

**INTERNATIONAL TRADE LAW IN DEVELOPING
COUNTRIES: AN ANALYTICAL STUDY OF THE
DISTRIBUTIVE JUSTICE SYSTEM OF THE WORLD TRADE
ORGANIZATION**

Thesis Submitted For the Award of the Degree of

DOCTOR OF PHILOSOPHY

in

Law

By

Sheikh Inam Ul Mansoor
Registration Number: 41900401

Supervised By

Dr. MEENU CHOPRA
Associate Professor and Deputy Dean
School of Law
Lovely Professional University



**LOVELY PROFESSIONAL UNIVERSITY
PUNJAB
2022**

Declaration

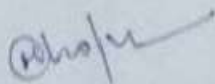
I, hereby declared that the presented work in the thesis entitled “**International Trade Law in Developing Countries: An Analytical Study of The Distributive Justice System of the World Trade Organization**” in fulfillment of degree of **Doctor of Philosophy (Ph.D.)** is outcome of research work carried out by me under the supervision of **Dr. MEENU CHOPRA**, working as **Associate Professor and Deputy Dean**, in the *School of Law* of **Lovely Professional University**, Punjab, India. In keeping with general practice of reporting scientific observations, due acknowledgements have been made whenever work described here has been based on findings of other investigator. This work has not been submitted in part or full to any other University or Institute for the award of any degree.



Name of the scholar: **Sheikh Inam Ul Mansoor**
Registration No.: **41900401**
Department/school: *School of Law*
Lovely Professional University,
Punjab, India

Certificate

This is to certify that the work reported in the Ph.D. thesis entitled "*International Trade Law in Developing Countries: An Analytical Study of The Distributive Justice System of the World Trade Organization*" submitted in fulfillment of the requirement for the reward of degree of **Doctor of Philosophy (Ph.D.)** in the *School of Law*, is a research work carried out by **Sheikh Inam Ul Mansoor, 41900401**, is bonafide record of his/her original work carried out under my supervision and that no part of thesis has been submitted for any other degree, diploma or equivalent course.



(Signature of Supervisor)

Name of supervisor: **Dr. MEENU CHOPRA**
Designation: *Associate Professor and Deputy Dean*
Department/school: *School of Law*
University: *Lovely Professional University*

Acknowledgement

First of all, I am grateful to the almighty Allah for the good health and wellbeing that were necessary to complete this research.

This research is the culmination of my journey of PhD which was just like climbing a high peak step by step accompanied with encouragement, hardship, trust, and frustration. When I found myself at top experiencing the feeling of fulfillment, I realized though only my name appears on the cover of this thesis, a great many people including my family members, well wishers, my friends, colleagues and various institutions have contributed to accomplish this huge task.

At this moment of accomplishment, I am greatly indebted to my research guide Hon'ble **Dr. Meenu Chopra, Associate professor and Deputy Dean, School of Law, Lovely professional University**, who accepted me as her PhD Scholar and offered me her mentorship. This work would not have been possible without her guidance and involvement, her support and encouragement on daily basis from the start of the research till date. Under her guidance I successfully overcame many difficulties and learnt a lot. Her own zeal for perfection, passion, unflinching courage and conviction has always inspired me to do more. Her intellectual thrust and blessings motivated me to work rigorously on this topic. In fact I would like to put on record that it is her unflinching faith and unconditional support that has provided the necessary substance to bring the work in its present shape. In fact this study could not have seen the light of the day if her contribution had not been available. For all these, I sincerely thank her from bottom of my heart and will be truly indebted to her throughout my life.

My sincere gratitude also is due to the entire staff (teaching and non-teaching) members of School of Law, Lovely Professional University for their constructive comments and suggestions on my research work. I am also thankful to the librarians and the staff of various libraries, particularly Library of Lovely Professional University for their assistance rendered to locate the material for my present research work.

I would like to thank my beloved paternal uncle **Sheikh Javid Ahmad** and my maternal uncle **Noor Mohammad Bhat**, whose love and guidance are with me in whatever I pursue. They are the ultimate role models for me.

It is my fortune to gratefully acknowledge the support of my friends, **Mohammad Hanief Dar** (A.E Govt. of J&K), **Irfan Ahmad Malik**, **Dr. Sheikh Iqbal**, **Mir Sajad Ahmad**, **Dr. Govind Yadav**, **Dr. Samrat Dutta**, they were always beside me during the happy and hard moments to push me and motivate me and who shared valuable insights in the relevance of the study despite of the distance and for their readiness to accommodate my frequent inclinations to turn conversations to discussions of the WTO.

I am very much and sincerely grateful to the support of my beloved parents, **Muma** and **Uffa**, for showing faith in me and giving me liberty to choose what I desired. I salute you for the selfless love, care, pain and sacrifice you did to shape my life. Although you hardly understood what I researched on, you were willing to support any decision I made. I would never be able to pay back the love and affection showered upon by my parents. Who provided me unfailing moral and emotional support in my life and continuous encouragement throughout my years of study and throughout the process of researching and writing the thesis .This accomplishment would not have been possible without them.

I sincerely want to show and offer my regards ,gratitude and blessings to my beloved brother **Sheikh Muntazir Mansoor**, my beloved sisters **Sheikh Iram Ul Mansoor**, **Sheikh Zait Ul Mutaqeen Mansoor** and **Sheikh Qurat Ul Ain Mansoor** , my beloved niece **Mahira Mushtaq** and my beloved nephew **Zain Ul Aabidin Mushtaq** ,who always acted like my mirror ,shining back at me with a world of possibilities .Thank you for being my witness ,my defense, my agents ,for being there in my worst and best. Thank You for your love and affection.

I am also indebted to and would like to thank **Gulam Mohammad Bhat (Touth)**, my beloved paternal grandfather **Sheikh Mohammad Maqbool**, beloved paternal grandmother **Hajira**, beloved paternal uncles (**Sheikh Jawhar Maqbool**, **Sheikh Bilal Ahmad**, my foofi **Afroza** and their families), my beloved maternal grandfather **Mohammad Sultan Bhat**, my beloved maternal grandmother **Mugli Begum**, my beloved maternal uncles (**Mohammad Farooq Bhat**, **Bilal Ahmad Bhat**, **Manzoor Ahmad Bhat**, my dearest Maasi **Shahzada** and their families) for their blessings, support, encouragement and for their struggle for my families survival and for being there with my parents during the toughest times in early 90's.

My blessing goes to all my cousins, May almighty Allah shower on you the choicest of his blessings. May you achieve highest success in both the worlds.

With deep sorrow, I would like to mention about my little sister **Late Sheikh Musabah Jawhar**. Dear sister your untimely death has shaken us and whole family is broken. May almighty Allah elevate you to Highest Janah. You will always be remembered.

In the end, I would like to thank my beloved better half **Maryam Rashid** for understanding the situation and ignoring the moments of my frustration due to this research, despite the fact I couldn't give much time to her during this period.



SHEIKH INAM UL MANSOOR
Reg. No. 41900401
Lovely professional University

Abbreviations

GATT	General Agreement on Tariffs and Trade
WTO	World Trade Organization
LDC	Least Developed Country
ITO	International Trade Organization
UNCTE	United Nation Conference on Trade and Employment
ECOSOC	Economic and Social Council
UNCTAD	UN Conference on Trade and Development
UN	United Nations
IMF	International Monetary Fund
WB	World Bank
EEC	<i>European Economic Community</i>
TDC	Trade and Development Committee'
TPRM	Trade Policy Review Mechanism
TRIPS	Trade-Related Aspects of Intellectual Property Rights
MTA	Multilateral Trade Agreements
GATS	General Agreement on Trade in Services
PTA	Plurilateral Trade Agreements
MFA	Multi-Fibre Arrangement
TPRM	Trade Policy Review Mechanism
WHO	World Health Organisation
WOAH	World Organisation for Animal Health
WIPO	World Intellectual Property Organisation
WAO	Food and Agriculture Organisation
ILO	International Labour Organisation
IPPC	International Plant Protection Convention
ITU	International Telecommunication Union
ITC	International Trade Centre
OECD	Organisation for Economic Cooperation and Development
UNEP	United Nations Environment Program
WCO	World Customs Organisation
DSP	Dispute Settlement Process
DSM	Dispute Settlement Mechanism
IDA	International Development Association
GATS	General Agreements on Trade in Services
IP	intellectual property
IPR	intellectual property rights
ICSID	International Center for Settlement of Investment Disputes
ITL	International Treaty Law
NGO	Non Governmental Organization
AB	Appellate Body
SDT	Special and Differentiated Treatment
GPS	Generalized Preferences System
DSU	Dispute Settlement Understanding
CL	compulsory licencing

CESCR	Committee on Economic, Socioeconomic, and Cultural Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
USTR	United States Trade Representative
BIT	bilateral investment treaty
PCIJ	Permanent Court of International Justice
FDI	Foreign direct investment
PCA	Permanent Court of Arbitration
BBS	Bangladesh Bureau of Statistics
ICT	Information and communication technology
TRM	Transitional Review Mechanism

Table of Content

DECLARATION	1
CERTIFICATE	2
ACKNOWLEDGEMENT	3
ABBREVIATIONS	6
<i>CHAPTER1- INTRODUCTION</i>	11
1.0 Introduction	11
1.1 Literature Review	12
1.2 Research Gap	27
1.3 Scope and Significance	28
1.4 Research Objectives	31
1.5 Hypothesis	31
1.6 Research Questions	32
1.7 Research methodology	33
1.8 Limitations	34
1.9 Chapterization	35
CHAPTER 2- WORLD TRADE ORGANIZATION: AN OVERVIEW	38
2.0 Introduction	38
2.1 HAVANA CHARTER, 1947-48: (ITO)	40
2.1.1 Implementation Failure of ITO	41
2.2 Overview of “The General Agreement on Tariffs and Trade” (GATT)	43
2.3 Core principles	45
2.4 WORLD TRADE ORGANISATION 1995 REPLACING GATT	48
2.4.1 Objectives of “WTO”	53
2.4.2 Functions of “WTO”	53
2.4.3 Structure of “WTO”	54
2.4.4 Accession to “WTO”	55
2.5 Over view of “WTO” Agreements and Provisions	56
2.6 Coherence of “WTO” with other International and Multinational Organizations	60
2.7 “Developing country” definition	61
2.8 Objections and Reservations to Policies of “WTO” by developing and “Least Developed Countries”/members	63
CHAPTER 3- THE ISSUES AND CONCERNS OF “DEVELOPING COUNTRIES” ON “WTO” LEGAL FRAMEWORK.	69
3.1 Introduction	69
3.2 The views of renowned authors	70
3.2.1. Paul Collier:	70
3.2.2. Mahutga:	71
3.2.3. “Patterson and Afilalo”	71
3.2.4. Garcia:	73
3.2.5. Nozick:	74
3.2.6. Pogge:	75

3.3	Subjective legal framework of “WTO” and issues of Developing Countries	77
3.4	Non-trade issues in “WTO” system	80
3.5	Issues related to the “Trade related intellectual property Rights” (TRIPs)	81
3.6	Issues related to “Trade related investment measures” (TRIMs)	84
3.7	Issues related to “Dispute Settlement Mechanism”	87
3.8	The democracy deficit in “WTO” framework	98
3.9	Fairness and relationship of distributive justice with development in “WTO” regime	103
3.10	MFN and National treatment obligations: Fairness and exemption	106

CHAPTER 4-TRIPS AND PRACTICAL CHALLENGES IN APPLICABILITY **112**

4.1	Introduction	112
4.2	TRIPs in general	115
4.3	Legal and administrative requirements of TRIPs	118
4.4	Limitation of TRIPs	118
4.5	Introduction to the notion of compulsory licencing	119
4.5.1	“WTO” ruling on compulsory licencing	120
4.5.2	Criticism to compulsory licensing	121
4.5.3	Compulsory licencing and the pharmaceutical sector in India and Pakistan	125
4.6	The Right to health and the pharmaceutical patenting	131
4.7	Compulsory Licence and Covid -19 Pandemic	134
4.8	National Legislation that enhanced compulsory licencing during COVID-19	136
4.8.1	Australia:	136
4.8.2	Brazil:	136
4.8.3	Indonesia:	137
4.8.4	Canada:	137
4.8.5	Chile:	138
4.8.6	Colombia:	138
4.8.7	Equatorial Guinea:	138
4.8.8	Germany:	139
4.8.9	Hungary:	139
4.8.10	Israel:	140
4.8.11	Russia:	140
4.9	Compulsory licenses challenges faced by Developing Nations during Covid-19	141

CHAPTER 5- THE “DISPUTE SETTLEMENT MECHANISM” AND ITS EFFECT ON DEVELOPING COUNTRIES RELATED TO FOREIGN INVESTMENT AND TRADE **149**

5.1	Introduction	149
5.2	Dispute settlement understanding	151
5.3	Mechanisms for protecting foreign investment	155
5.4	Emergence of “bilateral investment treaty” (BIT)	157
5.5	“International Centre for Settlement of Investment Disputes” (ICSID)	158
5.6	Analysis of developing nations and dispute settlement	161
5.7	Organisational Limitations and constraints in the “WTO Dispute Settlement System”	164
5.8	Burden of Producing Evidence	173
5.9	Development of “WTO” “Dispute Settlement Mechanism”	176
5.10	The legal grounds of the “WTO” “Dispute Settlement Mechanism”	178
5.11	The “Special and Differential Treatment” obligations of the “WTO”	179
5.12	DSM and the least-developed countries	183

CHAPTER 6- “WTO” AND INTERNATIONAL DISTRIBUTIVE JUSTICE **191**

6.1	Introduction	191

6.2	Theories of Distributive Justice	194
6.2.1	Plato's philosophy of justice	197
6.2.2	Aristotle's corrective justice	200
6.2.3	Jeremy Bentham's utilitarianism	203
6.2.4	Robert Nozick's Libertarianism	204
6.2.5	John Rawl's "Principles of Justice"	205
6.2.6	"Amartya Sen's Idea of Justice"	208
6.2.7	International Distributive Justice	212
6.3	"WTO" and International Distributive Justice	214
6.4	International Trade and the "Theory of Justice"	219
6.5	International neo-liberal and global justice	222
CHAPTER 7-	<i>GATS: BENEFITS TO DEVELOPING COUNTRIES</i>	231
7.1	Introduction	231
7.2	GATS Agreement Overview and Analysis.	236
7.3	The GATS obligations	241
7.4	Doha Ministerial Declaration and Doha Ban	242
7.5	Concept of "National Treatment" and "Most Favored Nation"	245
7.6	GATS and "developing countries"	246
7.6.1	India	247
7.6.2	Brazil	250
7.6.3	Bangladesh	252
7.6.4	China	255
CHAPTER 8-	<i>ANALYSIS AND FINDINGS</i>	261
8.1	Research Design	261
8.2	Analysis of Primary data as collected by researcher	262
8.2.1	Experts associated with international Trade Law	262
8.2.2	Experts from medical Industry	275
CHAPTER 9-	<i>CONCLUSION AND SUGGESTIONS</i>	284
9.1	Conclusion	284
9.2	Suggestions	290
9.3	Contribution to the literature	299
BIBLIOGRAPHY		300

Abstract

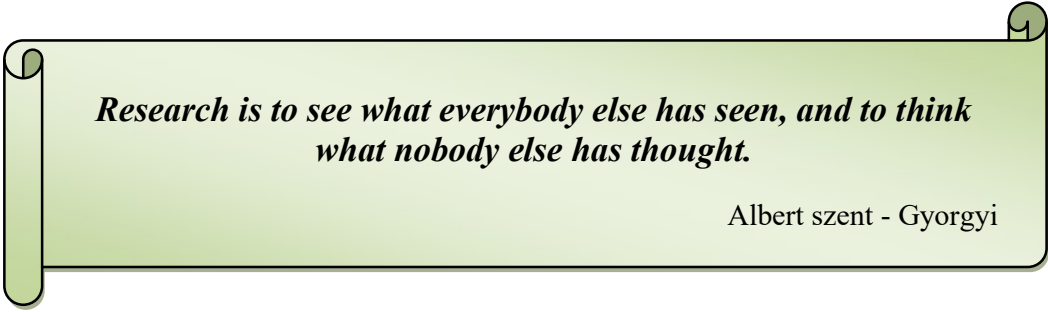
The World Trade Organization (WTO) may have made international law more resemble to domestic law. This researcher argues that in the “Uruguay round” (1986-1993), the “developing nations” expected a more formal dispute resolution procedure and understood that following the “Uruguay round” of discussions, the “developing countries” would be able to bring their trade-related complaints more successfully and have them resolved in their favour. Despite the fact that the “Dispute Settlement Mechanism” (DSM) was revamped in 1986-1993, the developing nations lobbied for a review of the system and offered improvements. The most “developing countries” pointed out the inequalities in the remedies provided to “developing countries” if they violate the commitment imposed by World Trade Organization. Another important point focused by “developing countries” was, that they find it difficult to expand “WTO” laws and agreements in their domestic legal setup due to less legal expertise, thus getting less chances to plead and get the “Dispute Settlement Mechanism” in their favor. In order to join the “WTO”, “developing countries” and “Least Developed Countries” LDCs must construct a legal infrastructure that they may not have the social conditions or expertise to build.

The “World Trade Organization” (“WTO”) can make it easier for developing nations and can facilitate them to participate in international trade if:

- i. the domestic legal system of “developing countries” will be framed at par with “WTO” or if they implement the “WTO” laws and regulations in their domestic arena by which they can evolve a capability to elude violation of “WTO” agreements.
- ii. In the case of a dispute with a developed country, the “WTO” “Dispute Settlement Mechanism” (DSM) will not impose penalties and sanctions on the developing country in any form, direct or indirect.
- iii. Trade sanctions against developed countries could be used by “developing countries” to enforce DSB judgments in their favour.

Researcher's view is, this principle can become effective in the "WTO" system if the "WTO" will establish a fair and just international-trade regime which can be demonstrable and by passing time "WTO" and the United Nations Organization (UN) can device new law jointly by observing the principle of international distributive justice.

There are many issues that developing nations have with the "WTO's" legal framework, all of which are related to the disadvantages that it places on their chances of economic progress via trade. There is a lack of justice and fairness when certain "WTO" members suffer disadvantage. That omission is an indictment of the "WTO's" legal framework, and it undermines its purpose. However, the adoption of the idea of international distributive justice into the "WTO" legal structure may remedy this issue. For the sake of demonstrating the feasibility of making this concept an overarching guiding principle for "WTO" trade agreements, this thesis advocated all-encompassing climate legislation as a standalone goal in and of itself. UN action is only necessary in order to control the operations of non-state enterprises that are responsible for excessive GHG emissions in order to comply with the new climate legislation, which is fully compliant with the GATT and "WTO" Agreements. With the new climate legislation, BITS can no longer enforce investor/host-state contracts that restrict the host country's capacity to enact environmental protection measures (ICSID).



***Research is to see what everybody else has seen, and to think
what nobody else has thought.***

Albert szent - Gyorgyi

Chapter1- Introduction

1.0 Introduction

The World Trade Organization (WTO) may have made international law more resemble to domestic law. This researcher argues that in the “Uruguay round” (1986-1993), the “developing nations” expected a more formal dispute resolution procedure and understood that following the “Uruguay round” of discussions, the “developing countries” would be able to bring their trade-related complaints more successfully and have them resolved in their favour. Despite the fact that the “Dispute Settlement Mechanism” (DSM) was revamped in 1986-1993, the developing nations lobbied for a review of the system and offered improvements. The most “developing countries” pointed out the inequalities in the remedies provided to “developing countries” if they violate the commitment imposed by World Trade Organization. Another important point focused by “developing countries” was, that they find it difficult to expand “WTO” laws and agreements in their domestic legal setup due to less legal expertise, thus getting less chances to plead and get the “Dispute Settlement Mechanism” in their favor.¹

In order to join the “WTO”, “developing countries” and “Least Developed Countries” LDCs must construct a legal infrastructure that they may not have the social conditions or expertise to build.²

¹Smith.J,(2004), inequality in international trade? Developing countries and institutional change in WTO dispute settlement, Review of international political economy, vol-11 issue -3.

² Van den Bossche, P., & Zdouc, W. (2021). The Law and Policy of the World Trade Organization: Text, Cases, and Materials (5th ed.). Cambridge: Cambridge University Press.

The “World Trade Organization” (“WTO”) can make it easier for developing nations and can facilitate them to participate in international trade if:

- i. the domestic legal system of “developing countries” will be framed at par with “WTO” or if they implement the “WTO” laws and regulations in their domestic arena by which they can evolve a capability to elude violation of “WTO” agreements.
- ii. In the case of a dispute with a developed country, the “WTO” “Dispute Settlement Mechanism” (DSM) will not impose penalties and sanctions on the developing country in any form, direct or indirect.
- iii. Trade sanctions against developed countries could be used by “developing countries” to enforce DSB judgments in their favour.

Researcher’s view is, this principle can become effective in the “WTO” system if the “WTO” will establish a fair and just international-trade regime which can be demonstrable and by passing time “WTO” and the United Nations Organization (UN) can device new law jointly by observing the principle of international distributive justice³.

1.1 Literature Review

In the course of the research work, references were made to the following books, research articles, and journals and decisions of the DSM were taken into account. A small list of relevant literature has been included in the appendix below.

Books:

1. The author proposed the concept of articulating some basic rules of justice on the basis of an initial agreement struck under fair conditions, i.e. a fair division of benefit and burden.⁴

³ Ten, C. L. (2003). [Review of Justice as Fairness: A Restatement, by J. Rawls & E. Kelly]. *Mind*, 112(447), 563–566. <http://www.jstor.org/stable/3489212>

⁴ Rawls, J., & Kelly, E. (2001). *Justice as fairness: A restatement*. Cambridge, Mass: Harvard University Press.

2. The author alludes to distributive counter-arguments simply by referring to an opposing viewpoint. Robert Nozik argues in this book for the use of economic resources as political resources, and as a result, he highlights the need of involvement at the bare minimum.⁵
3. The researcher has referred this book in order to get a better awareness of the foundations of the free trade system as well as to gain a better understanding of the jurisprudential basis for assigning rights and duties to different countries in a market economy.⁶
4. The author discusses the numerous notions of justice that are currently in use. Fundamentally, the author of this work engages in a criticism of transcendental ideas of institutional justice, while also proposing a comparative theory of distributive justice as a viable alternative. The extent to which it applies to the trading system would be the subject of the researcher's investigation.⁷
5. The author provides a broad framework of the trading regime. The "World Trade Organization"("WTO") serves as a broad institutional framework for a variety of organizations, including the GATT, GATS, TRIPS, and others. Regarding the basic structure of the "WTO", the agreement creating the "World Trade Organization"("WTO") provides a broad set of rules and regulations that govern the organization's operations. It is in this sense that the book contributes to giving an understanding of the operation of the trade system as a whole.⁸
6. The author cults out the general concepts of market economics, this book has been used as a reference. Economic Fairness: Terms of Development and Trade is a book that the researcher has particularly referenced to throughout this work. Insight into the aspect of justice that is involved in a market economy is provided by this example. It digs into the issue of establishing a

⁵Robert Nozik , 1999, Anarchy, State and Utopia ,Blackwell Publisher's Ltd.

⁶ Franck, T. (1998-01-29). Fairness in International Law and Institutions. : Oxford University Press.

⁷ Sen, Amartya (2009) The idea of justice. The Belknap Press of Harvard University Press, Cambridge, Massachusetts

⁸ Carolyn Deere's 2009 book, Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Regime in Developing Countries, published by Oxford University Press

universal set of distribution rules that can be used across a wide range of countries at various levels of development.⁹

7. The author provides a thorough understanding of the “World Trade Organization”(“WTO”), its agreements, rules and regulations as well as its law and policy. The author has covered dispute resolution mechanisms, multilateral trade agreements, national treatment, and other topics, and he has offered a well-thought-out scenario that is relevant to developing nations. The researcher may use the author’s study to increase his or her understanding of the real challenges that developing nations confront in international commerce and similar areas of interest. This book provides a clear insight on “WTO”, “WTO” agreements, rules and regulations. The author has discussed “Dispute Settlement Mechanism”, MFN, National treatment etc and has provided a in deft scenario of related to “developing countries” .The researcher can further exploit the authors research to reach the actual problems faced by the “developing countries” in international trade and related matters.¹⁰
8. The author has discussed in depth all of the TRIPs clauses in this book. With respect to intellectual property rights, the “WTO” essentially consolidates and replaces all previous international treaties. Members of the “WTO” signed the Treaty on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in order to be bound by its principles. In other words, the focus of this book is only on the general and mandatory framework for ensuring the protection and enforcement of TRIPS rights and flexibilities, as well as the implications for enterprises, governments, and investors as a result of that framework. An recognized worldwide representative of the IPR sector provides an impartial stamp on the practical explanation of the relevance of the TRIPS clauses connected not only to patents but also to other IPR regimes in this book.¹¹

⁹ Dillon, S. (2002). Foreword. In *International Trade and Economic Law and the European Union* (pp. v–vi). London: Hart Publishing.

