ad hoc negotiations where power dictates outcomes. But the GATT's two largest superpowers — the United States and the European Community — also wanted this kind of regulatory system. The perspective that leads large countries to want rule-based regulatory systems is quite complex, but for present purposes it will suffice to cite four advantages. A rule-based system is the most resource-efficient way to resolve conflicts with other countries. A rule-based system is also the most effective way to negotiate and capture desired policy changes in achievable incremental steps. A rule-based system creates the most predictable conditions for business decisions. Finally, a rule-based system helps to

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be materializing and his defence resonates with some of the reasons proffered by the Trump administration in the current impasse over the WTO AB, this neither exonerates US conduct to the extent it operates outside the bounds of the WTO framework, nor necessarily adds further substance to some of his arguments. The fact of the matter is power is transient as are super powers. Moreover, justifications for power are not just about power per se; they can often be about a certain kind of power. It is not completely clear if discourse in this manner would take place if China was the super power. All this said, Colares's prophecy and the recent undermining of the world trading order does indeed call for further understanding of how to manage economic power within the bounds of a normative framework. This discussion must be engaged in upfront regardless of which State is involved.

B. Decision-Making and Economic Capacity

The manner of decision making in international economic organizations is central to the accommodation of power in its institutional setting. In economic organizations this has been addressed through the introduction of qualified majorities, weighted voting and/or consensus decision-making.[18] In the IMF and the World Bank Group, the underlying rationale of this has been the greater contribution made by the member/members involved in the organisation concerned, albeit through criteria established to determine the economic weight generally of the members involved. Economic power on its own is not directly the reason as such.

Another way in which power is accommodated is through decision-making by consensus. Here, a decision is formed, unless it is formally challenged by a member.[19] Only if a decision cannot be arrived at through consensus is a decision made the subject of voting. In this situation, the knowledge of the voting framework of the organisation, and the economic weight underpinning opinions proffered, can have as potent an effect as, for example, a formal weighted voting system.[20] Moreover, as has been observed,[21] that consensus decision-making "does not provide for equality (in terms of decision and influence) because not every Member has the same

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cement one's own liberal trade policies against the internal political pressures of protectionism.

[18] *See generally* ASIF H QURESHI & ANDREAS ZIEGLER, INTERNATIONAL ECONOMIC LAW (4th ed., 2019).

[19] *See, e.g.*, Art. IX of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

[20] *See generally* QURESHI & ZIEGLER, *supra* note 18.

[21] *See generally* Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8(1) J. INT'L ECON. L. 51, 51 (2005). *See also id*.

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ability to maintain vetoes".[22] Thus, the US has been able to sustain its veto of further appointments in the WTO AB for some time now. However, this US veto is not without limitations.[23] First, the US blocking of the AB member recruitment process can be considered an "abuse" of the member's prerogative to participate in the WTO decision-making process. Consensus decision making in the WTO can be arbitrary, capricious, abusive and/or unreasonable. The US has not given specific reasons in terms of the decision to appoint or the agreed process involved in appointing a new member. Second, there cannot be an assumption that every minutia of decision making must be the subject of consensus decision making (including, for example, date, timing and the very launching of the recruitment process) such that it unravels an already agreed consensus of having an AB comprising of seven members. Of course, the US could block the appointments of individuals at the time of the decision involving the selection of a candidate, based on the suitability of the candidates in question, consecutively in the selection processes as the vacancies arise. This is in the circumstances the only technically appropriate option for a State taking such a strategy, but one more disruptive and insidious. Third, the membership of the WTO have been deprived of a benefit they were entitled to under the WTO Dispute Settlement Understanding, viz., access to an appellate process. In the circumstances, the US block has an impact on the balance of 'benefits' that members are entitled to and is likely to cause a nullification or impairment of those benefits. Moreover, the circumstances brought about by egregious abuse of power by a superpower in decision making and dispute settlement must universally be considered as bringing the whole economic system concerned as having come to an end—a circumstance akin to a material breach. The US veto on the AB appointments can be considered a material breach as it is an abusive exercise of the veto nullifying and impairing the benefits members are entitled to under the WTO. Moreover, the DSU provision that all disputes must be settled through the WTO dispute settlement system cannot be operative, since the dispute system itself has been materially paralysed by the US veto. Thus, just as the WTO agreements can be undone by the lack of consensus on the part of one member, the same process can be triggered in the case when a major stakeholder in the organisation fundamentally refuses to engage materially in the organisation. To some extent, this is de facto the case, but what is being advocated here is that this consequence should be acknowledged as potentially involving the deconstruction of the whole system — unravelling the possibility of counter-measures by others outside

