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HISTORY AND DEVELOPMENT OF INTERNATIONAL ECONOMIC LAW*

Abstract

There are lots of controversies regarding international economic law. Though the value of international economic law has not been decreased by those controversies, rather the development of international economic law is continuing by its own way and has got a special place in the field of international law. With the development of technology and demand of society, the concept of international economic law is ever-changing and ever growing day by day. Historical background or origin of international economic law is not clear and also there is no such proper definition of international economic law. There are many opinions regarding origin of international economic law as whether international economic law is originated from international law or vice versa or is it the product of post Second World War. Though confusions are there but still there are lots of developments have done in this field of international economic law especially after the decolonization. The main object of this paper is to find out the origin of international economic law. In this paper the author will try to see that whether international economic law which is exists today is the result of post Second World War period or it is the origin of international economic law of the past. The study of this paper has been confined within the following scope that identification of a definition of international economic law, international economic law as it was before decolonization and after decolonization or before post Second World War and scholars opinions regarding international economic law as post Second World War phenomena .

Introduction:

Modern international economic law is mainly developing by the functioning of international economic institutions and active participation of sovereign States. Hence problem is that though the area of international economic law is expanding day by day but the third world international law scholars have been identified that it is the outcome of Western thought and result of post Second World War. Even after decolonization Western States are imposing their decisions on the third world States by shaping and creating international economic law and international economic organizations according to their will. So, problems has arisen from the controversies of different international scholars as Western scholars argued that international economic law is not new it is the part of past history [1]but the TWAIL scholars argued that international economic law is the outcome of western thought and created after Second World War. This paper will try to look at the authenticity of those arguments.[2]

Though there are lots of Western literatures which show that international economic law was there even in 12th century and it has developed by States practices because it is the law which

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[1]Petersmann, Ernst-Ulruch. (2013), ' Fragmentation' and 'Judicialization' of International Law as Dialectic Strategies for Reforming International Economic Law", *Trade, Law and Development*,5 (2): 209

[2] Chimni, B.S. (2006), Third World Approaches to International Law: A Manifesto, *International Community Law Review* 8:3–27

regulates the economic relations with other States. But the argument is not totally acceptable because the form of international economic law we have been seen today is totally different from the past (before Second World War). There may be international economic law but that was not in this form which is regulating by the international economic organizations. And international economic organizations have been created by Western States when most of the States (especially third world States) were still under the colonization of west. So, it can be said that though there may be international economic law before Second World War but that was not same as we have been seen in this 21st century.[3]

In Search of a Definition of International Economic Law:

There is no specific definition of international economic law but some international scholars have tried to define international economic law in their writings. The definitions of those Scholars are as per chronologically:

- 'International economic law is the series of norms of public international law with regard to transnational economic relation'[4].(1948)
- 'International economic law regulates the international economic order or economic relation among nations. It includes the area of private international law of trade to private international law of trade, international commercial law, and international law of finance and investment'.[5](2006)
- Some jurists said that 'international economic law controls international economic relation among nations or controls international economic order among the nations. International economic law includes the area in between public international law and private international law which deals with area of trade, commerce, finance and investment'. [6](2007)
- Some jurists have defined international economic law as, 'international economic law is a part of public international law which regulates international economy on the basis of sovereign equality of States'.[7](2013)

There are also many other definitions of international economic law those have been given by different international scholars. Here the point is that though all the above definitions are not same but two things are common within all these definitions that the word 'State' and 'international law'. Now question is that from which period these definitions will be acceptable. The history of international law shows that we may accept that international economic law is the part of international law but international law which we know in this 21st century is the created after Second World War[8]. Before decolonization there was no concept of sovereign State or modern State. Though many people claimed that Treaty of Westphalia had been created sovereign State but many scholars opposed it. It has been said that the treaty was most likely a will rather than treaty and it does not fit with the concept of States sovereignty which has emerged after decolonization.[9] Also it can be realized after looking at those definitions that the scope of international economic law is ever-growing in nature. So, the above definitions are

[3] Chimni, B. S. (2006), A Just World Under Law: A View From the South, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 100: 17-24

[4]Themaat, P. VerLoren van and E. U. Petersmann.(1984), "The Changing Structure of International Economic Law", *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 17, (4): 503-522.