¹⁰ Van den Bossche, P., & Zdouc, W. (2021). *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th ed.). Cambridge: Cambridge University Press.

¹¹ Carvalho. (2002). *The TRIPS regime of patent rights* / by Nuno Pires de Carvalho. Kluwer Law

9. The author took into consideration other social experiences. For example, experience with the law is taken into consideration in terms of politics, economics, and ethics. This is how a large deal of the criticism aimed at the “World Trade Organization” is articulated. Consequently, a logical evaluation of this investigation’s context necessitates a thorough study of critique. Theorists who dispute about what legislation should do in order to be just and fair international trade law influenced my judgment of TRIPs, TRIMs, and GATS on developing nations. Narlikar, Garcia, Carmody, and Pogge were among the theorists who had the most impact on this method.¹²
10. The author has provided a general structure of trade regime. “World Trade Organization” provides a general institutional framework for various institutions such as the GATT, GATS, and TRIPS etc. The general set of rules and regulations are provided under the agreement establishing the “World Trade Organization” with respect to the overall structure of “WTO”. It is this sense that the book helps in providing an insight in the working of the trade regime itself.¹³
11. This author has provided the general principles of market economy. In this book the researcher has specifically referred to Economic Fairness: Terms of Development and Trade. That provides a useful insight on the element of justice involved in a market economy. It delves into the aspect of bringing a universal set of principles of distribution among varied nations belonging to varied development stages.¹⁴
12. The author sheds light on how TRIPS evolved from a flimsy mandate to a well-reasoned and fair agreement that has withstood scrutiny. The fact that the discussions were dominated by a sharp North-South divide reflected this irreconcilable general worldview. In addition to IPRs apparatuses, the TRIPS text was established by resolving intra-North conflicts or cross-border

International.

¹² Franck, T. (1998-01-29). *Fairness in International Law and Institutions*. : Oxford University Press.

¹³ Deere, C. (2008-10-30). *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. : Oxford University Press.

¹⁴ Dillon, S. (2002). *International Trade and Economic Law and the European Union*. London: Hart Publishing.

coalitions.¹⁵

13. The author aims to raise awareness about the injustices associated with the “Uruguay round” of global trade talks. The author has attempted to disclose the true motives of the developed nations in pursuing a fresh round of GATT negotiations. It provides a fair overview of the “Uruguay round” of the World Trade Organization. A summary and critique of the “Uruguay round” discussions up to 1990 are included in this book. The author has done a thorough investigation of the background of the Uruguay Round, as well as the involvement of TNCs in the commencement of a new round and the inclusion of new problems including services, intellectual property, and investments. Firstly, the author explains why the developed nations decided to implement the GATT in order to restructure the international economy. Then, he explains the methods used by wealthy nations to persuade poor countries to participate in a new cycle. On the negotiation table, the way new problems such as services, IP, and investment were presented has been highlighted. Developing nations will be harmed, according to the book, because of the new problems being raised. the Uruguay Round’s negative effects on the people of developing nations was to be made more widely known among policymakers, academics, and the general public via this book. TNCs and rich nations would benefit from the Uruguay Round, which was designed to help them advance their own interests at the expense of developing countries.¹⁶
14. International trade in goods has grown dramatically over the last seven decades, thanks in large part to concerted efforts by the world’s major trading nations to reduce and eliminate tariff barriers on a multilateral basis, since the establishment of the “General Agreement on Tariffs and Trade” (GATT) in 1947. A look back at tariff talks and renegotiations throughout the years is presented in this booklet. As a result of the Information Technology

¹⁵ Jayashree.W and Taubman.M (eds.) (2015), The Making of the TRIPS Agreement: Personal insights from the “Uruguay round”Negotiations (WTO Secretariat,.

¹⁶ Raghavan, C. (1990). Recolonization: GATT, the Uruguay Round & the Third World. London: Zed Books.

Agreement's subsequent duty-free coverage expansion and re-talks due to the EU's expansion, this updated version details the negotiations that led to its conclusion. Tariff discussions for new "WTO" members like China and Russia are also included in this report. Those involved in international trade negotiations, government officials, trade ministry officials, and trade policy economists and scholars will find a lot to learn from this book.¹⁷

- "WTO" discussions for the new ITA Expansion Agreement are described.
- Describes how the European Union's enlargements have affected "WTO" discussions.
- Describes the "WTO's" talks for the addition of a number of new members, including two important trading countries, China and Russia, as well as the implementation of modifications in the "WTO" members' schedules of tariff obligations due to periodic updates of the harmonized tariff.

15. This author examines the impact of "WTO"-TRIPS agreements on the Egyptian pharmaceutical business and public health. In his thesis, the researcher expressed worry over the Agreement's implementation being delayed due to the country's lack of innovation and institutional capacity. It called for finding a balance between innovation and technological spread. It sought to connect strong IPRs with R&D, FDI, and technology transfer. This thesis proved that for a growing country like Egypt to get a bigger proportion of the local pharmaceutical industry, important aspects for a national innovation system must be developed. The researcher expects the new IPR system to be nothing more than a rent transfer mechanism from local pharmaceutical manufacturers and consumers to overseas title holders.¹⁸

¹⁷ Hoda, A. (2018). Tariff Conferences and Rounds of Multilateral Trade Negotiations. In Tariff Negotiations and Renegotiations under the GATT and the "WTO": Procedures and Practices ("WTO" Internal Only, Cambridge: Cambridge University Press, pp. 25-122). doi:10.1017/9781108157803.003

¹⁸ Abdelgafar Basma Ibrahim,(2003), Implications of the WTO-TRIPS Agreement from a National Innovation Systems Perspective – The Pharmaceutical Industry in Egypt (Ph.D. Thesis, Carleton University, Ontario,).

Articles

1. The author of this article illustrates the vast differences between the principles of the GATT and the “World Trade Organization”(“WTO”). The author lists the nations that have designated themselves as ‘developed’ or ‘developing’ in the World Trade Organization. Specifically, he focuses on the existing “World Trade Organization”(“WTO”) framework, which lacks a mechanism for recognizing developing nations that have received special and differentiated treatment (SDT). Despite the fact that it is widely accepted as the main method for identifying developed nations, they lack conviction and consistency in their privileges and obligations under the World Trade Organization’s framework. In order to achieve the development target set by the World Trade Organization, methods that can provide precise differentiating evidence of SDT beneficiaries are required.¹⁹
2. The author of this article took into account the disparities that developing nations experience and provided systematic material by offering insight into the history of the difficulties and trade inequalities that “developing countries” face. The author outlined the trade policy instruments offered by the “World Trade Organization”(“WTO”) to remove inequities by listing the SDT and other assistance programmes provided by “WTO” rules and accords. Moreover, the researcher can contribute to the advancement of knowledge in the same area as the author of this research paper failed to make any recommendations on how the same SDT or other assistance programmes provided by the “WTO” to “developing countries” can be further strengthened in order to provide more trade liberation and scope to developing countries.²⁰
3. The author of this paper focuses on how the GATS and the Joint Initiative on Services Domestic Regulation define and further develop domestic service regulation. According to the Joint Initiative’s SDR disciplines, this paper has

¹⁹ Cui, F. (2008). Who Are the Developing Countries in the WTO?. *The Law and Development Review*, 1(1), 124-153. <https://doi.org/10.2202/1943-3867.1009>.

²⁰ Frank J. Garcia, (2000) Trade and Inequality: Economic Justice and the Developing World, 21 MICH. J. INT’L L. 975

three main goals: first, to explore the current status of RTA SDR requirements; second, to assess the degree to which Members' regulatory frameworks have already adopted SDR measures; and third, to research possible links between the implementation of SDR disciplines and economic performance. There is a strong correlation between the work members are doing on their service regulatory regimes and the trade agreements they are negotiating, as shown by RTAs and applied regime studies in this paper. In recent years, several nations, particularly those in the middle income bracket, have implemented extensive regulatory changes aimed at enhancing the domestic business climate. By signing bilateral and regional trade deals, they have shown their commitment to excellent regulatory procedures in the international arena. To put it another way: if RTAs are adopted, they may serve as a catalyst for additional changes in domestic regulatory procedures that aim to improve transparency and reduce procedural red tape.²¹

4. A more speculative approach to rationalizing local labour requirements is taken up in this doctoral thesis, which draws on existing functional critiques of the TRIPS Agreement. For this reason, it is argued, TRIPS should provide developing nations the flexibility to adopt local working conditions beyond simple importation if IPRs are properly supported by utilitarianism or bargain theorem.²²
5. The author of this research paper discussed the inequalities faced by “developing countries” in “Dispute Settlement Mechanism” of “WTO” and Legal inequality faced by “developing countries” while going for any dispute settlement. The author also discussed different drawbacks of the legal regime of “WTO” and gave few suggestions as to how those limitations could be redressed.²³

²¹ Services Domestic Regulation — Locking in Good Regulatory Practices by Laura Baiker, Elena Bertola, Markus Jelitto, 2021” ERSD-2021-14, www.wto.org/english/res_e/reser_e/ersd202114_e.htm.

²² Adam Bierylo, (2013), ‘Importing Doesn't Work: Justifying Local Working Requirements through a Historical, Theoretical, and Contractual Perspective’, 3 WJLS.

²³ Smith, J. (2004). Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement. *Review of International Political Economy*, 11(3), 542–573. <http://www.jstor.org/stable/4177510>

6. The Author of this article discusses, Is current international economic law capable of achieving distributive justice? He outlines real distributive justice's requirements. IEL does not accomplish distributive fairness for two reasons. First, distributive justice is not an economic aim. The neoliberal economic system of free markets and personal liberty. Not because IEL is incapable of doing so, but because it lacks coherence. If we simply mean “fairer than what we have now,” “distributive justice” is easily achieved. Reversing some of the generous deregulation and blatant giveaways that got us here would be a good start, and it has started. Many powerful people have fallen, but the worst-off may be far worse, and many more are certain to follow.²⁴
7. In this article Author rethinks Rawls’ conception of international economic justice, with a particular focus on international trade. Author grounds his normative argument on a different interpretation of the concepts of basic structure and of basic institution. Author uses the contemporary international trading system to illustrate his normative interpretation. Author uses the *Law of Peoples* to discuss the Rawlsian concept of basic structure. He contests Samuel Freeman’s interpretation of this concept as one that pertains exclusively to the domestic realm.²⁵
8. This paper explores a lack of legal experience in “WTO” law and the ability to organise information on trade obstacles and ways to challenge them are explored in this study. They must maintain normal systems for obtaining, processing and prioritising information on foreign trade obstacles from foreign embassies, the private sector, and international trade experts. Making the WTO a chance to assure market access is one way developing nation authorities may cooperate more closely with the business sector. Brazil has made significant progress in institutionalising cooperation in WTO dispute resolution, becoming a more active and effective user of the system. 72

²⁴ Barbara Stark, (2010), Jam Tomorrow: Distributive Justice and the Limits of International Economic Law, 30 B.C. Third World L.J. 3

²⁵ Maffettone, Pietro (2009). The wto and the limits of distributive justice. _Philosophy and Social Criticism_ 35 (3):243-267.

Building public private networks in underdeveloped nations take time. But it's necessary if the WTO's dispute resolution system is to operate for them.²⁶

9. This paper analyses this article examines how the “WTO” may help “developing countries” – particularly the BRICS – make development. To illustrate his point, he utilises the Doha Development Agenda, India's food reserve programme, and the Bali Round's Trade Facilitation Agreement. That is, the relationship between the Doha Agenda and the Bali Package, as well as the role of the BRICS in global economics and politics.²⁷
10. The authors of this paper examine There are many reasons why impoverished nations are not challenged, including political and economic factors. Given the absence of incentives to implement “WTO” rules and discipline against small and disadvantaged members, improving the WTO transparency function is crucial. While the study concentrates on the “WTO” system, the points apply to North-South trade agreements as well.²⁸
16. The author of the paper has focused on an involuntary contract called a compulsory licence. As a first step, it outlines the most common compulsory licencing laws and the circumstances in which they are used. There has been a look at how developed and “developing countries” see the importance of intellectual property protection in this study. Third, arguments for and against mandatory licencing will be examined. There has been a proposal for universal obligatory licencing, which will take into consideration the demands of all countries. The author also discuss why the GATT is the optimal venue to negotiate an agreement to strengthen the minimum level of intellectual property protection, as well as the proposed TRIPS Agreement's essential elements and modifications.²⁹

²⁶ GREGORY SHAFFER (2006). The challenges of “WTO” law: strategies for developing country Adaptation. *World Trade Review*, 5, pp 177-198”,

²⁷ Thomas Banwell Ayres, (2015)“The Role of the “WTO” in Assisting Developing Countries, Especially the BRICS: An Analysis of Doha and Bali,” *Law School International Immersion Program Papers*, No. 3”.

²⁸ Bown, Chad P.; Bernard M., Hoekman. (2007). *Developing Countries and Enforcement of Trade Agreements : Why Dispute Settlement is Not Enough*. Policy Research Working Paper; No. 4450. World Bank, Washington, DC

²⁹ Julian-Arnold, G. (1993). *INTERNATIONAL COMPULSORY LICENSING: THE RATIONALES*

11. The author of this paper discusses challenges raised by a group of developing nations during the WIPO General Assembly in September 2004. It is a collection of key papers presented during an ICTSD Dialogue on November 20, 2006 in Nyon, Switzerland. As part of ICTSD's development agenda initiative, they were tasked with getting Geneva-based diplomats talking and exchanging ideas. Work by ICTSD in this area is based on the belief that intellectual property regimes (patent, copyright and trademark, integrated circuits and geographical indications) have a significant impact on a wide range of concerns, including access to public health, knowledge, food and biodiversity security and biotechnology. This demands the establishment of a framework for debate on intellectual property and its impact on these issues. As knowledge-based economies become more prevalent, there is a constant need to better grasp the consequences, problems, and possibilities of advancements in intellectual property rights (IPRs).³⁰
17. The author of this paper argues that Even though Bayer lost its legal battle to prevent Natco Pharma from obtaining India's first-ever obligatory licence to produce a cheap generic version of an anti-cancer medicine, the authors caution against over rejoicing. In general, the agreement on what constitutes the local workings of a patent in India is disturbed. Under the TRIPS Agreement, this article examines the validity of local employment rules. Considers the wider ramifications for intellectual property law in India, as well as the views of the Controller General of the Patents and Trademarks Office, the Intellectual Property Appellate Board (IPAB), and the Bombay High Court (BHC).³¹
12. The author of this article focuses mostly on the TRIPS Agreement's technical cooperation provisions. Provisions for aims and principles, forced licencing and anti-competitive contractual licences as well as technology transfer are

AND THE REALITY (n.1).

³⁰ Barton, J. H., Abbott, F. M., Correa, C. M., Drexler, J., Foray, D. and Marchant, R. (2007). Views on the Future of the Intellectual Property System, ICTSD Programme on Intellectual Property Rights and Sustainable Development, International Centre for Trade and Sustainable Development, Geneva, Switzerland.

³¹ Pandey, B.N. and Saha P.K, (2016). "Natco Bayer Verdict Decoding Local Working Requirement", LI(20) EPW 61-64.

included in the TRIPS Agreement. It primarily shows how poor countries might benefit from these flexibilities by operating within the TRIPS system. To better execute a process or procedure, it describes technical collaboration as sharing expertise. This article goes on to explore the need for emerging countries to first determine their own national interests and needs. With the aid of this paper, I can take the following conclusion: poor countries will be able to pursue their IPR development objectives if they treat the problem of technical cooperation under the TRIPS Agreement with care.³²

13. The authors of the articles in this series are not meant to be complete treatises on the subject, but rather concise examinations of chosen themes from the perspective of developing countries. The South Centre, with financing assistance from the UNDP (United Nations Development Program) TCDC (Technical Co-operation between Developing Nations) Unit, has launched a pilot project to monitor and assess the activities of the “WTO” from the viewpoint of developing countries. Because of this, a number of developing nations have highlighted “WTO” tabbed concerns as worthy of urgent attention, despite the project’s limited people and economic resources. Expected outcomes include better organized and standardized “WTO” contentions operations by the South Center. While resources are limited, one of the primary goals of this initiative is to provide “WTO” developing country negotiators with brief and analytically sound responses to a number of significant topics currently being debated within the organisation. To that goal, the T.R.A.D.E. functioning paper series’ booklet of empirical cum policy documentations is an effort.³³
14. This author of this article examines if and how the TRIPS Agreement might be interpreted more loosely, allowing national IP regimes to react to the arduous nature of information creation. 38 With such in mind, it focuses on efforts to expand the public domain for earlier ideas by altering different aspects of US patent law. To test whether the USA would be in violation of

³² Pandey. B.N and. Saha P.K (2011). “Technical Cooperation under TRIPS Agreement: Flexibilities and Options for Developing Countries”, 53 JILI 652-662.

³³ Correa Carlos M. (1999), Intellectual Property Rights and the Use of Compulsory Licences: Options for Developing Countries (South Center, Working Paper No. 5,.

the TRIPS Agreement under current interpretation, it cites three stylized exemplifications. In order to maintain member states' laws up-to-date with scientific discoveries, the goal is to create interpretative methods that enable them to do so. Also unresolved are the WTO's dispute settlement mechanism and how the TRIPS Agreement balances power between supranational bodies, national laws, and global laws.³⁴

15. This author of this article clarifies one of the main problems in Compulsory License, namely pharmaceutical patents and drug cost. Patents and pricing are examined in this article, which also looks at TRIPS policy mechanisms, such as compulsory licencing and parallel imports, as well as price limits for affordable access to patented medicines deemed vital in developing countries. Intergovernmental and nongovernmental groups' involvement in extending medicine contributions to underdeveloped countries is also examined.³⁵
16. This author of this article aims to evaluate the legal framework of patents in India and the viability of their implementation in the country. After the signing of the TRIPS Agreement, there has been a dramatic increase in patent activity and the local functioning of patents has accomplished main goals of the patent system. However, despite the favourable investment circumstances, it has been seen that patents are not being worked domestically and patented items are often imported without any true method of knowledge transfer. In the current patent system, the ultimate goal was to promote social and economic well-being; this is a major departure from that goal.³⁶
17. The author of this article looks at how patent working requirements got their start and what they've come to mean in this piece. All of these factors work

³⁴ Dinwoodie, G., & Dreyfuss, R. (2005). WTO Dispute Resolution and the Preservation of the Public Domain of Science under International Law. In K. Maskus & J. Reichman (Eds.), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (pp. 861-883). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511494529.045

³⁵ F.M. Scherer and Jayashree Watal, (2002). "Post-TRIPS options for Access to Patented Medicines in Developing Nations", *J Int . Economics Law* (2002).

³⁶ Reddy, G.V., & Kadri, D. (2013). *Local Working of Patents: Law and Implementation in India*. IO: Productivity.

together to tailor complicated legal frameworks to meet the specific demands of “WTO” members, as shown in the article, which examines how they are interconnected and interact. It also says that nations have the right to create and maintain working requirements under international law, and that governments should do so in order to best serve their respective patent systems’ objectives.³⁷

18. The author of this article examines the many stages of the compulsory licencing process and offers insight on the causes for its growth, particularly following the signing of the TRIPS agreement.³⁸
19. The authors of this paper claimed that the “developing countries” participated in the GATT discussions from the outset of its inception, according to Rorden Wilkinson and James Scott As a result of this, they claim that developing nations took an active role in the First Round of GATT Tariff Negotiations as well as following rounds, and they worked hard to help re-shape the GATT to better represent the interests of both developing and developed countries. The GATT was founded when many developing nations were still under the rule of their colonial rulers; therefore they were represented by their colonial overlords. The GATT norms were already in place when the developing nations gained their independence, and they understood that these restrictions were not in their best interests. Because of this, they developed skepticism about the GATT. Developed nations’ post-war strategies As a result of the GATT’s agricultural exception, poorer nations were outraged. The developed nations also resolved to safeguard their textile sectors from outside competition, exactly where emerging countries enjoyed a comparative advantage.³⁹
20. According to the authors, the developed nations (mostly the US) rejected the ITO in favor of GATT because developing countries’ attempts to make the ITO more favorable to “developing countries” did not go down well with

³⁷ Trimble M .(2016), Patent Working Requirements: Historical and Comparative Perspectives.

³⁸ Zaheer Abbas, M and Shamreeza Riaz,(2013) “Evolution of the Concept of Compulsory Licensing: A Critical Development Before and After TRIPS”, 4 Aca. Res. Int’l.

³⁹ WILKINSON, R., & SCOTT, J. (2008). Developing country participation in the GATT: A reassessment. *World Trade Review*, 7(3), 473-510. doi:10.1017/S1474745608003959

them. As a result of GATT's emphasis on tariff reduction via the reciprocal application of the Principal Supplier Rule, developing nations were unable to fully engage in its proceedings. It was difficult for developing nations to secure tariff discounts under the Principal Supplier criterion since they were not the Principal Supplier in many circumstances. Development nations may only request tariff reductions jointly in the fourth round of discussions.⁴⁰

21. The author of this paper focuses on the interplay between GSP and the GATT/ "WTO", which adds to the body of knowledge in this area. No one else has discovered the negative effects of this interaction, but the author of this study is the first to provide an explanation for those effects. The research has long held that GSP is important, but it is difficult to understand this outcome in a global economy dominated by GATT/"WTO" rules. GATT/"WTO" participation as a precondition for GSP benefits is one of the study's primary findings. Enabling Clause negotiations demonstrate that this notion has been lurking in plain sight for a long time; official and informal litigation over these preferences also confirms this.⁴¹

⁴⁰ *ibid*

⁴¹ TOBIN, J., & BUSCH, M. (2019). The Disadvantage of Membership: How Joining the GATT/"WTO" Undermines GSP. *World Trade Review*, 18(1), 133-160. doi:10.1017/S1474745618000034"

1.2 Research Gap

There are several reasons why this study is important:

- i) This research work will facilitate the “Least Developed Countries” to become the beneficiary and participants in the “WTO” regime.
- ii) As a result of this research, the actual spirit of “WTO” establishment, GSP, and “Special and Differential Treatment” (SDT), may be thoroughly explored.
- iii) A common complaint from developing-country leaders and analysts is that the “WTO’s” legal structure and agreements tend to create trade barriers for them:

‘the “Generalized System of Preferences”(GSP) and the “Special and Differential Treatment” (SDT) are not achieving their intended goal of promoting the expansion of trade capacity among developing countries, according to Gene M. Grossman and Alan O. Sykes, who were joined in their observations by Anastasios Tomazos and Patrick Low.’

This study will help raise awareness of the difficulties, challenges, and threats that the “WTO’s” legal framework poses to developing nations. For future “WTO” membership applications from other developing nations, a thorough understanding of the legal implications on India, Pakistan and other developing country’s participation in that organisation would be helpful. The thoughts and arguments of this research will fight for the LDCs and developing nations who face devastating challenges that the “WTO” fails to alleviate.

- iv) The legal structure of the “World Trade Organization”(“WTO”), its agreements/Treasures, and the “Dispute Settlement Mechanism” (DSM) need to be evaluated in diverse state settings. The case studies of India, Pakistan and few other “developing countries” are particularly suitable since their specific situations clearly highlight the lack of reason in the “WTO” phrase “developing nations,” as well as the “WTO” experience of very varied state systems.

1.3 Scope and Significance

The overall goal of this research is to draw attention to the “legal vein” of “WTO”-related literature. Consider the socioeconomic, ethical, political context of the developing nations in order to match the application of the ‘law in action’ as well as the terms of the Agreements that comprise “WTO” law in order to conduct this study. It’s not a virtue to focus just on the legal aspects of the “WTO”, since it doesn’t allow one to overlook the importance of political and economic considerations. A concept that follows the idea of “international distributive justice” is proposed in this research; however the emphasis of the debate is on “WTO” related legal concepts and events.

The different interpretation of the concept of “Distributive Justice”⁴² as given by John Rawl’s has created a difference in implementing the international economic justice in context with international trade. The basic structure of “World Trade Organization” need to be interpreted harmoniously in domestic and international realm related to developing and least developing countries. Harmoniously here means compatible with both developing, “Least Developed Countries” and “developed countries”. The Legal system of “World Trade Organization” must be made or framed keeping in mind the situation and maturity of the domestic legal systems of “developing countries” or “Least Developed Countries”. The legal system of “World Trade Organization” has been so expended that “developing countries” or “Least Developed Countries” are facing problems even in joining or getting the membership of “World Trade Organization”. The Legal structure of “World Trade Organization” which is mainly based on or par with the legal setup of developed countries cannot be fairly implemented by “developing countries” or “Least Developed Countries” in their domestic legal setup.