[22] *See generally* Ehlermann & Ehring, *supra* note 21.

[23] What follows derives from Asif H Qureshi, *The World Trade Organization and the Promotion of Effective Dispute Resolution: In Times of A Trade War*, *in* INTERNATIONAL ORGANIZATIONS AND THE PROMOTION OF EFFECTIVE DISPUTE RESOLUTION: AIIB YEARBOOK OF INTERNATIONAL LAW 2019, 145, 149 (2019).

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the WTO framework. In the WTO, this is the case given that the dispute settlement system itself has been paralysed. Such an understanding should bring home the message that one breach of such proportion can be counterproductive to a member who presumes unreasonably to hold to hostage the WTO dispute settlement system.

This collective acknowledgement has in some measure now manifested itself through the setting up, albeit ad-hoc, of another form of an appellate process involving a significant membership of the WTO excluding the US.[24]

The collective response to this has begun with the establishment of an alternative appellate system including a growing chorus formally of members opposed to the US stand.[25]

In short, the veto in consensus decision making is set within the institutional and normative framework of the WTO. It does not exist in isolation. Indeed, its exercise must be informed by the objects and purposes of the institution and its normative framework.

The dynamics of economic power (contra military power) and its setting in international economic relations cannot be assumed to be beyond the rule of law. Moreover, a sustainable economic power trajectory must engage in the law in an economically interdependent world. The logic of economic power has a limited temporal dimension—more so in the economic sphere. The moral authority of the rule of law has a longer lasting legitimacy and resilience in the long run in civilised societies. Ultimately the logic of power will give ground to the moral authority of the rule of law, before the authority of the rule of law amasses legitimacy through a credible force, for example collective responses to the abusive use of economic power. In sum, the international economic order is not completely devoid of disciplines to address abusive exercises of economic power.

The management of economic powers in an international setting is a function of the IEO. Equally, the negotiations in the formulation of the decision-making processes in such settings, whilst controversial, is ultimately a reflection of the international power structure. However, with the according of some differential power in decision making, given realpolitik, there is a window of opportunity for the introduction of safeguards. This opportunity alas has not been taken. Yet there is a vested interest amongst all, in securing safeguards in such cases of abusive use of that differential decision-making. First, economically powerful States understand that their status is transient (prudential consideration). Second,

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[24] The multi-party interim appeal arrangement based on Article 25 of the WTO DSU. *See Statement by Ministers, Davos, Switzerland, 24 January 2020*, EUROPEAN COMMISSION (2020), https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf.

[25] For the increasing number of alternative proposals within the WTO to resolve the AB impasse, see *Members Adopt Panel Ruling in Australia-Indonesia Paper Duty Dispute*, WTO (Jan. 27, 2020), https://www.wto.org/english/news_e/news20_e/dsb_27jan20_e.htm.

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such States understand that the State at any given time can be hijacked by an unruly executive, and therefore there need to be external checks to forestall such an occurrence (external checks). Third, if there is no explicit spelling out of safeguards these could be read into the design of the differential decision-making process. Thus, it would be better to agree upon certain safeguards expressly at the outset to keep control over the scope of the differential decision-making process (safeguarding position). The safeguards could take different forms. For example, the differential and more favourable decision-making could be expressly made subject to such doctrines as ultra vires, *abus de droit*, accountable reasons for the decision, time frameworks for the decision, availability of judicial review of the decision made, and requirements of domestic parliamentary approval of certain executive decisions made. In addition, at some time historically it was considered farfetched that men should receive equal opportunities/gender awareness training before they made relevant decisions in domestic situations, for example in employment and promotions cases. Would it be similarly considered farfetched, yet possible, that prospective candidates standing for elections/and or taking oath for office as Presidents and Prime Ministers undergo "global awareness" training, so as to enrich their decision making with reference to decisions made in international economic relations, or at the least inhibit abusive use of preferential decision-making rights in international economic relations?

