



تقييم نقدي لدور منظمة التجارة العالمية في تحقيق العدالة الاقتصادية على المستوى الدولي

د/ عبدالكريم سعود الذيابي

أستاذ مساعد

قسم الأنظمة - كلية الشريعة والأنظمة - جامعة تبوك - المملكة العربية السعودية

المخلص

تأسست منظمة التجارة العالمية أجل إحداث تغيير في النظام الاقتصادي غير العادل الذي كان معمولاً به في ذلك الوقت. تم تأسيس المنظمة بأهداف واعدة نحو خلق أنظمة اقتصادية وقانونية أكثر توازناً تحاول منح الدول النامية فرصة حقيقية نحو التنمية والازدهار. وقد تم ذلك من خلال اتفاقيات مكوناتها التي أوجدت مجموعة من القواعد ليلتزم بها كلا من الدول النامية والمتقدمة من أجل تحقيق هدف المنظمة المتمثل في تكافؤ الفرص واقتصاد عادل للجميع. ومع ذلك، فإن الممارسات التي أعقبت تأسيسها تظهر بوضوح أن هذا الهدف لم يتحقق، وفي الحقيقة الوضع الحالي يبين بوضوح أن الدول المتقدمة أصبحت أكثر ثراءً والدول النامية أصبحت أكثر فقراً. لذلك تقيم هذه الورقة بشكل نقدي ما إذا كان النظام الاقتصادي الدولي غير عادل ويجب استبداله بنظام جديد. وتختتم الورقة بالموافقة على مثل هذا البيان والتأكيد على وجود العديد من المشكلات الجوهرية في النظام الاقتصادي العالمي الحديث الذي يتكون إلى حد كبير من منظمة التجارة العالمية والاتفاقيات المكونة لها. لذلك، هناك حاجة ملحة لإحداث تغيير فوري في النظام الاقتصادي الدولي من أجل تحقيق العدالة في النظام الاقتصادي العالمي بشكل كلي.

الكلمات المفتاحية: منظمة التجارة العالمية، العدالة الاقتصادية.



The Role of the World Trade Organization Universality in Achieving Economic Justice at the International Level (A critical evaluation)

Dr. Abdul Karim Saud Al-Dhiabi

Assistant Professor

Law Department - College of Sharia and Regulations - University of Tabuk - Kingdom of Saudi Arabia

ABSTRACT

The world trade organisation was first established to create a change to the unjust economic system that presided at the time. It was established with promising goals towards creating a more balanced economic and legal orders that attempt to give developing states a real chance towards development and prosperity. This was done through its constituent agreements that created sets of rule for both developing and developed states to abide by in order to achieve the organisation's goal of equal and just opportunity for all. However, the practices that followed its establishment shows clearly that this goal was not achieved and in fact we are left with a situation where developed countries are becoming richer and developing states are becoming poorer. Therefore this paper critically evaluates whether or not the international economic system is unfair and should be replaced with a new one. The paper concludes by agreeing with such a statement and confirming that there are several substantial problems with the modern world economic system that is formed largely by the WTO and its constituent agreements. There is therefore an urgent need for an immediate change to be made to the international economic system in order for justice to be achieved at the world economic sphere.

Keywords: WTO, Economic Justice.



Introduction

In the years following the establishment of the World Trade Organization (WTO), there was much optimism amongst developing nations about the new economic order that it formed along with its constituent agreements such as the General Agreement on Tariffs and Trade (GATT).¹ Developing states and developed states alike appeared to have acknowledged the importance of the role that enhanced trade could play in securing economic development.² Furthermore, states appeared to acknowledge the benefits that development in poorer states would have for more developed ones, and liberalisation of trade which sought to remove barriers to trade in tariff and non-tariff form as far as possible was considered to be equally effective for developing states as it was for more developed ones.³ However, in more recent years, many have criticised this new economic order for failing to deliver on these promises, and it has been argued that the system is in fact “unfair” and that it should be replaced with a new system. This paper will consider the extent to which these criticisms are fair, and will assess whether or not the WTO and its sustainable development agenda have failed developing states to the point where substantial reform, or an entirely new international economic order is required. It will be shown that there are four substantive criticisms of the WTO system which can be put forwards to support the assertion that the WTO is in fact unfair to developing states.

