

RESISTANCE AT THE WTO: (DE) COLONIALITY IN THE MAKING?

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This paper aims to contribute to the growing global decoloniality process. As Mignolo noted, the process of decolonising knowledge and being is underway via spatialising the site of knowledge and linking them through the colonial epistemic power differential. Decoloniality discourse allows us to understand the continuity of colonial forms of domination produced by the colonial cultures and structures in the modern/colonial world system. Reframing the debate for reforms in the World Trade Organisation ('WTO') within the decoloniality discourse, this paper demonstrates the continued colonial legacy in WTO negotiations and how it maintains the developing and developed countries' divide at the cost of the institution itself. Examining the negotiation process leading to the Agreement on Fisheries Subsidies ('AFS'), it demonstrates the global coloniality matrix is still operative at WTO. This paper recommends concerted efforts to dismantle the matrix of coloniality operating at three concurrent and interconnected levels in WTO. However, reforms are not the aim but the path to transformation of WTO- from a hegemonic universal rule-based system - towards an institution supporting a pluriversal global trade regime born out of epistemic democratisation embedding common experiences of the non-western world. Decolonial option starts from epistemic disobedience to the point of no return, only then transformation is possible. The epistemic disobedience and delinking from traditional trade law discourse in viewing WTO reforms in this paper is a step in that direction.

I. INTRODUCTION

The calls for World Trade Organisation ('WTO') reforms are not new. However, such calls have been mounting in recent years following the 'dual crisis,' i.e. the deadlock at the Doha Development Agenda negotiations as well as the inoperability of the dispute settlement system. On one hand, the US's veto

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to the appointment of new Appellate Body members, thereby crippling the efficacy and functionality of the dispute settlement mechanism, exhibits the hegemony in the international economic order. On the other hand, the logjam of the legislative function shows the struggle faced by major developing and developed countries to reach an agreement on various trade issues.¹ Proposed reforms reflect the many different objectives and perspectives of the heterogeneous interest groups and stakeholders in the trade regime, yet all the arguments could be narrowed down to (i) rule/decision-making process; (ii) the management of the day-to-day functions; and (iii) the enforcement of negotiated commitments.² It is evident from the unidimensional aspect of the proposed reforms that a fundamental reorientation and epistemic delinking is necessary to understand the current impasse. Therefore, this paper proposes to perceive the developing and developed countries' divide from the coloniality perspective. The decoloniality framework is an epistemic change of perspective that provides an alternative framework by bringing the power dimension to the fore.

The paper begins with outlining the calls for reforms in WTO and reorienting the debate within global coloniality. Understanding the underlying coloniality allows us to understand the continuity of colonial forms of domination produced by colonial cultures and structures in the modern/colonial world order.³ Given that rule-making has been a central focus of reforms, this paper first places the matrix of coloniality (i.e. the interplay of coloniality of power; coloniality of knowledge; and coloniality of being) at the centre of our understanding of the negotiation process at the WTO. Examining the negotiation process leading to the Agreement on Fisheries Subsidies ('AFS'), it demonstrates how the rich and powerful ex-colonisers are continuing to shape the WTO agreements to date. However, India - a former colony and a low-income developing state - rejected the initial draft criticising it for institutionalising disparities between rich and poor nations.⁴ Building on insights from the literature on the global coloniality of power, this paper conceptualises India's resistance as decoloniality. Regarding decoloniality as resistance against the persistence of domination and imperialism (which still tries to maintain the old economic order), this paper calls for the dismantling of the matrix of coloniality as central to lasting meaningful reforms at the WTO. It recommends concerted efforts to undo the matrix of coloniality operating at three concurrent and interconnected levels in international economic

¹ Zhijie Ding, 'What a Multi-Phased Reform Strategy of the WTO Should Look Like' (*East Asia Forum*, 2 March 2022) <<https://www.eastasiaforum.org/2022/03/02/what-a-multi-phased-reform-strategy-of-the-wto-should-look-like/>> accessed 18 October 2023.

² Bernard Hoekman, 'Proposals for WTO Reform: A Synthesis and Assessment' (2011) 5525 World Bank Policy Research Working Paper 324, 326 <<https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5525>> accessed 18 October 2023.

³ Ramón Grosfoguel, 'The Epistemic Decolonial Turn' (2007) 21 *Cultural Studies* 211, 218.

⁴ FE Bureau, 'India rejects unfair text on fishery subsidies at WTO' (*Financial Express*, 15 June 2022) <<https://www.financialexpress.com/policy/economy-india-rejects-unfair-text-on-fishery-subsidies-at-wto-2560775/>> accessed 19 October 2023.

law. This paper thus offers a new, out-of-the-box approach to WTO reforms as the opportunity to bridge the developing/developed country divide by dismantling the legacy of colonialism and hegemony of trade rules over all else.

However, reforms are not the aim but the path to transformation of WTO - from a hegemonic universal rule-based system - towards an institution supporting a pluriversal global trade regime born out of epistemic democratisation embedding common experiences of the non-western world. The decolonial option starts from epistemic disobedience to the point of no return, only then the transformation is possible.⁵ The epistemic disobedience and delinking from traditional trade law discourse in viewing WTO reforms in this paper is a step in that direction.

II. WTO REFORMS AND GLOBAL COLONIALITY

For long, WTO has been criticised by governments, civil societies, industry stalwarts and academics alike. Complaints range from the lack of transparency in rule-making and implementation to insensitivity towards environmental and social concerns.⁶ There are further calls for clarifying the understanding of developmental issues, new approaches to special and differential treatment, transparency, and monitoring trade rules.⁷ A review of the proposals and position papers highlights the divide between the developing and developed countries' perspectives towards reforms. For example, developed countries are concerned with the self-declaring nature of the 'developing' country status and the associated concessions, judicial overreach by Appellate Body Members and intellectual property theft, to name a few. Developing countries' concerns relate to market access, agricultural subsidies and the right to special and differential treatment concessions.⁸ The Least Developed Countries ('LDCs') are further worried about their capacity con-

⁵ Walter D Mignolo, 'It is "Our" Modernity: Delinking, Independent Thought, and Decolonial Freedom' in *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011) 118, 139.

⁶ See for example Marco Bronckers, 'Trade Conflicts: Whither the WTO?' (2020) 47(3) *Legal Issues of Economic Integration* 232 ('Bronckers'); Rorden Wilkinson, *What's Wrong with the WTO and How to Fix It* (Polity Press 2007); J Michael Finger, 'Implementation and imbalance: dealing with hangover from the Uruguay Round' (2007) 23(3) *Oxford Review of Economic Policy* 440; Joseph E Stiglitz & Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development* (Oxford University Press 2005); Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (W. W. Norton & Company 2011); Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (Zed Books 2003).

⁷ See for proposals, M Sait Akman and others, 'The Need for WTO Reform: Where to Start in Governing World Trade?' (2020) T20 Saudi Arabia Policy Brief 18; Hoekman (n 2) 324.

⁸ Prashant Khurana & Dhananjay Sahai, 'Reforms at the WTO: Beyond Archaic Binaries' (2021) Observer Research Foundation, Issue Brief 475 <<https://www.orfonline.org/research/reforms-at-the-wto-beyond-archaic-binaries>> accessed 18 October 2023; For developing countries' perspective, see also Faizel Ismail, *WTO reform and the crisis of multilateralism: A Developing Country Perspective* (South Centre 2020).

straints and want to ensure inclusive negotiating processes and consensus-based decision-making.⁹ WTO negotiations with the operating system of 'reciprocal exchange of market access concessions' came under fire since the Doha Round of Negotiations in 2001 which has been slow and unsuccessful so far. For the continuation of a functional rule-based trading system, reforms at the WTO are long overdue. Given the lack of common purpose for the WTO members and the gaps between the developed and developing country Members' positions, finding a consensus in multilateral negotiations is no easy task.