[5]Subedi, S.P. (2007), '*International economic law*', London: Published by the University of London Press

[6] Ibid

[7]Petersmann, supra note1

[8]Anghie, Antony. (2006), The Evolution of International Law: Colonial and Postcolonial Realities, *Third World Quarterly*, 27 (5): 739-753

[9] Ibid

suitable only from the era of decolonization. But basically there is no such specific definition of international economic law because of its evolving and changing character.

Is international economic law post Second World War phenomena?

It is the most controversial question in the field of international economic law that whether international economic law is the outcome of post Second World War or it is the part of past. In search of answer of this question it has been found that there are divergent opinions on it. The international scholarship has been divided in two parts while answering this question. One is the arguments of Western Scholars and another one is the Arguments of Third World Scholars.

- **Western Scholars Arguments:**

International economic law before Second World War:

Western scholars have been opined that though modern international economic law is the outcome of 20th century but it has started in 12th century. It has been said that international economic law has been developed gradually from Middle Ages up to parent international economic organization (IEO).The development has been done by different national, regional and international treaties.[10]There are many examples have been given by Western scholars, where it has been shown that how international economic law has been evolved. As e.g. Henry II of England concluded a treaty of commerce with Cologne in 1154. The British history shows that treaty practices of international economic law during the period of eight hundred years. At that time customary international law has been developed and it was used to meet the standard of international economic law. Principle of 'reciprocity', was there to provide identical treatment to each other's merchants; 'principle of national treatments' was applicable to those countries that had similar structure and complementary interest that would provide equal treatment to nationals and foreigners; then the 'most favored nation treatment' was also applicable at that time. And it has been argued that though in academic arguments international economic law is very junior but in practical it is senior.[11] Some Scholars argued that application of MFN treatment has been found in many international trade agreements and it had been started by the treaty between England and Burgundy in 1417. The treaty of 1417 had played crucial role in collaboration and liberalization of multilateral trading systems.[12] Some jurists argued that international economic law has been evolved on the basis of some factors as e.g. exchange to maximize its utility, allocation of property rights, development of market, evolution of contract law and good faith (*pactasuntservanda*). It has been claimed that trade law, contract law and market regulations are the part of old legal system as (*Ubi Commercium, ibi jus*) and Roman medieval law *jus jentum* and it was the foundation of all medieval merchant law which was followed by Europe. In 1860, the bilateral treaty (*Cobden Chevaliers*) between England and France was an evidence of use of MFN principle in bilateral trading system which was based on periodic negotiation till 19th century. It was also argued that after World War I, Europe failed to established trade liberalization because of colonization, imperialism and rejection of *laissez fair* liberalism. The financial crisis 1929 and the protectionist 'Smooth – Hawley' Tariff Act 1930 had been triggered to break down world trading system but USA succeeded to adopt 'Reciprocal Trade Agreement Act 1934' by USA's Secretary of State Cordel Hull. Reciprocal trade linearization was continued by USA till outbreak of Second World War.[13] Article 23 of the Covenant of League of Nations provided some guidelines relating to

[10]Themaat, supra note 4

[11]Schwarzenberger, Georg. (1948), The Province and Standards of International Economic Law, *The International Law Quarterly*, 2 (3): 402-420

[12]Themaat, supra note4

[13]Petersmann, Ernst- Ulrich. (2013), Fragmentation and Judicialization of International Law as Dialectic Strategies for Reforming International Economic Law, *TRADE L. & DEV.* 5(2):209

international trade. The Permanent Court of International Justice in *Railway Traffic between Lithuania and Poland* case (1931) opined that 'members of League had minimum legal obligations regarding Article 23 of the Covenant of League of Nations'. [14]

Views of Western Scholars regarding international Economic Law after Second World War:

The Western scholars opined that international economic law got its new shape after the Second World War by Atlantic Charter (Anglo American Lease Land Agreement 1942), Bretton Wood Conference and Charter of United Nations 1945. It was felt that collective frame work was needed to achieve the objective of these three instruments. In past only trade development or commercial development was concentrated now economic, social progress and development has been introduced as a subject matter of joint action. And finally the development of international economic law has been dome by the establishment of international economic institutions (International Monetary Fund, World Bank, GATT/WTO).[15]Though the institutional based international economic law has been started after Second World War (World Bank, International Monetary Fund, and GATT/WTO etc.) but they argued that it has been stated in past.[16] They gave some example of international economic organizations as E.g. the Zollverein, a customs union of Germanic States, it was established in 1834 and it was the first effort at international economic integration and governance in Europe etc.[17]