The Development of the Modern Economic Trading System

Whilst the WTO itself was only established in 1995, its origins can in fact be traced back to the height of the Second World War and the Bretton Woods conference, where delegates from states led by the United Kingdom and United States considered how best to build a post-war economic order. The conference determined that enhanced trade between states would be likely to lead to faster economic development, and so rebuild the war-torn economies of the world following the conclusion of hostilities.⁴ The conference had lasting results, in that it formed the basis for the establishment of what are now considered pillars of this order, in the first of the negotiated multilateral trade agreements in the form of the GATT in 1947, and in the establishment of institutions such as the International Monetary Fund (IMF) and the World Bank, both of which were aimed at establishing an infrastructure for which

¹ General Agreement on Tariffs and Trade 1994

² Jordana Hunter, ‘Broken Promises: Trade, Agriculture and Development in the WTO’ (2003) 4 Melbourne Journal of International Law’ 299, 299

³ Bernard Hoekman, ‘Developing Countries and the Multilateral Trading System after the Uruguay Round’ in Albert Berry and others (eds), *Global Development Fifty Years After Bretton Woods* (1st edn Palgrave MacMillan 1997) 266

⁴ Jordana Hunter, ‘Broken Promises: Trade, Agriculture and Development in the WTO’ (2003) 4 Melbourne Journal of International Law’ 299, 299



development and aid could be provided to developing states.⁵ The Bretton-Woods conference also called for the establishment of what was termed the “International Trade Organization” (ITO), and whilst this did not in fact actually result in the establishment of this organization (which would have to wait until 1995 to be formed as the WTO), the GATT’s establishment did at least provide for a system of rules aimed largely around trade liberalisation. The main provisions of the GATT were, and indeed still are, aimed at ensuring a level playing field between states through requiring these states to offer all states “most favourable nation” treatment, and through prohibiting discrimination against other states imports. Indeed, these two fundamental provisions, contained within Article I:1 and Article III:4 of the GATT respectively, have remained central to the basis of the multilateral trading system ever since the GATT’s inception.⁶

This economic model has, with some subsequent changes made over the years, now been in force for over 70 years (at least since the establishment of the GATT). Whilst not all developing states were initial parties to the GATT, many have since joined and developing state participation in the multilateral trade negotiation rounds of the Tokyo and Uruguay round have in fact argued to have been characterised by developing nation participation, and the proposal of further mechanisms which are aimed at enhancing opportunities for development in these developing states.⁷ Despite this however, as is noted by Hunter, the world has not yet seen a significant growth in development of those states in the “global south”, and there remain criticisms that whilst the WTO has benefitted developed states in the so-called “global north”, it has failed to deliver on the promise of enhanced development and increases in trade for developing states in a manner which is commensurate with these states’ needs (as is in fact regarded as a stated objective of the WTO itself as set out in the preamble to the Agreement Establishing the World Trade Organization for example).⁸

The question that arises as a result of these continued criticisms that the WTO and the economic order it represents have failed developing states is, firstly, whether or not these criticisms are justified, and, secondly, whether this in turn means that the system should be replaced with a new system. This will now be considered by assessing some of the substantive criticisms which have been put forwards in support of the suggestion that the modern economic system remains unfair to developing nations.

⁵ Mark Halle, ‘WTO and Sustainable Development’ in Yasuhei Taniguchi and others (eds), *The WTO in the 21st Century - Dispute Settlement, Negotiations, and Regionalism in Asia* (1st edn CUP 2007) 395

⁶ Peter Van den Bossche, Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn CUP 2013) 333

⁷ Erich Supper, ‘Is There Effectively A Level Playing Field for Developing Country Exports?’ (2001) UNCTAD Policy Issues in International Trade and Commodities Study Series No 1. Available online at <https://unctad.org/en/docs/itcdtab2_en.pdf> accessed 21 April 2019

⁸ Preamble Agreement Establishing the World Trade Agreement 1994



Criticisms of the WTO from the point of view of Developing States.