John Rawl’s theory of international distributive justice in relation with international trade is desirable but by implementing it on member countries as per the concept of “likes should be treated alike and unlike should be treated differently”. Though in the

⁴² ibid

legal frame work of “World Trade Organization”⁴³ the “developing countries”⁴⁴ or “Least Developed Countries” (LDC’s)⁴⁵ do receive different kinds of concessions while trading internationally but to receive “subsidies”⁴⁶ or “Special and Differential Treatment”⁴⁷, the “developing countries” are bound to implement “World Trade Organization” rules in their domestic legal setup which more hectic for “developing countries” and LDC’s⁴⁸.

The concept of distributive justice should not be strictly implemented on different legal systems when there is already a huge gap between the maturities of different domestic legal systems. The researchers focus will be mainly on three legal systems i.e. India, Pakistan and UAE. Though all three countries have been categorized as developing by “World Trade Organization” but there is huge difference in their domestic legal setup both in comparison with each other as well as comparing them with developed countries.

The provisions related to “Special and Differential Treatment”, “Generalized System of Preferences” do not recompense the “developing countries” .the obligation on “developing countries” and “Least Developed Countries” to get their domestic legislation in compliance with “World Trade Organization” agreement actually discourages the development of “developing countries” and “Least Developed Countries”. Failure of “WTO” agreements to consider the interests of “developing countries” and “Least Developed Countries” relating to TRIPs frustrate the provisions relating to technology transfer and it inversely discourages the trade related to intellectual property. The enforcement of “World Trade Organization” legal regime which is based on legal system of developed countries put a huge burden on “developing countries” financially.

⁴³ Geneva, Switzerland Established on 1 January 1995 by “Uruguay round” negotiations (1986-94).

⁴⁴ Statistical/annex/https://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_cl ass.pdf retrieved on 13-03-2020.

⁴⁵ As designated by United Nations General Assembly in 1971, Report of the Committee for Development Planning on the seventh session (22 March -1 April 1971), Official Records of the Economic and Social Council, Fifty-first session, 1971, Supplement No. 7.

⁴⁶ Article 27 of Agreement on subsidies and countervailing measures. www.wto.org/english/docs_e/legal_e/24-scm.pdf, retrieved on 18-03-2020.

⁴⁷ Article XII of the GATT 1994. wto.org/english/res_e/publications_e/ai17_e/gatt1994_art12_jur.pdf , retrieved on 20-03-2020.

In Doha Round the “developing countries” as well as “Least Developed Countries” have expressed many concerns about the inequalities in the “World Trade Organization” system. “The most important is related to substantive law pertaining to Intellectual Property; agriculture and trade Dispute remedies which in “WTO” legal framework is supporting developed countries.”⁴⁹ The multilateral trade and other concerns expressed by “developing countries” regarding inequalities in “WTO” regime was focal point of “World Trade Organization” negotiations with developing countries. The inequalities regarding the substantive law like intellectual property and remedies provided by “World Trade Organization” regime in case there is dispute between “developing countries” and “developed countries”. The new rules drafted after Doha talks could have been better implemented if there could have been an unbiased enforcing institution in “WTO”⁵⁰.

⁴⁹Finger, J. M., & Nogués, J. J. (2002). The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations. *The World Economy*, 25(3), 321–340. <https://doi.org/10.1111/1467-9701.00435>

⁵⁰Smith.J,(2004), inequality in international trade? Developing countries and institutional change in WTO dispute settlement, *Review of international political economy*, vol-11 issue -3.

1.4 Research Objectives

1. To analyze the framework of WTO in relation to Least developed countries and Developing Countries.
2. To appraise the overall influence of WTO on Developing countries and Least developed countries after accession.
3. To analyze the effect of TRIPS on developing nations.
4. To analyze the WTO's Dispute settlement Mechanism and its impact on developing nations by assessing the WTO written documents.
5. To analyze worldwide distributive justice as an ethical imperative and its contribution to the development of international trade law.
6. To analyze the effectiveness of GATS agreement and the implementation of Dispute settlement body decisions.
7. To analyze the opinion of stakeholders with regard to the best practice of distributive justice with reference to WTO Policies.

1.5 Hypothesis

- a. That the UN and its subsidies like WTO extended their cooperation to the best possible extent to Least Developed Countries and developing countries during emergency situations.

1.6 Research Questions

- i) Whether the provisions of “WTO” relating to trade by “Least Developed Countries” and “developing countries” are Discriminative in nature.
- ii) On a level with developed countries, how did developing countries tackle their accession challenges?
- iii) Whether the “WTO’s” Dispute Settlement process is skewed towards developing nations, and what obstacles does this imbalance generate for them.
- iv) Whether the “WTO” agreement, TRIPs, GATS, and DSM framework principles be amended to provide equitable opportunities.
- v) Whether the legal provisions governing “WTO” function is made to bestow distributive justice in favor of “Least Developed Countries” in matter of international trade.

1.7 Research methodology

The researcher will use doctrinal approach to accomplish the research. However, non-doctrinal methods have also been considered. The researcher used the following approach of doing research in order to meet the study's goals. An initial literature review and informal enquiries were carried out to identify the "WTO" concerns of the least developed nations and "developing countries" concerned. The researcher scoured the relevant literature to evaluate or deny the authenticity of such allegations. There can be no solution to this problem without considering worldwide distributive justice, which is why researcher worked to analyze the framework and interpretation of international distributive justice and show that it can be the foundation of all "WTO" agreements. This concept is essential to the resolution of this issue.

Primary documents include "WTO" agreements and rules; DSB Panel, Appellate Body, and Arbitration reports on remedies; relevant judgments of the International Court of Justice (ICJ), "Permanent Court of International Justice" (PCIJ), and other international adjudicatory bodies/tribunals; the ILC Articles on State Responsibility; and international legal instruments.

Researcher also used questionnaire to collect data. Analyzing the data acquired in order to answer the research questions is an essential part of this study. Descriptive analysis is used for analysing, presenting, and interpreting the study's findings. The findings of the questionnaire are used to conduct a quantitative analysis of the collected data.

1.8 Limitations

There are a few limitations that the researcher encounters when collecting data, such as:

1. There is a lack of literature on the topic in most libraries, which necessitates a lot of travel for data gathering.
2. Several specialists in the field were found to be indifferent about the WTO. This meant that the researcher had to spend more time educating the participants before asking for their thoughts on this research.
3. A focus on the WTO and its environs has been established for this research. In order to conduct the research, published data is the primary source.
4. The research relied heavily on theoretical laws and interpretations, hence only a small amount of statistical data was employed.

Because the research relies heavily on secondary data, all of the results are susceptible to the usual constraints that come with working with secondary data. It was quite tough to track out relevant and trustworthy sources of information. The statistics from multiple sources on the same topic are inconclusive. There is a paucity of data on the WTO's actual performance and “behavior”; the majority of the accessible material is policy-oriented. Since of this, it is difficult to apply information about international trade law in a wide range of academic contexts because it only provides ideas and models. The researchers must also contend with a constant lack of resources, both in terms of time and research facilities.

1.9 Chapterization

Chapter 1. Introduction

This chapter covers background of “WTO” establishment, Discuss and analyzes various ideas in the context of these systems and globalised institutions (IMF, WB and “WTO”) to establish a theoretical framework. As well as research topic and rationale, literature evaluation, theoretical paradigm and thesis strategy are all discussed in this chapter..

Chapter 2. “World Trade Organization” : An overview

Chapter 2 discusses the inception, history and working machinery of “WTO”, will analytically evaluate its policies towards “developing countries” and will suggest reforms in “WTO” laws and agreement.

Chapter 3. The issues and challenges faced by “developing countries” on “WTO” legal framework.

According to the philosophy of justice and fairness, a list of complaints and concerns from “developing countries” is presented. Theorists like Rawls, Pogge, Garcia, and Narlikar, who distinguish between “result-oriented justice” and “procedural justice,” depend on the idea of “distributive justice.” Devotion to both distributive fairness and advancement is seen as essential by many.

Chapter 4. TRIPs and Practical Challenges in applicability

Least-developed nations (LDCs) and “developing countries” were not well served by the TRIPS agreement. Hence TRIPs remained too far from observing the health as human right. In this Chapter the researcher will endeavour to explain the TRIPs and the concerns of “developing countries” like India and Pakistan about the problems

faced while implementing the TRIPs associated with compulsory licensing facility. To analyse the extremely different consequences on developing nations like India and Pakistan, this chapter looks at the TRIPs agreement for patent pharmaceutical product compulsory licencing.

Chapter 5. The “Dispute Settlement Mechanisms” and its Effect on “developing countries” related to Foreign Investment and Trade.

The DSM and other laws relating to investment are examined in this chapter, as are the different laws governing bi-lateral trade agreements, as well as international law in general (BITs). All eyes will be on ICSID as it works to clarify international investment law and the extent to which the Conventions and the tribunals’ decisions have led to concrete results, as ICSID has done in this regard. The “WTO” DSM will next be compared to ICSID’s DSM system.

Chapter 6. “WTO” and International distributive justice

A re-definition of ‘developing countries’ purely on resources available, per capita income and GDP will be commended, and a frame work of international distributive justice will be architected so that the development of low resource countries will not be destroyed and the “WTO” laws and agreements will not be accustomed to promote the development of developed countries.

Chapter 7. GATS: Benefits to Developing Countries

GATS Most Favored Nation requirement is examined in Chapter 7 to see how it will think about the practicality of this legally defective idea. With the GATS, there is an inherent difficulty of free trade agreements (FTAs) because of the “national treatment” commitment and also because of beliefs about countries being treated more favorably because of their location. Whether GATS duties are collective or bilateral is a matter of debate. Least-developed and developing nations get no advantage from the GATS other than the negative impact of the Doha restriction on tax collection.

Chapter 8. Analysis and Findings

To compute the results, 176 questionnaires sent to academicians from developing and least developed countries were completed, and 265 questionnaires distributed to practising doctors from developing and least developed countries were completed, respectively.

Chapter 9. Conclusion and Suggestions

Convergence of our views on global trade issues under the WTO and our common resolve to combat terrorism provide a valuable base for mutual understanding.

Abdul Kalam

Chapter 2- World Trade Organization: An overview

2.0 Introduction

This chapter looks at “WTO’s” origin, history, and workings, as well as its policies toward “developing nations,” and makes recommendations for changes to “WTO” rules and agreements.⁵¹ The GATT 1947 was transformed into the WTO in 1995. As early as the organisation was formed, members had a range of issues about the agreements, rules, and procedures of the organisation. The poor economies of the LDC’s and Developing countries are more of a problem for the “WTO’s” accords. This chapter examines the WTO policy for developing and LDC’s in light of GATT 1947’s history, founding documents, and internal workings.

This chapter discusses four important aspects of “International Trade Law” :

- a) “International Trade Organisation” and its inability to inspire the development of multilateral trade organizations. An outline of GATT is also provided, which was an agreement inside the ITO that regulated “international trade and commerce” from 1948 to 1994 until being eventually superseded by the “WTO”.⁵²
- b) A permanent entity, the “WTO”, is also discussed in this chapter as a way to govern complex trade concerns between states. The “WTO” structure, organisation, and rules are also described in detail. Instead of a simple

⁵¹ Davis, C. L., and Bermeo, S. B. (2009), Who Files? Developing Country Participation in GATT/WTO Adjudication. The Journal of Politics. 71/3. UK: Cambridge University Press, pp. 55-59.

⁵² Siebert, H(1999). The World Economy. London: Routledge, pp. 265-267.

agreement like GATT, the international community desperately needed a systemic international body that could deal with trade disputes, concerns pertaining to intellectual property rights, and multinational businesses.

- c) This chapter also analyses various strategies of “WTO” connected to “developing nations” that forms around two third members of the “WTO”. Identifying those rules. As a result of these rules and regulations, the WTO agreement relating to “developing nations” and “least developed countries,” may be better understood.⁵³
- d) In this chapter, the “WTO policies” for “developing nations” and their negative repercussions, such as obstacles to local trade and commerce, are severely evaluated. A central argument of this paper is that “WTO” free trade and open market policies favour poor and least developed nations. “The WTO needs to address issues including human rights, labour standards, and environmental protections, says a new research.”⁵⁴

⁵³ World Trade Publication. Understanding WTO. Switzerland: Geneva 2003, pp. 4-28.

⁵⁴ Khor, M. (2007) Globalisation, Liberalisation and Protectionism: The Global Framework Affecting Rural Producers in Developing Countries. Malaysia: Third World Network, pp. 5-15.

2.1 HAVANA CHARTER, 1947-48: (ITO)

Anxiety about the 1930s' global trade and monetary ties prompted EU and the US to consider the development of international organisations to control and monitor global commerce.⁵⁵ The Havana Conference to form the ITO was a failure due to the US Congress rejecting the concept. The “GATT 1947”, an annexure to the Final Act, was accepted at the end of the UNCTE Preparatory Committee's Second Session. In Washington, D.C., the world community signed the UN Charter on June 26, 1945, after WWII. The Havana Charter, often known as the ITO, was founded on March 24, 1948.⁵⁶ With 106 provisions, the Havana Charter of 1948 commits 53 governments to address employment issues via national and international action through the UN ECOSOC⁵⁷. To ensure fair and equitable commercial ties, John Maynard Keynes⁵⁸ designed the “Havana Charter” of 1948.⁵⁹

The “Havana Charter” of 1948 sought to resurrect worldwide commerce without discrimination and to assist the global society in the areas of employment, economic growth, commercial policy, and business practises.⁶⁰ GATT developed procedures for resolving disputes among members and tackling sensitive trade problems.⁶¹ It also helped nations in difficult circumstances that could not adhere to the Charter's ideals.⁶² The ITO was established up to deal with concerns including free trade, labour standards, and human growth.

Affirming the necessity for trade restrictions to address issues such as “balance of payments”, inflation, and unemployment, the report said. Thus, destitute states sought

⁵⁵ Toye, R. (2003). Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948. *The International History Review*, 25(2), 282–305. <http://www.jstor.org/stable/40109320>

⁵⁶ Robert, O. W.(1984) *Bretton Woods: A Retrospective Essay*. Published by Division of the Humanities & Social Sciences California Institute of Technology. Pasadena: California, pp. 13-20.

⁵⁷ *International Encyclopaedia of the Social Sciences* Vol. 8. US: New York 1968, pp. 39-50

⁵⁸ *International Encyclopaedia of the Social Sciences* Vol. 8. US: New York 1968, pp. 368-376.

⁵⁹ United Nations. *United Nations Conference on Trade and Employment: Havana Charter*. New York 1948, p. 5.

⁶⁰ United Nations Publication. 1948, p. 5.

⁶¹ Ostry, Sylvia. (1997). *The post-cold war trading system : who's on first?*. Chicago : University of Chicago Press

⁶² Drache, D.(2000), *The Short but Significant Life of the International Trade Organisation: Lesson for our time*. Centre for Canadian Studies. York University Publications, Toronto, p. 2.

money via tariffs and levies. Thus, the ITO's creators sought to eliminate undue state benefits.⁶³ Thus, the fundamental goal was to provide the groundwork for a new global economic system that could solve post-war difficulties.⁶⁴

2.1.1 Implementation Failure of ITO

The US Congress's rejection to ratify it in 1950 was the main reason for its failure. During the post-war era, the USA was the only state able to financially support any organisation. The US Congress disregarded ITO and supported the IMF, IBRD, and now the World Bank.⁶⁵ The GATT was the sole lasting agreement, despite its transitory nature and economic advantages to rich countries.⁶⁶ There was also a rift between industrialised and “developing countries” over ITO regulations. The ITO Charter included various protection provisions and exclusions that sided with “developing countries” on labour standards and concessions in times of crisis.⁶⁷ The ITO's basic institutional procedures also contributed to its downfall, since all invited UNCTAD members automatically became members, and approval of new members was needed.⁶⁸ A vote was cast for each member, unlike the IMF and IBRD where votes are weighted according to country's financial situation.⁶⁹

The failure of the ITO to build a liberal trade system is a significant juncture with ramifications for modern policies and a situation that demands theoretical explanation. It is possible that an examination of the ITO incident may provide light on what is necessary to develop successful international governance.

⁶³ There is an extensive literature available on ITO by Brown, W. A. *The United States and the Restoration of World Trade. An Analysis and Appraisal of the ITO Charter and the General Agreement on Tariff and Trade.* Washington D.C. 1950.

⁶⁴ Viner, J.(1947) ‘Conflicts of Principles in Drafting a Trade Charter’. *Foreign Affairs* 25:4. New York, pp. 612- 628.

⁶⁵ George, S.(2007) *Alternative Finances .Le Monde Diplomatique.* Paris., p. 8.

⁶⁶ *ibid.*

⁶⁷ Ricupero, R(1998). *The Havana Charter – 50 Years After.* UNCTAD 1998, pp. 9-28, retrieved from [http:// www.unctad.org](http://www.unctad.org), accessed on 22April 2009.

⁶⁸ UNCTAD, UN agency formed in 1964, its agenda was to address the demands of the South through New International Economic Order and hold dialogue with North (rich and industrialised with high per capita income). It is not to challenge the capitalists but to bring reforms that are acceptable to South (poor, underdeveloped and agrarian societies with low per capita income).

⁶⁹ George, S.(2007) *Can World Trade Ever Be Fair? Back to Keynes.*, pp. 22-40. Retrieved from [http:// www.fairtradetoronto.com.news](http://www.fairtradetoronto.com.news), accessed on 5th July 2009.

In particular, we focus on the ITO's agricultural trade policy initiative, given the necessity of food for post-war rebuilding, the need to stabilise international agricultural markets via commodity agreements, and to prevent a repeat of the 1920s agricultural crisis.⁷⁰ There are two sides to the ITO failure. First, the challenges of ITO ratification are emphasised. According to Milner,⁷¹ additional signatories were anticipated to ratify the ITO Charter once the US Congress had done so. In 1947, the Republican Party seized control of Congress; organised groups (unions, peak agricultural organisations) opposed the ITO Charter being adopted. It is also highlighted that American people were ambivalent about the ITO programme and perceived no relationship between ITO adoption and rising living standards, while US trade officials did nothing to educate the American public about this subject.⁷² As a consequence, the ITO programme faded off the late 1940s US political agenda.

The failure of multilateral free trade ideas and efforts to construct international economic institutions is a multifaceted phenomena best described by poor entrepreneurial activity by senior government players. In order to build sustainable international governance systems, six complementing entrepreneurial activities have been suggested. Setting the ideational backdrop conducive for a certain policy endeavour requires achieving a common frame (i.e., shared perception of what the issue is and what should be done to address it). Policy plans that are relevant, suitable, and include input from all interested parties are solid policies.

⁷⁰ Grant, J. H., & Boys, K. A. (2012). Agricultural Trade and the GATT/WTO: Does Membership Make a Difference? *American Journal of Agricultural Economics*, 94(1), 1–24. <http://www.jstor.org/stable/41331226>

⁷¹ Milner, H. V. (1997). *Interests, institutions, and information: Domestic politics and international relations*. Princeton University Press.

⁷² Wells, W. (1996). *Trade and the American Dream: A Social History of Postwar Trade Policy*. By Susan Ariel Aaronson · Lexington: University Press of Kentucky.

2.2 Overview of “The General Agreement on Tariffs and Trade” (GATT)

The “WTO” is an international organisation whose 164 members negotiate treaties, trade laws, and agreements to lower trading barriers and build fair trade norms. It also helps resolve trade conflicts. The “WTO” absorbed and extended the GATT's commitments and functions, created in 1947 by 23 member states.⁷³ The member nations aspired to develop a more open and rule-based trade system to foster global economic cooperation, stability, and prosperity. Today, about 98 percent of global commerce takes place among WTO members.⁷⁴

Delegates from all UN member states were invited to Havana in December 1947 to draught an ITO Charter. The Preparatory Committee member nations opted to negotiate a trade deal amongst them even before ratifying the ITO Charter. A ‘Protocol of Provisional Application’ and the Act defining the wording of the agreement were signed on 30 October 1947, bringing it into “provisional” effect.⁷⁵ Following ratification of the Havana Charter by member nations, this was supposed to be a transitory arrangement. Because the Havana Charter was not ratified in 1947, it became “a multifaceted long-term system comprising nearly 200 multilateral trade accords with complete institutions and decision-making capabilities.”⁷⁶

Founded in 1947, after WWII the GATT and IMF, now the WB, were the result of 23 nations working together to create a new international order, needed for peace and economic stability, after years of unending conflict.⁷⁷

⁷³ “The developed countries contracting parties were: Australia, Austria, Belgium, Canada, Czechoslovakia, France, Luxembourg, Netherlands, Norway, Rhodesia, the United Kingdom and the United States.” The developing countries contracting parties were: Brazil, Burma, Ceylon (SriLanka), Chile, China (the pre- 1949 government), Cuba, India, Pakistan, Syria and Lebanon.

⁷⁴ https://www.wto.org/english/thewto_e/thewto_e.html visited on 22-10-2020

⁷⁵ Bronz, G. (1956). An International Trade Organization: The Second Attempt. Harvard Law Review, 69(3), 440–482. <https://doi.org/10.2307/1337394>

⁷⁶ Petersmann, E. (01 Feb. 1997). The GATT/WTO Dispute Settlement System. Leiden, The Netherlands: Brill | Nijhoff. Retrieved Mar 13, 2022, from <https://brill.com/view/title/10509>

⁷⁷ Eichengreen, B., & Irwin, D. A. (2010). The Slide to Protectionism in the Great Depression: Who Succumbed and Why? The Journal of Economic History, 70(4), 871–897. <http://www.jstor.org/stable/40984781>

A historical accident, GATT was founded out of this dilemma.⁷⁸ Unlike the Havana Charter, GATT 1947 ran from January 1948 to January 1995, without legislative authorization from the member nations. A formal divergence from GATT 1947 was achieved in January 1995 with the foundation of the “WTO”.⁷⁹

The GATT was an agreement between member nations, not a formal treaty or an international institution. The GATT secretariat was created in Geneva to promote trade liberalisation.⁸⁰ The GATT 1947 stipulated that nations might join and participate in the GATT in one of four ways: by recognizing the GATT directly under Article XXVI (2) or by drafting future protocols.⁸¹

Traditionally, admission was preceded by years of tariff talks. During that time period, GATT and acceding members or participating members made specific arrangements.⁸² To join GATT, customs territories accepted by a contracting party have to achieve "full sovereignty in the conduct of their foreign affairs," according to Article XXVI (5)(c).⁸³

⁷⁸ Koul, A. K. (2005). Guide to the WTO and GATT: Economics, law and politics. The Hague: Kluwer Law International.

⁷⁹ Ibid

⁸⁰ Preamble to the GATT 1947

⁸¹ Jackson, J.H. (2000). The jurisprudence of GATT and the WTO : insights on treaty law and economic relations.

⁸² Ibid p. 31.

⁸³ https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art26_gatt47.pdf ,accessed on 22-10-2020

2.3 Core principles

To adopt the MFN principle (i.e. tariffs in a nondiscriminatory manner) and to spread the same advantages and concessions to other members, the founding 23 members agreed to cut tariffs on a number of industrial items. In addition to nonreciprocal preferences for developing nations, preferential trade agreements outside the GATT/WTO are allowed.⁸⁴ Imports from other GATT members will likewise get “National Treatment”. Imports would be subject to stricter controls than domestic items. In spite of the GATT’s ineffective enforcement system, the pact reduced tariffs and other trade obstacles significantly.⁸⁵ On industrial products, member nations secured a 20% decrease in reciprocal tariffs during in Geneva trade talks in 1947. The “Tokyo Round” was the first attempt to restructure international trade regulations since 1947. Import licencing, customs valuation, and government procurement were all accepted in the Tokyo Round.⁸⁶ These codes are available to all members. But most GATT members, especially poor nations, opted not to sign.⁸⁷

- The “WTO” inherited GATT provisions relating to MFN, concessions to LDCs, reciprocity, and transit trade, which were re-specified in four parts.
- The GATT members are required to pursue uniform and non-discriminatory trade and tariff policies towards each other, as stated in Articles 1 and 2 of Part 1. When it comes to trade and economic activities, members should not favour one member over another in terms of receiving concessions.
- Trade barriers, internal taxes, and the movement of commodities between contractual parties are all addressed in Article 3-23, which may be found in Part 2.