The divide in the approaches and outcomes that led to an impasse can be better understood through an examination of the historical process of colonisation that although, ended politically, has nonetheless paved the path for modernity/coloniality.¹⁰ Coloniality is not colonialism but its descendent. As opposed to colonialism which denotes a political and economic relationship between the coloniser and the colonised, coloniality denotes a long-standing pattern of power that emerged because of colonialism. Coloniality is not restricted to the strict limits of colonial administration.¹¹ As a model of power, coloniality continues to codify differences in a way that constructs domination and inferiority based on race which serves as a fundamental criterion for the social structure of power.¹² Although colonialism as an express political order was destroyed, coloniality is the most general form of domination in the world today where cultural Europeanisation has transformed into an aspiration and a gateway to power.¹³ In the post-colonial world, developing countries continue to play a subordinate role in the international system because of their economic dependency on the West.¹⁴

Following the eradication of 'colonial administration' with juridical-political decolonisation, the world order moved from 'global colonialism' to 'global coloniality' with non-Europeans still living under crude Euro-American exploitation and domination.¹⁵ One important feature of this global coloniality is the transformation and/or design of institutions that would maintain the coloniality of

⁹ Least Developed Countries' Views on WTO Reform Discussions and Proposals: Communication from Chad on Behalf of the LDC Group (6 December 2019) JOB/GC/223.

¹⁰ Aníbal Quijano, 'Coloniality and Modernity/Rationality' (2007) 21(2) Cultural Studies 169 (Aníbal Quijano illustrated how the modern global system is a continuation of Eurocentred colonisation. This led to a new discourse exploring 'border thinking' and 'border epistemologies', i.e., 'the modernity/coloniality research program' as termed by Arturo Escobar in 'Worlds and Knowledges Otherwise' (2007) 21(2-3) Cultural Studies 179.

¹¹ Nelson Maldonado-Torres, 'On the Coloniality of Being: Contribution to the development of a concept' (2007) 21(2-3) Cultural Studies 243.

¹² Catherine Walsh, 'Shifting the Geopolitics of Critical Knowledge: Decolonial thought and cultural studies 'others' in the Andes' (2007) 21(2-3) Cultural Studies 229.

¹³ Quijano (n 10) 170.

¹⁴ Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' in Richard Falk and others, *Reshaping Justice: International Law and the Third World* (Taylor & Francis 2006) 749.

¹⁵ Grosfoguel (n 3) 219.

power structured and implemented in the sixteenth century. The modern international institutions thus became the seat of global coloniality, maintaining the historical structural dependency, not only economically and politically but also epistemically.¹⁶

As Cardinal noted, “Coloniality, through its codified scientific ramifications (such as international law) is...the enabling structure of this misrepresentation, supported in this endeavour by positivism”.¹⁷ He summed these epistemic and methodological biases as well as the threefold interrelating set of dominion in international law as the ‘matrix of coloniality.’ It includes (i) a ‘coloniality of power’, i.e. the interrelation of modern forms of direct domination; (ii) a ‘coloniality of knowledge’, i.e. the control of different areas of knowledge production; and (iii) a ‘coloniality of Being,’ that is engendered by the interrelation of the previous two, the lived experience of self-denial of the colonial subject’.¹⁸ The matrix of coloniality in WTO that operates through an interrelating threefold set of domination is clearly visible in the negotiations that led to the AFS as the next section will demonstrate.

III. AGREEMENT ON FISHERIES SUBSIDIES EMBEDDING THE MATRIX OF COLONIALITY

The need for regulating the fishing industry cannot be overstated. Since the last quarter of the twentieth century, the global trade in fisheries products and services has increased swiftly. However, the increased volume of fisheries trade has not only resulted in economic gains but also brought about several challenges, including overfishing i.e. stock abundance fished below the level that can produce maximum sustainable yield (‘MSY’).¹⁹ It further led to illegal, unreported, and unregulated (‘IUU’) fishing across the globe across all fish types, sectors and geographies, from inshore waters to the high seas.²⁰ IUU in recent years has emerged as a serious global threat with far-reaching environmental, social and economic impacts.²¹ About 35% of the fish stock of the world’s marine fisheries is now classified as overfished. Overfishing not only causes a decline in fish

¹⁶ Walter D Mignolo, ‘The Geopolitics of Knowledge and Colonial Difference’ (2002) 101(1) *The South Atlantic Quarterly*, 57.

¹⁷ Pierre-Alexandre Cardinal, ‘Resistance and International Law; De-coloniality and Pluritopic Hermeneutics’ (2016) 1(1) *Inter Gentes* 44.

¹⁸ *ibid* 42.

¹⁹ Food and Agriculture Organisation (FAO), ‘The State of World Fisheries and Aquaculture 2020: Sustainability in Action’ (2020) 54.

²⁰ Convention on the High Seas 1958 (adopted on 29 April 1958, entered into force on 30 September 1962) 450 UNTS art 1 (all parts of the sea that are not included in the territorial sea or in the internal waters of a State).

²¹ Andrew J Temple and others, ‘Illegal, unregulated and unreported fishing impacts: A systematic review of evidence and proposed future agenda’ (2022) 139(3) *Marine Policy*.

production but also negatively impacts habitat, biodiversity and ecosystem functioning.²² Beyond immediate environmental impact and sustainability, IUU leads to loss of taxable income, undermines social cohesion, human rights abuse, forced labour and modern slavery, maritime conflict and direct cost for workers in the fisheries sector.²³ The export of fish and fish products is particularly crucial to the economies of many developing and least-developed countries and islands. For example, in Cabo Verde, Faroe Islands, Greenland, Iceland, Maldives, Seychelles and Vanuatu, exports of fish and fish products exceed 40% of the total value of merchandise trade.²⁴

IUU is flourishing because its profitability outweighs the likelihood of detection or any cost of capture to operators. Government subsidies in fisheries (that are highly dependent on that support) are an important lever to increase its profitability.²⁵ A subsidy is a “financial contribution” by a government or a public body that confers a “benefit” to the private sector.²⁶ It can be conferred directly in the form of grants, loans and equity infusions or potential transfers of funds such as loan guarantees; foregone government revenue from tax exemptions; goods and services provided to the private sector other than general infrastructure or in indirect form through government payments into funding mechanisms; or any form of income or price support. A fishing subsidy is a “direct or indirect financial transfer from public entities that creates a benefit for the fisheries sector, which enables enterprises to make more profit than they would have otherwise”.²⁷ Governments support their domestic fisheries sectors for a number of reasons, particularly to improve fishing communities’ welfare, increase production and ensure sustainability. Fishing subsidies are therefore important for poverty alleviation as well as food and livelihood security of these communities.²⁸ However, not all subsidies are beneficial. Harmful subsidies are capacity-enhancing subsidies that “enable fishing capacity to increase to a point where resource exploitation exceeds the maximum sustainable yield”.²⁹ These subsidies distort the economic environment

²² FAO (n 19) 54.

²³ Temple (n 21) 3.

²⁴ FAO (n 19) 73.

²⁵ Claire Delpuech and others, ‘Eliminating Government Support to Illegal, Unreported and Unregulated Fishing’ (2022) 178 Food, Agriculture and Fisheries Working Papers 6 <https://www.oecd-ilibrary.org/agriculture-and-food/eliminating-government-support-to-illegal-unreported-and-unregulated-fishing_f09ab3ao-en#> accessed 18 October 2023.

²⁶ Agreement on Subsidies and Countervailing Measures (enacted 15 April 1994, came into force 1 January 1995) LT/UR/A-1A/9, art 1.1.

²⁷ Ussif Rashid Sumaila and others, ‘Updated estimates and analysis of global fisheries subsidies’ (2019) 109 Marine Policy 1.

²⁸ Need for Effective Special & Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text: Submission by India, Indonesia and China (19 May 2008) TN/RL/GEN/155/Rev.1.