Following the Uruguay round of negotiations, it can now be suggested that the WTO has a definite, and explicit agenda towards sustainable development, and that part of the *raison d'être* of the WTO itself is to aid development in poorer states, as is established clearly by the objectives of the WTO itself. The Agreement Establishing the WTO makes clear that the goals of the WTO include, amongst other things, the;

“raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development”.⁹

In addition to this, the preamble goes on to provide;

“that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”.¹⁰

It is clear from this preamble therefore that there is a general desire that the WTO agreements are designed, at least in part, to help develop poorer countries through trade. The original GATT however made no reference to developing countries. This raises the first potential criticism of the world economic system from the point of view of developing states, which is that the principle of non-discrimination and trade liberalisation is not one which creates a real level playing field between developed states and developed ones.¹¹

a) Trade Liberalisation Has Not Benefited Developing States to the Same Degree as Developed States.

There have however been efforts made by the international community to rectify these imbalances. Even the original GATT can be seen as having recognised the difficulties faced by developing states, as it introduced a system of exceptions against the general prohibition on quantitative restrictions set out in Article XII of the GATT in situations where states were facing balance of payment difficulties.¹² According to Hunter, this system was expected to be utilised primarily by developing states according to the so-called “import substitution” model of development, by which development would be regarded as being best achieved in poorer states by creating incentives for these

⁹ *ibid*

¹⁰ *ibid*

¹¹ Jordana Hunter, ‘Broken Promises: Trade, Agriculture and Development in the WTO’ (2003) 4 Melbourne Journal of International Law’ 299, 299

¹² Article XII General Agreement on Tariffs and Trade 1947



economies to move from a primarily agrarian economy to a more industrialised one, during which time, certain key industries of the developing state would be protected allowing them to “catch up” to the more developed states.¹³ This “import substitution theory” has, to some extent at least, been discredited in modern economic theory as argued by Panagariya for example.¹⁴

Seen in this way, it might be fair to suggest that the entire basis of the global economic order is inherently unfair to developing states as it is based principally on a model of non-discrimination which grants a comparative advantage to established industries and economies over fledgling industries in developing states which are in need of protection (at least initially). Formal equality therefore, which is attained through ensuring that all states are provided the same opportunities and are protected from discrimination, does not automatically result in economic fairness, or actual equality of outcome for developing states.¹⁵ This is a point made by Christensen, who suggests that whilst the WTO and its agreements are based on “formal equality”, the operation of the most-favoured nation and national treatment provisions which lie at the heart of the GATT operate to entrench the advantage of already established industries and exporters in developed nations to the detriment of those in developing states.¹⁶

b) Special and Differential Treatment Provisions Have been Ineffective.

Despite the Article XII balance of payments exception to quantitative restrictions, no specific special or differential treatment provisions were in fact provided for under the GATT until the Tokyo Round of Negotiations eventually resulted in the “enabling clause” to the GATT being developed with the 1979.¹⁷ The enabling clause allows states to afford “special and differential treatment” to developing states thereby creating a fundamental exception to the general most-favoured nation provisions set out in Article I:1 of the GATT itself as was made clear by the WTO dispute settlement tribunal in the form of the appellate body in the case of *EC - Tariff Preferences* (2004).¹⁸ This therefore represents, on paper at least, what would appear to be a major step forwards for developing state and which might have been expected to overcome some of the criticisms set out above which are based on the argument

¹³ Michael Todaro, *Economic Development* (7th edn Addison Wesley 2000) 498

¹⁴ Arvind Panagariya, ‘A Re-Examination of the Infant Industry Argument for Protection’ (2011) 5 The Journal of Applied Economic Research 7, 7

¹⁵ Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO’s Development Mission* (1st edn Hart 2010) 206

¹⁶ James Christensen, ‘Fair Trade, Formal Equality and Preferential Treatment’ (2015) 41 Social Theory and Practice 505, 505

¹⁷ GATT Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries 1979

¹⁸ *EC - Tariff Preferences* (2004) Appellate Body Report WT/DS246/16/Add.3 adopted on 20 July 2005



that trade liberalisation itself is not necessarily beneficial for developing states who are forced to compete with developed states on a formally level playing field.¹⁹