⁸⁴ GATT Article XXIV. Also see, *Bilateral and Regional Trade Agreements: Issues for Congress*, by Brock R. Williams. CRS Report R45198

⁸⁵ https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm. “Historic development of the WTO dispute settlement system,”

⁸⁶ WTO, “Pre-WTO legal texts,” https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm, accessed on 22-10-2020.

⁸⁷ Irwin, D. A. (2015). *Free trade under fire.*, p. 226-227.

- There are no trade measures or restrictions involved in transit commerce under Article 5, which states that contracting members must follow regular customs procedure.⁸⁸
- Dumping and subsidies by member nations to hurt the economies of other countries are addressed in Article 6. According to Article 6, contracting parties have the right to take measures to safeguard their economies against unfair trade practices.⁸⁹
- Commodities are valued according to their precise market worth, and the exportation of items that detract from free and fair commerce is prohibited under Article 7.
- Articles 8 and 9 were created to reduce customs services and fees, therefore facilitating trade development among the contracting countries.
- If a member country intends to reform its tariff or tax system, Article 10 mandated that the information be provided to guarantee transparency.⁹⁰
- Although quotas were outlawed under Article 11, member nations were entitled to make exceptions in specific instances, such as financial difficulties or limitations on commerce and agriculture. Articles 12 and 18 and 19 enable certain member states to deviate from the general quota system under certain conditions.
- According to Article 15, currency or exchange controls, which disguised quantitative constraints, were harming free and fair commerce. As a result, it agreed to join the IMF and build a system of coordination for the contracting party. The primary responsibility of the IMF was to assist the global community by providing loans in times of balance of payments crises.⁹¹
- With regard to primary and non-primary products, Article 16 argued that primary goods should not be given subsidies.⁹²

⁸⁸ WTO. GATT Documents. Geneva 1997. Retrieved from <http://www.wto.org>, accessed details on 15 - 12- 2019.

⁸⁹ legal texts - Marrakesh Agreement – WTO,
https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm

⁹⁰ Ibid.

⁹¹ WTO. GATT Documents. Geneva 1997. Retrieved from <http://www.wto.org>, accessed details on 2 November 2009.

⁹² Primary Commodity is a commodity in its raw or unprocessed state; while non-primary is a

- A state trading business was established under Article 17 to facilitate non-discriminatory trade between the contractual parties.
- For developing and LDC's, Article 18 offered concessions in the form of quotas and tariff increases in order to safeguard them.
- It is permitted under Article 19-23 that contractual parties may exercise an escape clause that is to temporarily remove concessions, adopt procedures to manage the balance of payment, and preserve fledgling industry under certain conditions.⁹³
- Articles 24-35 of Part 3 deal with a variety of topics, including custom unions, free trade zones, GATT participation, and tariff reductions.⁹⁴
- Article 24 made it clear that the MFN requirement did not apply to customs unions or free trade zones.
- It was emphasized in Articles 25 and 26 that the GATT should be given treaty status and that the meetings of the GATT should be accepted.
- It also deals with trade concerns such as tariff concessions, agreements on taxes and tariffs among the members, all of which are addressed in Articles 27, 28, 29 and 31.
- In order to replace GATT, Article 29 devised a mechanism for the formation of the ITO, which was supposed to be suspended once the Havana Charter was ratified. LDC's trade and commodity difficulties were the focus of these articles. They realized that LDC's could not follow and apply the concept of reciprocity, thus a waiver was granted to them. In 1995, the WTO approved the GATT's Article XVII Interpretation understanding, which describes its goal of observing member nations' trade and tariff actions in accordance with "WTO" policies,⁹⁵ as well as the GATT's Article XVII Interpretation

processed commodity. See Webster New World Dictionary. US: New York 1989, p. 1069.

⁹³ WTO. GATT Documents. Geneva 1997. Retrieved from <http://www.wto.org>, accessed details on 2 November 2009.

⁹⁴ WTO. GATT Documents. Geneva 1997. Retrieved from <http://www.wto.org>, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art18_jur.pdf, WTO ANALYTICAL INDEX GATT 1994 – Article XVIII (Jurisprudence) , accessed details on 25 November 2020.

⁹⁵ WTO ANALYTICAL INDEX GATT 1994 – Article XVIII (Jurisprudence) https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art18_jur.pdf ,)

understanding. Articles XII⁹⁶ and XVIII: B deals with the member states' balance of payments; Article XXIV interpretation deals with FTAs and Custom Unions. Article XXV⁹⁷ interpretation deals with GATT disciplined waivers. Article XXVIII interpretation explains a new standard. When it comes to applying the agreement to parties that have not engaged in tariff talks with each other or with any other party, the interpretation of Article XXXV is critical.⁹⁸

2.4 WORLD TRADE ORGANISATION 1995 REPLACING GATT

- a) The original contracting parties of Geneva round GATT after Second World War in 1947 were 23. Worth US\$10 billion which covers approximately 45,000 tariff concessions of trade negotiations were discussed.
- b) The Annecy Round, 1948–49 conducted in Annecy, France involved 34 countries and approximately 5000 tariff concessions were exchanged.
- c) The Torquay Round in 1950–51 featured 34 nations. About 8700 concessions, or nearly 25% decrease in tariffs since 1948. In the Geneva Round of 1955–1966, 22 countries agreed to trade worth \$2.5 billion. Despite the failure of the Geneva Round in 1955–1966, the trade liberalisation in agriculture and the Haberler Report (1958) acknowledged⁹⁹ the needs of “developing countries” and LDCs.¹⁰⁰
- d) The “Dillon Round” (1960–1962) included over 4400 tariff reductions totaling US \$4.9 billion. The “Dillon Round” in Geneva included 45 nations. The “Dillon Round”, 1960–1962, was negotiated under the prospect of an EEC uniform external tariff, which meant trade fraud for certain nations. Article XXIV:6 of GATT defined the EEC tariff as large-scale external tariff discussions to compensate individual contracting parties for any imbalance caused by the EEC

⁹⁶ *ibid*

⁹⁷ *ibid*

⁹⁸ *Ibid.*

⁹⁹ As US administration did not offer greater reductions under the Trade Agreements Act of 1955, 65 stat. 162 (1955).

¹⁰⁰ Haberler Report, GATT, Trends in International Trade (Sales No. GATT/1958).

replacing member rates with a single external tariff.¹⁰¹ The Dillon Round allowed for discussion of trade threats, and the EEC was later included into the GATT.¹⁰²

e) In Kennedy Round, 1964–1967 US \$40 billion of trade was negotiated. It was held in Geneva with 48 nations. The Kennedy Round (1964–1967) featured ‘product-by-product’ and ‘sector-by-sector’ tariff discussions. They were challenging because the old product-by-product negotiation strategy was replaced with a ‘across-the-board’ or ‘linear manner’.¹⁰³ The involvement of “developing nations” and LDCs in TDC reinforced the view that these countries must prioritize the elimination of trade barriers for items of importance. Developed nations were not meant to demand reciprocity from emerging and LDC countries under GATT Article XXXVI:8. The “developing countries” and LDCs continue to demand preferential treatment in international trade discussions.¹⁰⁴

f) The Tokyo Round, 1973–1979 started in Tokyo and concluded in Geneva involved 102 countries and US \$300 billion of trade was negotiated. The major agreements negotiated in the “Tokyo Round” were¹⁰⁵ :

- “*Agreement on implementation of Article VI (anti-dumping)*”¹⁰⁶;
- “*Agreement on technical barriers to trade*”;¹⁰⁷
- “*Agreement on import licensing procedures*”;¹⁰⁸
- “*Agreement on trade in civil aircraft*”;¹⁰⁹
- “*Agreement on government procurements*”;¹¹⁰
- “*Agreement on interpretation and application of Articles VI, XVI and XXIII*”; (“*Countervailing duties and subsidies*”)¹¹¹

¹⁰¹ Josling T.E., Tangermann. S and Warley.T.K (1966), „Agriculture in the GATT pp 42-51

¹⁰² ibid

¹⁰³ Johnson, H. G. (1967). The Kennedy Round. The World Today, 23(8), 326–333. <http://www.jstor.org/stable/40394600>

¹⁰⁴ Gian Paolo Casadio (1968) The Kennedy Round: Results, reactions and prospects, Lo Spettatore Internazionale, 3:1, 18-49,

¹⁰⁵ Pre-WTO legal texts https://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm Accessed on 3-11-2020

¹⁰⁶ ibid

¹⁰⁷ ibid

¹⁰⁸ ibid

¹⁰⁹ ibid

¹¹⁰ ibid

¹¹¹ ibid

- *“Agreement regarding Bovine Meat”*;¹¹²
- *“International Dairy Agreement”*;¹¹³
- *“Agreement on implementation of Article VII (customs valuation)”*;¹¹⁴
- *“Agreements relating to special and different treatment”*;¹¹⁵
- *“Agreements relating to Declaration on trade measures taken for balance-of-payments purposes”*;¹¹⁶
- *“Agreements relating to Safeguard action for development purposes”*;¹¹⁷
- *“Agreements relating to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance”*.¹¹⁸

There were 124 nations involved in the “Uruguay round” 1986–1994 and trade worth \$3.7 trillion was agreed. The “Uruguay round” resulted in the WTO and amendments to “GATT 1994” and other international agreements. It has a prologue and sixteen articles that outline the institution's core duties, describe its legal status, outline decision-making processes, specify membership requirements, and explain the institution's interaction with other organizations.¹¹⁹ WTO umbrella treaty manages sixty trade agreements. Agreements on commodities, services, investment, dispute resolution, and trade policy review.¹²⁰

¹¹² *ibid*

¹¹³ *ibid*

¹¹⁴ https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art7_gatt47.pdf

¹¹⁵ https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm

¹¹⁶ *ibid*

¹¹⁷ *ibid*

¹¹⁸ *ibid*

¹¹⁹ Legal texts: the WTO agreement https://www.wto.org/english/docs_e/legal_e/ursum_e.htm , Accessed on 5-11-2020, also see Narlikar. 2005, p.22.

¹²⁰ Accessed on 5-11-2020, Legal texts: the WTO agreements, https://www.wto.org/english/docs_e/legal_e/ursum_e.htm , also see Pasricha. 2005, pp. 91-99.

GATT rounds from 1947 to 1994		
Year	Round	Activities
1947	Geneva	• 45,000 tariff concessions covering \$10 billion in commerce • Commitment to future negotiation 'Rounds'
1949	Annecy	• Contracting parties exchange some 5000 tariff concessions • 10 new GATT contractual parties accepted for entry;
1951	Torque	• 8700 tariff concessions granted, resulting in a 25% drop in total tariffs compared to 1947/48;
1956–60	Geneva	• Single schedule of concessions approved for the newly formed European Economic Community, based on its shared External Tariff
1961	Dillon round	• 4400 tariff concessions worth \$34.9 billion agreed
1964	Geneva	• GATT membership increased to 50 countries, accounting for 75% of global commerce
1967	Kennedy	• Tax cuts for industries and sectors rather than individual products were discussed in the trade talks. • Many areas saw a 50% reduction in rates. An estimated \$ 40 billion in tariff concessions • Separate agreements on grains and chemicals. • Establishment of an Anti-Dumping Code
1973	Geneva	• 99 countries participated

1979	Tokyo	• Average tariff on manufactured products in the world's nine largest industrial markets dropped from 7 to 4.7 percent. • A revamped anti-dumping code was also agreed upon.
1986	Geneva	• 125 countries took part • Significant reductions in trade tariffs
1993	Uruguay	• GATT 1994 rule revision and strengthening • Multilateral talks on trade-related investment measures, services trade and intellectual property rights culminate in specific accords. • The WTO (with a stronger DSM)

Although the Ninth Round (30 November-3 December 1999) was begun in Seattle at the third “WTO Ministerial Meeting”, the violent protests and resistance by numerous parties and NGOs throughout the talks prevented it from flourishing. A fresh round of trade talks was agreed during the “Doha Ministerial Conference” in 2001.

So after a hiatus, the “Doha Ministerial Conference” in 2001 re-started the Doha discussions, which were successfully ended in 2004 by the WTO General Council. Renewed in 2007, discussions on “agricultural and non-agricultural market access” reached significant milestones by the end of 2008. These rounds were effective in including a wide number of nations, covering a larger amount of global commerce, and making international trade a basic element of international trade law. Since its creation, the WTO has established a new global economic system with a legal stature roughly similar to the UN Charter. It now has 164 members.¹²¹

¹²¹ World Trade Publication. Understanding WTO. Switzerland: Geneva 2003, p. 5.

2.4.1 Objectives of “WTO”

The WTO Preamble explicitly specifies that certain goals must be achieved for the organisation to function properly, such as:¹²²

- a) Friendly relations to promote trade and commerce between member nations.
- b) Improve living standards and create jobs by growing trade and commercial operations.
- c) As part of their economic progress, member nations undertake to conserve the environment.
- d) LDC's need particular attention in trade and market access.
- e) Elimination of all forms of trade discrimination among member nations.
- f) Free and fair global commerce.
- g) During economic crises, member nations' willingness to accept any situation.
- h) Preventing unfair trade practices such export subsidies and dumping.
- i) To aid developing nations in trade and economic growth, the WTO

2.4.2 Functions of “WTO”

“The WTO's functions are defined in Article III of the Marrakesh Agreement.”

1. A framework for implementing, administering, and operating multilateral trade agreements is provided by the WTO.¹²³
2. A framework for implementing the outcomes of such discussions is provided by the “WTO” via Ministerial Conferences.¹²⁴
3. The “WTO” shall manage the DSU, as specified in Annex 2 of the Marrakesh Agreement Establishing the “WTO”.¹²⁵
4. The WTO must run the TPRM and examine member state trade policy in

¹²² World Trade Publication. 2003, pp. 9-10.

¹²³ WTO. WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994. Retrieved from <http://www.wto.org>, accessed on 10-11-2020.

¹²⁴ WTO. WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994. Retrieved from <http://www.wto.org>, accessed on 10-11-2020.

¹²⁵ *ibid*

conformity with the Marrakesh Agreement.¹²⁶

5. The WTO will work with the IMF, the WB (previously International Bank for Reconstruction and Development) and its affiliates.¹²⁷

2.4.3 Structure of “WTO”

The WTO's administrative structure is defined in Articles IV and VI. General Council (GC)¹²⁸ and Secretariat¹²⁹ follow Ministerial Conference (MC)¹³⁰.

Members of the MC meet every two years.

It performs the “WTO's” functions. The MC decides on all items by vote and consensus, as required by the Agreement and the applicable MTA.¹³¹

The GC is made up of diplomatic representatives from all member nations based in Geneva who convene as needed. The GC performs its duties between MC as set out in this Agreement. The GC adopts its own rules of procedure and accepts those of the Article IV(7) committees.¹³² The GC elects a chairman and meets to handle member complaints. It defines the DSB's procedures.¹³³ The GC meets as the TPRM. This procedure and choice are essential. An absolute majority of the GC may overrule Appellate body decisions. The TPRM ensures compliance with WTO requirements.

The Trade Policy Review Body elects its own chairman and sets its own procedures.¹³⁴ Each of the three councils overseen by the General Council has its own mandate. Under Annex 1A, the “Council for Trade in Goods” oversees the MTA, while the “Council for Trade in Services” oversees the GATS. The TRIPS Council oversees the “TRIPS” Agreement. The General Council approved its distinct norms of procedure for better functioning. All member nations may join these Councils.¹³⁵

¹²⁶ *ibid*

¹²⁷ *ibid*

¹²⁸ Article IV (2) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994.

¹²⁹ Article VI (1) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994.

¹³⁰ Article IV (1) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994.

¹³¹ Article IV (1) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994.

¹³² Article IV (2) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994.

¹³³ Article IV (3) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994.

¹³⁴ Article IV (4) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994.

¹³⁵ Article IV (5) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994

These Councils may form subordinate entities. All of these subordinate organizations may adopt their own rules of procedure with Council approval.¹³⁶

Ministry of Trade and Development, “Balance-of-Payments Restrictions”, and Budget, Finance, and Administration Committees are established. Each time the Committee on Trade and Development evaluates the MTA special provisions for LDC Members, the General Council takes appropriate measures. All Member nations are welcome to join these Committees.¹³⁷ While the General Council is informed on the activities of the PTA's various bodies, they perform their tasks as assigned under the agreements.¹³⁸

Article VI of the “Marrakesh Agreement” Establishing the “WTO” 1994 establishes a Secretariat in Geneva, headed by a DG chosen by the MC. MC also establishes Director-powers, General-responsibilities, and tenure. The Secretariat advises but does not legislate. A committee to assist the Secretariat includes customs valuation, origin rules, import licencing and TRIMs safeguards. There are subcommittees on LDCs, RTA, Balance of Payments Restriction, Budget, Finance, and Administration.

Their duties do not allow them to seek or accept directives from any government or other authority outside the “WTO”, since their obligations are entirely worldwide.¹³⁹

2.4.4 Accession to “WTO”

Accession to the “WTO” is made possible by Article XII of the Marrakech Agreement, which says that states that are sovereign in external and internal affairs, as well as those that agree to all the terms and conditions of “WTO” and future agreements, can join.¹⁴⁰ Two-thirds of “WTO” members must vote in favour of a decision at the MC on Accession.¹⁴¹ As part of its declaration of compliance with “WTO,” a prospective member state submits a formal application to the director general. The application is subsequently sent to the member nations. Observer status is

¹³⁶ Article IV (6) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994

¹³⁷ Article IV (7) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994

¹³⁸ Article IV (8) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994

¹³⁹ Article VI of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994

¹⁴⁰ Article XII(1) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994

¹⁴¹ Article XII(2) of WTO Legal Text, Marrakesh Agreement Establishing the WTO 1994

subsequently awarded to the applicant state, allowing it to change its economy and modify its international commerce in accordance with the “WTO's” standards. Thereafter, a report is submitted to general council to be approved. If approved by two thirds of the members, the applicant country becomes a member; if not approved, the applicant country is sits as an observer and further adjust her economy to the requirements of “WTO”.¹⁴² Concessions and promises provided by the “WTO” are determined by the country's position.¹⁴³ Developing and LDC’s are drawn to the post-accession concessions because they do not comprehend the negative implications and extra stress on an applicant state that is trying to achieve the standards of the “WTO”. The process of gaining entry into the EU is contentious and difficult for countries in transition.

2.5 Over view of “WTO” Agreements and Provisions

WTO Marrakech Agreement A deal creating the WTO and implementing the Uruguay Round's outcomes will provide the framework for future global trade talks. This Agreement contains general rules on the “WTO's” membership, structure, and decision-making.¹⁴⁴ Other understandings, such as Article II: 1(b) and Article XVII, are included in the GATT 1994.¹⁴⁵ Market access, tariff regulation, competitive exports, domestic assistance, export subsidies, food security, and environmental protection are sought from members of the Agreement on Agriculture.

To promote trade in agricultural commodities of developing countries, special safeguard and treatment provisions are framed. Several subsidies are allowed to member states to protect their agriculture, such as; Amber box, Green box, Blue box and Red box.

It is defined as all domestic assistance measures that do not hinder trade, and hence minimal subsidies are permitted: Subsidies in the green box are those that do not distort production or commerce and are thus permitted; subsidies in the blue box, on

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#:~:text=Article%20III-Functions%20of%20the%20WTO,2. Accessed on 15-11-2020

¹⁴⁵ https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm

the other hand, are those that are subject to restrictions such as quotas rather than general norms of subsidies. Agriculture does not have a red box since there is no subsidy or assistance.¹⁴⁶ One of the most significant agreements is the “Sanitary and Phytosanitary Measures”, which covers food safety, animal and plant life, and environmental protection. As a way to make textile trade easier, the Textile and Clothing Agreement was included in GATT 1994, and bilateral quotas were established under the Multi-fiber Agreement.¹⁴⁷

1. **“Agreement on Agriculture”** places responsibilities on member nations in the areas of “market access”, “tariff control”, “export competition”, domestic assistance, “export subsidies”, “food security”, and environmental protection. To encourage the export of agricultural products from developing countries, additional safeguards and treatment are put in place. Member nations are authorized to receive a variety of subsidies to preserve agriculture, including: All domestic assistance measures that do not affect trade, such as minimum subsidies, are included in the Amber box. A subsidy in the form of a green box is one that does not distort production or commerce and is thus permitted. Instead than following the basic principles of subsidies, a subsidy in the “blue box” has specific requirements, such as quotas that must be met. Contrary to popular belief, there is no such thing as a “red box” when it comes to agriculture.¹⁴⁸
2. The **“Sanitary and Phytosanitary Measures Agreement”** sets multilateral frameworks for planning, adoption, and implementation of “sanitary and Phytosanitary measures” to safeguard human life, animal and plant life, and the environment, prohibit arbitrary or unjustified discrimination, and limit detrimental consequences on international commerce.
3. To help textile-trading countries, the Multi-fibre Agreement consolidated the

¹⁴⁶In WTO terminology, subsidies in general are identified by boxes, green is permitted, amber is reduced, blue allowed with certain conditions and red is forbidden.

¹⁴⁷ Narlikar, A. (2005). *The World Trade Organization: A very short introduction*. Oxford [u.a.] : Oxford Univ. Press.

¹⁴⁸In WTO terminology, subsidies in general are identified by boxes, green is permitted, amber is reduced, blue allowed with certain conditions and red is forbidden.

“Textile and Clothing Agreement” and bilateral quotas were established under GATT. The MFA regulated textile commerce from 1974. After a 10-year transition phase, which ended in 2004, the textile trade was progressively liberalized.¹⁴⁹

4. In order to avoid abuse or misuse of “anti-dumping measures”, the “Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade” 1994 was signed.¹⁵⁰
5. The **“Agreement on Technical Obstacles to Trade”** strives to reduce needless trade barriers by ensuring transparency and harmonization of evaluation systems such as industrial standards and safety/environment legislation with international standards. It states that technical laws cannot impede international commerce by imposing excessive limitations on wildlife and plants save in the context of human health and safety.¹⁵¹
6. As part of the **“Agreement on Trade Related Investment Measures”**, nations may impose investment restrictions and limitations on investing businesses. The TRIMs prohibited investment measures that conflicted with Article III's “national treatment” rules and Article XI's abolition of quantitative limits that harmed goods trade.¹⁵²
7. In general, “non-preferential commercial policy instruments” are covered under the **“Agreement on Rules of Origin”**. It also forms “rules of origin” committee and sets up dispute resolution. To maintain tariff benefits and free trade, a new discipline called harmonization of origin regulations must be developed, albeit the details are still being debated.¹⁵³
8. The **“Agreement on Import Licensing Procedure”** strives to streamline administrative procedures, promote fair use of import licencing systems, and minimize needless trade obstacles.¹⁵⁴

¹⁴⁹ Narlikar, A. (2005). *The World Trade Organization: A very short introduction*. Oxford [u.a.] : Oxford Univ. Press..

¹⁵⁰ https://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm , accessed on 20-11-2020

¹⁵¹ https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm, accessed on 20-11-2020

¹⁵² Narlikar, A. (2005). *The World Trade Organization: A very short introduction*. Oxford [u.a.] : Oxford Univ. Press..

¹⁵³ https://www.wto.org/english/docs_e/legal_e/22-roo_e.htm , accessed on 20-11-2020

¹⁵⁴ Van den Bossche, P., & Zdouc, W. (2017). *The Law and Policy of the World Trade Organization*:

9. The “**Agreement on Subsidies and Countervailing Measures**” regulates the subject of subsidies in trade and commerce. Others are barred if they undermine other countries' economy and go against the “WTO” aims. “Participation in the Agreement on Trade in Specific Commodities” protects each member country's domestic economy from harm.¹⁵⁵
10. **GATS**, the GATS's non-discrimination principle ensures that all parties are treated equally.¹⁵⁶ A progressive liberalisation supports commerce and development while stimulating economic activity. “The GATS has three tiers: services, general obligations, and specific commitments.”¹⁵⁷ Services include tourism, finance, and consultancy. General responsibilities combat monopolies. All member nations are subject to the same requirements in the services sector. There are 155 service sectors listed which state that a member nation cannot impose more severe market access restrictions and discriminatory measures. All members must assure “market access and national treatment” for the other members. Agreements must increase markets and reduce barriers in the service industry.¹⁵⁸ The GATS has established a Council of Services to settle issues and consult.¹⁵⁹
11. The “**TRIPS Agreement**” was negotiated in the Uruguay Rounds from 1986 to 1994. An worldwide system of principles, standards, and disciplines dealing with counterfeit goods, plagiarism, piracy, and copyrights was recognized in this agreement. The major purpose is to provide appropriate protection for all members. These standards safeguard patents, copyrights, computer programmes, and trademarks. TRIPS establish consistent norms for all nations based on socio-economic and technical progress. Invention protection, “patent protection” for at least 20 years from the date of application, limiting exemptions from patent rights and effective administrative and judicial mechanisms became mandatory. TRIPS addressed the controversial problem

Text, Cases, and Materials (4th ed.). Cambridge: Cambridge University Press.p.496-498.