²⁹ Vania Andreoli and others ‘Fisheries subsidies exacerbate inequities in accessing seafood nutrients in the Indian Ocean’ (2023) 2(23) npj Ocean Sustain <<https://www.nature.com/articles/s44183-023-00031-9>> accessed 18 October 2023.

in which the fisheries sector operates leading to IUU. For example, subsidies given for fuel and equipment enable fishing in places, such as high seas, where it would otherwise not be profitable to go.³⁰

Given these large-scale long-term socio-economic and environmental impacts, the need for a global regulatory framework to address IUU fishing has been felt for a long time. The contemporary Law of Seas regulating activities related to the ocean is the United Nations Convention on the Law of the Sea ('UNCLOS') 1982 which aims to achieve balanced relations among multiple users and scarce marine resources. The UN Fish Stock Agreement ('FSA')³¹ regulates key fisheries of transboundary nature to ensure their long-term conservation and sustainable use.³² The UN Food and Agriculture Organisation ('FAO') encourages States to establish/join Regional Fisheries Management Organisations ('RFMOs') that are set up to share scientific data and coordinate the policies and laws governing the fishery in their region.³³ RFMOs also manage the high seas fisheries as FSA explicitly mandates that the rules of conservation and management measures established by RFMOs apply to all States.³⁴ Despite the plethora of legally binding instruments, high-seas fisheries and marine biodiversity conservation are at risk as the goals of international law and actions of individual states do not match, as shown later. Acknowledging the role of government subsidies in IUU and overfishing, target 14.6, Goal 14 of the Sustainable Development Goal calls upon the Member States to "prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies".³⁵ The Doha Declaration 2001, paragraph 28, also mandated negotiations on fisheries subsidies.³⁶ Finally, in June 2022, an agreement to curb harmful fisheries subsidies for vessels and operators engaged in IUU was finally reached at the 12th WTO Ministerial Meeting in Geneva. The AFS, which sets new global rules to curb harmful subsidies and protect global fish stocks will enter into force

³⁰ Elizabeth Fitt, 'WTO Finally Nets Deal Curbing Fisheries Subsidies, but Tables Key Bits for later' (*Mongabay*, 17 June 2022) <<https://news.mongabay.com/2022/06/wto-finally-nets-deal-curb-fisheries-subsidies-but-tables-key-bits-for-later/>> accessed 18 October 2023.

³¹ The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) A/CONF.164/37 ('UNFSA 1995').

³² United Nations Division for Ocean Affairs and the Law of the Sea, 'UNFSA Overview' <<https://www.un.org/oceancapacity/unfsa>> accessed 18 October 2023.

³³ Peter J Tamburello, 'Hypocrisy on the High Seas: An Examination of the Conflicting Policy Goals and Actions of the International Community Regarding Illegal, Unreported, and Unregulated Fishing' (2021) 11 EELJ 48, 53.

³⁴ UNFSA 1995 (n 31) art 8.

³⁵ Transforming our World: the 2030 Agenda for Sustainable Development (adopted 21 October 2015) UNGA A/RES/70/1, Goal 14 ("Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development").

³⁶ World Trade Organisation, 'The Doha Declaration explained' <https://www.wto.org/english/tra-top_e/dda_e/dohaexplained_e.htm#subsidies> accessed 18 October 2023.

upon acceptance by two-thirds of the membership. However, the rule-making process at the WTO leading to the finalisation of the AFS once again echoed the coloniality and imperialism deeply embedded within international economic law. The following sections will examine how coloniality of power, epistemology, and being are still pervasive and persisting at the WTO, resulting in an outcome that institutionalises the divide between the developed and the developing world.

A. COLONIALITY OF POWER

Coloniality of power refers to the interrelation among modern forms of exploitation and domination through which the global hegemony sustains itself.³⁷ While creating the institutional framework of international trade law, the WTO/GATT has historically influenced the economic and financial policies of third-world countries. Through the adoption of uniform global standards, the autonomy of sovereign states has been restricted, relocating the sovereign decision-making authority from the State to the WTO with effective enforcement mechanisms.³⁸ As a gatekeeper of the international economic system, its power extends into most domains of human activities in the Third World, ranging from socio-economic policies, urban and rural development and even the very structure of the State.³⁹

Technically, the rulemaking in the WTO requires consensus at the Ministerial Conference which is the topmost decision-making body of the WTO and usually meets every two years.⁴⁰ In principle, each Member has one vote but in practice, agreement is generally reached by consensus, i.e. it requires all 164 Members to agree to reach a deal. Nonetheless, since its inception, WTO/GATT was viewed as “a rich men’s club”, where the LDCs played a very marginal role in the negotiations. Trade negotiations were particularly focused on the issues more relevant to the needs of the industrialised states like tariff concessions, non-tariff barriers to trade, subsidies, technical standards, etc.⁴¹ The negotiations are usually conducted among a small group of countries (essentially large, industrialised nations having resources and diplomatic expertise), who meet in the so-called “green rooms” to discuss policy issues. A Member, usually a developed or big developing country, can only participate in green room negotiation if invited by the Director General or the Chair. Neither the minutes of the meetings nor the official deliberations are officially recorded.⁴² The outcomes of these negoti-

³⁷ Maldonado-Torres (n 11) 242.

³⁸ BS Chimni, ‘International Institutions Today: An Imperial Global State in the Making’ (2004) 15(1) *European Journal of International Law* 2.

³⁹ Balakrishnan Rajagopal, ‘From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions’ (2000) 41(2) *Harvard International Law Journal* 538.

⁴⁰ World Trade Organisation, Ministerial Conferences, <https://www.wto.org/english/thewto_e/minist_e/minist_e.htm> accessed 18 October 2023.

⁴¹ Michael Trebilcock, *The Regulation of International Trade* (Routledge 2012) 23.

⁴² Kent Jones, *The Doha Blues: Institutional Crisis and Reform in the WTO* (Oxford University Press 2009) 88.

ations are then tabled before WTO members with an expectation of approval. Usually, developing countries' delegations with a lack of technical expertise and understanding finally give in to the negotiation pressure.⁴³ Due to their economic dependency on the West, the developing and least developed countries continue to play a subordinate role in this neo-colonial international economic world order where the rules continue to ensure the status quo.

Fishing in high seas is dominated by a small number of fishing countries.⁴⁴ Only 14 countries⁴⁵ account for 90% of the high seas catch,⁴⁶ of which only 3 countries⁴⁷ account for 51% of the total high seas catch.⁴⁸ Five countries – China, Taiwan, Japan, South Korea and Spain, account for 64% of all high sea fishing (HSF) revenue.⁴⁹ The majority (68%) of unreported catch in 2016 was made by large-scale fishing fleets, 32% by small-scale fishing fleets and only 7% for subsistence.⁵⁰

Temple et al. noted that the distance water fishing ('DWF') fleets of high and very high-income states with strong regulatory control regularly exploit the regions of lower fisheries governance strength.⁵¹ On the other hand, given the lack of technical, financial and governance infrastructure, few developing countries are able to fully exploit the fisheries resources within their own exclusive economic zone ('EEZ'). Often these countries give fishing licences to foreign vessels which increases the risk of IUU and over-exploitation of the fisheries resources of the host countries.⁵² As a result of poor governance and management failure to allocate fishing access sustainably, traditional and more responsible fishing fleets of the host countries are being replaced by large foreign fleets receiving harmful subsidies from their respective governments.⁵³ For example, large-scale IUU in Somalia's EEZ is purported to be done by nations such as China, Russia, Spain, Japan, and Poland. These States, the culprits of the overfishing, are members of UNCLOS,⁵⁴ i.e. these states have committed themselves to the conservation and management of transboundary fish stock following the precautionary principle. As opposed to commercial fishing in developed nations, fishing is a means

⁴³ Syed Javed Maswood, *The South in the International Economic Regimes: Whose Globalisation?* (Palgrave Macmillan 2006) 98.

⁴⁴ Enric Sala and others, 'The Economics of Fishing the High Seas' (2018) 4(6) *Science Advances* 1.

⁴⁵ China, Taiwan, South Korea, Spain, Japan, Ecuador, Indonesia, Russia, Mexico, United States, Norway, France, Seychelles, Panama.

⁴⁶ Sala (n 44) 3.

⁴⁷ China, Russia and Taiwan.

⁴⁸ Sala (n 44) 6.

⁴⁹ *ibid* 2.

⁵⁰ Temple (n 21) 3.

⁵¹ *ibid*.

⁵² Daniel Skerritt & Ussif Rashid Sumaila, 'Assessing the Spatial Burden of Harmful Fisheries Subsidies' (2021) *Fisheries Economics Research Unit* 5.

⁵³ *ibid* 6.