So, according to Georg Schwarzenberger the scopes of international economic law was, *'Basic standard with special reference to national treatment, most favored nation treatment; protection of properties in abroad; Commercial treaties, monetary agreements, State loans and other State contract; the Calvo doctrine, methods of international financial control, Pater Convention; the law relating to trading with enemy, the international economic and financial law of military occupation, the protection of natural property, and the law of reparations; and the law of international economic and financial institutions'***.** This scope has been defined in 1948.Lastly it has concluded that international economic law is the separate branch of international law which has been developed by customary international law and treaty norms.[18]

- **International Economic Law in the eye of Third World Scholars:**

The Third World scholars are agreeing with the view that international economic law has been emerged after the Second World War but with some different aspects. So, the opinions of TWAIL scholars are as follows:

The history of the relationship between imperialism and international law shows that international law is the law which is applicable in this present era is the creation of Europe. Historian JHW Verzijl opined that, '*Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but also has drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin*'.[19]

[14]Schwarzenberger, supra note11

[15]Schwarzenberger, supra note11

[16]Vagts ,Detlev F . (2006), International Economic Law and the American Journal of International Law, *The American Journal of International Law,* 100 (4): 769-782

[17] Thompson, Alecander and Snidal Duncan, 'International Organization', University of Chicago, [Online web] Accessed 2nd December 2015, URL: www.encyclo.findlaw.com/9800book.pdf

[18]Schwarzenberger, supra note11

[19]Anghie, supra note8

It has been proved by different scholars that international law came into existence in nineteenth century. Before nineteenth century international law was the local product of west and most of the African and Asian countries were out of its preview. Third World States were only the object of international law and subject of colonial exploitation. Though Western society claimed that international society was there even before decolonization but that was 'un equal international society' controlled by west. And the Euro centric international law could not be treated as 'global international law'. International law can be treated as 'global law' only after the post Second World War period when decolonization has been completed and all State especially Africa and Asia became full flagged subject matter of international law. European international law hardly played any role in decolonization processes.[20]

After decolonization the newly independent States got the status of 'sovereign States' and stared to participate in international society of international economic law (which has been evolved after Second World War e.g. United Nations, WTO etc.). But soon they realized that they are still in unequal position because the modern international law is also the subject matter of colonial project and they are forcing indirectly to follow those laws. They stated to raised their voice against continuation of old unequal treaties, established principle of international law or old norms (e.g. the newly independent States were hesitated or refused to accept the jurisdiction of ICJ in *Anglo Iranian Oil Company case, nationalization of Suez Canal* case, *expropriation of Dutch property in Indonesia* etc. cases because they were afraid that ICJ would enforce the 'established legal rights' so, the new states did not want to go to ICJ against the colonial States); political and economic principles etc. New laws emerged by the new independent States especially in the field of international economic law to remove unequal position in global level. *Calvo doctrine* has been evolved by the Latin American States to challenge the traditional established international law which only supported debtor States. The new States have demanded a new form of international law which will promote their economy and will help to raise their living standard. They stated to erase the colonial rights by using their position in United Nations e.g. General assembly Resolution on 'Permanent Sovereignty over Natural Resources' (1952),[21] Charter of Economic Rights and Duties of States, United Nations Declarations on Friendly Relationship od States, United Nations Conference on Trade and Development (1964) which has adopted NEO (New International Economic Order etc.[22]

In this present era international economic law is controlling by international economic institutions such as WTO, World Bank, IMF and Trans National Corporations (TNC) which are the result of the Western Thought. The policies of these institutions are made by the West and all the policies are not good for the Third World countries. The Western World is forcing the Third world countries to follow their policies by becoming members of these institutions. There are many examples which have shown that international economic institutions are favorable towards the Western countries e.g. The rule oriented compulsory WTO DSS (WTO Dispute Settlement System) and WTO Appellate Body is not always beneficial for the third world countries. Where the substantive law of WTO is bias towards third world, WTO DSS is unable to provide equal justice to the third world; lack of expertise and financial resources discourage the developing States to go to WTO DSS; rigid interpretation of text by the WTO Appellate Body upset the balance of rights and obligations of the third world States. [23] Third World States has faced lots of obstacles to adopt SDT (Special and Differentiate Treatment) by