C. Modern Nature of Trade and Investment

International trade and investment both call for self-scrutiny and self-restraint in the manner of their engagement. Most goods/services and foreign investment in this era are not mere transmissions of goods, services and investment as such. In fact, they encapsulate in varying degrees gender, cultural, environmental, social, aesthetic, religious, technological (including standards) and civilizational values and attributes (non-economic attributes). Few goods and services are not value laden in this manner — those that are least processed and essentially are the building blocks or facilitators for the realisation for others in surviving and developing their own non-economic value aspirations. Another category of economic relations that is non-value laden is where the international trade and investment is made to the order of the receiving State.

To some extent the goods/services and investment that have some of these attributes are recognised already in so far as cultural goods and services are concerned in the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter "the Cultural Diversity

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Convention"). The same can be said of the recognition of gender[26] and environmental[27] specific goods and services. Indeed, there are now efforts at determining a list of goods and services that threaten national security.[28] This gradual unpacking of the non-economic attributes of goods and services in the real world has come about in a reactive manner and is moreover not yet fully shaped in clear legal practice, if at all.

The Prime Directive — In the science fiction "Star Trek"[29] the space explorers from earth were governed by the Prime Directive which prohibited in any way interference in the natural development of other alien civilisations. There are good reasons for the ethos of the "Prime Directive" to inform at some level the way States and residents of one State engage in economic relations with those of another. The basis for such a contention is already founded in some fundamental principles of International Law viz., sovereign equality and independence; non-interference in the internal affairs of another State; the International Law regime on indigenous people; the right to development; and the right to self-determination and sustainable development. Indeed, where international trade and investment destroys completely native cultures, values, identity and self-development/determination capacities is there not a case to introduce the vernacular of economic genocide/creeping genocide/indirect genocide to borrow from international investment law? Moreover, there is in State practice, both in trade and investment, national legislation that carves out a domain protecting certain national values. This is also reflected in multilateral and bilateral trade and investment agreements that allow for exceptions—albeit at the discretion of States—in the restriction of trade and investment in certain fields. What is reserved for a State as a defence for itself must also in some measure influence that State's engagement with others.

This advocation of a "Prime Directive" ethos in the framework of international economic relations has echoes of the call for a New International Economic Order by developing countries in the 1970s. However, that call was set against a different set of historical circumstances, and importantly was essentially a reassertion/re-affirmation by those States

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[26] *See generally* UNCTAD, MAKING TRADE POLICIES GENDER-RESPONSIVE: DATA REQUIREMENTS, METHODOLOGICAL DEVELOPMENTS AND CHALLENGES, UNCTAD/DITC/2019/1 (2019), https://unctad.org/en/PublicationsLibrary/ditc2019d1_en.pdf.

[27] *See generally* Mahesh Sugathanm, *Lists of Environmental Goods: An Overview*, INT'L CTR. TRADE & SUSTAINABLE DEV. (ICTSD) (2013), https://www.ictsd.org/sites/default/files/research/2013/12/info_note_list-of-environmental-goods_sugathan.pdf.

[28] Ana Swanson, *Trump Officials Battle Over Plan to Keep Technology Out of Chinese Hands*, N.Y. TIMES (Oct. 23, 2019), https://www.nytimes.com/2019/10/23/business/trump-technology-china-trade.html?smid=nytcore-ios-share.

[29] *See WATCH: My First Contact with Michael Dorn*, STAR TREK, https://www.startrek.com/videos/watch-my-first-contact-with-michael-dorn (last visited Mar. 7, 2020).

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of their ownership of their natural resources. The call for a "Prime Directive" has not hitherto featured much in international discourse mainly because historically the nature of trade/investment involved non-processed materials and the rules for international trade generated in that paradigm have continued into this very different era. Historically also international economic engagements partook of conquest and colonialism.