⁵⁴ Tamburello (n 33) 58.

of livelihood for a large section of the population in most developing countries. Moreover, the fishing technology used in the developing world is often very basic, ranging from unpowered boats to vessels with minimal motorisation at best. Finally, the quality of life in fishing communities is increasingly deteriorating due to pollution, sea erosion, increased pressure on the coastline, degradation of the coastal environment and displacement.⁵⁵

HSF is sustained artificially through an estimated USD 4.2 billion in subsidies far exceeding the net economic benefits of fishing in high seas.⁵⁶ Advanced nations provide the largest subsidies to their high-seas fishing fleets (Japan (20% of the global subsidies) and Spain (14%), followed by China, South Korea, and the United States).⁵⁷ As Sala et al. noted, subsidised high-seas fishing far exceeds the net economic benefit of fishing on high seas; it suggests that high-seas fishing at the global scale would be unsustainable without subsidies.⁵⁸ In 2018, \$22 billion out of \$35 billion in global fisheries subsidies went to harmful subsidies.⁵⁹ Fuel subsidies, ranging from \$194.5 million (provided by Norway) to \$1.1 billion (provided by China) represented the greatest single harmful subsidy type. Other significant harmful subsidy types were “Fishing port developments”, “Market and storage infrastructure”, and “Tax exemptions”.⁶⁰ On the other hand, in 2018, India gave USD 277 million in fishing subsidies⁶¹ which roughly translates to USD 15 a year in subsidies to its fishermen families, as opposed to Norway which, with a fraction of the population, gave USD 194.5 million in harmful “fuel” subsidies alone.⁶² A joint communication from Brazil, China, India and Mexico recommended that subsidies should not be prohibited where the benefits of those subsidies are conferred on low-income, resource-poor or livelihood fishing activities, provided that these activities are performed by fish workers on an individual or family basis or employed by associations or micro-enterprises or individual boat owners.⁶³ Many civil society groups and some other developing country Members too felt that the blanket ban on subsidies in the draft text would jeopardise the livelihood of small-scale fisherfolks in the developing and the least developed countries while leaving the loophole for rich countries to continue subsidising the most harmful fishing activities of their large-scale industrial fleets.⁶⁴ As FAO has noted, developing countries are particularly vulnerable to potentially

⁵⁵ Need for Effective Special & Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text: Submission by India, Indonesia and China (19 May 2008) TN/RL/GEN/155/Rev.1.

⁵⁶ Sala (n 44) 2.

⁵⁷ *ibid* 3.

⁵⁸ *ibid* 2.

⁵⁹ Sumaila (n 27) 2.

⁶⁰ Skerritt & Sumaila (n 52) 9.

⁶¹ Sumaila (n 27) 7.

⁶² Skerritt & Sumaila (n 52) 9.

⁶³ Fisheries Subsidies: Special and Differential Treatment: Communication from Brazil, China, India and Mexico (11 February 2010) TN/RL/GEN/163, 3.

⁶⁴ Fitt (n 30).

negative consequences of overtly strict regulations as compliance can impose prohibitive costs.⁶⁵ Yet no exemption was granted to the developing or least developed countries for unregulated and unreported fishing despite the acknowledgement of their lack of resources.

Given that big States have long been indiscriminately exploiting the global fisheries resources through distant water fishing in other's EEZs and high seas, India sought these States should own "greater responsibility" and put an embargo on fishing subsidies for 25 years.⁶⁶ The draft agreement tabled on 10 June 2022 was criticised by India for not endorsing "common but differentiated responsibility" and the "polluter pays" principle for any given agreement seeking sustainability.⁶⁷ Questioning the draft text, the Indian Minister asked how a country with 9 million families of fishermen could be expected to accept the same *de minimis* level as those advanced fishing nations with only a few thousand fishermen.⁶⁸ Prohibiting any form of subsidies if the fish stock is overfished, the draft agreement failed to note the lack of capacity and technological know-how as well as the inability to monitor and measure the stock of fish amongst the vulnerable fishing communities of the developing and the least developed countries.⁶⁹ On the other hand, Section 4.3 of the AFS enables Members to continue providing subsidies affecting stocks that are overfished for rebuilding the stock to a biologically sustainable level.⁷⁰ As noted earlier, advanced nations have been subsidising HSF which has led to overfishing and IUU in high seas. Harmful subsidies enhance fishing capacity, enabling industrial fishing fleets to expand their geographic limit into high seas and maintain profitability despite diminishing returns. It, thus, creates barriers to more equitable fisheries, increases the inequality in the distribution of fisheries benefits among the world's maritime countries and poses a risk to human nutrition security due to declining catch returns from the overfished stocks.⁷¹ Failure to prohibit harmful fuel subsidies along with the so-called "sustainability test" allows members to maintain harmful subsidies for fishing on overfished stocks.⁷² The carve-out clause can thus be seen to incentivise the subsidising of industrial fishing on high seas as it continues to profit large industrial fishing fleets and continue inequitable use of marine resources. It supports India's claim that instead of tougher regulations for advanced fishing countries that are

⁶⁵ FAO (n 19) 82.

⁶⁶ Fitt (n 30).

⁶⁷ Apoorva Lalwani, 'Has WTO Addressed the 'Fish' in the Room?' (*Observer Research Foundation*, 5 July 2022) <<https://www.orfonline.org/expert-speak/has-wto-addressed-the-elephant-fish-in-the-room/>> accessed 18 October 2023.

⁶⁸ FE Bureau (n 4).

⁶⁹ Lalwani (n 67).

⁷⁰ Agreement on Fisheries Subsidies (adopted 17 June 2022), WT/MIN (22)/33; WT/L/1144, art 4.3.

⁷¹ *ibid.*

⁷² Andreoli (n 29).

over-exploiting the fisheries resources, the fisheries agreement “indiscreetly allows such practices indefinitely”.⁷³

At the same time, the negotiations did not pay much attention to the developing countries’ concerns regarding “special and differential treatment” and the applicable controls for disciplines on fisheries subsidies. Target 14.6 of the SDG 14 that underlies the WTO fisheries agreement too recognises that “appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation”.⁷⁴ Since the initiation of negotiations, the developing countries have argued for “special and differential treatment of artisanal fisheries as a crucial issue for food security, development of local community and poverty reduction in the world”.⁷⁵ Small and vulnerable economies were concerned that “one size does not fit all” and that subsidies are necessary if the fisheries subsidies disciplines are to have any real and practical meaning for the developing small island and coastal states of the WTO.⁷⁶ In its communication, India recommended that developing and least developed countries should be exempted from prohibitions in respect of unregulated and unreported fishing and fishing-related activities at sea by vessels other than large-scale industrial fishing vessels.⁷⁷ Advanced nations, on the other hand, were concerned that “flexibilities provided to LDCs and to artisanal fisheries in other developing countries should not open a door to circumvention of the general prohibition of subsidies”.⁷⁸ For the United States and Japan, programmes and subsidies for artisanal fisheries in developing countries were never a focus and/or out of scope.⁷⁹ In the end, the differences over the definition and descriptive characteristics led to the exclusion of “artisanal” and “small scale” fisheries from the subsidies exception regardless of the “universal agreement about the importance of the food and livelihood security of artisanal

⁷³ FE Bureau (n 4).

⁷⁴ Transforming our World: The 2030 Agenda for Sustainable Development (adopted 21 October 2015) A/RES/70/1, Goal 14 (“Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development”).

⁷⁵ Principles and Elements for Concluding Negotiations on Fisheries Subsidies Rules in the WTO-Submission by Rwanda on behalf of the ACP Group (16 November 2016) TN/RL/Gen/182.

⁷⁶ Small, Vulnerable Economies (SVEs) - Statement on Key Aspects of Article III of the Fisheries Subsidies Annex - Communication from Barbados, Cuba, Dominican Republic, El Salvador, Fiji, Honduras, Mauritius, Papua New Guinea, St. Vincent & the Grenadines and Tonga Revision (24 April 2008) TN/RL/W/226/Rev.2.

⁷⁷ Article [X]: Special and Differential Treatment: Communication from India (6 March 2020) TN/RL/GEN/200/Rev.1.

⁷⁸ Communication from Argentina, Australia, Chile, Colombia, the United States, New Zealand, Norway, Iceland, Peru and Pakistan (7 October 2009) TN/RL/W/243 (There are few developing countries participating in this communication to keep up appearance).