[20]Anand, R.P. (2004), Review Article, ONUMA Yasuaki's "When was the Law of International Society Born? - An Inquiry of the History of International Law from an Intercivilizational Perspective", *Journal of the History of International Law*, 6(1)1-66

[21]Anand, R.P (1966), Attitude of the Asian-African States Towards Certain Problems of International Law, *International and Comparative Law Quarterly*, 15: 55

[22] UNCTRD, [Online web] Accessed 3rd December 2015, URL: www.unctrd.org

[23]Chimni, B.S. (2006),Third World Approaches to International Law: A Manifesto, *International Community Law Review* 8: 3–27

amending GATT. The third world States are even unable to adopt the soft law of code of conduct on transnational corporations and transfer of technology. The TAWAIL scholars opined that third world States are again becoming colonized which is called as '*Neo-Colonialism*'[24]

Conclusion:

So, after the above discussion it is clear that international economic law scholarship has been divided into two parts one is Western or First World international economic law scholarship and another is TWAIL international economic law scholarship. Western scholars claimed that international economic law is originated from traditional international law. They deny the fact that international economic law is the phenomena of Second World War. Some Western scholars opined that States became sovereign States by the treaty of Westphalia but treaty of Westphalia was a will rather than an international treaty, also by this treaty only some European States got sovereignty not all nations especially non-European Nations[25]. The TWAIL scholars have been proved that States became in depended sovereign States after the completion of decolonization process not before that. [26] As per the claim of Western scholars if it has been accepted that international economic law has been originated from the traditional international law and it has been developed in past (Before decolonization) still it cannot give the status of modern international economic law. Because those principles of international economic law has been developed in past has been suffered by different drawbacks as: **One** is that the available literatures cant not specifically mentioned that exact in which century the international law and international economic law has been developed because there are lots of ambiguity in information which are in the literatures. Maximum literatures have been avoided the ancient period. **Second** the available literatures show that the international law from which international economic law has been derived was the law which was applicable only in Europe. At that time European civilizations was not the only civilizations, there were also many other civilizations which were developing. So, there is no comparative study regarding evolution of international economic law. **Third** modern international economic law has been shown that not only the States but also international economic institutions are playing crucial role in the evolution and development of international economic law but there was no such active international economic institution in the past European history of international economic law. **Fourth** is that before Second World War or before completion of decolonization there may be international economic law but the main subject matter that is the modern State was absent. Because before decolonization the concept of modern States has not been raised and it has been proved by the various eminent TWAIL scholars. So, there may be economy but international economic law was not there. As per the TWAIL scholars view it has been proved that international economic law is the phenomena of post Second World War. But the modern international economic law is the outcome of the Western thought. The available western literatures show that past principles of international economic relations which are included in the modern international economic law. As e.g. MFN, NT principles etc. also The modern international economic law has been developed originated by the initiatives of western States and third world States are forced to become party to develop their economy which has been ruined by the colonial States. And inequality has been started from here because all principles of international economic law cannot be equally applicable for industrialized developed nations and economically weak third world nations e.g. conditionality principle of World Bank as well as IMF is not in favor of third world States etc. though third world States have taken initiative to reform international economic law by NIEO etc. but maximum international instruments are soft law instruments which are non-binding in nature. Now there are some other area of

[24]Chimni, B.S. (2012), Capitalism, Imperialism, and International Law in the Twenty-First Century, *Oregon Review of International Law*, 14: 17

[25] Jackson, John. H. (2003), Changing Fundamentals of International Law and International Economic Law, *Archiv des Völkerrechts*, 41.Bd (4): 435-448

[26]Anghie, supra note8

international law are becoming part of international economic law as international human rights law and international environmental law. Question is that how much third world States will be successful to compete with developed nations in the field of international economic law or whether again these States will be colonized by the industrialized developed States?