However, there are continuing criticisms which suggest that these special and differential treatment provisions have been largely ineffective.²⁰ Outside of the enabling clause itself, most specific special and differential treatment provisions have been aimed instead at allowing developing states additional time to comply with implementation of WTO agreements, to have greater flexibility in their eventual implementation, and in the provision of technical assistance for developing states.²¹ Examples of this include the Trade Facilitation Agreement of 2013.²² However, these provisions do not relate specifically to the liberalisation of trade, and although states are entitled to offer developing states preferential tariffs as shown by the case of *EC - Tariff Preferences*, in general, it can be seen that tariff levels generally remain high, even after the Uruguay round. Although it is now clear that the enabling clause is now applicable to regional trade agreements by virtue of the 1999 Waiver for Preferential Treatment for Least-Developed Countries (LDC Waiver),²³ which closed what Feichtner refers to as a “gap” in the tariff preferences scheme which appeared to extend non-reciprocal tariff preferences to be offered to states inside a regional trade agreement, which had not been thought to be covered by the enabling clause at this point in time.²⁴

Because tariff levels for regional trade agreement areas and within and between developed countries remains high, it is suggested that there has been a general failure of the GATT which still prevents developing states from obtaining the access to developed states markets in a way which properly reflects their economic position, and their development needs. Furthermore, even where tariff barriers are reduced as a result of obtaining preferential access to a developed state’s market, it is suggested by some such as Keck and Low that there remain difficult technical barriers to trade which have not been removed by the Agreement on Technical Barriers to Trade (TBT),²⁵ and which relate to practical matters such as the costs of monitoring or

¹⁹ Erich Supper, ‘Is There Effectively A Level Playing Field for Developing Country Exports?’ (2001) UNCTAD Policy Issues in International Trade and Commodities Study Series No 1. Available online at <https://unctad.org/en/docs/itcdtab2_en.pdf> accessed 21 April 2019

²⁰ Thomas Fritz, ‘Special and Differential Treatment for Developing Countries’ (2005) 18 Global Issue Papers 4, 5

²¹ Kiichiro Fukasaku, ‘Special and Differential Treatment for Developing Countries: Does it Help Those who Help Themselves?’ (2000) United Nations World Institute for Development Economics Research Working Paper No 197, available online at <<https://www.wider.unu.edu/sites/default/files/wp197.pdf>> accessed 21 April 2019

²² Trade Facilitation Agreement 2013

²³ Waiver for Preferential Treatment for Least-Developed Countries 1999

²⁴ Isabella Feichtner, *The Law and Politic of WTO Waivers: Stability and Flexibility in Public International Law* (1st edn CUP 2012) 138

²⁵ Agreement on Technical Barriers to Trade 1994



مجلة الفنون والآداب وعلوم الانسانيات والعلوم

Journal of Arts, Literature, Humanities and Social Sciences

www.jalhss.com

Volume (65) - February 2021

العدد (65) - فبراير 2021



ensuring that provisions such as rule of origin requirements which disproportionately impact developing states even when such measures are applied in an indiscriminate manner, and in a way which complies with the requirements of the TBT for example.²⁶ The same is suggested by Josling, who argues that whilst there have been improvements made by agreements such as the Trade Facilitation Agreement which do offer greater technical assistance to developing states as part of the WTO's general special and differential treatment provisions, it is apparent that, in general, these provisions have not been as effective as was first hoped.²⁷ In other words, developing states still appear to face disproportionately impactful tariff and non-tariff barriers to trade when compared to developed states even with the special and differential treatment provisions being provided for.

Regardless of the actual level of success that these provisions entailed, it is still true to suggest that the development of graduated special and differential treatment provisions and the incorporation of the enabling clause into the GATT itself, were considered at first to have been a major achievement for developing states which showed the essential benefits that could accrue to such states by virtue of their signatory status as part of the GATT.²⁸ The impetus, or pressure to agree such provisions at the Tokyo Round can itself be regarded as a natural consequence of the growing diversity of membership over the years from 1947 to 1979, when developing nation membership of the GATT substantially.²⁹ The growth of developing country engagement has only increased since the end of the Uruguay round, and the establishment of the WTO itself, and developing states now constitute the majority of the WTO's membership itself.³⁰ Given the fact that these countries managed to secure special and differential treatment provisions in the form of the enabling clause upon negotiation at the Tokyo and Uruguay rounds, it might be thought that further development of the economic system in favour of developing states would be likely to continue.