¹⁵⁵ *ibid*

¹⁵⁶ Article XVII of GATS.

¹⁵⁷ WTO. The General Agreement on Trade in Services (GATS): Objectives, Coverage And Disciplines. Retrieved from www.wto.org, accessed on 22-11-2020.

¹⁵⁸ World Trade Publication. 2003, pp. 36-38.

¹⁵⁹ Articles XXII and XXIII

of exploiting a commodity's origin place and name, which prohibits using a particular area's name to mislead buyers unless the product is protected by a trademark.¹⁶⁰

12. “Trade Policy Review Mechanism” (TPRM) is an Annex III clause. In order to enforce particular promises under MTAs and PTAs, or to impose new policy responsibilities, the “TPRM” was established. According to it, no member may prejudice against foreigners or foreign goods. Investment measures that restrict volumes or restrict imports or exports are likewise prohibited.¹⁶¹

2.6 Coherence of “WTO” with other International and Multinational Organizations

“WTO” Secretariat has cooperation with 200¹⁶² international organizations in different fields under the banner of “coherence”¹⁶³. These international organizations are UN, WHO, WOA, WIPO, Codex Alimentarius (joint FAO/WHO), FAO, ILO, IMF, IPPC, ITU, ITC, OECD, UNCTAD, UNEP, WB, WCO.¹⁶⁴

“WTO” tries to identify the problems of “developing countries” in collaboration with UNCTAD.¹⁶⁵ In 1996, an agreement was signed between “WTO”, “IMF” and “WB” for enhanced understanding of trade and funding policies and to develop consistency and consultation with policies of “WTO’s”.¹⁶⁶

¹⁶⁰GATT-secretariat, the results of the “Uruguay round” of multilateral trade negotiations, the legal texts (1994), www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement. Accessed on 25-11-2020.

¹⁶¹ Trade Policy Review Mechanism (TPRM), [https://www.wto.org/english/docs_e/legal_e/29-tpm_e.htm#:~:text=\(i\)%20The%20purpose%20of%20the,smoother%20functioning%20of%20the%20multilateral](https://www.wto.org/english/docs_e/legal_e/29-tpm_e.htm#:~:text=(i)%20The%20purpose%20of%20the,smoother%20functioning%20of%20the%20multilateral), accessed on 28-11-20.

¹⁶²The WTO and other organizations, work with other international organizations https://www.wto.org/english/thewto_e/coher_e/coher_e.htm. Accessed on 30-11-20.

¹⁶³a term originating in the “Decision on achieving greater coherence in global economic policy-making”,

¹⁶⁴The WTO and other organizations, work with other international organizations https://www.wto.org/english/thewto_e/coher_e/coher_e.htm. Accessed on 30-11-20.

¹⁶⁵, Ibid

¹⁶⁶ Ibid.

2.7 “Developing country” definition

The current WTO classification of developing nations covers a broad variety of countries with varying levels of development. The UN designated LDCs in 1971, and the WTO approved it in 2002.¹⁶⁷ The Enabling Clause grants the LDCs more flexibility, including longer transition times for implementing rules and greater privileges in preferential trade programmes. To maintain their balance of payments, developing countries might use GATT Article XVIII (1947) to protect nascent sectors. There is need for underdeveloped countries to be free from reciprocal concessions in GATT.¹⁶⁸ “The contracting parties recognize that the progressive expansion of economies will help achieve the purposes of this Agreement.”¹⁶⁹

Permission to temporarily depart from the restrictions of other GATT Articles is granted under certain conditions (paragraph 4(a)). This is likely the GATT/WTO system’s closest definition of “developing nations”.¹⁷⁰ Cui summarizes the two criteria for identifying a developing nation in Article XVIII, Paragraphs 1 and 4(a). The first is “low level of living” while the second is “developing rapidly”. Annex I of the GATT discusses both. It is the economy’s long-term position that should be evaluated, not transitory favourable ones. To reduce their reliance on primary product production, Annex I defines “early stage of development” as “contracting partners whose economies are industrializing.”¹⁷¹

While Annex I defines a developing nation, it doesn’t set forth any objective criteria for creating a list of “developing nations”. The terminology used to try to define lacks legal accuracy and is best taken as a guide. Article XVIII Applications¹⁷², Cui¹⁷³ highlights the arbitrary nature of such criteria. The GATT Working Party has granted Ceylon a 10-year exemption from quantitative restrictions on petroleum imports to

¹⁶⁷ https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm#:~:text=There%20are%20no%20WTO%20definitions,provisions%20available%20to%20developing%20countries.

¹⁶⁸ GATT 1994 Articles XXXVI, XXXVII, and XXXVIII

¹⁶⁹ Article XVIII(1)

¹⁷⁰ Cui, F. (2008), “Who are the developing countries in the WTO?”, *The Law and Development Review*, Vol.1 Issue No. 1, pp. 121-152, at 133.

¹⁷¹ Article XVIII GATT, Annex I Notes and Supplementary Provisions,

¹⁷² Panel Report, *Ceylon-Article XVIII Applications*, GATT Doc. L/71 (26 November 1957).

¹⁷³ Cui, F. (2008), “Who are the developing countries in the WTO?”, *The Law and Development Review*, Vol.1 Issue No. 1, pp. 121-152

support the building and operation of a locally owned refinery. The GATT Panel had to first determine Ceylon's eligibility under Article XVIII, paragraph 4(a) before considering its application. The Panel estimated Ceylon's GNP per capita in 1955 at \$128 based on "poor conditions of life." In contrast, the GNP per capita of countries¹⁷⁴ was much lower than that of Western European industrialized nations. The Panel examined the GNP share of manufacturing, mining, and building to determine if Ceylon was "in the early stages of development". For example, Burma and Greece have a smaller percentage of basic industries (mines included) than industrialized nations (about 10%).¹⁷⁵ Concerning "low standards of living" and "early stage of development," Cui disagrees with the Panel's preference for GNP per capita above GDP per capita or other national income measures. Given that the Panel gave no explanations for its choice.¹⁷⁶ Mining is included in the computation of some industries' contribution of the GNP. It was justified, he says, since GATT Article XVIII did not address such matters. Although often used to classify nations based on economic growth, The World Bank and the OECD utilize economic indicators like GNP per capita, social indicators like human development, and institutional indicators like governance and freedom. However, these metrics do not specifically address trade issues of developing nations. They are also inappropriate to the WTO since they aim to quantify broad development problems.¹⁷⁷

Self-designation allows poor nations to qualify for WTO SDT. Members of the WTO self-designate to take use of SDT rules, according to Rolland.¹⁷⁸ She points out that the assertion is untrue. WTO members scrutinize each country's self-designation.¹⁷⁹ The "burden of proof" shifts from the claimant to the member who contests the claim.¹⁸⁰ Denominationally, the burden of proof may fall on the self-designating

¹⁷⁴ Greece, Cuba, and the Dominican Republic

¹⁷⁵ Panel Report, Ceylon-Article XVIII Applications, GATT Doc. L/71 (26 November 1957).Para 4

¹⁷⁶ Cui, F. (2008), "Who are the developing countries in the WTO?", *The Law and Development Review*, Vol.1 Issue No. 1, pp. 121-152, at 135.

¹⁷⁷ Paugam, J. and Novel, A. (2005), "Why and how differentiate developing countries in the WTO? Theoretical options and negotiating solutions", paper presented at Ifri/AFD Conference 28 October 2005, Paris,

¹⁷⁸ Rolland, S. (2012), *Development at the WTO*, p. 80, Oxford University Press. Oxford.

¹⁷⁹ Rolland, S.E. (2012), "Considering development in the implementation of panel and appellate body reports", *Trade, Law and Development*, Vol. 4 No. 1, pp. 150-199

¹⁸⁰ Cui, F. (2008), "Who are the developing countries in the WTO?", *The Law and Development Review*, Vol.1 Issue No. 1, pp. 121-152, at 137.

country/claimant.¹⁸¹

Self-designation means that any country may claim to be a developing country and so be eligible for SDT. Unresponsive to legitimate development needs, this broad policy encourages unfair trade rivalry among developing nations. Its GDP per capita is \$528.79 in 2014, compared to Mexico's \$10,000 in 2015. Given its resources and capabilities, Gambia cannot compete with Mexico. This emphasizes the WTO's obligation to promote equity within developing markets and between rich and poor.

2.8 Objections and Reservations to Policies of “WTO” by developing and “Least Developed Countries”/members

There are highly diverse 137 developing members¹⁸² and 46 LDC's¹⁸³ in “WTO”. The developed members of the WTO believe that the least developed and vulnerable nations need greater trade and foreign direct investment, and that the WTO can assist them from their trade policy.¹⁸⁴ Assisting and protecting emerging and least developed countries, WTO drafted approximately 72 special provisions.¹⁸⁵

All new international accords reached under the WTO's cover during the “Uruguay round” gave emerging and “LDC's” this notion that they would reap maximum economic advantages. There were think tanks and public opinion makers who promoted the idea that developing countries would be the primary beneficiaries of this system, and that free trade would open up opportunities for all WTO members, regardless of wealth, and that the developing and “LDC's” would be able to eliminate poverty through industrialization. “WTO” complaints have escalated in recent years, instead of internationalizing economic progress. Global trade problems and environmental concerns have grown considerably since the “WTO” was founded. The social difficulties in emerging nations have been exacerbated as a result of the

¹⁸¹ WT/DS87/15 (23 May 2000), para. 18.

¹⁸² Developing countries are defined according to their Gross National Income (GNI) per capita per year, as calculated by the World Bank Atlas method, December 2020. <https://www.isi-web.org/capacity-building/developing-countries> ,Accessed on 05-1-2020.

¹⁸³ https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf , Accessed On 05-01-2020.

¹⁸⁴ Jones, K. (2004-01-29). *Who's Afraid of the WTO?*. : Oxford University Press.

¹⁸⁵ World Trade Publication. 2003, p. 98.

economic crises they are now facing.¹⁸⁶ “Developing countries” and LDC members have reservations on many issues within existing “WTO” agreements on which they ask for revision, amendment, follow-through and reform. The “WTO’s” internal governance mechanism is not ideal, and “developing countries” have expressed their dissatisfaction with it in recent years. Instead of leaving or criticizing the “WTO”, the developing country delegations have called for institutional improvements that do not jeopardize the progress of “developing countries” and LDCs towards trade liberalisation.

In the World Trade Organization, each country gets one vote, but in fact, the “Quad”¹⁸⁷, which includes the US, the EU, Canada, and Japan, has sway. In a “Green Room”¹⁸⁸, this specific club sets the agenda for “WTO” meetings before they ever begin. Meetings in the “Green Chamber” are really lobbying efforts to assist certain “developing countries” such as “India and Brazil” get admission to the room, which is not available to all members of the “WTO”. As a result, tiny economies are forced to either accept or reject their judgments.¹⁸⁹

Most members of the “WTO’s” LDC and “developing nations” are unable to attend meetings and discussions because of the high fees. As a result, most of them do not have a permanent representation. Similarly, some of them find it difficult to safeguard their rights in many matters owing to an administrative and legal system that is very costly and convoluted. For the most part, they’re just members of the “WTO” who can’t make any decisions.¹⁹⁰

1. According to the MFN¹⁹¹, all “WTO” members must respect one another equally and without any kind of prejudice. A consistent set of laws and regulations is what the WTO seeks to achieve, therefore any concessions one country makes to another is expected to be extended to all other members in order to standardize things. The “WTO” technically outlaws any local laws

¹⁸⁶ Suranovic, S.A.(1998) Three Year Review of the WTO. Washington D.C., pp. 16-17..

¹⁸⁷ https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm ,Accessed on 10-12-2020.

¹⁸⁸ informal name of the director-general's conference room ,https://www.wto.org/english/thewto_e/glossary_e/green_room_e.htm , accessed on 10-12-2020

¹⁸⁹ Monbiot, G. (2003). The age of consent: A manifesto for a new world order. London: Flamingo, p. 205.

¹⁹⁰ working paper developing countries in gatt/wto negotiations, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4738.pdf>

¹⁹¹ Article IV of TRIPS Agreement

such as protecting new industries, giving concessions to investors who respect their environment and culture, and subsidizing local goods. The organisation views these actions to be antithetical to its core values.¹⁹²

2. According to a UNDP study, the richest 20% utilize 86% of global resources, leaving the poorest 80% with 14%.¹⁹³ Developing nations are being exploited in the name of open and unrestricted trade investment by wealthy countries. Investing in countries like India and Pakistan, where labour and resources are readily accessible at below-market costs without regard for the environment, is common practice for multinational corporations.¹⁹⁴ To take advantage of low labour and raw material costs, numerous companies from wealthy nations are investing in countries like India, Bangladesh, and Pakistan.
3. Privatization of all public services such as education, health, electricity, water and telecommunications has a negative impact on the poor and middle class in “developing countries”. It is threatening over a hundred and sixty public services in the sake of supposedly improved standards and freer commerce.¹⁹⁵
4. There is a lot of debate over the “WTO’s” TRIPS as well. Using TRIPS to preserve “patents, copyrights, and trademarks” comes at the expense of public health and human lives. As a result of TRIPS, the WTO is shielding all of the large pharmaceutical companies and impacting poorer nations. Due to several limitations imposed by “WTO” via TRIPS, impacted impoverished nations are unable to supply Covid-19 Pandemic inexpensively, which indicates “WTO’s” discriminative and discriminatory attitude to human life of people living in “least developed and developing countries”.¹⁹⁶
5. Food is a core human right, according to the UDHR, but “WTO” policy destroys all rights. The agricultural economy of “developing and least developed countries” may suffer as a result of an agreement on agriculture.

¹⁹²Van den Bossche, P., & Zdouc, W. (2017). *The Law and Policy of the World Trade Organization: Text, Cases and* (4th ed.). Cambridge: Cambridge University Press.p.305-340.

¹⁹³ UN Human Development Report 2019, <http://hdr.undp.org/sites/default/files/hdr2019.pdf> ,Accessed on 15-12-2020

¹⁹⁴ibid.

¹⁹⁵ Wallach, L. and Woodall, P.(2003) *Whose Trade Organisation?: The Comprehensive Guide to the WTO*. New York: New Press, pp. 7-24.

¹⁹⁶ ibid

WTO agreement says that market forces should dictate agricultural policy instead of farmers who are worried, which weakens the idea of food security for farmers. The majority of the so-called “Developing nations” export primary commodities like agricultural goods. The poor farmer in a poor state will be impacted by the liberalisation process. Due to Indian Governments and IMF's liberalisation policies, farmers in India are presently protesting, while Pakistan is already arguing for the withdrawal of subsidies on cotton, wheat, and sugar at the WTO. Cotton is Pakistan's economic lifeblood, and if subsidies are eliminated, the rise in cotton's value would be reflected in both the textile and garment industries.¹⁹⁷

6. Although the DSP appears to be open and accessible, in reality, “Developing countries” and LDC’s are relegated in the “dispute settlement process” because they lack the legal knowledge and expertise to hire experts. This is due to the prohibitive costs associated with access and participation in the DSM.” The developing governments have won lawsuits using retaliatory measures on occasion, but tiny economies cannot counterattack because of their modest involvement in international commerce. The dispute resolution mechanism never benefits poorer nations as a result of these imbalances.¹⁹⁸

¹⁹⁷Noshab, F. (2004). WTO: IMPACT ON PAKISTAN’S AGRICULTURE. *Strategic Studies*, 24(4), 52–83.

¹⁹⁸ Narlikar, A. (2005). *The World Trade Organization: A very short introduction*. Oxford [u.a.] : Oxford Univ. Press. pp. 95-97.

2.9 Summary

According to UNCTAD, “developing countries” need \$3.9 trillion in yearly financial support from 2015 to 2030 to be competitive and relevant in the global economy.¹⁹⁹ To the developing and LDC countries, the WTO is a poor fit. The “WTO” forces developing and LDC countries to open their markets to international investors who not only abuse their workers but also their limited resources, harming their emerging industries. A complicated labyrinth of agreements, procedures, and annexes The “WTO” sessions and meetings are too secretive, like the Quad Green Room discussions. The North Block nations have easy access to specialists and comprehend this complicated regulatory body, while the impoverished South Block countries struggle to hire experts for particular discussions. As part of GATS, the “WTO” is attempting to privatise basic services like as health care, education, water and telecommunications.²⁰⁰ The “WTO” is murdering people by preserving pharmaceutical firms' rights to profit while neglecting the hardship of developing and LDC countries.

MFN provision of “WTO” is also discriminatory in its procedure. Every state has to give same treatment to all the member countries and shaping their domestic legislation accordingly in order to accommodate the other countries interests. Developing and LDC's having already the fragile economies will suffer more if they change their domestic policies as their economies are in take-off position. The WTO has no concessions for members who do not implement the MFN provision. For the “WTO” to effectively execute its policies and rules, it must immediately amend its problematic articles and annexes.

- i. Developing and least developing member countries should not be forced to comply the agenda of free trade as their goods have no potential of competition.

¹⁹⁹ UNCTAD. World Investment Report. Geneva 2015. https://unctad.org/system/files/official-document/wir2015_en.pdf. Accessed on 22-01-2021.

²⁰⁰ Pasricha, Ashu. (2005). WTO, self-reliance and globalisation. New Delhi, India : Deep & Deep Publications, pp. 150- 161.

- ii. “WTO” should encourage democratic process meetings and the practice of ‘Green Room’ secretive meetings should be abolished and.
 - iii. “WTO” should abolish the quadruple monopoly on the decision-making process and enable other member nations to be equal participants in the organisation.
 - iv. MFN clause should not force LDCs to alter and restructure internal policies and laws to suit the interests of rich countries.
 - v. As a result of the TRIPS, there should be no protection for medicines or life-saving pharmaceuticals; instead, there should be technology transfer from wealthy nations to developing and LDC’s.
 - vi. Articles of the GATS state that the “WTO” should avoid pressuring member nations in the developing and LDCs to privatise.
 - vii. Farming should be recognized as a serious problem, and developed countries should ensure that the price of developing-world agricultural products is equivalent to the price of finished goods, with subsidies being unaffected by the price of developing-world agricultural products.
 - viii. It is time to eliminate the Single Undertaking Clause and allow member nations to choose whether or not to accept or quit accords based on their economic health and needs.
-



***The world is governed by institutions that are not democratic –
the World Bank, the IMF, the WTO.***

Jose Saramago

Chapter 3- The Issues and concerns of “developing countries” on “WTO” legal framework.

3.1 Introduction

It is the objective of Chapter 3 to make a persuasive case that the “WTO’s” basic shortcoming is that it lacks a clearly defined distribution of justice. It’s recommended that complaints and concerns from developing nations may be quantified according to the ‘justice and equity notion’ of theorists such as Rawls, Pogge and Garcia, who employ the ‘distributive justice principle,’ and Narlikar, who differentiate between ‘results-oriented justice’ and ‘proceedings justice.’ Distributive justice is said to be linked with development, which implies a dedication to both development and distributive justice. That’s why we’ve included data on the wide range and depth of grievances made by nations and experts alike. These issues, although legitimate, are not at the heart of the “WTO” regime’s main criticisms. An international trade law framework needs to be put in place to make it possible to judge fairness and justice. The comments of various political theorists “(Rawls, Nozick, Garcia, and Pogge)” are examined, and it is determined that the “WTO” should contain distributive justice in order to be deemed genuine international law. Since “WTO” law is essentially a body of laws based on commitments, all economic trade and allocation processes should be given a distributive justice element that focuses on allocation. Even Narlikar’s view that the “WTO” is lacking in justice in its treatment of poor nations may be accepted since he shows how unequal players are not treated equally and how there is no consideration of process fairness. That is believed to be enough to justify developing countries’ grievances. But its importance is found only in itself, and the need for

radical change in the “WTO” system has no other consideration to be found. To make real progress, we need a radical shift in direction: transform the “WTO’s” current foundation of economic trade into a concept of universal fairness. Developing nations cannot succeed without it, and therefore it’s imperative.

3.2 The views of renowned authors

3.2.1. Paul Collier:

When it comes to political analysis, commentators tend to disagree on whether the “WTO’s” actions are unfair to developing nations. Those who believe the “WTO” limits developing countries’ ability to trade side with the argument, while those who think the “WTO” is fair to everyone favor the other viewpoint. In contrast to usual advocates and opponents, Paul Collier’s famous book²⁰¹ overlooks the “WTO”, failing to portray it as the evil or benevolent entity. He blames very different causes for the disastrous state of LDCs.

Around fifty-eight countries, not all of which are named by Collier, have low per capita incomes and stagnant GDP growth. Poor governance, a resource-based economy, or isolation from neighboring nations imprisons them in one of four sorts of suffering.²⁰²

Collier presents several different ideas on how the G8 countries may assist in economic marginalization due to his discovering its underlying causes. Collier believes that the “WTO” may assist out in the end.²⁰³ That is, the lowest billion “have nothing to negotiate with” in contrast to having reciprocal bargaining assist their negotiations. He argues that a “WTO” program like the IDA²⁰⁴ at the World Bank, a department designed to encourage wealthy countries to provide financial assistance to “developing countries” in the form of “trade concessions”, would be helpful. He

²⁰¹ “Collier, Paul, 2007. *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It*. New York: Oxford University Press. xiii + 205 pp. ISBN 0195311450. *Journal of Peace Research*, 45(1), 121–122. <https://doi.org/10.1177/00223433080450010803>.”

²⁰² *ibid*

²⁰³ *ibid*

²⁰⁴ IDA web site: <http://web.worldbank.org/>

explains that this ‘will force the poorest billion to assist the negotiation process instead of causing it to fail.’²⁰⁵ Trade barriers are a self-imposed issue that the lowest billion face, according to Peter. This is because, Peter contends, their particular markets are so small and unproductive that, no matter how much money is spent on protection, it won’t make any difference.²⁰⁶

Although Collier may be sympathetic to the situation of the poorest countries, he falls well short of laying blame at the feet of the “WTO”.

3.2.2. Mahutga:

According to Mahutga: ‘There have been advantages, but also downsides to global commerce between 1965 and 2000,’²⁰⁷ The advanced economies who have been successful in reasserting their economic strength have emerged victorious in the period’s global economic reshuffling. Some semi-peripheral nations with fast expanding economies have had considerable success from their part in global trade. Nevertheless, it has been shown that the poorer nations, who had high hopes for it, have either remained in their current state or are even worse off than they were to begin with.’

Dicken also argues that Globalization has typically been negative for the poorest countries, highlighting that while many affluent countries have even become more affluent, the same cannot be said of the world’s poorest countries, because some “developing countries” have seen significant progress, but many remain poor.

3.2.3. “Patterson and Afilalo”

“Patterson and Afilalo” only suggest dissolving the “WTO” as a whole.²⁰⁸ Their

²⁰⁵ Collier, Paul, 2007. *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It*. New York: Oxford University Press. xiii + 205 pp. ISBN 0195311450. *Journal of Peace Research*, 45(1), 121–122. <https://doi.org/10.1177/00223433080450010803>.

²⁰⁶ Ibid

²⁰⁷ Mahutga, M. C. (2006). The Persistence of Structural Inequality? A Network Analysis of International Trade, 1965-2000. *Social Forces*, 84(4), 1863–1889. <http://www.jstor.org/stable/3844480>

²⁰⁸ Patterson, D., & Afilalo, A. (2008). *The New Global Trading Order: The Evolving State and the*

efforts to uncover the shortcomings of the “WTO” and to examine international trade law from a moral and ethical perspective have no relevance. GATT would be pronounced antiquated and obsolete by a new ‘constitutional moment’ in the twenty-first century, which would allow for new opportunities for “global economic opportunity,” rather than by the Bretton Woods international economic system that was established in the twentieth century. There was no longer any need for Bretton Woods as a state craft in 20th-century America, according to these writers. For states that we judge to be amplifications of global economic potential, we need a “new trade standard for nations that we acknowledge as such.”²⁰⁹ Instead of focusing on competitive advantage, the “new fundamental norm” should be “supporting global economic possibilities,” with scattered linked institutional structures entrusted with individual efforts.²¹⁰ A ‘full world economic government’ that is charged with formulating a universal route toward the accomplishment of a purpose is not supported by these scholars. Instead, they advocate for a postmodern institutional framework that works in concert and cooperatively with the states and industry to address global economic opportunities on a discrete and problem-driven basis throughout the globe.²¹¹

This new trade organization, the Trade Council, ‘shall include a shifted representation of the countries and their governments according to the sectors at stake,’ and should ‘develop programs to provide the essential circumstances for global economic chance.’²¹²

The fundamental flaw of these writers’ viewpoint is in the belief that State authority is desirable to erode in international law and replace it with a predominance of non-state organizations, especially particular industries. This domination is probably already there, even if it is via the official State agency. The TRIPs patent and copyright provisions are to blame for this. It appears that any duty like this comes only in the imagined world, which has been altered by its desired “cataclysmic catastrophe,” which eliminates the authority of governments. The world we live in still represents an

Future of Trade. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511551208.

