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LDC graduation of Bangladesh and WTO dispute resolution**

Mohammed Forrukh Rahman*

The World Trade Organization operates under set rules which are framed under different agreements signed by its member countries. The rules are enforced by a Dispute Settlement mechanism as well as a review panel and other supporting bodies.

Several principles, for example, non- discrimination (MFN, National treatment), fair competition, reciprocity, transparency, economic development, predictability etc. tries to ensure fairness imbedded in different agreements which sets the rules of International Trade.

Dispute Settlement Understanding (DSU) provides the procedure of consultation followed by review by a Panel and finally by the Appellate Body formed by the Dispute Settlement Body.

Historically most of the complaints were filed by developed countries. However, in recent years the number of complaints filed by the developing countries are significantly higher compared to the developed countries. The complaints are filed against developed or another developing country, where a third-party observer often joined in the proceedings. Disputes are normally arising from alleged violation of one or more agreements of WTO.

However, there is not a single complaint filed against LDC and no LDC have been made a respondent in any such complaint so far. The reason is obvious. The LDCs are receiving Special and Differential treatment by developed countries. Many of their obligations under the WTO agreements are either waived by allowing a long transitional period or legally, they have been receiving non- reciprocal treatment of quota free market access. LDCs are not competing with anyone.

However, after graduation from its LDC status to a developing country in 2026, Bangladesh will be exposed to several risks due to non- availability of many protections which are available to LDC. For example, there is a risk that different subsidies and dumping duties imposed may be subjected to challenge under SCM and AD Agreements. And customs duties and supplementary duties may also be challenged for not following the safeguard principle under GATT. Mexico filed a complaint against China [WT/DS 451] under SCM and AOA for tax exemption, reduction of import duty, VAT etc. alleging the same as actionable subsidies as the same is provided to the suppliers of cotton and fiber.

On the other hand, Intellectual Property (IP) Legislation and the enforcement of IP rights may be subjected to challenge as transitional period up to 2033 available for LDCs will not be available after graduation. Failure to keep policy on securing IP enforcement as per TRIPS was challenged by the European Union against China in WT/DS 611.

Similarly, India challenged the actions of European Union in WT/DS 408 involving restricting transit of generic drug as the policy of Netherland contradicts GATT, TRIPS etc.

Bangladesh will fall under more competitive EU Preference Scheme after graduation. To avoid possible unilateral withdrawal of such scheme and prolonging the impact of graduation, a separate FTA may be required to be signed with the EU. FTAs are also required to be signed with countries who have not developed any such preferential scheme. It is possible that countries who will be parties to the FTA or RTA may need to apply for waiver from applicability of certain provisions of WTO Agreements. Such waiver must follow the rules and its underlying principles. This is a complex exercise and the same is also not free from the risk of being challenged by other competing graduating countries, who are not party to such agreement.

As Bangladesh must now gradually align with other developing countries on its participation and commitment, as a WTO member, by reviewing and/or strengthening its institutional ability, IP related legislations and a by withdrawing actionable subsidies, anti- dumping duties, safeguarding policy etc. Similarly, it is also required to gradually upgrade its tariff commitment under schedule of concession.

Generally, most LDCs who are graduating lack's relevant capabilities and expert professionals, as WTO laws and jurisprudence constantly growing and are complex. On the other hand, government officials are generally remains busy with their regular duties involving WTO. It is difficult for them to deal with disputes.

It is welcoming that Government of Bangladesh updated its Patent laws, formed several committees with different official and published a policy allowing use of external professionals. It is expected that the government officials working under different committees and professionals will be able to deal with the challenges of graduation and be able to minimize and/or deal with any potential disputes in future after graduation.

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Reasonable opportunity of being heard **

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'Access to justice' has always remained an integral part of any functioning civil society governed by the rule of law, which can only be ensured by providing the right to a fair trial for its citizens, presided over by an independent and unbiased judiciary constituted under the prevailing laws of any given jurisdiction.

At the very onset, the principle of providing parties 'reasonable opportunity of being heard' is derived from one of the fundamental principles of the rule of 'natural justice' which entails two significant maxims (in Latin) namely; '*audi alterem partem*' (the Right to be Heard) & '*nemo index in causua sua*' (the Rule against Bias). These principles of natural justice, although remaining un-indoctrinated by any statutory legislation, still serves as a check and balance in cases of arbitrary exercises of State and Administrative powers against the citizens of a country.