However, the most recent round of multilateral trade negotiations, in the Doha round, which were regarded by many as being aimed primarily at further encouraging

²⁶ Alexander Keck, Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How?' (2004) WTO Staff Working Papers No ERSD-2004-03 available online at: <<https://pdfs.semanticscholar.org/5bff/cc644b300e2496ca40b655cf1c93e041796e.pdf>> accessed 22 April 2019

²⁷ Tim Josling, 'Special and Differential Treatment for Developing Countries' in Kym Anderson, Will Martin, *Agricultural Trade Reform and the Doha Development Agenda* (1st edn World Bank/Palgrave MacMillan 2005) 64

²⁸ Ajit Singh, *Special and Differential Treatment, The Multilateral Trading System and Economic Development in the 21st Century* (1st edn Zed Books 2003) 233

²⁹ Kiichiro Fukasaku, 'Special and Differential Treatment for Developing Countries: Does it Help Those who Help Themselves?' (2000) United Nations World Institute for Development Economics Research Working Paper No 197, available online at <<https://www.wider.unu.edu/sites/default/files/wp197.pdf>> accessed 21 April 2019

³⁰ *ibid*



development (and which were thereby granted the title of being the “Doha Development Round”) ended in somewhat abject failure as developing states and developed states failed to come to a consensus over further efforts that could be taken to improve the position of these developing states.³¹ This represented the first ever failure of multilateral trade negotiations since the establishment of the GATT itself, and has raised existential fears over the future of the WTO itself.³² This in turn leads to the next substantive criticism that has been raised over the fairness of the WTO from the point of view of developing nations, which is that the WTO’s decision making process does not grant each state an equal voice. This will now be considered.

c) WTO Consensus-Decision Making Remains based on Market Power and Economic Strength

The modern world trading system which is now administered largely through the WTO operates on a system on “consensus”.³³ Consensus requires that no member formally object to a decision or an agreement.³⁴ Many have criticised this system of decision making as being “medieval in approach”, and it is certainly one in which negotiations might be expected to be forceful and robust, as states will seek to exercise their influence and strength in order to ensure that the decisions made by consensus are ones which ultimately suit their agenda.³⁵ In many ways this is unfortunate for developing countries, because whilst they may, as a class, now form the majority of the membership of the WTO, they are still economically weaker than the less-numerous developed countries. Because of the method of decision-making taken in the WTO as a result of the consensus method, trade negotiations are dictated by leverage, bargaining position, and by economic might and market strength, as more powerful developed nations are able to exert a disproportionate level of influence (numerically at least) over the developing states. This is largely as a result of the developed states already being content with their position within the WTO’s rules and agreements, and being unwilling to compromise further on this in order to advance the WTO’s sustainable development agenda, and this is argued by some such as Trebilcock to have been the cause of the downfall of the Doha Development Round’s talks. As such, any future trade talks in which developed states might be required to grant concessions to developing states are likely to be similarly frustrated as the more numerous developing states will not be able to assert or demonstrate this

³¹ Michael Trebilcock and others, *The Regulation of International Trade* (4th edn Routledge 2013) 803

³² *ibid*

³³ Jaime Tijmes-Lhl, ‘Consensus and Majority Voting in the WTO’ (2009) 8 World Trade Review 417, 417

³⁴ *ibid*

³⁵ Robert Wolfe, ‘Decision-Making and Transparency in the ‘Medieval’ WTO: Does the Sutherland Report Have the Right Prescription?’ (2005) 8 Journal of International Economic Law 631, 631



advantage because of the fact that the WTO displays consensus, and not majority, decision making as its procedural basis.³⁶ Some alternatives have been proposed for this, such as adopting a “qualified majority voting” procedure in a manner similar to that in operation in the European Union for example.³⁷ However, reform of the decision making consensus within the WTO is itself dependent on all states agreeing (or at least refusing to object to) proposals which would reform this, and so it is difficult to see how this could be reformed given the general reluctance of states in the developed world to abandon a position in which they can influence trade talks and negotiations in their favour through use of their market strength, to one in which they would lose this power by being just one of a minority of developed states within the WTO. This is therefore a ground to suggest that the WTO as it stands is unfair to developing states (and this is all the more cogent a criticism considering that many developing states contend that the agreements that are currently in place, and which favour developed states were negotiated almost solely by developed states initially at conferences such as at Bretton Woods for example).³⁸