Moreover, the theory of comparative advantage that has dominated economic analysis is mainly focussed on increased productivity. This was reinforced by the realisation that mass production accommodated through larger markets facilitated by the opening of foreign markets led to marginal cost efficiencies. In short, economic theory driven by profit maximisation and efficiency considerations suppressed such discourse, and its realisation in a comprehensive normative framework.

Organising and inculcating a "Prime Directive" specifically in the engagement of international economic relations requires first as a prerequisite establishment of indicia for the calibration of the non-trade attributes of goods/services and investment. For example, with respect to goods, the degree of processing; the variety of alternatives fulfilling similar functions; the aesthetic ranges of colour and shape that the good could be assimilated to; and the likely impact of the good on the environment, safety/social and cultural concerns. Thus, forks and spoons are like chopsticks but a flood of these in the markets of Northeast Asia could have a severe impact on the use of chopsticks. Second, giving more specificity to the "Prime Directive" against the rich background of existing international legal principles. For example, codes of conduct in different sectors that require manufacturers seeking to extend their market before extending it to reflect on the non-functional attributes of the product and the impact of those on the foreign society in which the market exists. These could become part of the corpus of existing codes inculcating corporate social responsibility. And finally transmitting the "Prime Directive" ethos at relevant national decision makers engaged in international trade/investment or its facilitation. Thus, negotiating market access for a certain sector, for example women's apparel of a certain design, into a society with different and set expectations of apparel designs, needs to be approached with some restraint.

Trading of goods/services and the imparting of foreign investment with non-functional attributes are not only informed by those responsible for setting the framework for the international transfer of such items, and those responsible for their manufacture/creation and marketing—but also by individual foreign choices. Moreover, the range of non-functional attributes are not set in stone in any society but are the subject of change, development and evolution depending on the state of knowledge and foreign infusions that different societies undergo because of endogenous/exogenous influences. There is no suggestion here that individual choices should be stifled, or that

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the state of development of non-functional concerns (culture/environment/art/safety . . .) should be cast in stone or that the responsibility is only unidirectional. What is being proposed here is that these concerns should feature in the decision making of anyone concerned with imparting/receiving foreign goods/services and investment. All relevant decision makers need to be aware of the impact of their decisions and choices. Importantly these decisions should be informed and not coerced/under pressure.

How does this specifically engage in the economic power management focus of this discourse? First, it forms an important part of the restraint that is generated from self-awareness, self-scrutiny and introspection. It invites the important reflection on the part of relevant decision makers in the export of goods and services as well as in foreign investment, of the non-economic impact of their economic transactions. Economic capacity empowers and with this empowerment there is responsibility. Second, economic capacity comes from mass production and associated capacity to supply in trade and investment. This economic capacity must facilitate the opening of new markets in a responsible, informed and non-coercive manner. Third, with economic capacity comes also the command of a large domestic market which translated in the modus operandi of international trade negotiations is instrumental in opening foreign markets. For example, insisting on the opening of the market for aircrafts impacts on environmental questions and travelling habits of foreign individuals.

In sum, the rule of IEL and the underlying nature of the subject matter inform the rule of IEL in the interface between economic capacity and law.

III. ECONOMIC POWER AND RESPONSIBILITY IN ITS EXERCISE?

IEL allows for a fair degree of autonomy to States. This autonomy is availed of and exercised disparately by different States. In a globalised world, engagement in this autonomy by the more powerful can leave a greater imprint on the international economy; indeed, sometimes even create tensions with the IEO. One important attribute of economic prowess in this domain is the potential for engaging in trade wars. This form of warfare engaged in by economically powerful states can have serious consequences for the international community. In the current state of the development of IEL, what constitutes a trade war is not clear. This is to the advantage of the powerful States, as it reserves to them the determination as to when a state of such a war exists, when it can be triggered; as well as leaving them a wide measure of discretion in determining when their national security interests are affected. The more powerful a State the more expansive its concern for its national security and its perception of a threat to it—such as to trigger engagement in economic warfare. In this section economic warfare as an

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aspect of economic power is explored with reference to the responsibilities of the State in such an engagement. State responsibility here includes State Responsibility under International Law and State responsibility that is set in notions of fairness and justice. The latter is a necessary precursor for the development of International Law on State Responsibility.