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Bangladesh, being a common law based jurisdiction, certain fundamental and inalienable rights such as to enjoy the 'protection of the law' and 'trial by an independent and impartial Court or tribunal' is also guaranteed under its great Constitution in Article 31 and 35(3) respectively.

In a brief comparative analysis with other common law countries, for example Malaysia, the term 'reasonable opportunity of being heard', unlike its Bangladeshi counterpart, is expressly mentioned under Article 135(2) of its Federal Constitution wherein such a right is 'bestowed to public servants facing disciplinary proceedings'. And while there have been differences (inconsistencies) in its judicial interpretation (in the Malaysian jurisdiction) of whether such a term exclusively includes the right to be heard orally or via written representation following proper procedure and decorum, however there appears to be no precedent to attest its circumvention of the same (except otherwise by statutory intervention) in terms of the proper adjudication and/or disposal of any given matter under law.

Aside from the Constitutional law, the term 'reasonable opportunity of being heard' is frequently referred to in several significant legislations in Bangladesh, for example Customs Act of 1969 (in case of imposition on penalty, confiscation of goods, cancellation of bonded warehousing licenses etc.), Income Tax Ordinance 1984 (in case of imposition of penalty, failure to make deduction, exemption for newly established industrial undertakings, physical infrastructure facility, etc.), or even in Money Laundering Prevention Act 2012 (in case of return or frozen and/or attached property) etc.

The Hon'ble Supreme Courts of the High Court Division, of Bangladesh have several Judgments upholding the principles of natural justice citing reliance on old English case laws dating as far back as 1885 such as Spackman V. Plumstead Board of Works (1885) 10 AC 229 bearing instructions to provide "…parties an opportunity of being heard before him and stating their case and their view". Over the years, throughout the course of judicial precedents set, the principles and natural justice has been refined and polished to even include issues of a
"…second notice to show cause under the Government Servant (Discipline and Appeal) Rules, 1976"
which was ultimately settled in favor of the Petitioner. [*Fazlul Huq Chowdhury V. Govt. of Bangladesh 30 DLR(1978) 144*]. However, differences in precedent may be sought in [Md. Torab Ali V. Bangladesh Textile Mills Corporation 41 DLR (1989) 138] wherein "…it is said that a second opportunity to show-cause cannot be claimed as a matter of right unless the relevant service regulation provides such an opportunity". In a most dexterous of efforts to culminate the principles of natural justice, the Hon'ble Courts held in [*Kazi Farooque Ahmed Vs. Respondent: National University and Ors 2005(13)BLT(HCD)181*] that "…reasonable opportunity for being heard in person has to be afforded to the person about whom a decision is going to be taken which may adversely affect his interest. This opportunity is only reasonable and not absolute. Nobody would expect that the concerned authority would hunt down the delinquent employee in order to give him a personal hearing…". India, being another remnant of colonial empire, its judicial precedents clearly iterates that "…opportunity of being heard should be real, reasonable and effective. The same should not be for name sake. It should not be a paper opportunity." [*CIT v. Panna Devi Saraogi [1970] 78 ITR 728 (Cal.)*]. Furthermore, that a time period of one single day to furnish a reply by the Assesse would, instead of being considered a reasonable opportunity would rather constitute a 'denial of opportunity'. [*Smt. Ritu Devi v. CIT [2004] 141 Taxman 559 (Mad.)*]. Such "denial of opportunity" may violate the principles of natural justice thereby rendering an order void. Even limitation of time cannot stand in the way of not giving adequate opportunity. The principle is inviolable. [*E. Vittal v. Appropriate Authority [1996] 221 ITR 760 (AP)*].

The principles of natural justice are ingrained in the legal systems of all civilized societies. It has been evolved over time, by the judiciary to safeguard the fundamental rights of citizen and enshrine the concept of fairness by the administrative authorities despite never being engraved in any legislative stone, in line with the quote *"The universal and absolute law is that natural justice which cannot be written down, but which appeals to the hearts of all"*.

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