Indeed, this is argued to be the position even with regards non-reciprocal trade negotiations or concessions that are granted by developed states to developing states under either the enabling clause, or, more generally, under Article XXXVI GATT, which in Article XXXVI:8 allows such non-reciprocal treatment to be afforded without any negotiation or agreement from the developing state.³⁹ According to authors such as Carreau and Juillard, this itself has had a perverse impact on developing states, who do not offer concessions of this sort, and so who are excluded from the negotiation process by which more developed states agree these provisions between themselves.⁴⁰ The developing states are therefore “shut out of the green room” and become spectators to the negotiation process before being presented with what is essentially a *fait accompli*.⁴¹ This reinforces the picture of developed world superiority over the negotiating process whilst presenting developed states, ostensibly at least, as being benevolent and magnanimous in their position towards developing states.

Given the serious criticisms of the WTO’s consensus agreement mechanisms, it is again apparent that the WTO does not necessarily work in the favour of developing

³⁶ *ibid*

³⁷ Manfred Elsig, ‘Help From the Secretariat and the Critical Mass?’ in Debra Steger (ed), *Redesigning the World Trade Organization for the 21st Century* (1st edn Wilfred Laurier 2010) 73

³⁸ Jaime Tijmes-Lhl, ‘Consensus and Majority Voting in the WTO’ (2009) 8 *World Trade Review* 417, 420

³⁹ Article XXXVI General Agreement on Tariffs and Trade 1994

⁴⁰ Dominique Carreau, Patrick Juillard, ‘Droit International Economique (5th edn Dalloz 2010) 100

⁴¹ Jaime Tijmes-Lhl, ‘Consensus and Majority Voting in the WTO’ (2009) 8 *World Trade Review* 417, 421



states. The final substantive criticism of the WTO from the position of developing states will now be considered.

d) The WTO Dispute Settlement Mechanism is Inaccessible and Unfair to Developing States.

In general, the WTO's dispute settlement understanding (DSU) is regarded as being the "jewel in the crown" of the world trading system.⁴² It has been argued by some that the system, under which Members are entitled to bring complaints over alleged infractions of WTO law before the dispute settlement panel (comprised of WTO members), and then to the Appellate Body, (a standing body of leading world trade law academics and practitioners), is widely admired, and is engaged in "enthusiastically" by both developed states and developing states alike.⁴³

However, many others have criticised the dispute resolution process as being one which disadvantages developing states. In particular, authors such as Brown suggest that there has been a general failure to ensure that developing states can practically engage in initiating or continuing disputes, and that, empirically at least, there are too few complaints being begun by developing states.⁴⁴ This is in fact something which has gained attention from the mainstream media, as indicated by an article in the British newspaper, *The Guardian*, which castigated the failure of the WTO's dispute resolution settlement because there has never been a case in which an African nation has begun proceedings under the DSU, whilst all developed nations have engaged in at least one action of the 400 or so cases begun at the time of writing.⁴⁵ This is indicative of a general problem which is faced by developing nations in respect of dispute resolution at the WTO and which has within it two strands. The first strand of criticism faced by the WTO's dispute resolution process is that developing nations are disadvantaged because they often lack the resources or technical and technological equipment or know-how to properly monitor customs, technical regulations or other practices or ordinances which might be initiated in another Member states.⁴⁶ This

⁴² Simon Lester and others, *World Trade Law: Text, Materials and Commentary* (3rd edn Bloomsbury 2018) 884

⁴³ Peter Van den Bossche, Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn CUP 2013) 302

⁴⁴ Chad Brown, Bernard Hoekman, 'WTO Dispute Settlement and the Missing Development Country Cases: Engaging the Private Sector' (2005) 8 *Journal of International Economic Law* 861, 861

⁴⁵ Aurelie Walker, 'The WTO Has Failed Developing Countries' *The Guardian*, 14 November 2011, available online at; <<https://www.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries>> accessed 22 April 2019