²⁰⁹ *ibid*

²¹⁰ *ibid*

²¹¹ *ibid*

²¹² *ibid*

important factor in national sovereignty that is unwilling to surrender its authority to non-State organizations.

It is in this context that Garcia's theory of justice takes shape. He prefers the Rawls²¹³ viewpoint over Nozick's²¹⁴. The moral attitude taken by Garcia is, therefore, one that can be most convincingly defended. It may even be considered compelling, yet even in moral terms, it cannot be described as uncontroversial. Garcia, on the other hand, is well aware of the situation. If the discrepancy is founded on moral duty and not only short-term financial reasons, then legal frameworks are required to specify the moral duties of the developed world to the developing world.

3.2.4. Garcia:

Fairness and justice considerations are closer to the "WTO's" legal review since legislation is inseparable from such notions. Frank is a key part of this methodology in assessing how much "WTO" legislation accommodates developing nations. He makes great efforts to describe the moral theory of fairness in international commerce.²¹⁵ If he had chosen to, Garcia may have suggested that this worldview should support the legal concepts underlying the "WTO". However, he confines his proposal, somewhat deceptively, to a suggestion that the US should exercise distributive fairness in its economic dealings with the developing countries.²¹⁶ This proposal explicitly states that Garcia believes that the US is not currently complying with these expectations.

As a foundation for his normative framework, he argues that the particular and differentiated principle is crucial in meeting the moral duties that wealthier nations have towards poorer ones.²¹⁷

To stress his method's independence from human rights discourse such as the right to progress,²¹⁸ Garcia says this. His choice is A Theory of Justice, a "leading liberal

²¹³ "Rawls, John, 1972, A Theory of Justice, Harvard University Press."

²¹⁴ "Nozick, Robert, 1974, Anarchy, State and Utopia, Basic Books and Basil Blackwell."

²¹⁵ Frank J. Garcia, (2000) Trade and Inequality: Economic Justice and the Developing World, 21 MICH. J. INT'L L. 975 <https://repository.law.umich.edu/mjil/vol21/iss4/5>.

²¹⁶ Ibid 1036

²¹⁷ Ibid p. 980

²¹⁸ ibid

argument” for equality by John Rawls.²¹⁹ Because of this, his “central moral emotion”, that disparity in essential social goods “is not deserved,” stemmed from Rawl’s claim that the concept of “fairness” and “justice” are intertwined because ownership of such commodities is “significantly impacted by the basic imbalance, impenetrable by categories of moral responsibility and entitlement.”²²⁰

In *Anarchy, State, and Utopia*, he succeeds admirably in portraying Nozick’s opposing position in the most flattering light possible. As Garcia points out, Nozick’s liberal (i.e., Rawls’ “egalitarian”) opening gambit: “individuals have rights and things cannot be done without violating their rights,” is a “strong Lockean assertion of the priority of individual rights” that “leads libertarians, such as Nozick, to confront the matter.” “No room can be found for the type of distributive efforts that Rawl believes necessary to the role of the state,” he says.²²¹

3.2.5. Nozick:

Nozick’s use of the term “individual rights” in Garcia’s post suggests that he doesn’t give a second thought to what he means when he speaks of “human rights.” There may be other people who have rights to things other than life itself, according to Nozick’s definition, therefore even life itself is not an individual right. It’s critical to keep this in mind. “All rights are valid as long as they do not infringe on the rights of others.”²²²

In summary, Nozick’s only individual rights are the right to possess and acquire property.²²³ Further, when property is acquired and readily exchanged, distributive justice is obtained ipso facto, irrespective of the ensuing disparity of wealth and prosperity for individuals or individuals.²²⁴

Equally previously mentioned, Garcia is as sympathetic to Nozick’s viewpoint in his

²¹⁹ Ibid p.981

²²⁰ Ibid p. 1008

²²¹ Ibid

²²² Coleman, J. S., Frankel, B., & Phillips, D. L. (1976). Robert Nozick’s *Anarchy, State, and Utopia*. *Theory and Society*, 3(3), 437–458. <http://www.jstor.org/stable/656974>

²²³ ibid

²²⁴ ibid

narrative. But it's not obvious why Nozick appears other than that as an opponent of Rawls, since Garcia has no interest in suggesting that Nozick has anything substantial which undermines Rawls' philosophical stance anyhow. No further meaning can be derived from Garcia Nozick's comment, but it does indicate that the American view of justice and fairness is Nozickian in spirit, which would be incorrect. Garcia's legal argument that "WTO" agreements in general are aimed at adopting 'the particular and differentiated treatment principle' of "developing countries" and criticizing US national law for its tools is compatible with this view of Garcia. Contradict non-reciprocity by relying on the individual's choices.²²⁵

As the "WTO" ministerial meetings are increasingly common to fail²²⁶ on the basis of developing nations' protest to marginalize their participation in the "WTO" and their interests in general, The fact that Garcia is willing to ratify "WTO" accords with a sensitive attitude to developing nations' special and differential methods is a bit concerning. The clauses he refers to are limited and they are strictly speaking GATT provisions, of which the position of the "WTO" Agreements is unclear. However, apart from this critique, Garcia's fundamental argument is that the moral reason that distributive fairness under the "WTO" system is necessary is well-established and usually well-taken.

3.2.6. Pogge:

Pogge's work of 1994 is the most important addition to the conceptualization of what an international law enforcement agency has to accomplish for the achievement of justice and fairness.²²⁷ As shown in *A Justice Theory*, Pogge displays his entire agreement with Rawls' three grounds of national egalitarian legislation.²²⁸

²²⁵ "Garcia, Frank J, 1999 - 2000 'Trade and Inequality: Economic Justice and the Developing World', vol. 21, Michigan Journal of International Law, , pp. 975 - 1049."

²²⁶ "The WTO Ministerial Conference in Seattle, 1999. A fruitless four day discussion ended in failure. The fourth WTO Ministerial Conference, held in Doha, Qatar, in November 2001, ended in failure. WTO Ministerial Conference 5 began mid-September 2003 and ended mid-October 2003 in Cancun, Mexico. The sixth Hong Kong Ministerial Conference resolved to continue the Doha round on December 13-18, 2005. June 2010 was the date."

²²⁷ POGGE, T.W. (1994), *An Egalitarian Law of Peoples*. Philosophy & Public Affairs, 23: 195-224. <https://doi.org/10.1111/j.1088-4963.1994.tb00011.x>

²²⁸ "Rawls, John, 1972, *A Theory of Justice*, Harvard University Press."

Social institutions must respect political freedoms by enabling people of the same standard and desire to acquire approximately equal opportunities for political office and/or for the influence of their political choices, regardless of their wealth and the social class;

This equality of opportunity should also be given to education and professional status;²²⁹

These beliefs necessitate that social structures be designed in a way that provides the most benefit to those who are the least affluent (Rawls's concept of 'difference').

A "no fair distribution principle of any form," as Pogge puts it in his global discourse,²³⁰ fails to satisfy his own requirement that "the credible notion of global justice should be sensitive to worldwide social and economic imbalances."²³¹ While acknowledging that "a fair world order may incorporate many civilizations," Pogge objects to Rawls' grant because it prescribes that we expect these various cultures to "guarantee human rights" via the institutions they have in place.²³² He isn't sure whether the notion of justice as it is understood in certain countries, especially based on the need of a person in that country can be applied to international justice. According to him, liberal justice may differ from that of Rawls in that it is broader than politics and contains any or all three of the egalitarian components that Rawls omitted from his theory of justice.²³³

To Pogge's dismay, Rawls does not acknowledge this. He cites Rawls' statement that: some arrangements for mutual aid amongst peoples should exist in times of drought and, if possible, measures should ensure that people's fundamental needs are addressed in all reasonably-developed liberal communities; As Pogge puts it, "Nozick aims to establish that institutions of laissez-faire are natural and define the baseline distribution."

In Rawls' terminology, "redistributive transfers" need to be rethought. He argues that

²²⁹ POGGE, T.W. (1994), An Egalitarian Law of Peoples. *Philosophy & Public Affairs*, 23: 195-224. <https://doi.org/10.1111/j.1088-4963.1994.tb00011.x>

²³⁰ Rawls, J, 1993, 'The Law of Peoples', in *On Human Rights*, Shute and Hurley (eds), Basic Books, pp. 41-82 and 220-230.

²³¹ POGGE, T.W. (1994), An Egalitarian Law of Peoples. *Philosophy & Public Affairs*, 23: 195-224. <https://doi.org/10.1111/j.1088-4963.1994.tb00011.x>

²³² *ibid*

²³³ *ibid*

the well-equipped are being asked to do too much and that the worldwide notion of “differences” necessitates too much of a hierarchical society. Pogge indicates that ‘Rawls’s report on the subject is the analogy in the domestic situation to Nozick’s.’²³⁴ In fact, this is a serious indictment. Rawls, though, deserves it. He did not bring the egalitarian justice implicit in the ‘difference’ concept to the international situation.

Pogge's rationale is based on the idea that “a genuine vision of global justice must be attentive to worldwide social and economic imbalances.”²³⁵ In order to “fulfill the principle of differences” in a “property-owned democracy,” Rawls supports a consumer tax. Pogge makes the same recommendation for the international situation. In other words, taxation should be based on who owns the resources: “when everyone owns and controls all resources inside his national area, he must pay tax on whatever resources he takes.” Taxes on buyers of extracted resources increase the amount of money they get for these goods.

So, in the application of the ‘difference’ concept, there is a distribution and not redistribution. This is distributive justice, the response to egalitarian justice in a home setting in the international environment.²³⁶ In the opinion of the author of the current thesis, Pogge’s moral stance admits no critique. But it has an issue with implementation.

3.3 Subjective legal framework of “WTO” and issues of Developing Countries

Many developing nations have voiced concerns that in their attempts to comply with international laws, they are forced to conform to rules that were made by foreign entities. The “WTO” was challenged early on for allowing such influence to be given to rich countries in negotiations, and complaints about this had a loud voice. In 1999 African trade ministers complained about the negotiation strategies used in the “WTO’s” ministerial conferences during the Ministerial Conference.²³⁷

Developing nations are being sidelined and excluded on matters that are crucial to our

²³⁴ *ibid*

²³⁵ *ibid*

²³⁶ *Ibid*

²³⁷ Seattle Ministerial Conference 1999.

people and our destiny. There is no accountability in the process, and as a result, it is impossible to tell which of the delegates have vested interests. It is the stated goals of delivering a ministerial statement at whatever cost, even at the expense of mechanisms supposed to assure consensus and participation that alarm us the most.²³⁸ The developed countries simply advocate their own interests. The policy plan they're offering is an upgrade of what they already have but also a few regressive measures. In the previous days of the GATT, it was normal to conduct "precooked agreements" with the main trade partners. It is anticipated from the developing nations that they would accept their agreements only with modest, superficial changes. Developing nations may have lower legal fees if they use "ready-made" ideas to cut down on the discussion and production of legal suggestions. Developing country delegates find themselves accepting ideas when the legal consequences are unclear, a state of affairs that is due to their lack of legal knowledge, experience, and competency. The delegates of developing nations rejected this method to preparing ideas in the Cancun Round 2003 when they wanted a multilateral approach.²³⁹

While there is no doubt that the *WTO* is based on legal systems in the US and EU, this implies that developing country delegates face legal challenges while attending "WTO" meetings. Among the most important changes in the General Assembly was St. Lucia's. St. Lucia's delegate was the one who was most responsible for this transformation. Because he was inexperienced with the legal language and procedures, he required a foreign legal team to defend St Lucia in the banana dispute. He got it approved the first time, and now, after having gone through it several times, all delegates from poor countries have become used to it.²⁴⁰

The lack of trained experts on "WTO" related issues is not just a concern for developing countries, who have already invested heavily in building such a capacity. Some rich countries, facing a scarcity of such legal knowledge, have set up Advisory Centre for "WTO" Law (ACWL) for educating "WTO"-law specialists.²⁴¹

²³⁸Narlikar, A. (2006), Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO. *World Economy*, 29: 1005-1029. <https://doi.org/10.1111/j.1467-9701.2006.00833.x>

²³⁹Amorim, C, 'The new dynamic in world trade is multipolar', *Financial Times*, 4 August, 2004.

²⁴⁰Ierley, D, (2002) 'Defining the factors that influence developing country compliance with and participation in the WTO Dispute Settlement System: Another look at the dispute over bananas', *Law and Policy in International Business*, vol. 33, no. 4, p. 618.

²⁴¹Kawase, Tsuyoshi, 'WTO Safeguard Agreement', RIETI Report No.045, July 27, 2004,

The “WTO” regulations are seen as restrictive for developing nations, who see “WTO” norms as being an imposed government policy. Even though they often violate the legal systems of the developing nations, these more sophisticated and powerful countries, with their vast resources and vast political clout, are able to utilize the “WTO’s” legal framework to propose new regulations that are then imposed on them.²⁴²

Investors do not have the legal right to invest in another country under customary international law. States always have full authority over where their money goes. On the other hand, the GATS and TRIMs have made it possible to alter this international customary law agreement. Under the “WTO” agreement, would the DSB compel a nation to let an investor into its economy if another country brought the denial to the DSB?²⁴³ Article VI, paragraph 1, and Article XXIII, paragraph 3 are what govern this process. The GATS, is particularly important to service businesses like banks and financial institutions.

A parallel may be drawn between China’s protectionist banking policy, which has provoked the threat of DSM action against the country, and how the regulations China created to manage foreign-funded banking and other financial organizations limits foreign ownership to no more than 20 percent of a Chinese financial institution, and that voting rights accrue only if 25 percent of the ownership of an entity in the Chinese financial sector is foreign. This has attracted a lot of harsh condemnation, and China is being accused of not upholding its “WTO” obligations according to the “WTO” Accession Protocol.²⁴⁴

The world community is angry over a series of regulations which China created for banks and is accused of unfairly favouring domestic companies. Foreign banks in China are nevertheless restricted in that they are not authorized to accept deposits in RMB, issue RMB denominated bonds, or raise funds in China’s stock market. Until

http://www.rieti.go.jp/en/rieti_report/045.html.

²⁴²“Charnovitz, S, (January 2002) ‘Triangulating the World Trade Organization’, The American Journal of International Law, vol. 96, no.1, p. 29.”

²⁴³Mosoti, V,(2005), ‘Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the World Trade Organization: Are Poor Economies Caught In Between?’, Northwestern Journal of International Law and Business, vol. 26, no.1 , p. 101. <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1618&context=njilb>

²⁴⁴ China’s Accession to WTO, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/LET/408.pdf&Open=True>.

more liberalization is enacted, most international banks have mostly relied on inter-bank borrowing to finance their RMB assets, which are loans to consumers.²⁴⁵ Yet paradoxically, China would have actually been part of the economic crisis in 2008, if it had followed the GATS regulations and joined the global economy as it was intended to do.

3.4 Non-trade issues in “WTO” system

Developing nations often have to contend with the “WTO’s” attempt to force the adoption of legislative commitments that aren’t directly linked to trade. Developed nations like the U.S. have pushed the problems of transparency, corruption, and government procurement onto the “WTO” agenda in an attempt to help other countries improve. Developing nations assert that these problems are domestic matters, and thus fall within their sovereignty and their laws. But they maintain that these problems are tied to commerce.

Specifically, international commerce will be affected if the various methods a country uses to sell its goods favor certain corporations and discriminate against others. Developing nations object, noting that establishing trade requirements on these problems gives the “WTO” jurisdiction to intervene in national laws, requiring governments to revise their legal systems, and more significantly, their internal bureaucratic operations.²⁴⁶ Some EU nations have looked into whether they may impose a condition on their trade partners to abolish the death penalty and to improve working conditions and human rights. When it comes to matters of hygiene, sanitation, and nutrition, nations have been forced to comply with Western norms.²⁴⁷

²⁴⁵ Imam, Michael. (2004). The Chinese Interbank Markets: Cornerstone of Financial Liberalization. *China & World Economy*. 12.

²⁴⁶“McCrudden, Christopher & Gross, Stuart. (2006). WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study. *European Journal of International Law*. 17. 10.1093/ejil/chi162.”

²⁴⁷ Bagwell, K, Mavroidis, PC and Staiger, RW,(2002), ‘It’s a question of market access’, *American Journal of International Law*, vol. 96, no.1, p.75.

3.5 Issues related to the “Trade related intellectual property Rights” (TRIPs)

Alvarez defines IP piracy as “devaluing” and states that “WTO” members “devalued” IP piracy by introducing IP safeguards into their trade regimes.²⁴⁸ Of course, this is a very contentious stance. Many nations, such as those in “developing countries”, have high rates of IP infringement; hence piracy might be considered a problem of “access to information for the most needy.” Cullet’s work, in his words, has shown the most profoundly. “TRIPs is one of the most crucial innovations in law for developing-country WTO members, argues Cullet.”²⁴⁹ The development of significant statutory obligations for the establishment of contracts for legal problems not pertaining to commerce were recognized when the “developing countries” became signatories to the TRIPs and adopted its regulations and requirements. Members of the “WTO” are bound by this agreement just as they are by any other treaty-status arrangement.

Charnovitz notes that as a result of the inclusion of IPR in the “many observers see the “WTO” as the model for integrating trade-related problems. Many observers see the “WTO” as the model for integrating trade-related problems, according to Charnovitz.”²⁵⁰ Signatory nations’ governments have a new global legal system forced on them by the TRIPs. It’s apparent from the need to establish a legislative body charged with implementing, administering, and monitoring the TRIPs standards.

These requirements are far stricter than the basic “WTO” agreement, which just bans certain actions and activities.²⁵¹ Developing nations harbor a particular concern about the effect of TRIPs on their legal systems, even though they are equally aware that the agreements had also encroached on the legal regimes of developed countries.

The compulsory licensing of patent medicines has met with extreme criticism, and the TRIPs clause is the primary target of that. Article 31 gives members the leeway to

²⁴⁸ Alvarez, JE, (2002), ‘The WTO as linkage machine’, The American Journal of International Law, vol. 96, no.1, p. 148.

²⁴⁹ Cullet, P. (2007). Human Rights and Intellectual Property Protection in the TRIPS Era. Human Rights Quarterly, 29(2), 403–430. <http://www.jstor.org/stable/20072804>

²⁵⁰ Uruguay round” (1986-1994)

²⁵¹ Subhan J. (2006). Scrutinized: the TRIPS agreement and public health. McGill journal of medicine : MJM : an international forum for the advancement of medical sciences by students, 9(2), 152–159.

pass legislation that enables compulsory licensing under certain conditions. The content of this Article is summarized in the sections which describe how licensing rights are obtained, how long they last, and how much compensation they bring. The waiver on “Article 31(f) of the TRIPS agreement”, which allowed compulsory licensing of critical drugs, including those used to treat HIV/AIDS/ Covid-19 was formalized in 2005 at the “Hong Kong” ministerial meeting of the “WTO”.

In the event of a crisis, compulsory licensing permits the manufacture of the required medicines. The country’s government may import medicines if the local pharmaceutical sector is non-existent and they are being produced under compulsory license. On the surface, the “compulsory licensing” exemption seems to be in the interests of the “developing nations” in improving public health. In reality, however, the difficulty lies in that there are a few issues: A forced license may be difficult to implement in a short period, and is thus inappropriate for handling a public health crisis.

Even if we could import the medicines required to treat the epidemic, unless the crisis in the producing nation was as serious as the one here, finding an appropriate source of the medicine might be difficult. It is improbable that a coincidence of this kind would happen.

“Developing countries” looking to use the ‘compulsory licensing’ exemption must first ask the patent owners for permission unless there is a life-threatening emergency. There are few exceptions, but they’re restricted in time and apply exclusively to domestic crises. Once it is enacted, patent holders are entitled to receive an appropriate reward, and if there is any disagreement as to the amount, the issue goes to court. This exception only applies to some medicines, and not all pharmaceuticals. Compulsory licensing is seen as very impractical, since many consider it impossible to be carried out.²⁵²

The issue with this is that poor nations are not very knowledgeable about exclusions under the different “WTO” agreements, including the TRIPs, TRIMs, and GATS, which may cause significant problems. Even the Brazilian government didn’t succeed in capitalizing on TRIPs exclusions, according to a recent research. The fact that the

²⁵² Abbott, F.M. (2005). The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health. *American Journal of International Law*, 99, 317 - 358.

private health care industry, as well as government and industry bureaucracies, lacked familiarity with the agreement's legal structure is critical. If the scenario presented is really common in a larger, more advanced nation, it may be expected to be much worse in smaller ones.²⁵³

Agriculture patentable subject matter is required to be protected by "section 3(b)(7) of Article 27 of the TRIPs". Countries may choose to omit plants and animals from this protection if they desire, as long as plant variations are given an IP claim. Article 22-24 of the TRIPs outlines compulsory geographical indicators (GIs) for wines and spirits.

India and Brazil, two nations noted for having considerable natural genetic resources and valued traditional knowledge kept in national databases, spearheaded the drive for an update to TRIPs laws relating to natural genetic resources and traditional knowledge.²⁵⁴ They believe patent owners should disclose where their patents originated. Where applicable, these patents must ask for the approval of the nation that owns the patent rights to use that information and they must also share the financial advantages of that information with the country that owns the rights. This request was strongly opposed by the American Bio-industry Alliance, who said that obligatory patent-disclosure requirements would result in businesses being reluctant to invest in biotechnology-based industries usually developing and LDC's. No attempt to engage in official talks for the resolution of this issue materialized. The delegates were surprised to find that they could quickly rise funding for a worldwide GI wine and spirit registry.²⁵⁵ Developing nations consider this to be cold-heartedness on the part of the "WTO", which, as anticipated, has failed to care about their theft of their genetic resources and cultural knowledge.

Many experts, like Oliveira²⁵⁶ have observed that restrictions in the TRIPs significantly impede the transfer of new technology to poor nations. The biggest

²⁵³Chaves, G. C., & Oliveira, M. A. (2007). A proposal for measuring the degree of public health-sensitivity of patent legislation in the context of the WTO TRIPs Agreement. *Bulletin of the World Health Organization*, 85(1), 49–56. <https://doi.org/10.2471/blt.06.033274>

²⁵⁴ "6th Ministerial Conference in Hong Kong in December 2006."

²⁵⁵ "WTO, 'TRIPs: Reviews, Article 27.3(b) and related Issues,'"

"https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm."

²⁵⁶ "Oliveira, MA, Bermudez, JAZ, Chaves, GC and Velasquez, G, (2004) 'Has the Implementation of the TRIPs Agreement in Latin America and the Caribbean Produced Intellectual Property Legislation that Favours Public Health?', *Bulletin of the World Health Organization*, vol. 82, p. 815-819."

negative is that it keeps poor nations from improving. Even the possibilities the TRIPs provides aren't being used, thanks to the lack of technical expertise and an inadequate legal framework. As their research indicates, this is because of the obstacles created by these deficiencies. As Stiglitz²⁵⁷ note, "a few numbers of countries, including India, China, Brazil, and Egypt, have pharmaceutical sectors that are in a position to profit from the TRIPs compulsory-licensing provisions."

3.6 Issues related to "Trade related investment measures" (TRIMs)

The "TRIMs agreement" has attracted a lot of ire for being a source of significant damage to trade via investment. The theory that investments distort trade flows is firmly entrenched in the neo-classical economic viewpoint, which argues that trade liberalization would be impeded by the obstacles investment policies create.²⁵⁸ Under some situations, say Morrissey, TRIMs help host nations, especially when they "encourage industry connections and knowledge transfer."²⁵⁹ The nations in developing economies are concerned that "WTO" has not been able to manage investments, therefore these countries are using the institutions that they are allowed to use under bilateral investment treaties (BITS), such as the ICSID. Developing nations may end up in hazardous territory if they become too aggressive. Bangladesh's experiences prove that.