A. Trade War[30]

A trade war can be understood in terms of the value of the international trade involved; the kind of trading nations implicated, along with the consequential spill over effects on the trade of other countries; or with reference to violations of the world trade disciplines under the WTO, and/or under other International Law disciplines. There are two sound reasons for addressing this basic question, viz., to determine the relevant normative framework and to address the consequences arising from it.

A trade war is not a trade dispute. A trade dispute is specific; it is one that is amenable to being justiciable under an agreed normative framework — very likely under the WTO. However, a trade war may well have its origins in a trade dispute and in principle trade wars can play out both within and outside the WTO. A trade war within the WTO could involve one or a series of disputes involving "violations" of the WTO agreements but conducted within the framework of the WTO DSU. A trade war outside the WTO involves a general disregard of the existing normative framework, with a "gloves off" approach to achieving certain policy goals. As such it can be purely bilateral but where it undermines the international trading order, and the economic interests of a wider circle of countries involving counter-responses, the trade war can partake of a "world trade war". Where this trade war is "likely to endanger the maintenance of international peace and security" or becomes a "threat to the peace, breach of the peace, or act of aggression" it could in principle be of interest to the United Nations (hereinafter "UN") Security Council.[31] Where the trade war impacts on foreign investment, the investment concerns engendered may be the subject of investor State arbitration under the conditions set out in applicable bilateral investment agreements. In the circumstances, the nature of a trade war has normative significance, albeit in extreme situations. Recourse to the UN Security Council of course has a political context where the participants in the trade war are members of the Security Council. Be that as it may an international consensus, albeit outside the UN Security Council, that the

[30] The following four paragraphs on what is a "trade war" is based on Qureshi, *supra* note 23. This is set out here as a necessary prelude to the further discussion on State responsibility in the context of a trade war.

[31] *See* U.N. Charter ch. VI art. 34 & ch. VII.

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trade war endangers "peace and security" or is a "threat to the peace, breach of the peace, or act of aggression" must of itself carry some weight.

From a WTO perspective, its architects seem to have envisaged a spectrum of possible trade grievances involving "violations" of the WTO disciplines, including "non-violations" of WTO disciplines which nevertheless nullify or impair the benefits a member is entitled to; and grievances arising from the occurrence of a "situation" known as a "situation complaint" which affect a member's negotiated benefits.[32] Most disputes between members involve actual violations of provisions of the WTO agreements as such. The full scope of a "non-violation" and "situation" complaint is not clear, other than the received wisdom that they are applicable in very limited circumstances involving the undermining of tariff undertakings. This breath of grievances which the WTO dispute settlement mechanism caters for seems to involve all manner of conflicts—from a mere dispute to a situation approximating to a war—but with the important caveat that the grievance should be aired within the framework of the WTO dispute settlement system. In such circumstances, there is some scope for a trade grievance to surface and escalate which is outside the WTO managed substantive rights and obligations as such, but which nevertheless can be resolved within the WTO dispute settlement system, assuming it is justiciable. That said, there are disputes which can fester outside the WTO dispute settlement system, as for example the raising of unbound tariffs as between opposite sides; or where the dispute is of a political/ideological nature, as between market/and State oriented economic doctrines. Of course, all the parties in such circumstances can have recourse to the political organs of the WTO to bring about desired changes.

Finally, disputes can play out outside the WTO framework—indeed despite it, as in the Trump era. This is because whilst there is a prohibition in the WTO that disputes should be settled within the WTO dispute settlement system, there are no effective sanctions available within the WTO for enforcing its internalisation of disputes within the WTO, if the parties together choose to engage with each other outside its framework and/or one or both of the parties have the capacity to operate outside the bounds of the WTO. Where however only one party acts in the cover of the WTO, that party may be authorised to retaliate. However, the authority to retaliate including the quantum of retaliation could be informed by the extent to which there has already been the use of unilateral retaliation outside the WTO. In sum, the capacity of the WTO dispute settlement system to manage "trade wars" has existed although weakened by the current AB impasse. Members

[32] *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

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of the WTO have a responsibility to resolve trade disputes within the framework of the WTO dispute settlement system,[33] and/or engage in constructive dialogue within the WTO political organs, namely the General Council and the Ministerial Council. In principle the UN Security Council is also open for this purpose.