⁴⁶ Gregory Schaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed' (2008) Minnesota Legal Studies Paper 08-50, available online at; <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1320222> accessed 22 April 2019



naturally prohibits states from bringing action for breaches of WTO law, as they are not aware that such a breach has occurred.⁴⁷

Even where such a breach might be identified, these states might simply lack the available resources to engage in expensive and time-consuming proceedings before the dispute resolution bodies of the WTO, implying that there is a lack of technical capacity for these states in bringing proceedings. Secondly however, even where such proceedings might be begun, there is a difficulty for developing states that arises out of the fact that the DSU provides for no real enforcement mechanism other than for authorising the complainant to take “retaliatory” measures. Retaliation is, by and large, a non-effective method for developing states, as they are usually in a much weaker position than the developed state economically, and their retaliatory measures are likely to be ineffective as a result. In addition, retaliation is likely to result in a degradation in relations between the developed and developing state which might be harmful to the developing state if they are dependent on the larger developed state. As such, it is fair to suggest that the dispute resolution process is fundamentally unfair for developing states. To rectify this, it would be necessary for much greater technical and legal assistance to be granted to developing states, and for some form of enforcement mechanism to be made available to the WTO in general which would allow them to punish and deter states from engaging in breaches of WTO law in the first place. However, given the “consensus” approach adopted by the WTO as has been discussed, such “enforcement” provisions would not be possible, as enforcement would require the breaching state to effectively sanction themselves by failing to object to such an act.

Conclusion

In conclusion, it has been shown that there are several substantial problems with the modern world economic system that is formed largely by the WTO and its constituent agreements. In particular, there are cogent criticisms that trade liberalisation has not in fact necessarily benefited developing countries to the same extent as developed ones, and that the special and differential treatment provisions set out in the WTO agreements have been largely ineffective in remedying this. In addition to this, it has been shown that there are some further criticisms that are capable of being made regarding the consensus decision making process of the WTO on the basis that this denies developing states the power that their numerical superiority within the WTO might warrant. This has been seen to have led to significant resentment from developing states who have, over the years, become more prominently represented than developed states as Members of the WTO, but who have not as of yet seen the substantive benefits of such Membership. Finally, it has been shown that there are technical difficulties faced by WTO complainants from developing states which may well have hindered developing states from either identifying, or pursuing actions in

⁴⁷ *ibid*



مجلة الفنون والآداب والعلوم الإنسانية والعلوم الاجتماعية

Journal of Arts, Literature, Humanities and Social Sciences

www.jalhss.com

Volume (65) - February 2021

العدد (65) - فبراير 2021



front of the WTO's dispute resolution bodies.⁴⁸ This has led to suggestions that more technical and legal assistance be provided for developing states in order for them to be more able to identify breaches of WTO obligations that negatively impact on them. These concerns all suggest that there is a fundamental need to reform the world economic regime for the 21st century, as, in its current form, it does not serve the interests of developing states. The Doha Development Agenda, which sought largely to rectify this, ended in failure, and as such it might well be that the entire system is in need of replacement. Similarly, it can be concluded that future reform of the WTO's dispute settlement mechanism in such a way that some form of enforcement mechanism might be forthcoming (and which would therefore create more of an incentive for developing Members to seek to enforce their rights) is unlikely. This is because of the consensus decision making mechanism which essentially gives every state a veto over the operation of the WTO decisions, and which might prevent developing states from creating a system in which developing states can in fact hold developed states to account without having to resort to retaliation.

References

Table of Cases

1. *EC - Tariff Preferences* (2004) Appellate Body Report WT/DS246/16/Add.3 adopted on 20 July 2005

Table of Legislation and Treaties

2. Agreement Establishing the World Trade Organization 1994
3. Agreement on Technical Barriers to Trade 1994
4. GATT Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries 1979
5. General Agreement on Tariffs and Trade 1994
6. Trade Facilitation Agreement 2013
7. Waiver for Preferential Treatment for Least-Developed Countries 1999