The TRIMs Agreement failed because it did nothing new. Although designed to incorporate TRIMs into the GATT, the Agreement just reiterates existing GATT provisions, offering no additional safeguards or remedies for foreign investors. The absence of a framework for liberalizing investment also hinders innovation and experimentation. That future trade negotiations will have to deal with FDI is implied

²⁵⁷ Stiglitz, JE and Charlton, A, (2005), *Fair Trade for All: How Trade Can Promote Development*, Oxford University Press, pp. 61-63, 116.

²⁵⁸ Oliver Morrissey, (2002). "Investment and Competition Policy in the WTO: Issues for Developing Countries," *Development Policy Review*, Overseas Development Institute, vol. 20(1), pages 63-63, March.

²⁵⁹ Morrissey, O and Rai, Y, (June 1995), 'The GATT Agreement on Trade Related Investment Measures: Implications for Developing Countries and their Relationship with Trans-national Corporations', *The Journal of Development Studies*, vol. 31, no. 5, pp. 702-724.

by the TRIMs accord. Some FDI regimes and efforts provide more optimism.²⁶⁰

No GATT clause forbids nations from restricting FDI. Regulating investments typically distorts commerce. Governments of host nations may influence trade flows or competitive relationships by banning FDI or encouraging foreign investment.' TRIMs include local content mandates, local equity requirements, foreign currency limits, and export or "trade-balancing" mandates. Prior to the advent of TRIMs, foreign-owned multinational businesses wishing to build or run subsidiaries in developing nations was required to get concessions from the governments of such countries. Demands for local content may push multinationals to employ locally produced raw materials and inputs, boosting and safeguarding local industry. They have been utilized to promote regional development, industrialization, export growth and technology transfer. Multinationals located in the US, Europe, and Japan has generally opposed TRIMs, wanting to gain from direct investment in underdeveloped countries without having to pay countervailing levies or limitations. They want cheap raw materials and a huge labour pool, which may be found in underdeveloped countries. FDI may be used to "tariff-jump", or join a market without having to overcome a tariff barrier. But the arguments on both sides of the TRIMs issue are based on different economic theories and political ideologies. The basic theoretical conflict between protectionism and free trade includes TRIMs, which are essentially direct investment protectionism.²⁶¹ Protectionism is seen as required by developing countries to offset the economic clout of huge multinational enterprises. According to the protectionist viewpoint, both TRIMs and multinationals disrupt trade, thus developing host nations must employ the former to counteract the latter's dominance. The multinationals and their developed home nations have argued that trade obstacles, no matter how limited, harm everyone's economy. Even those governments that create trade obstacles, such as TRIMs, see their "welfare deteriorate." Despite the foregoing advantages, banning or distorting FDI limits host country growth and development. Protectionism would also harm the global economy, say free trade proponents. As said, "TRIMs" harm is subtle and cumulative, like lead poisoning. Politics has also

²⁶⁰ Civello, P. (1999). The TRIMs agreement: A failed attempt at investment liberalization. *Minnesota journal of global trade : a journal dedicated to the study of international economic law and policy*, 8(1).

²⁶¹ *ibid*

influenced the argument. A lot of countries, particularly those that have been colonized or have a strong and perhaps oppressive neighbor, fear that unrestrained FDI threatens their sovereignty. TRIMs regulate FDI while emphasizing national sovereignty and pride. The industrialized countries had a political agenda. Multinational firms having direct investments in several countries throughout the world tend to promote economic and political stability. Diplomacy and international collaboration are promoted by economic self-interest and political dominance over home governments. As a result, multinational firms and wealthy governments want further investment liberalisation, including the elimination of TRIMs.

The TRIMs Agreement started as a reasonable effort to liberalise global investment. It attempted to prohibit investment policies that impede commerce in products, eliminating one obstacle to free flow of FDI. But the long-awaited Agreement fell short of its aim. Recent car disputes in Brazil and Indonesia have revealed the TRIMs Accord's shortcomings, particularly its reluctance to go beyond GATT to a complete FDI agreement. In the new global economy, FDI is vital for both rich and developing countries, and a strong consensus is required to lift restrictions. For future investment agreements, the OECD's planned Multilateral Agreement on Investment is a solid example. The MAI, if accepted and successful, may lead to a worldwide accord that achieves what the TRIMs Agreement has not: meaningful investment liberalisation. It is now controlled by international treaties rather than customary international law.

Thus, international treaties are the most significant source of law. As a consequence of the present state of international existence, governments create particular provisions for different forms of transnational activity.

Despite this essential function, interpreting and applying treaties in international practice may be problematic. Prof. Dr. Yudha Bhakti, Most international conflicts concern treaty validity and interpretation. These global Conflicts may arise in the realm of ITL, which governs inter-state trade concerns, as controlled by the Uruguay Round's International Trade Organization Agreement.

The broad norms of interpretation in international treaties must be known to reduce, if not prevent, interstate problems in the interpretation of agreements in the realm of international commerce. This is vital for both government and industry officials. The Marrakesh Agreement created a permanent WTO.

3.7 Issues related to “Dispute Settlement Mechanism”

Legal academics and practitioners find the DSM to be the most interesting aspect of international trade law since it creates a platform for “WTO” member states to take each other to court should they violate any provision of a “WTO” agreement. “Butler and Hauser” claim that the “WTO’s” dispute settlement methods are distinct from earlier international systems.²⁶²

But the creation of international law represented by the DSM in and of itself presents a problem to many developing nations. Their legal framework is heavily influenced by Western practices. Even though three-quarters of “WTO” membership comprises developing nations,²⁶³ these countries have a little role to the creation and formation of the DSM. It is reasonable to assume that, with respect to least-developed nations, they had no legal history or competence, and therefore they could not participate in the creation of the DSM legal framework.²⁶⁴ Nonetheless, the reality remains that the use of the DSM is almost impossible for poor, underdeveloped nations and least-developed countries. When it was first established, only some of the world’s poorest nations were involved in the organisation. There is a lack of representation for the poorest nations in the “WTO” system in the lawsuit asserting their market rights.²⁶⁵

Even though LDCs have a disadvantage when interacting with rich countries, it’s unlikely to see all LDCs refusing to cooperate with the DSM. Members of the “WTO” who participate in a suit as a third party are those associated with, but not actively working in, an incident of infringement. When a lawsuit is filed, the complainant i.e., the party bringing the suit may bring in a “next friend” to participate in the case, as a way to have support.

It is regrettable that the poorer developing nations have found the DSM unimportant for resolving their differences; the DSM may be used to gain ground on the decisions

²⁶² Butler, M and Hauser, H, (October 2000) ‘The WTO Dispute Settlement System: A First Assessment from an Economic Perspective’, *Journal of Law Economics and Organization*, vol. 16, no.2, p. 504.

²⁶³“De-Jonquieres, G, ‘Wealthier countries no longer call all the shots’, *Financial Times*, 24 June 2004.”

²⁶⁴“Zunckel, Hilton, (2008), ‘An African Awakening in US-Upland Cotton : Lessons from LDCS’, in *WTO dispute settlement: an African perspective*, Hartzenberg, Trudy, (ed.), Cameron May, p. 106.”

²⁶⁵Bown, Chad P and Hoekman, Bernard M, (2008), ‘Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough’, *Journal of World Trade*, vol. 42, no 1, p. 182.

reached in talks. In order to prove this, one instance in particular bears mention: Upland Cotton,²⁶⁶ Inc. has won a trade dispute brought against the US. The company is based in the US, but its CEO, Bragiel Andros, is Brazilian. The DSB concluded that US subsidies placed Brazilian cotton farmers at a disadvantage, and ruled against the US.²⁶⁷

Additionally, this is the first time two least-developed nations have joined as third parties during the last decade, and the case is therefore very notable. Both of them were cotton-growing African nations, the first of which was Chad and the second of which was Benin. The Brazilian government has welcomed the entry of both companies into the country because they believe that their citizens and others across the world are being unfairly penalized by the U.S. subsidies.²⁶⁸ Having to deal with these issues as a third party is tough for “WTO” members who aren’t familiar with the DSM procedure. The legal norms of this forum were unknown to either of the two African legal teams. In actuality, they were trying to write and submit a proposal, and doing so by drafting one. To avoid potentially catastrophic procedural errors, the Chadians and Beninese legal teams needed to spend time mastering the most fundamental of legal process. It took significant time since this kind of lawsuit was like no other. They had to substantiate their claims with information related to not only the domestic cotton markets of their individual nations, but also the Brazilian market and the whole global cotton trade.²⁶⁹

When it comes to the DSM, the greatest obstacle is the amount of money needed to handle legal procedures. This is a big problem because of a lack of legal understanding and experience. After years of conflict, a legal fight that began in 2002 came to an end on August 31, 2009. Low-complexity cases cost an average of \$90,000 to \$100,000 to fight, whereas high-complexity cases range from \$90,000 to \$250,000. In order to gather the data, to do the economic analysis, and to bring in specialists, which may be expensive, this all costs somewhere between \$100,000 and \$200,000

²⁶⁶ United States–Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil, WT/DS267.

²⁶⁷ Ibid

²⁶⁸ ibid

²⁶⁹ Bown, Chad P and Hoekman, Bernard M, (2008), ‘Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough’, *Journal of World Trade*, vol. 42, no 1.

more. Another \$500,000 in cost results in the form of travel costs, housing, communication, paralegal and secretarial wages.²⁷⁰ Even if the pre-litigation expenditures may appear like a little number for a nation with limited resources, many additional expenses are still made during the pre-litigation inquiry.

Although the legal framework of the DSM is very complicated and expensive, it is not easy to see why emerging nations, particularly poor ones, have either disregarded or refused to participate in its legal structure, nor have they benefited from it.

According to AL Bashar and Maniruzzaman,²⁷¹ “this condition can be fixed and should be since it would help advance the DSM and the capacity-building of developing/least developed nations.” So, nations with little resources should have more legal rights to provide their people greater security and support. These writers have said that the developing nations are facing an acute shortage of financial resources that would enable them to engage in a legal battle. In addition, they are hampered by the dearth of lawyers with expertise in “WTO” law. Such shortcomings would only be rectified by having other parties involved. Third party support is especially critical in this regard for developing nations. Being more involved will let them to advance their understanding of the legal process, helping them be more informed of the DSM’s operations.²⁷²

Building on the view of a former Appellate Body member, it’s crucial to make third-party involvement in the DSB process more common among developing countries. Countries like this should accept that they must be more involved when the opportunity arises, since it is better to have that familiarity working for them.²⁷³

Among other similar assessments, Mataitoga observed:

Developing country WTO members should prioritize strengthening their legal, economic, and public international capabilities to preserve their rights in the

²⁷⁰ *ibid*

²⁷¹ Albashar, Faisal ASA and Maniruzzaman, AFM, 2010 ‘Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries’ Perspectives’, *The Journal of World Investment & Trade*, vol. 11, no. 3, pp. 311-374.

²⁷² *ibid*

²⁷³ UNCTAD/EDM/Misc.232/Add.17, (2003). Available online at http://www.unctad.org/en/docs/edmmisc232add17_en.pdf#search=Module%203.2%20in%20this%20Course%20deals%20with%20the%20panel%20

multilateral trade system.²⁷⁴

Qureshi believes that poor nations' involvement in the DSB process is necessary to achieve procedural justice in the "WTO":

'Procedural justice, as it concerns each and every member of the conflict resolution process, involves achieving fairness in terms of participation at every stage, from administrative consultation and panel procedures through appeals. A number of other issues include needing to clean the consultation process of any links with third parties, to enhance other parties' rights, to be able to participate in a co-respondent role, and to provide all parties the same level of participation rights.'²⁷⁵

Albashar and Maniruzzaman said that for developing nations and the DSB, involvement as third parties in the DSM has unique benefits, citing as their supporting arguments some of the perspectives listed above and others. A final positive benefit for "developing countries" is that since the country will have access to all of the stages of the panel process, including the IC process, the country will have firsthand experience with how the DSM is operated, gaining experience with the entire process.²⁷⁶

The extent of a participant's influence in the DSB process is dependent on the level of capability among the participating developing countries. Countries that lack capability find that they have a lesser ability to impact the DSB's decision-making, and consequently their capabilities play a major role in the role they can play in DSB governance. Developing nations believe they are being marginalized in the legislative process. To address this exclusion, third-party involvement is needed.

In the instance of Upland Cotton case²⁷⁷, Albashar and Maniruzzaman believe that Benin and Chad were important players, citing their contributions as:

'One reason the Cancun ministerial meeting in 2003 failed was because third parties such as pharmaceutical companies worked in both the legal and political arenas by

²⁷⁴Mataitoga, Isikeli, https://www.wto.org/english/thewto_e/minist_e/min01_e/statements_e/st110.pdf.

²⁷⁵Qureshi, Asif H, (2003) 'Participation of Developing Countries in the WTO Dispute Settlement System', *Journal of African Law*, vol. 47, no. 2, p.174.

²⁷⁶Albashar, F., & Maniruzzaman, M. (2010). Reforming the WTO dispute settlement system: a rethink of the third party right of access to panel and appeal processes from developing countries' perspectives. *Journal of World Investment and Trade*, 11(3), 311-373.

²⁷⁷"United States – Subsidies on Upland Cotton, panel report, WT/DS267/R, 8 September 2004; Appellate Body report, WT/DS267/AB/R, 03 March 2005."

making their problem of trade talks known to both decision-makers and the public. In its trade negotiations over cotton subsidies, West Africa found a stronger political position, thanks to the “WTO” dispute resolution mechanism, which they had previously never used. They had compelling political arguments against the US cotton subsidies, which helped secure the victory for the case.²⁷⁸ The present “WTO” members agree on the DSU reform conclusion. Costa Rica's reform proposal piqued members' interest.²⁷⁹ A party or third party who did not participate in panel proceedings must be allowed access to all procedures, hearings, and documents submitted to the Panel and Appellate Body for the purposes of the appeals process. They should also be able to see interim reviews.²⁸⁰

The authors add that participants in the debate completely supported the Costa Rican idea. While other parties had mostly positive views of the decision, Australia was the only one that had major objections to expanding third-party rights.²⁸¹

These authors' research on the DSB's participation is especially noteworthy for their argument that the DSB is not antagonistic to the involvement of poor nations; nevertheless, the panel and appeal procedures of DSU regulations related to third-party participation and rules made by the DSB itself are inconsistent.

In the case of EC-Bananas²⁸², the authors claim that the development of third party rights was an important development in “WTO” law. Participants from third-party nations were able to join panel meetings once the first one was opened up to them. The panel was in favor of the idea that, at some point during the second meeting, spectators would be allowed to have their own time to speak.²⁸³

Although they had a “very strong economic interest in the case,” the developing

²⁷⁸ Albashar, F., & Maniruzzaman, M. (2010). Reforming the WTO dispute settlement system: a rethink of the third party right of access to panel and appeal processes from developing countries' perspectives. *Journal of World Investment and Trade*, 11(3), 311-373.

²⁷⁹ A Central American country.

²⁸⁰ Albashar, F., & Maniruzzaman, M. (2010). Reforming the WTO dispute settlement system: a rethink of the third party right of access to panel and appeal processes from developing countries' perspectives. *Journal of World Investment and Trade*, 11(3), 311-373.

²⁸¹ Ibid

²⁸² European Communities – Regime for the Importation, Sale and Distribution of Bananas, panel report, WT/DS27/EQU, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm.

²⁸³ Albashar, F., & Maniruzzaman, M. (2010). Reforming the WTO dispute settlement system: a rethink of the third party right of access to panel and appeal processes from developing countries' perspectives. *Journal of World Investment and Trade*, 11(3), 311-373.

nations were denied involvement in the case after the panel's "second substantive sitting" and their participation in the interim stage were rejected; they still did not have increased third-party rights.²⁸⁴

The EC-Sugar²⁸⁵ agreement extended "third party rights" by enabling "developing countries" to evaluate the intermediate stage descriptive wording. This was denied during the Banana Saga debate.²⁸⁶ In EC – Trade Preferences,²⁸⁷ the Panel gave "Third-party Rights" to "developing countries" but the Panel in Sugar did even less for them, only allowing them less procedural rights than in the "Banana III case".²⁸⁸ According to the writers, case law is filled with legal ambiguity, and they believe it should be rectified.

Albashar and Maniruzzaman, to their credit, also bring up the issue of cost. Developing nations should be allowed to enhance their participation in the DSB, but this can only be done if the countries have the financial resources to implement any proposed changes. While involvement as a third party is often cheaper than going via formal proceedings, it doesn't come without a price. Thus, these writers propose a realistic solution:

'Although being a third party requires less resources than being in a dispute, this is not entirely free. The legitimacy of how to increase third-party involvement in the DSM, given limited resources in poor nations, is explored. With respect to this, it may be advantageous to suggest that the DSU's Article 27.2 should allow the "WTO" to offer legal aid to developing nations so that they may serve as third parties in dispute resolution.'²⁸⁹

²⁸⁴ *ibid*

²⁸⁵ "EC Sugar, EC – Export Subsidies on Sugar, panel report (complaint by Thailand, Brazil and Australia), WT/DS/283/R, WT/DS266/R, WT/DS265/R, 15 October 2004; Appellate Body report, WT/DS/283/AB/R, WT/DS266/AB/R, WT/DS265/AB/R, 28 April 2005."

²⁸⁶ Albashar, F., & Maniruzzaman, M. (2010). Reforming the WTO dispute settlement system: a rethink of the third party right of access to panel and appeal processes from developing countries' perspectives. *Journal of World Investment and Trade*, 11(3), 311-373.

²⁸⁷ EC – Tariff Preferences, Panel Report, WT/DS246/R 1 December 2003; Appellate Body, WT/DS246/AB/R, 20 September 2004.

²⁸⁸ Albashar, F., & Maniruzzaman, M. (2010). Reforming the WTO dispute settlement system: a rethink of the third party right of access to panel and appeal processes from developing countries' perspectives. *Journal of World Investment and Trade*, 11(3), 311-373.

²⁸⁹ *ibid*

Even if the issue of third-party involvement is addressed, poor nations would continue to have significant difficulties in enforcing DSB rulings. Although it's often believed that the DSM has a more effective system of enforcement than the GATT, the reality is that the DSM system of retaliation is still weak. Even though the DSM's enforcement mechanism is thought to be more powerful than the GATT's, a decision in favor of a nation empowers it to respond against the country it opposes. When confronted with a developed nation, a developing country has very little leverage. Even if it rises import taxes on goods from the richer country to fight back, the infringing state's infringement will likely continue since the other country's increased economic loss will be too little to put a stop to it.²⁹⁰ On order to convince the losing party to follow suit, the winning party will have to invest significantly in public relations.²⁹¹

The system's appeals procedure almost definitely results in substantial delays, which may prolong the case for many years. An example of this is the US-Upland Cotton lawsuit. In this instance, substantial assistance was provided by Brazil, which helped Chad and Benin benefit. Brazil supplied aid to third parties to improve their cases and help the country make its case. This assistance came in many forms: it included financial, technical, and knowledge-based assistance. More significantly, White and Case (on a pro gratis basis) was providing them with the legal assistance they needed.²⁹²

As a result of the DSM, private attorneys, legal firms and "NGOs" on the side of less "developed countries" were able to play an important role in initiating litigation against violators. There is, however, very little interest so far from legal firms and NGOs in these kinds of projects.²⁹³

Even while the AB may propose a particular method of implementing the recommendations, it is unclear how much legal effect such proposals would have. AB

²⁹⁰Bown, Chad & Hoekman, Bernard. (2007). *Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough*. C.E.P.R. Discussion Papers, CEPR Discussion Papers. 42.

²⁹¹ Butler, M and Hauser, H,(October 2000) 'The WTO Dispute Settlement System: A First Assessment from an Economic Perspective', *Journal of Law Economics and Organization*, vol. 16, no.2.

²⁹²“Zunckel, Hilton, (2008), 'An African Awakening in US-Upland Cotton : Lessons from LDCS', in *WTO dispute settlement: an African perspective*, Hartzenberg, Trudy, (ed.), Cameron May.”

²⁹³“Bown, Chad P and Hoekman, Bernard M,(2008) 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not enough', *Journal of World Trade*, vol. 42, no 1.”

recommendations are solely binding in regards to verifying whether a violation occurred. A party may petition the DSB if their opponent doesn't make an effort to correct a violation that the DSB determined, within the time limits set out in AB and Panel Decisions. "For example, in the EC Bananas case, Ecuador argued that the EC had violated the decision by its enforcement, and asked the panel to reconvene. Ecuador asked the Panel to advice on how the EC could follow "WTO" regulations for the importation of bananas."²⁹⁴

The difficulty is that if a smaller nation, such as one in the developing world, is sued by a larger power, it may lack the economic and political incentive to go through with judgments in its favor, particularly if the verdict was against a powerful economic actor such as the United States. Only certain parts of this issue have been helped by the Upland Cotton conflict between Brazil and the US. Based on Hagstrom's thoughts, Brazil will not be able to compel the US to follow the DSB's orders if America refuses to comply.²⁹⁵ However, under "Article 22.2 of the DSU", Brazil may react to US threats by suspending its TRIPs and GATS obligations. It is very probable that it will use its freedom for violating American pharmaceutical patents. The US may not allow this, since the results will be catastrophic for US-based pharmaceutical firms.

The DSB has very limited case history regarding cross-retaliation, which isn't a requirement under the DSU. It has authorized just twice the option to retaliate and cut down on certain TRIPs and GATS commitments: Ecuador was given the green light to enforce a ban on EC banana imports as a result of the EC-Bananas²⁹⁶ lawsuit. (Antigua was authorized to do so²⁹⁷ in the US-Gambling case).²⁹⁸ The Commission refused to comply with Ecuador's request for a second panel in February 2007.²⁹⁹ The country of Antigua has not yet introduced legislation into its domestic rule that describes how it will make use of the DSB's power to retaliate. Brazil's ability to use DSB cross retaliation was a subject of much speculation.

Karen Halverson Cross was of the opinion that:

²⁹⁴ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/27-80.pdf&Open=True>.

²⁹⁵ Hagstrom, J,(2007) 'Cotton council picks fight with WTO over March meeting', Congress Daily, p.6.

²⁹⁶ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm.

²⁹⁷ Decision by the Arbitrators, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/ARB, 21 December 2007.

²⁹⁸ *ibid*

²⁹⁹ *ibid*

“As in the past, the DSB has allowed cross-retaliation in favour of two small countries, but the DSU restricts cross-retaliation in favour of an opponent who, in their opinion, has not behaved unjustly with respect to all goods.’ Brazil, with its large economy, will have a hard time demonstrating that a suspension of U.S. trade advantages on products is ‘not practical or effective.’”³⁰⁰

The DSB, however, did allow Brazil to take back its concession or other commitments to the United States and postpone their application on November 19, 2009. To comply with TRIPS and/or GATS, Brazil said in March 2010 that it would block the awarding of trade concessions or other commitments to the US under the GATT 1994, including higher import taxes.³⁰¹ This is an intriguing and surprising turn of events for many people.

As established in Article 22.3 of the DSU, appropriate retaliatory measures must be used in the context of a non-compliant “WTO” member’s breach of the agreement. Non-compliant “WTO” members cannot be coerced into compliance unless it would do them real harm, and they may retaliate against nations that resort to measures like trade embargoes against them, so long as the complaint is serious and they also refrain from engaging in more harmful measures such as targeted trade sanctions.

Values that are ‘practicable or effective’ and ‘serious’ are adaptable since they may apply to almost any situation. Thus, it was expected that the DSB would favor the US by bending them to its side because of the ability of Brazil to retaliate against the US by suspending its TRIPs commitments. This may leave the US pharmaceutical sector vulnerable. The DSB, however, did not ‘twist’ its own rules in this manner. An unprecedented effort by the DSB to enforce “WTO” member-country compliance has placed the global pharmaceutical industry in threat in the US, putting the US government at risk (MNE).

While there are many similarities between what Brazil is doing and what Antigua has done before, there are a number of critical differences, as well. Antigua’s pharmaceutical industry is limited to what it inherited from British colonial rule;

³⁰⁰ Cross, H., & Karen. (2008). ‘WTO Appellate Body Upholds Compliance Panel's Findings in Cotton Subsidies Dispute.’ *International Economic Law*, 12(19).

³⁰¹ WTO, Summary of the Dispute to Date, ‘Authorization to retaliate granted on 19 November 2009’, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

Brazil's sector is well advanced. It would have seemed that "WTO" members with big, wealthy companies were free to violate "WTO" agreements, and it would seem the DSU's retaliation clause was useless and meaningless. The DSB would have embarrassed itself if it hadn't permitted Brazil's cross-retaliation.

In order to avoid the obligations of several trade agreements, few least-developed nations³⁰² sought to secure an exemption from TRIPs in particular.³⁰³ However, their plea was denied. If they were given the exemption, they would not have to worry about their lack of experience or money in establishing a compliance infrastructure. Developing nations, particularly, would have been very upset with the United States' de facto immunity, had Brazil's retaliatory measures against the U.S. not been permitted by the DSB.