⁷⁹ Possible Approaches to Improved Disciplines on Fisheries Subsidies Communication from The United States (19 March 2003) TN/RL/W/77; Questions from Japan Concerning Papers on the Fisheries Subsidies Issue (30 April 2003) TN/RL/W/84.

fishers in developing and least-developed countries”.⁸⁰ The final outcome resulted in partial success for developing countries as they now get a two-year (instead of five years as initially proposed) transitional period, exempting subsidies granted or maintained within their EEZ.⁸¹

It is evident how the advanced nations that are way ahead in high-sea fishing managed to get leeway for harmful subsidies in the name of rebuilding the fish stock. Yet, there is no exception for subsidies given by developing countries that are crucial for supporting the livelihood and welfare of millions of poor fisherfolks’ families. Superficial differences over definitions of “artisanal” and “small scale” fisheries led to their removal from the exception in the revised draft text.⁸² Despite the standard/correlated characteristics,⁸³ such as “family-based/fishing household” as opposed to commercial companies, with economic operations for subsistence or commercial but not industrial, fishing activities located close to shore and inland, using a small amount of capital and traditional methods, and done in relatively small boating vessels, superficial excuses as to the definition were made to exclude small scale fisheries from the exception.⁸⁴ Similarly, the draft provision in section 6, which would grant a transitional period for graduating LDC Members,⁸⁵ did not make it to the final text of AFS.

The blanket ban on all subsidies except the one the advanced nations can maintain reiterates the coloniality of power that protects the global hegemony by putting the resource-poor developing countries at par with the advanced nations. Thus, it legitimises the system of capitalistic relationships while institutionalising the disparity. Despite the claim of an equal vote for all the Members, the lack of fair rules and support mechanisms for countries with little to no power of negotiation and an inferior trade position and their dependence on their developed countries-trade partners, sustains the global coloniality of power in WTO.

B. COLONIALITY OF KNOWLEDGE

“The chains are not on our feet, but on our minds.”⁸⁶ Coloniality of knowledge refers to the impact of colonisation as well as control on the different areas

⁸⁰ Virtual Formal Trade Negotiations Committee Meeting at Ministerial Level on Fisheries Subsidies (16 July 2021) JOB/TNC/95.

⁸¹ See Agreement on Fisheries Subsidies (n 70), arts 3.8 & 4.4.

⁸² *ibid*, art 5.4 in the revised draft provided for special and differential treatment for subsidies for subsistence, artisanal and small-scale fisheries; Revised Draft Consolidated Chair Text-Chair’s Explanatory Note (8 November 2021) TN/RL/W/276/Rev.2/Add.1, para 104 (‘Revised Draft’).

⁸³ Emerging from International Organisations Like FAO, World Bank and Asian Development Bank.

⁸⁴ Definitions Related to Artisanal, Small-Scale and Subsistence Fishing: Note by the Secretariat (24 November 2005) TN/RL/W/197.

⁸⁵ Revised Draft (n 82) para 106.

⁸⁶ Walsh (n 12) 235.

of knowledge production.⁸⁷ Western expansion was not only economic and political but also educational and intellectual.⁸⁸ The doctrines and principles that emerged from European history and experience, and developed in Europe were extended in time to the non-European world.⁸⁹ Racialisation of places and people in the formation and transformation of coloniality of power established economic and political structures of domination based on the geopolitical and hierarchical organisation of knowledge. These institutions accomplished two functions: i) training new epistemically obedient members, and, ii) controlling who enters and what knowledge-making is allowed, disallowed, devalued or celebrated.⁹⁰ In the end, the epistemic location was no longer correlated to social or geographical location as subjects socially located in the sites of oppression, i.e. the colonised states, think epistemically like the colonisers.⁹¹ For/in establishing the supremacy and omniscience of European knowledge, science became more than a truth-finding practice. It became a meta-discourse that defines certain practices as science and disqualifies any other knowledge that does not fit within this meta-discourse.⁹² Thus, scientific thought production became the only valid way of producing knowledge and every other way of knowing and sensing/feeling that did not conform to the aesthetics of science was cast behind in time and/or in the order of myth, legend, folklore, local knowledge, and the like.⁹³

Negotiations on fisheries subsidies once again exhibited epistemic bias when the recommendation to include indigenous fisheries management institutions and measures aimed at ensuring a sustainable level⁹⁴ failed to form part of the final text of the AFS. There is a total absence of discussion on the role of indigenous knowledge in fisheries in the negotiation documents except for one joint communication proposing maintaining subsidies, as mentioned above. Instead, the submission on behalf of the African, Caribbean and Pacific ('ACP') group proposed the fisheries management system based on internationally recognised best practices for fisheries management and international instruments, such as the Fish Stock Agreement, the Code of Conduct, and the Compliance Agreement.⁹⁵

The importance of indigenous traditional knowledge for responsible fisheries is well documented. For example, the objective of achieving conservation

⁸⁷ Maldonado-Torres (n 11) 242.

⁸⁸ Mignolo (n 16) 63.

⁸⁹ Anghie (n 14) 740.

⁹⁰ Mignolo (n 5) 141.

⁹¹ Grosfoguel (n 3) 213.

⁹² Cardinal (n 17) 43.

⁹³ Walter D Mignolo, 'I am Where I Do: Remapping the Order of Knowing' in *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011) 80.

⁹⁴ Fisheries Subsidies: Special and Differential Treatment: Communication from Brazil, China, India and Mexico (11 February 2010) TN/RL/GEN/163.

⁹⁵ Fisheries Subsidies: Articles III and V: Communication from Kenya on behalf of the ACP Group (1 March 2011) TN/RL/GEN/176.

and sustainable use of fishery resources contained in the Code of Responsible Fisheries, adopted by the Food and Agriculture Organization of the United Nations in 1995, resonates with the customary values of indigenous people who protect biodiversity and manage their aquatic resources sustainably.⁹⁶ The Declaration on Science and the Use of Scientific Knowledge considered that:

*“Traditional and local knowledge systems, as dynamic expressions of perceiving and understanding the world, can make, and historically have made, a valuable contribution to science and technology, and that there is a need to preserve, protect, research and promote this cultural heritage and empirical knowledge.”*⁹⁷

Yet, the AFS failed to leave any policy or regulatory space for the Members to develop their own fisheries management resources through the application of their indigenous and traditional knowledge. Instead, the Agreement tasked the Committee on Fisheries Subsidies,⁹⁸ to maintain close contact with FAO and regional fisheries management organisations.⁹⁹

As Santos stated, modern knowledge and modern law are abyssal thinking that divides social reality into two realms where the other side of the line vanishes as reality and becomes non-existent. The knowledge forms that cannot be fitted into the Western way of knowing such as lay, plebian and indigenous or traditional knowledge are not real knowledge and as such, vanish as irrelevant or incommensurable knowledge. Consequently, whatever is produced as non-existent is automatically excluded.¹⁰⁰ Failure to acknowledge the role played by indigenous communities in sustainable and ecological fishing is a prime example of how abyssal thinking has substantiated the coloniality of knowledge where anything other than modern scientific knowledge simply vanishes. The epistemic injustice is thus inherent in the international institutions and WTO law.

C. COLONIALITY OF BEING

Coloniality of being, created by the interrelation of coloniality of power and coloniality of knowledge, refers to the lived experiences of self-denial of

⁹⁶ PS Swathilekshmi, ‘Relevance of Indigenous Technical Knowledge for Responsible Fisheries’ in C. Ramachandran, Aswathy.N, Vipin Kumar.V.P and Shyam. S. Salim (eds), *ICAR funded Winter School on ICT-oriented Strategic Extension for Responsible Fisheries Management* (ICAR 2013) 299, 300.

⁹⁷ UNESCO, ‘World Conference on Science for the Twenty-first Century: A New Commitment’ (Budapest, 1999) <<https://unesdoc.unesco.org/ark:/48223/pf0000122938>> accessed 18 October 2023.

⁹⁸ Agreement on Fisheries Subsidies (n 70) art 9.1 (Composed of representatives from each of the Members).

⁹⁹ Agreement on Fisheries Subsidies (n 70) art 9.5.