Secondary Sources

8. Alessandrini D, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (1st edn Hart 2010)
9. Brown C, Hoekman B, 'WTO Dispute Settlement and the Missing Development Country Cases: Engaging the Private Sector' (2005) 8 *Journal of International Economic Law* 861
10. Carreau D, Juillard P, *Droit International Economique* (5th edn Dalloz 2010)
11. Christensen J, 'Fair Trade, Formal Equality and Preferential Treatment' (2015) 41 *Social Theory and Practice* 505

⁴⁸ *ibid*



مجلة الفنون والآداب وعلوم الانسانيات والجنماع

Journal of Arts, Literature, Humanities and Social Sciences

www.jalhss.com

Volume (65) - February 2021

العدد (65) - فبراير 2021



12. Elsig M, 'Help From the Secretariat and the Critical Mass?' in Debra Steger (ed), Redesigning the World Trade Organization for the 21st Century (1st edn Wilfred Laurier 2010)
13. Feichtner I, The Law and Politic of WTO Waivers: Stability and Flexibility in Public International Law (1st edn CUP 2012)
14. Fritz T, 'Special and Differential Treatment for Developing Countries' (2005) 18 Global Issue Papers 4
15. Fukasaku K, 'Special and Differential Treatment for Developing Countries: Does it Help Those who Help Themselves?' (2000) United Nations World Institute for Development Economics Research Working Paper No 197, available online at <<https://www.wider.unu.edu/sites/default/files/wp197.pdf>> accessed 21 April 2019
16. Halle M, 'WTO and Sustainable Development' in Yasuhei Taniguchi and others (eds), The WTO in the 21st Century - Dispute Settlement, Negotiations, and Regionalism in Asia (1st edn CUP 2007)
17. Hunter J, 'Broken Promises: Trade, Agriculture and Development in the WTO' (2003) 4 Melbourne Journal of International Law' 299
18. Josling T, 'Special and Differential Treatment for Developing Countries' in Kym Anderson, Will Martin, Agricultural Trade Reform and the Doha Development Agenda (1st edn World Bank/Palgrave MacMillan 2005)
19. Keck A, Low P, 'Special and Differential Treatment in the WTO: Why, When and How?' (2004) WTO Staff Working Papers No ERSD-2004-03 available online at;
<https://pdfs.semanticscholar.org/5bff/cc644b300e2496ca40b655cf1c93e041796e.pdf>
> accessed 22 April 2019
20. Lester S and others, World Trade Law: Text, Materials and Commentary (3rd edn Bloomsbury 2018)
21. Panagariya A, 'A Re-Examination of the Infant Industry Argument for Protection' (2011) 5 The Journal of Applied Economic Research 7
22. Schaffer G, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed' (2008) Minnesota Legal Studies Paper 08-50, available online at; <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1320222> accessed 22 April 2019
23. Singh A, Special and Differential Treatment, The Multilateral Trading System and Economic Development in the 21st Century (1st edn Zed Books 2003)
24. Supper E, 'Is There Effectively A Level Playing Field for Developing Country Exports?' (2001) UNCTAD Policy Issues in International Trade and Commodities Study Series No 1. Available online at <https://unctad.org/en/docs/itcdtab2_en.pdf> accessed 21 April 2019
25. Tijmes-Lhl J, 'Consensus and Majority Voting in the WTO' (2009) 8 World Trade Review 417
26. Todaro M, Economic Development (7th edn Addison Wesley 2000)
27. Trebilcock M and others, The Regulation of International Trade (4th edn Routledge 2013)

**مجلة الفنون والآداب والعلوم الإنسانية والعلوم الاجتماعية**

Journal of Arts, Literature, Humanities and Social Sciences

www.jalhss.com

Volume (65) - February 2021

العدد (65) - فبراير 2021



28. Van den Berg H, Lewen J, International Trade and Economic Growth (1st edn Routledge 2007)
29. Van den Bossche P, Zdouc W, The Law and Policy of the World Trade Organization (3rd edn CUP 2013)
30. Walker A, 'The WTO Has Failed Developing Countries' The Guardian, 14 November 2011, available online at; <<https://www.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries>> accessed 22 April 2019
31. Wolfe R, 'Decision-Making and Transparency in the 'Medieval' WTO: Does the Sutherland Report Have the Right Prescription?' (2005) 8 Journal of International Economic Law 631.