Aspects of a trade wars can be assimilated to circumstances of an armed conflict where the consequences of the trade war are like those resulting from an armed conflict and/or raise national security concerns, for example of an existential nature. This intellectual leap has already been made in investment arbitration wherein the Argentinian circumstances of economic necessity have been assimilated to that of national security.[34] There is nothing intrinsically different between killing a person through arms and starving to death a person by robbing them of their livelihood or vital medicine. There is nothing different between bombing a hospital and depriving the hospital of vital life-saving supplies resulting in patient deaths. There is nothing different between degrading civilian treatment that consists of making men walk naked and depriving women of the use of vital sanitary menstrual pads in public. Granted in all such circumstances there is a temporal difference, a methodological difference, and differences in nature and degree of coerciveness. There is however, certainty and comparability in consequences.

This assimilation of a trade war to a circumstance akin to an armed conflict has not been countenanced in the WTO dispute settlement. Thus, in the recent Russia — Measures Concerning Traffic in Transit[35] a WTO panel ruled in interpreting the meaning of "war or other emergency in international relations" in Article XXI of GATT 1994 national security exception as follows. It equated "war" with armed conflict and "other emergency in international relations" as being informed by the genre of war and thus excluding "political and economic differences" unless these give rise to "defence and military interests, or maintenance of law and public order interests."[36] This WTO panel decision which has not been the subject of appeal must be read strictly in terms of the interpretation of Article XXI of GATT 1994 such that it is not open to abusive use as an exception to conformity with WTO rules. Moreover, whilst war is narrowly defined 'other emergency in international relations' does not exclude the possibility of assimilating a circumstance of economic conflict with a war like circumstance provided it gives rise to "defence and military interests, or

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[33] *See* art. 23 of the DSU.

[34] *See, e.g.*, LG&E Energy Corp. et al. v. Argentine Republic, ICSID Case No. ARB/02/1, Award (July 25, 2007).

[35] *See generally* Panel Report, *Russia — Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

[36] *Id.* ¶ 7.75.

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maintenance of law and public order interests." Certainly, a trade war as conceived herein impacts on "maintenance of law and public order interests." Indeed, a trade war impacts on the maintenance of International Law and international public order interests. Moreover, this narrow interpretation for the purposes of the invocation of the national security defence must be correct otherwise a wider interpretation would take the regulation of a trade war out of the ambit of the disciplines of the WTO and indeed pave the way for self-initiated displacement of the application of WTO disciplines.

B. Questions as to Whether a State Has Responsibilities[37] in the Conduct of a Trade War

States have certain responsibilities in their conduct of a trade war i.e., when a trade war that has significant economic/non-economic consequences that are inflicted intentionally and that are foreseeable. The focus of these responsibilities under International Law centre around the very legality of the actions taken and the redress available (on a par to *jus ad bellum*). This responsibility is set essentially in the normative frameworks of the WTO, the IMF and bilateral investment agreements. These are currently being considered in the WTO dispute settlement system. There is also here another question, namely whether there is a prohibition against harming another State's trade that is not party to the trade war under Customary International Law, if the negative consequences are foreseeable, intended and avoidable?

Both in the trade sphere economically successful States whose economies have an important impact on the world economy should have certain responsibilities in an interdependent globalised world economy. The basis of this expectation derives from the fact that the success of these economies in some measure derives from the existence of the globalised interdependent market. It follows that it is reasonable to expect some discipline in State action that restrains State conduct in not damaging the delicate fabric of the very system which has contributed to their success. In other words, the exercise of State autonomy in international economic relations should not exhibit characteristics of unjust enrichment. Indeed, there are grounds for suggesting that in such circumstances, reliance on State autonomy of action in international economic relations should be estopped. In addition, such States have a responsibility at the least to reflect on the negative spill overs of their trade policies on other States where these have adverse consequences which are foreseeable; intended; and unfair in terms of level playing fields; or the undermining of a universally agreed communal

[37] The focus here is on the responsibilities of the State. These can be either responsibilities under International Law (State responsibility) or responsibilities in a moral sense and/or *de lege ferenda*.