¹⁰⁰ Boaventura de Sousa Santos, ‘Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges’ (2007) 30(1) Review—Fernand Braudel Center for the Study of Economies, Historical Systems, and Civilizations 45.

the colonial subject.¹⁰¹ Following the colonisation of the imagination of the colonised through the imposition of the ruler's own patterns of expressions, beliefs and images, the cultural production of the dominated was not only impeded but it also served as an effective means of cultural control long after the immediate repression ceased.¹⁰² As Maldonado-Torres aptly summed, "as modern subjects we breathe coloniality all the time and every day".¹⁰³ Post-colonial modern developing countries are no different. Adhering to modern developmental theories, they adopted models of development and progress.¹⁰⁴ Development and welfare were used by the colonial administration to provide a moral basis for colonialism as well as an economic rationale for the cultural project of civilising the natives. Erasing the uncivilised, aberrant, and violent civilisations, the Eurocentric civilisation mission continued in the post-colonial world as "development". The former colonies, who were earlier the target of Christianisation and civilising missions, now became the target of development, modernisation, and the new marketplace as the project of the modern world system.¹⁰⁵ To be developed now meant to be modern and to reach the same level of material benefits and yield the same power as Europeans.¹⁰⁶

In addition to that, the ideology of development necessitates international cooperation through means of "capital", "modernisation", and "technology" from the industrialised Western world. This interlinking of development and cooperation ensures the dependency of the developing countries on their former colonial masters.¹⁰⁷ The request for international cooperation and technology transfer at the WTO is not new and was seen during the negotiations for AFS. Communications from the ACP countries and Cambodia on behalf of the Least Developed Countries specifically requested targeted technical assistance, capacity-building assistance, and support mechanisms from the developed country members.¹⁰⁸ Similar requests for support to develop their fishing capacity and to address institutional and financial constraints were made by Rwanda, on behalf of the ACP group and Benin on behalf of the LDC group.¹⁰⁹

¹⁰¹ Cardinal (n 17) 42.

¹⁰² Quijano (n 10) 169.

¹⁰³ Maldonado-Torres (n 11) 243.

¹⁰⁴ Anghie (n 14) 749.

¹⁰⁵ Mignolo (n 16) 84.

¹⁰⁶ Quijano (n 10) 169.

¹⁰⁷ Mohammed Bedjaoui, *Towards a New International Economic Order*, (Holmes & Meier Publishers 1979) 69.

¹⁰⁸ LCD Group Fisheries Subsidies Text Proposal: Submission by Cambodia on Behalf of the LDC Group (17 July 2017) TN/RL/GEN/193, 2.

¹⁰⁹ Principles and Elements for Concluding Negotiations on Fisheries Subsidies Rules in the WTO: Submission by Rwanda on Behalf of the ACP Group (16 November 2016) TN/RL/GEN/182; LDC Group Submission on Elements for WTO Fisheries Subsidies Disciplines Submission by Benin on Behalf of the LDC Group (22 December 2016) TN/RL/GEN/184.

Despite being home to indigenous fishing communities, their fisheries management recommendations did not include indigenous and traditional knowledge systems of sustainable fishing. There are over 370 million indigenous people living in over 90 countries, many of whom rely heavily on small-scale fisheries for their livelihood, food security and nutrition. Small-scale fisheries are important for their culture, heritage and way of life which are at risk because of the large-scale fishing by the industrial fleets and IUU. Industrial fishing further raises barriers to access, usage, and effective management of their fisheries resources by the indigenous communities.¹¹⁰ The traditional knowledge of indigenous people can not only help in maintaining and managing the fragile aquatic ecosystem, but also in achieving a responsible management of fisheries resources and sustainable fishing. The FAO Code of Conduct for Responsible Fisheries also encourages the States to “investigate and document traditional fisheries knowledge and technologies, in particular those applied to small-scale fisheries, in order to assess their application to sustainable fisheries conservation, management and development”.¹¹¹ Yet, only one joint communication from Brazil, China, India and Mexico recommended the inclusion of subsidies for indigenous fisheries management and measures.¹¹² Instead of demanding an exception for subsidies for their indigenous fisheries management and practices, most developing and least developed countries kept requesting technology transfer and support from the developed countries.

The integration and annexation of developing countries in the global capital system through trade and colonisation also comprised a “scientific” window. The scientific designs used in the developing world are not created by them but in the developed world, responding not to their needs but to the needs and visions of the Euro-Americans.¹¹³ Developing countries’ problems are not the same as those of the developed ones and therefore, to transplant both the problems and methods from the West is no less a colonial operation than transporting armies.¹¹⁴ The imitation of Western-style development/modernity has led to the impoverishment of their cultural values and the deterioration of their environment. Yet, the developing and least developed countries ignore their own indigenous heritage, exhibiting how coloniality of being has encapsulated the essence of “modern” nation-states.

¹¹⁰ Food and Agriculture Organisation, ‘Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication’, <<https://www.fao.org/voluntary-guidelines-small-scale-fisheries/guidelines/indigenous-peoples/en/>> accessed 19 October 2023.

¹¹¹ Food and Agricultural Organisation, Code of Conduct for Responsible Fisheries (adopted 31 October 1995) art 12.12.

¹¹² Fisheries Subsidies: Special and Differential Treatment: Communication from Brazil, China, India and Mexico (11 February 2010) TN/RL/GEN/163, 3.

¹¹³ Mignolo (n 5) 129.

¹¹⁴ *ibid.*

IV. INDIA'S RESISTANCE AT THE WTO- A STEP TOWARDS DECOLONIALITY?

Decolonisation is more than the political project of self-governance by the newly independent nation-states. Decoloniality is “the pursuit of a long overdue geopolitical reordering of benefits of a global order defined by interdependence forged in the colonial era”.¹¹⁵ It is more than tokenistic cultural diversity in international institutions or the willingness to include those considered least developed without the willingness to accord their voice or concerns the same consideration and respect given to the Western nations. As Catherine Walsh noted, decoloniality is not a static condition, an individual attribute, or a lineal point to reach as an end destination or achieve enlightenment. Instead, decoloniality opens up, makes visible and advances “radically distinct perspectives and positionalities that displace Western rationality as the only framework and possibility of existence, analysis, and thought”. Decolonial perspectives and positionalities evoke and convoke as relational ways of seeing the world, including the relation between privilege and oppression.¹¹⁶

Rooted within the matrix of coloniality, decoloniality necessarily evokes coloniality.¹¹⁷ As Foucault famously said, “Where there is power, there is resistance”.¹¹⁸ Decoloniality, therefore, is resistance against the persistence of domination and imperialism which still tries to maintain the old economic order. Building on the work of Cardinal, this section discusses resistance as the driving force to challenge the matrix of coloniality at the WTO.

A. RESISTING THE DOMINATION

In the global coloniality of power, decoloniality is the resistance that is the anomaly of the other.¹¹⁹ More than a passive underside to domination that is doomed forever to remain in a subaltern position, resistance is an active force of agency, an imminent subjectivity. As an irreducible opposite, decolonisation is resistance when appropriately codified and given effect by an Other that refuses to submit to the form or method of the global State. Decoloniality is resistance that

¹¹⁵ E Tendayi Achiume, ‘Reimagining International Law for Global Migration: Migration as Decolonization?’ (2017) 111 *American Journal of International Law* 145.

¹¹⁶ Catherine E Walsh, ‘The Decolonial For: Resurgences, Shifts, and Movements’ in Walter D Mignolo and Catherine E Walsh (eds) *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press 2018) 17.

¹¹⁷ *ibid* 23.

¹¹⁸ Michael Foucault, *The History of Sexuality* (Pantheon Books 1978) 95.

¹¹⁹ Cardinal (n 17) (Cardinal called this resistance as an anomaly as this structure of coloniality cannot exist if the resistance of the other is to succeed but at the same time, it is the reason why resistance exists).

cannot be subsumed under methodological institutionalism and thus makes the upsetting of the institutional arrangement of power relations possible.¹²⁰

Decoloniality, thus, is a move towards gradually setting up a global trade regime where the developing or least developed countries refuse to remain submissive. Coloniality of power was once again at play in the MC12 where the draft fisheries agreement was tabled with the expectation that the developing countries of the Third World would accept it even though their concerns were not heeded. However, this time, the initial draft agreement was rejected by India. Although the green room politics has changed with the evolving role of developing countries in the world trading system, its capacity to accommodate their specific interest has not increased.¹²¹ In this wake, India's resistance at the WTO ministerial conference can be seen as a step towards decoloniality. India, a former colony and home to over 9 million fisherfolks families, not only resisted the pressure to accept the draft fisheries agreement as presented but also criticised the tabled draft for not endorsing the "polluter pays" principle when the industrial high-seas fishing is sustained through subsidies by a few advanced nations. Demanding "special and differential" treatment for developing and least developed countries to protect and promote their domestic fisheries industry, India's stance reflected the developing countries' unwillingness to accept the asymmetric bargaining model. Although a consensus in the end resulted in the adoption of the AFS, only 29 members have accepted it as of December 2023.¹²² India has so far resisted the ratification of the AFS amidst pressure from the WTO secretariat and developed country members.¹²³ Instead, India circulated a proposal during the fifth "Fish Week" of negotiations for a blueprint of issues to be decided at the WTO's 13th ministerial conference (MC13) in Abu Dhabi in February 2024. India called for some fundamental changes in addressing the subsidies provided by advanced nations allegedly responsible for the global depletion of fish stocks. It proposed the inclusion of non-specific fuel subsidies as harmful subsidies as well as treating government-to-government payments under fisheries access agreements as subsidies.¹²⁴ The resistance that led to the failure of the Seattle Ministerial in 1999, the Cancún Ministerial meeting in 1993 and the gridlock since then has shaken the hegemonic political structure of GATT/WTO decision-making dominated by the US and the EU since the inception of GATT in 1947.

¹²⁰ *ibid* 45.

¹²¹ Jones (n 42) 95.

¹²² World Trade Organisation, 'Members submitting acceptance of Agreement on Fisheries Subsidies' <https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm> accessed 18 October 2023.

¹²³ Anisa, '43 signatories have called on the Indian Government to not formally accept the June 2022 WTO Agreement on Fisheries Subsidies' (Focus on the Global South, 19 July 2023) <<https://focusweb.org/281689-2/>> accessed 18 October 2023.

¹²⁴ D Ravi Kanth, 'WTO: Fisheries chair needs to discuss Indian proposal along with his draft text' (*Third World Network*, 11 October 2023) <<https://www.twn.my/title2/wto.info/2023/t1231012.htm>> accessed 18 October 2023.

However, this resistance is but a first and, in fact, a baby step towards decolonising the structural hierarchy at the WTO. Resistance against epistemic domination and resistance to being a decolonial State are equally if not more important to dismantle the global coloniality matrix. Unfortunately, India stopped short of both. Building on the current discourse on decoloniality, the next two sections aim to provide a short blueprint of what resistance to achieve epistemic justice and decoloniality of being looks like and invite further deliberation and discussion in this direction.

B. RESISTANCE AGAINST EPISTEMIC DOMINATION

Time and history have allowed global designs to emerge as responses to the needs of a given place to be assumed to have universal value across time and space.¹²⁵ A decolonial epistemic perspective requires a broader canon of thoughts than simply the Western one.¹²⁶ Decolonising knowledge is not about rejecting Western epistemic contributions to the world but stripping it out of the pretence that is the only valid form of knowledge. The modern/colonial epistemic style of thinking hides coloniality and prevents the pluriversal, dialogical and epistemically democratic systems of thought from progressing.¹²⁷ The existence of European frames is not a problem in itself but rather the ways they have historically subordinated “other” frames, “other” knowledge and “other” subjects and thinkers.¹²⁸ The epistemic horizon opens beyond Bacon’s authoritarian assertion that “there can be no others”.¹²⁹ Decolonisation of knowledge would require taking seriously the epistemic perspectives, cosmologies and insights of critical thinkers from developing countries thinking from and within subaltern spaces.¹³⁰

Decoloniality of knowledge raises questions about the kind of knowledge needed and what for. It calls for changing the terms of conversation through epistemic disobedience and delinking from disciplinary controversies and conflict of interpretation.¹³¹ For the decoloniality of knowledge, there ought to be a relocation of the thinking and critical awareness of the geopolitics of knowledge.¹³² Shifting the geopolitics of critical knowledge would lead to the building of decolonial thoughts and spaces for its positioning and constructions.¹³³ Decolonising

¹²⁵ Mignolo (n 16) 69.

¹²⁶ Grosfoguel (n 3) 212.

¹²⁷ Mignolo (n 93) 82.

¹²⁸ Walsh (n 12) 224.

¹²⁹ Mignolo (n 16) 85 quoting Francis Bacon, an early seventeenth-century philosopher, who claimed, “Wherefore from these three fountains, Memory, Imagination and Reason, flow these three emanations, History, Poesy and Philosophy, and there can be no others”. Francis Bacon, *Novum Organum* (Ellis Spedding & DD Heath (eds), Lawrence Chapman 1875), 292–93.

¹³⁰ Grosfoguel (n 3) 212.

¹³¹ Mignolo (n 5) 122.

¹³² Mignolo (n 16) 67.

¹³³ Walsh (n 12) 224.

knowledge thus requires an understanding of what the coloniser has inculcated, a relearning of past and present ancestral knowledge as well as a focus on social, political, and epistemic work to be done from within.¹³⁴ It asks for shifting the geography of reasoning and subsuming tools into indigenous cosmology and ideology.¹³⁵ For the decoloniality of knowledge, not only the sites of knowledge-making are important, but knowledge production is for well-being rather than for controlling and managing. Therefore, it shall come from local experiences and needs rather than from imperial experiences and needs projected on the globe.¹³⁶

Traditional and indigenous knowledge in fisheries science and management has been the focus of researchers worldwide for some time. For example, the UNESCO Coastal Management Sourcebook¹³⁷ compiles indigenous fisheries practices from around the globe. At the domestic level, researchers in various coastal countries like India, Indonesia, Solomon Islands, and Kenya (to name a few) have long been documenting local wisdom generated through holistic traditional utilisation of marine resources. These studies are increasingly demonstrating the usefulness of local ecological knowledge for successful fisheries management and marine conservation planning.¹³⁸ Yet, the historical epistemic bias tries to fit the indigenous knowledge within the framework of modern science, resulting in misleading and misrepresentative results taken out of cultural and historical context.¹³⁹ To this end, India has not fared any better. Despite a number of studies on traditional and indigenous fisheries practices, the National Fisheries Policy 2020 fails to take cognisance of indigenous knowledge in fisheries management and instead focuses only on modern technology including artificial intelligence.¹⁴⁰

Although scholars in the Global South have started to call for justice against epistemicide voicing for epistemologies of the South,¹⁴¹ the road to restoring indigenous and traditional knowledge systems in the global arena needs epistemic delinking and disobedience in every discipline to the point of no return that Mignolo calls for. This paper aims to contribute to this growing global

¹³⁴ *ibid* 231.

¹³⁵ Mignolo (n 5) 135.

¹³⁶ *ibid* 143.

¹³⁷ Nigel Haggan, Barbara Neis and Ian G Baird (ed.) *Fishers' Knowledge in Fisheries Science and Management* (UNESCO 2007).

¹³⁸ Divya Karnad, 'Incorporating local ecological knowledge aids participatory mapping for marine conservation and customary fishing management' (2022) 135 *Marine Policy* 104841.

¹³⁹ Richard Hamilton and Richard Walter, 'Indigenous ecological knowledge and its role in fisheries research design: A case study from Roviana Lagoon, Western Province, Solomon Islands' (1999) 11 *SPC Traditional Marine Resource Management and Knowledge Information Bulletin*, 13.

¹⁴⁰ National Fisheries Policy 2020 (September 2020) <<https://faolex.fao.org/docs/pdf/ind201321.pdf>> accessed 18 October 2023.

¹⁴¹ See Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge 2016); Masaharu Mizumoto, Stephen Stich and Eric McCready (ed) *Epistemology for the Rest of the World* (OUP 2018); Raewyn Connell, *Southern Theory: The global dynamics of knowledge in social science* (Polity Press 2007) presenting scholars from the Global South.

decolonial process. However, the road to being a decolonial being/State is neither short nor straight as it requires one foot in the past and the other in future as the next section demonstrates.