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objective under Customary International Law, for example genocide of a people through deprivation of vital food/medicine resources. In other areas of international relations there is such responsibility. Thus, there is State obligation to prevent transboundary harm in environmental law. Why should the international trade sphere be different?

In addition, what about the responsibility of the State during the conduct of a trade war? The fact that there is no State responsibility under International Law, or that it is difficult to substantiate, does not distract from a discourse on the propriety of the State's conduct during the course of the trade war. In other words, the *jus in bello* is not contingent on a demonstration of legality *in jus ad bellum.*

C. Trade War — jus in bello

There are two normative questions that are not generally discussed or understood but are a more modern challenge that need to be addressed. These two questions are essentially set on a par to *jus in bello.* First, regardless of the legality of the trade war, are there any rules in International Law that regulate the conduct of the parties in the way they engage in the trade war? In other words, is there a comparable International Humanitarian Law here? Or are the principles built in International Humanitarian Law of relevance here? Second, and related are there any ethical considerations that States need to reflect upon regardless of the law? Thus, there is much ado about a trade war, including the cloaking of such economic conflicts as trade wars by the principal participants involved. Such claims must embody responsibility in terms of fair play along with ethical considerations.

The normative framework of International Humanitarian Law (hereinafter "IHL") is focused on the conduct of armed conflict. Therefore, in principle it does not have a bearing in circumstances of a trade war. The principles underlying IHL may however have a relevance to circumstances of a trade war. The rules of IHL differentiate between civilian and armed combatants. International economic sanctions can distinguish between State operators and civilians although trade wars conducted through tariff responses blur the distinction between State and civilian operators. This is not critical in that the important lesson here is that there are certain rules that need to be followed in times of war albeit differently in terms of civilians. Moreover, the distinction itself is useful in that it points to the possibility of the reduction of the impact of the consequences of a trade war by limiting its impact on State operators alone. Obligations under IHL are owed to the international community. A trade war specially in a global integrated market has international repercussions and therefore quite apart from anything else as underpinned in IHL, the international community has a substantive interest in the enforcement of the manner of the conduct of a trade war.

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Some fundamental principles underpinning IHL[38] have relevance and/or can be adapted to the circumstances of a trade war viz., the prohibition on the use of indiscriminate measures; the need to confine measures to those that are necessary; the use of only proportionate measures; the prohibition on causing unnecessary suffering and superfluous damage; the prohibition on not causing injury/damage to third States; and finally, the principle of humanity. These are the principles which are discernible in the four Geneva Conventions 1949[39] and are said to reflect Customary International Law. These principles are of such a nature that it is arguable even outside the framework of IHL they have relevance to comparable situations, in the conduct of a trade war. One other principle in IHL, namely the prohibition on certain types of weapons, has a bearing in terms of the type of "weaponization" used in a trade war—for example it may be possible to adapt this by placing a ceiling on the amount of tariffs imposed; the type of trade measures used; or the types of goods and services targeted or indeed the weaponization of a reserve currency such as the dollar.

Just as International Human Rights Law is not displaced by a circumstance of armed conflict it must follow also that a trade war does not displace the application of international human rights law.[40] Conceivably where a trade war does result in violations of human rights international human rights law could come into play. A trade war can result in violations of human rights although the circumstances wherein this can happen may not be obvious, and extreme. Circumstances that could raise questions relating to human rights violations may be consequential upon the application of sanctions, for example where these involve freezing assets of innocent individuals; arresting individuals for violations of illegally imposed tariffs; applying retrospective tariffs that have an effect equivalent to expropriation in character; and suspending, or raising very high tariffs, on vital medicinal supplies that constituted lifelines for patients. Some measures used in a trade war also may have a bearing in affecting a country's ability to achieve the 2030 Sustainable Development goals.