C. RESISTANCE OF A DECOLONIAL BEING

Resistance as decoloniality calls for a new form of social existence. Decoloniality here is viewed as a point of departure and the democratic self-production and reproduction of social existence as a continuous orientational axis of social practices.¹⁴² The WTO has so far failed to achieve its objectives of sustainable development as well as protection and preservation of the environment. Modernity/coloniality-led development in poor countries has in fact led to the “modernisation of poverty” or “planned poverty” by cutting its people from their culture and environment.¹⁴³ Separation of “reason” from “nature” is one of the foundational elements of Euro-American coloniality/modernity. Consequently, the exploitation of nature does not require any further justification.¹⁴⁴ Since the Industrial Revolution, Western modernity has imposed its exploitative hegemony on all other species, fisheries being no different. Conquering nature on the high seas and over-exploitation of fishes to the extent that it is becoming untenable is but a follow-up of the modern development model. Decoloniality discourse, on the other hand, maintains that regeneration of life shall prevail over the primacy of recycling the production and reproduction of goods.¹⁴⁵

Decolonisation of mind takes place not only in facing the experience of colonialism but also in recognising the pre-colonial.¹⁴⁶ Decoloniality is not about going back in time and/or dreaming of a world forever gone. Instead, it is Wiredu’s call, *African, know thyself*,¹⁴⁷ a call not just for Africans but all indigenous people. Once the former colonised know themselves, there is a good chance that they will understand what is good or bad for them and regain the capacity to design their own scientific reviews rather than depending on expertise from the West.¹⁴⁸ Therefore, it is a call for the co-existence of diverse ways of producing and transmitting knowledge. Unfortunately, India’s resistance went only as far as recommending subsidies for indigenous fisheries management institutions and measures during AFS negotiations. But at the domestic level, the National Fisheries Policy 2020 failed to incorporate indigenous knowledge in fisheries.

¹⁴² Sebastián Garbe & Anibal Quijano, “Bien Vivir” – Between “Development” and the De/Coloniality of Power’ (2016) 3(1) *Alternautas* 19.

¹⁴³ Bedjaoui (n 108) 70.

¹⁴⁴ Garbe & Quijano (n 143) 18.

¹⁴⁵ Mignolo (n 5) 121.

¹⁴⁶ Mignolo (n 16) 72.

¹⁴⁷ Kwasi Wiredu, ‘Formulating Modern Thought in African Languages: Some Theoretical Considerations’ in V. Y. Mudimbe (ed) *The Surreptitious Speech: Presence Africaine and the Politics of Otherness 1947-1987* (University of Chicago 1992) quoted in Mignolo (n 5) 131.

¹⁴⁸ Mignolo (n 5) 138.

With the aim to modernise and rationalise (infusing science and technology), the model of development it follows is industrial and extractive. For example, India provides nearly 80% of fisheries subsidies to industrial sector fishing as opposed to just above 20% that goes to the small sector.¹⁴⁹ Prioritising industry profit over food and nutritional security, through a disproportionate allocation of subsidies between the two sectors, exacerbates inequities and poverty in small-scale fishing communities by further jeopardising their income.¹⁵⁰

The social reality of development is more than material well-being. True development is embedded within human dignity which is meaningless without a culture that is at once both the custodian and the critic, the repository and the originator.¹⁵¹ Thus, development as a comprehensive process must be “a cultural process which transmits values and includes not only production, distribution and consumption but also social relationships, education, the well-being and the natural environment of man.” With survival itself at stake, decolonisation thus is the understanding that there is no single uniform way to development and that development must be a product and reflection of each society’s own specific genius.¹⁵² India, with a long and violent history of colonisation, must revisit its goal of development as economic and material progress alone. It must dive deep into its thousand years old civilisational history, make use of its indigenous knowledge traditions, learn from past mistakes, and embed modern development within it. True development can only be achieved if indigenous people can continue their role as the custodians of the vast majority of legal, linguistic, cultural, and biological diversity. Only a decolonial state rooted within its indigenous knowledge traditions and values can demand an equal place at the table of the global trade order.

V. CONCLUSION

Trade liberalisation has failed to deliver, be it sustainable development, protection and preservation of the environment or being cognisant of respective needs and concerns at different levels of economic development. Over the years, not only the gap between the rich and the poor but also the disparities between the rich and the poor nations have grown wider than ever.¹⁵³ This should not be surprising if one looks closely at the single package outcome of the Uruguay round negotiations that represents a politically driven compromise among members that is more about managing trade rather than liberalising it. Political pressure from the influential nations shaped the single package to include protectionist measures

¹⁴⁹ Andreoli (n 29) 6.

¹⁵⁰ *ibid* Fig. 2.

¹⁵¹ Bedjaoui (n 108) 73 (quoting the Director General of UNESCO).

¹⁵² *ibid* 74.

¹⁵³ Joost Pauwelyn, ‘The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO’ (2005) 8(2) *Journal of International Economic Law* 332.

that suited them, such as safeguards and antidumping, and agreements that protected their monopoly, such as TRIPS. Whereas developing countries undertook commitments in “new areas” with high implementation costs, like intellectual property rights and services, the areas of their advantage were either carved out (e.g. textile and agriculture) or the so-called fair trade remedies (e.g. anti-dumping and safeguards) were ushered in.¹⁵⁴ Despite making two-thirds of the WTO membership, the developing countries’ concerns such as Special and Differential Treatment, did not seem to get much attention.¹⁵⁵ No wonder then that the developing countries soon became disenchanted with the so-called benefits of free trade and WTO’s single package and started to demand more attention to their developmental needs.¹⁵⁶ After the failure of the 1999 Seattle Ministerial meeting, Members in 2001 finally agreed to launch a new round of negotiations at the 4th Ministerial meeting at Doha. Although ministers seem to place development at the heart of the negotiations (thus calling it the Doha Development Agenda), placing emphasis on developing countries’ interests and addressing public concerns, the very fact that the Doha round is still ongoing substantiates the foundational problems within the WTO system.

Experts have agreed that institutional reforms in the WTO will require a paradigm shift both in the mechanics and substantive rules of the institution.¹⁵⁷ This paper goes a step further by epistemically delinking reforms from the normative categorisation of trade law and framing the debate within the modernity/coloniality framework. Instead of a piecemeal approach towards institutional reforms at the WTO that reflect the many different objectives and perspectives of the interest groups forwarding the proposals, this paper recommends a holistic approach that embeds international trade rules within epistemic pluralism and decoloniality. Examining the political pressures by the rich and influential members that continue to shape the WTO agreements, this paper used negotiations leading to the AFS to illustrate how the matrix of coloniality still persists at the WTO. Once again, the rich States managed to carve out exceptions for their subsidies in the name of rebuilding the fish stock while imposing a blanket ban on subsidies that support the poor fisherfolks in developing countries. Once again, the areas where developing countries could have an advantage, such as indigenous fisheries management, were ignored. But developing countries too will need to accept the blame here for undermining their own indigenous knowledge in favour of the meta-narrative of modern scientific and technical knowledge.

The discussion in this paper conceptualised India’s resistance against the persistent domination of the developed countries as a step towards *de facto* decoloniality. Some scholars reduced developing countries’ concerns as their

¹⁵⁴ *ibid* 331.

¹⁵⁵ Bronckers (n 6) 230.

¹⁵⁶ *ibid* 235.

¹⁵⁷ Pauwelyn (n 154) 333.

unwillingness to discuss new and emerging issues and abuse of the consensus decision-making to reduce the effectiveness of the WTO as a forum of cooperation.¹⁵⁸ However, the effective functioning of the WTO could not and should not come at the cost of developing countries' interests. Albeit, resistance against the domination is but one small step towards dismantling the imperialist set-up and in itself insufficient to achieve a structural change. The most important step in this direction is the decoloniality of knowledge, i.e. moving towards recognising, reviving and revisiting indigenous knowledge and epistemic pluralism. That will lead to the post-colonial Members becoming decolonial beings with a firm grounding within their culture and an understanding that development is more than just material well-being. Moving away from a resource-extensive Western model of development will in turn reduce their dependency on their former colonial masters, enabling them to negotiate on equal terms instead of pleading for technical assistance and aid. Members need to acknowledge that the world is not a global village but a series of non-homogenous pockets of identity with conflicting interests emerging from and representing different historical arrangements of emotional energy.¹⁵⁹ If WTO members are sincere about the principal objectives of sustainable development and environmental protection and promotion, dismantling the matrix of coloniality and transforming WTO is the only way forward.

¹⁵⁸ Bernard Hoekman & Petros C Mavroidis, 'WTO Reform: Back to the Past to Build for the Future' (2021) 12(3) *Global Policy* 6.

¹⁵⁹ Mignolo (n 16) 69.