In sum, there are cogent reasons for drawing on the lessons from IHL in a focus on the manner of the conduct of a trade war. Conceivably in some limited circumstances State responsibility may be implicated under International Law although it may be difficult to clearly substantiate. The

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[38] *See, e.g.*, EMILY CRAWFORD & ALISON PERT, INTERNATIONAL HUMANITARIAN LAW 29-49 (2015).

[39] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I), Aug. 12, 1949,75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II), Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (GC III), Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), Aug. 12, 1949, 75 U.N.T.S. 287.

[40] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 37 (July 8, 1996).

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fact that States have a freedom to trade or not and to some extent freedom to discriminate in trade under general international law is not exhaustive of the legal consequences that could flow upon the exercise of that freedom.

But certainly, there is scope for codifying a set of basic principles setting out the responsibilities of the State. In time these could develop into norms of State responsibility in International Law, particularly if the case for State responsibility at present is considered controversial. Such a code would need proper dissemination to relevant decision-makers. Currently, the machinery for enforcement of IHL is somewhat weak in relation to the more powerful world actors prone to embarking on trade wars. Thus, neither the US or China have accepted the jurisdiction of the International Criminal Court, an appropriate forum for the enforcement of IHL.

The ethical dimension of a trade war is concerned with the welfare costs/social justice and human rights aspects of a trade war. The theatre of a trade war as well as its weapons are not decoupled from humanity, human rights and questions of distributive justice. Trade policy instruments impact on livelihoods and lifesaving supplies without any cushions. They shift and distort supply chains in a reckless manner without adequate warning for adjustment measures. The weaponization of trade measures such as tariffs shifts the focus on numbers, percentages, targeted goods and equivalence in tariffs. The economic analysis should however focus on the costs to humanity, the environment and the vulnerable sections of society. An impact analysis is needed of the weaponization of trade policy instruments before they are triggered. This is necessary for the ethical discourse that should follow it.

IV. CONCLUSIONS

The phenomenon of the Americanization of the IEO has been for the purposes of the analysis here mainly a reference to the problem of a super power wherein that entity could exude a propensity to arrogate communal decision making; impose intentionally or consequentially its world view on the world; and expect a preferential treatment in dispute settlement and decision making. In this paper the need for specific scrutiny of this phenomenon has been explained. There must be upfront discourse about it in any organisation of a normative framework. It is simply nonsense to muffle discourse on it by the mere assertion that "law is constituted by both power and reason, exercising its authority both through coercion and a normativity that is grounded in legal reasoning and process."[41] Moreover, that discourse should lead to a normative framework within which the

[41] Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 1, 12 (Terence C. Halliday & Gregory Shaffer eds., 2015).

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phenomenon of the Americanization of the IEO is addressed. The basis for such normativity is to be found in existing International Law analysis of what constitutes responsible State behaviour and the need for the design of innovative reforms. Certainly, there are cogent reasons for a normative discourse on the phenomenon of the Americanization of the IEO.

The exercise of sustainable power can only coexist with power *per se* if it defers to the rule of law in dispute resolution and decision-making. There is no logic in the exercise of State power which calls for a preferential treatment in the adherence to agreed-upon norms. In the same vein, agreed processes of decision making in international organisations do have set parameters for their exercise. Where the agreed decision making reflects the political or economic power structures, proper safeguards should be put in place so that the decision making is not the subject of abuse. With privilege in decision making must come transparency and accountability in its making.

Moreover, the modern state of international trade and investment is to a fair degree not just about functional transmissions of goods services and investment: it is also laden with non-functional values. Given this, there is not only the need for caution in their importation as there is to some extent currently, but also some measure of responsibility on those who engage in their transmission (this is not the case currently). Moreover, economic warfare conducted through trade can raise questions of a State's responsibility and engage State responsibility in ethical/justice discourse—both in the instigation of such warfare, as much as during it. There is scope here for the development of codes of conduct that reign in, in particular, the manner of the conduct of such warfare.

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