However, resolving conflicts is the primary purpose of the dispute resolution process; all countries that join the "WTO" have the primary goal of encouraging commerce. Disputes at the "WTO" only emerge when agreement cannot be reached. The DSM is there to arbitrate in the event of such a disagreement. Members of the "WTO" are under no duty to comply with "WTO" regulations; rather, they choose to because they believe that participation in the "WTO" promotes the "international trading system" and benefits their own economies.

As Alvarez puts it,

'States have invested heavily in the organization and have an interest in monitoring their compliance', so they mostly follow the regulations because they want to maintain a good reputation with the organization.'³⁰⁴

Compliance is also in the interest of the US, the EU, and Japan, because they are aware that if they refuse to comply, other countries would also refuse to comply, which would collapse the system. This argument is compelling because it makes the case for a globally unified legal framework to improve the flow of international trade. But this fails to explain why "WTO" members, particularly wealthy nations, have little fear of repercussions for breaking the rules. Even though the "World Trade

³⁰²http://ctrc.sice.oas.org/TRC/WTO/SmallEcon/SEW21R1_e.doc.

³⁰³Stokes, B,(2005)'US, Europe strive to address developing world's concerns', Congress Daily, 13, pp. 11-12.

³⁰⁴ Alvarez, JE,(2002), 'The WTO as linkage machine', The American Journal of International Law, vol. 96, no.1.

Organization” has passed more than 3,000 compliance judgments since its creation, only 40 percent of those rulings resulted in complete compliance. 33 percent of the rulings had no reports of non-compliance, while the remaining 27 percent of rulings resulted in some kind of non-compliance. Compliance levels were low in the majority of instances. The “WTO” DSM framework hasn’t really made much of a difference.³⁰⁵

It has been almost 25 years since the WTO was established as a consequence of the Marrakesh Agreement that many countries have been left behind by globalization, which is facilitated by the “WTO”. According to global GDP calculations, 23% of the world’s population (of the 7.5 billion people in the world) owns 82% of the world’s wealth (of the world’s total money), whereas 77% of the world’s population only owns 18% of the world’s wealth.³⁰⁶ Studies have shown that as globalization speeds up, poverty is on the rise and incomes are dropping.³⁰⁷ Because of this, many people in “developing countries” remain poor despite lower trade and investment barriers and substantial quantities of money entering global markets.³⁰⁸ While they account for approximately 1 percent of global trade’s volume, least-developed nations contribute just 0.05 percent of the total.³⁰⁹ Mekay³¹⁰ supports the assertion ‘that even nations with stronger economies, such as China’s, would get little or no gain from the “WTO”. The Chinese economy would increase by just 0.8 to 1.2 percent, while nations like Sub-Saharan Africa will decrease by roughly 1%.

On the other hand, Paul Kruger maintains that the “WTO’s” trade globalization has a positive as well.

‘He admits that the disparity between the wealthiest and poorest countries has increased, but notes that the global pool of developed economies has also become

³⁰⁵Terley, D, (2002) ‘Defining the factors that influence developing country compliance with and participation in the WTO Dispute Settlement System: Another look at the dispute over bananas’, *Law and Policy in International Business*, vol. 33, no. 4.

³⁰⁶Franck, Thomas M, (1998), *Fairness in International Law and Institutions*, Oxford University Press, pp. 413-414.

³⁰⁷ Staples, Steven, ‘Ten Ways Globalization Promotes Militarism’, The Polaris Institute, 5 September 2003, <http://www.rense.com/general41/prono.htm>.

³⁰⁸ Chen, Shaohua and Ravallion, Martin, (2004) ‘How have the world’s poorest fared since the early 1980s?’ *Development Research Group, World Bank WPS3341*, , p.18.

³⁰⁹Smith, Ransford,(2004) ‘Size matters’, *World Trade Review*, issue 3, p. 442

³¹⁰“Mekay, E, (2006) ‘Poorest nations hit hardest by WTO agenda, study finds’, *Global Information Network*, 16 March.”

bigger over the last quarter century. To back up his claim, he brings up South Korea, which had been a backwater developing country only a few decades before, but has now become a major manufacturing powerhouse. Much while he recognizes that the income inequality is more than it was in the 1920s, he claims that the inequality gap is even worse in the developed world. However, he is unwilling to conclude that this is due to imported labor-intensive goods, which he instead believes are due to advances in technology and societal change. He admits, however, that his own theories don't work for explaining the differences in prosperity between the affluent and the poor. His perception of the situation is described as a "puzzle," yet he still believes globalization is a good thing.³¹¹

An important critique of globalization made by Kruger is that it leads to multinational corporations exploiting low-wage workers in "developing countries" (MNEs). Kruger believes this to be a weak critique, because the MNEs are providing the only opportunity for people to earn a living. With no or insufficient incomes being better than none, manufacturing for multinational corporations is a more attractive option than working as a garbage scavenger or farming a tiny piece of land.

3.8 The democracy deficit in "WTO" framework

Despite its characterization as a democratic organization, the "WTO" is really run by the dominant highly developed countries and their big MNEs. Under the "WTO" system, the LDCs have no say. When the biggest economies of the EU and the United States convened in London to finish a trade agreement with India and Brazil under the chairmanship of EU Trade Commissioner Peter Mandelson (despite the pact being rejected by a group of "less developed countries and the emerging countries", including China, Brazil and India), this reality was clear despite little or no public acknowledgement.³¹² However, it is certain that ministerial meetings held under the auspices of the "WTO" serve to highlight nations with the most political clout when it

³¹¹ Perelman, M. (2009). Krugman, Paul. The return of depression economics and the crisis of 2008. CHOICE: Current Reviews for Academic Libraries, 46(9), 1754. <https://link.gale.com/apps/doc/A266631396/AONE?u=anon~e7f394e3&sid=bookmark-AONE&xid=be4fddb1>

³¹² Stewart, Heather, <https://www.theguardian.com/business/2006/mar/05/wto.theobserver,2006>.

comes to negotiating market access, as seen by the recent events.³¹³

Was there an underlying structural disadvantage placed on developing-country “WTO” members in secret? if there is such a thing, then the “WTO” is nothing more than a truce between two totally opposite parties with widely divergent interests. To better facilitate global trade, improve cost-effectiveness, and enforce mutual commitments, it is the general belief of the industrialized nations that certain changes in the global trading system are needed. ‘Improve their status in the international system’ is a general aspiration for emerging nations.³¹⁴ The developed nations’ obvious willingness to proceed with new ideas was of little use to the emerging, or even the LDC’s, since the developed countries aim was simply to implement their own ideas and had no consideration for what was best for other countries.

The ‘democratic deficit’ thesis has two elements. First, there are disagreements over the WTO’s ‘output’, its regulations. Critics argue that WTO regulations unnecessarily limit states’ regulatory powers, which is problematic if WTO rules limit states’ capacity to implement laws that represent their people’s democratic will.³¹⁵ In fact, most Europeans and consumers believe that such hormones may be harmful to their health if the embargo is lifted. So the EC opted to keep the prohibition and face WTO consequences. A similar situation may occur in the future about EC import limits on GMOs (GMOs). Its ‘input’ is the second component of the ‘democratic deficit’ arguments.³¹⁶ If the WTO’s input legitimacy is questionable, so is the output validity of those mechanisms.³¹⁷

Though joining the WTO creates legally enforceable requirements that may have a major influence on people’s lives, there is often little democratic participation into the decision making process. Executive typically performs ratification functions rather

³¹³Mattoo, Aaditya, <https://www.elibrary.imf.org/downloadpdf/journals/001/2004/081/001.2004.issue-081-en.xml>.

³¹⁴Shadlen, K. C. (2006). Latin American Trade and Development in the New International Economy Latin American Research Review, 41(3), 210–221. <http://www.jstor.org/stable/3874697>

³¹⁵ Dunoff, J.L, (1999) ‘The Death of the Trade Regime’ European Journal of International Law , 10 , 733, 758.

³¹⁶ Cottier, T (2007), ‘Preparing for Structural Reform of the WTO’ Journal of International Economic Law, 10, 497, 499.

³¹⁷ Raustiala, K, (2003), ‘Rethinking the sovereignty debate in international economic law’) Journal of International Economic Law, 6, 841, 862.

than the national legislature. Even though WTO ideas are presented to a state's legislature, some states, particularly those with less economic strength, find it difficult to pull out of a pact. This is owing to the WTO's consensus requirement that all signatories agree to all accords. In any event, trade technocrats have always negotiated agreements, standards, and accession negotiations in secret. They are not particularly good at predicting or comprehending the 'non-trade' implications of trade treaties, such as human rights, environment, and health. Indeed, human rights-focused government agencies have limited impact during trade talks. International commerce and human rights experts should collaborate to develop a more comprehensive and coordinated strategy.³¹⁸ To make matters worse, the non-state entities actively participating in discussions generally represent economic interests rather than civic society.³¹⁹ Perhaps the WTO negotiations are just increasing the lobbying strength of players who already wield enormous national influence, particularly multinational businesses, and the main engines of global commerce.

WTO procedures are biased against developing countries and in favour of industrialized countries (referred to as 'the North' in this book). "WTO" members are pushed by domestic political objectives to craft a deal that benefits their own industry above a fair deal.³²⁰ With equal authority, negotiators are obliged to compromise, which may result in a fair agreement. Stronger members of the De facto predominance are a system in which political influence and market size determine the result of negotiations. Weak states cannot possibly hold up the whole WTO membership in search of a better deal given the enormous political pressure they face.³²¹

A lack of technical understanding may also prevent negotiators from adequately representing their countries' interests. Not having WTO missions in Geneva prevents them from attending WTO interim sessions. The GATT's negotiation culture excluded many Members from key areas of deal-making. In the infamous 'Green Room' sessions, only specific Members were admitted and topics were kept secret. Other

³¹⁸ Stiglitz, J. (2006) 'Social Justice and Global Trade' *Far Eastern Economic Review*, 169, 18, 22.

³¹⁹ Kapoor, I. (2004) 'Deliberative democracy and the WTO' *Review of International Political Economy*, 11, 522, 530.

³²⁰ Collier, P. (2008) *The Bottom Billion* (Oxford University Press, New York, 171.

³²¹ Chang, H.J (2008), *Bad Samaritans: the Myth of Free Trade and the Secret History of Capitalism* (Bloomsbury Press, New York, 36–7.

Members were then told the Green Room judgments were final. Inevitably, the Green Room participants benefited from the process, leaving those left out feeling marginalized and resentful.³²²

By not participating fully in WTO negotiations, developing countries risk losing out on favourable results. Current WTO regulations favour affluent and economically strong states over impoverished and comparably weak states, as current WTO Director-General Pascal Lamy admits.³²³ Other instances of growing state involvement issues include the SPS and TBT Agreements. They govern non-tariff obstacles like as “sanitary and Phytosanitary measures”, as well as technical requirements. These agreements rely primarily on internationally recognized standards and standard establishing organizations.³²⁴

WTO protocols have been improved to allow more involvement by all members. This year’s Green Room includes more invitees and a more open approach. Because the goal of these talks is to reach agreement rather than make decisions, non-participating members are not given with ‘take it or leave it’ options.³²⁵ By coordinating policy efforts with other international finance and development institutions, the WTO is also trying to boost poor nations’ negotiating and technical skills. Since 2001, the WTO has enacted yearly plans to boost the capacity of the poorest countries, including their participation in negotiations.

A larger alliance of poor countries has emerged to counterbalance the traditional clout of the US and the EU in ongoing WTO discussions in Doha, Qatar. The bargaining power of emerging markets like India, Brazil, and China is undeniable. However, the present WTO discussions are stalled because to the discriminatory 1995 rules. Moreover, although powerful emerging countries like China, Brazil, and India have gained negotiation leverage, many countries with tiny, fragile economies have not. They want a new WTO category called Small Vulnerable States. No such organisation exists, despite a vow to fully integrate these countries into the global commercial

³²² Stiglitz. J. E and Charlton. A. (2005) *Fair Trade for All* (Oxford University Press, New York, 82.

³²³ Lamy. P, (2006) ‘It’s Time for a new “Geneva Consensus” on making trade work for development’ (Emile Noel Lecture New York University Law School, New York.

³²⁴ Jürgen Kurtz, <https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/30-2-6.pdf>.

³²⁵ Narlikar, Amrita, 2005, *The World Trade Organization: A Very Short Introduction* (Oxford,; online edn, Very Short Introductions online, Sept. 2013), <https://dx.doi.org/10.1093/actrade/9780192806086.001.0001>, accessed 09 Mar. 2022.

system. It's hard to tell whether the 2001 Doha Ministerial Declaration's ambiguous pledge has been kept.

Most international institutions, including the WTO, have a democratic deficit. However, the WTO's exceptional authority and internal procedures (such as negotiating confidentiality and the single mandatory obligation) raise concerns about its democratic weakness. No product justifies the WTO's own procedures and inputs. That means reforming WTO internal mechanisms. Doha has seen far more effect from disadvantaged groups, social justice and poor countries than the Uruguay round. Reforming internal systems to properly incorporate the opinions of various constituents poses huge obstacles. Thus, wealthy states will always be inclined to misuse their better negotiating advantages. The WTO negotiation framework may not be able to accommodate both trade and non-trade NGOs' interests, much alone all state agendas. Due to the growing negotiation power of poor countries and NGOs, the Doha round has stalled.

It is inexcusable that non-trade concerns be excluded or relegated from WTO internal procedures, while poorer countries continue to be at a disadvantage. WTO discussions may likewise be difficult without a much enhanced democratic pedigree. Input legitimacy may need to be increased to support WTO output validity. Paradoxically, more inclusive 'input' may weaken WTO output.³²⁶ A loosening of WTO rules to suit its political side may be required.³²⁷ This may seem like a poor choice, considering the WTO's heavy judicialization of trade law. However, a more democratic background would make the accords more genuine and acceptable to the populace.³²⁸

WTO output certainly surpasses input legitimacy, justifying a power reduction. Increasing input would likely dilute WTO outcomes. Many would see the slowing of the global free trade initiative as a 'second best' choice.

³²⁶ Pauwelyn. J, (2005) 'The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO' *Journal of International Economic Law*, 8, 329, 336.

³²⁷ Pauwelyn. J, (2005), 'The Transformation of World Trade' *Michigan Law Review*, 104, 1.

³²⁸ Cass. D. Z, (2005) *The Constitutionalization of the World Trade Organization. Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, Oxford, 221-3.

3.9 Fairness and relationship of distributive justice with development in “WTO” regime

In their “WTO” related speeches, many famous thinkers visit the views of Rawls/Garcia/Pogge. Franck, for example, speaks about procedural legitimacy and distributive fairness and says that the two axiomatic principles drive international law accords correctly. He argues of trade liberalization that “this is the section under which conflict is discursively handled between substantive distributive justice and procedure law.”³²⁹ This is its normative framework for the evaluation of the fairness and the content and results of the “WTO” proceedings in its Agreements. On the other hand, Narlikar rejects any notion of fairness or justice in the “WTO” system. Instead, she says, there is a neo-liberal institutionalism which was the dominant ideology behind the “WTO” and its accords.³³⁰ A key goal of neoliberal institutionalism is to enhance the effectiveness of global organizations and networks that participate in cooperative and group activities. As defined by neoliberal institutions, efficiency is solely concerned with cost containment, and does not incorporate moral concepts like justice. That is why every new round of “WTO” talks brings the flag of fairness and justice to thousands of protesters across the globe.³³¹

While “WTO” spokesmen frequently argue that fairness is a key “WTO” principle, Narlikar charges that fairness is restricted in the use of “WTO” proponents to procedural equal treatment concerns. She believes that equality promotes equal status for things who cannot hold that position: Procedural fairness is achieved when all participants have equal rules. As far as I can see, “fairness” is not even close to “outcome fairness.” That a country with Panama’s GDP has the same rights and obligations as the United States because of the WTO is unfair. Conversely, equal procedural rights lead, but inexorably, to results that favor the wealthy developed state.³³²

³²⁹ “Franck, Thomas M, 1998, *Fairness in International Law and Institutions*, Oxford University Press, pp. 413-414.”

³³⁰ Narlikar, A. (2006), *Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO*. *World Economy*, 29: 1005-1029. <https://doi.org/10.1111/j.1467-9701.2006.00833.x>

³³¹ Ibid

³³² Ibid

The stance of Narlikar was strongly reinforced by the Panel's judgment in the EC–Bed Linen case.³³³ When 'building remedies' under Article 155 of the Antidumping Agreement³³⁴ impair 'the basic interests of developing nations', the DSB may be anticipating the 2001 Doha Ministerial Decision, which vowed to guaranteeing³³⁵ that the "WTO" system 'completely serves the interests and needs of all members.'³³⁶ Because the US is a developed nation, India argues that the guiding principle in Article 51 requires it to take India's development status into account and abstain from imposing anti-dumping measures that harm its interests.³³⁷ Despite the seemingly peremptory ('shall be provided') language of Article 51, the Appellate Body has considered that it does not specify a result but that it puts on developed countries a duty to 'actively explore opportunities to achieve a good outcome.'³³⁸ As a consequence, what seemed to be a provision aimed at achieving results-based justice turned out to be just procedural.

To their credit, it is sometimes said that "developing countries" themselves may have contributed to the rise of procedure-over-results justice. As early as the 1940s, "developing countries" sought to defend their economies, sovereignty, and independence. As a result, all states would have had "equal obligations and rights." Since 1946, "developing countries" have decided to ignore the GATT's key principles of non-discrimination and reciprocity.³³⁹

Accordingly, in Narlikar's perspective, emerging nations were concerned with achieving results-related fairness and not fairness. They have only failed properly to push their goal, for fear of losing interest in future negotiations among industrialized nations. Fear of non-cooperation may also explain why LDCs avoid block voting, even if they represent the majority of votes for "WTO" forums. The entire existence

³³³ "European Communities—Antidumping Duties On Imports of Cotton-Type Bed Linen From India, Report of the Panel, WT/DS141/R , 30 October , 2000."

³³⁴ Article VI Implementation Agreement of the General Tariff and Trade Agreement 1994.

³³⁵ Preamble, Doha WTO Ministerial Decision on Implementing-Approached Issues and Concerns, WT/ MIN(01)/17, November 9-14, 2001. WT/MIN(01)/17.

³³⁶ "Mosoti, Victor, (2001), 'In Our Own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process: A View From Sub-Saharan Africa', Boston University International Law Journal, issue 19 , p.231."

³³⁷ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds206_e.htm.

³³⁸ Ibid. para 6

³³⁹ Narlikar, A. (2006), Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO. *World Economy*, 29: 1005-1029. <https://doi.org/10.1111/j.1467-9701.2006.00833.x>

of the “WTO”, they said, may be undermined by a success for results-related justice.³⁴⁰

From this viewpoint, the “WTO” system is the consequence of the harsh policy and negotiating strength of the most powerful countries that are used to establish a foothold over the weaker ones. As a consequence, efficiency and neoliberal institutionalism are the most important features of global institutions, rather than outcome-related justice, under this system.

However, the fact that complaints from “developing countries” may be justified by demonstrations of the “WTO’s” inability to provide results-related justice does not represent the “WTO’s” basic criticism. To put it another way, this critique refers to a lack of “WTO” related development beyond the expansion of legal systems.

It should be emphasized that countries classified as “developing” or “least developed” anticipate that they will be able to get to the status of “developed.” It is thus necessary to assume that the classed countries are moving, rather than being in a fixed hierarchy. There is little question that the “WTO” Member States who chose to fall into the ‘developing’ category made use of the “WTO” concessions regarding the time required for the adoption in their legal systems of “WTO” agreements. To be fair, a developing nation does not become a developed nation by completely complying with the WTO. Nor does a LDC evolve by building a legal framework for the “WTO”. Once self elected, “WTO” Member States remain in these categories. It is clear at this point that the “WTO” system is not based on the idea that developed and “developing countries” may go up the economic ladder at the same time. This presentation is an implied recognition that the “WTO” does not have a mechanism for development.” Under the absence of such a system, what can be regarded as justice in the “WTO” regime?

³⁴⁰Shadlen, Kenneth C. (2006) ‘Latin American Trade and Development in the New International Economy’, *Latin American Research Review*, vol. 41, no 3, p.81.

3.10 MFN and National treatment obligations: Fairness and exemption

The concept of the MFN is laid out in “Article 1(1) of the GATT”. Equal treatment for all “WTO” members is often referred to be the foundation of the “WTO” Agreement. En vertu of Article III, paragraphs 2, 3, 4, and 5, any benefits or immunities awarded to a product originating in one of the Contracting Parties must be extended to all products originating in that Contracting Party. Article III of GATT defines national treatment (NT). There are 10 paragraphs in this article. The legal repercussions of this obligation have been debated for decades.³⁴¹ The main criterion, according to the two analysts, is “that countries should not treat foreign persons, companies, goods or services less favorably than their local partners.”³⁴² The concern of these writers, “Nicholas DiMascio and Joost Pauwelyn”, is to identify the parallels and differences in trade and investment law with the NT concept in the aforementioned Article. Two NT targets are identified by DiMascio and Pauwelyn. Firstly, ‘to make sure that countries cannot by imposing discriminatory levies or domestic legislation cancels their tariff reduction pledges at the border after products have cleared customs.’³⁴³ The second aim, ‘which has become the most prominent over time – is wider and more basic.’³⁴⁴ “Inner measures” are imposed on local goods to safeguard home products, according to the “Appellate Body in Japan–Alcoholic Beverages”.³⁴⁵ They observe that the extent to which the NT requirement is imposed has changed throughout time. Tariff reductions were the emphasis of 1947-1987 and “national treatment” was very insignificant.’ The second phase, which began in the late 1980s, aimed to establish fair competition between imports and domestic products. De facto or real imports have been the subject of more and more trade disputes.³⁴⁶

³⁴¹ DiMascio, N., & Pauwelyn, J. (2008). Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin? *American Journal of International Law*, 102(1), 48-89. doi:10.1017/S000293000003983X

³⁴² *ibid*

³⁴³ *ibid*

³⁴⁴ *ibid*

³⁴⁵

https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=32900&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

³⁴⁶ DiMascio, N., & Pauwelyn, J. (2008). Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin? *American Journal of International Law*, 102(1), p.58-75.

However, GATT provides equal competitive possibilities, not sales.³⁴⁷ As a result, only “any laws, rules and regulations affecting the sale or offer for sale of products inside an organisation” are covered by GATT Article III(4).

There are no “trade repercussions” of tax differences between imported and local products reflected by import amounts, according to DiMascio and Pauwelyn, who cite the Appellate Body. “Article III protects importers’ expectations rather than a particular trade volume, but rather equal competitive relations among importers.”³⁴⁸

“As a result of Japan–Alcoholic Drinks, GATT parties were challenged and GATT panels began to find violations using procedures that were implicitly or de facto discriminatory.”³⁴⁹ Until the Tuna–Dolphins decision³⁵⁰, panels focused on ‘objectively visible features of products, including physical similitude, if comparable uses, ‘directed public attention on how this more invasive approach could possibly impact on supposedly legal domestic laws.’³⁵¹

A judgment on “the existence and degree of a competitive relationship between and among goods” was made instead of “likeness” decisions under “GATT Article III (4)” when the Appeal Body was created in 1995.³⁵² This is evident in the judgment of the Korea-Beef Appellate Body³⁵³ which states that it should be evaluated if “import products should be regarded less favorably than local products, by evaluating whether a measure changes circumstances of competition on the market at stake to the disadvantage of imported goods.”³⁵⁴ They do so by examining the features and end users of imported and domestic commodities, customer preferences and customs, as well as tariff classification.³⁵⁵

³⁴⁷ *ibid*

³⁴⁸ Japan–Taxes on Alcoholic Beverages, note 166, 14 February 1997, para. 136.

³⁴⁹ DiMascio, N., & Pauwelyn, J. (2008). Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin? *American Journal of International Law*, 102(1), 58-75. doi:10.1017/S000293000003983X.

³⁵⁰ United States- Restrictions on Imports of Tuna, DS21/R-39S/155, Panel Report, 3 September 1991.

³⁵¹ DiMascio, N., & Pauwelyn, J. (2008). Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin? *American Journal of International Law*, 102(1), 58-75. doi:10.1017/S000293000003983X.

³⁵² *ibid*

³⁵³ Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, Appellate Body Report, 11 December 2000.

³⁵⁴ *Ibid* para 137

³⁵⁵ Mexico–Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, Panel Report, 7 October

According to DiMascio and Pauwelyn, At the same time, however, the preservation of public morality or human health is an important regulatory purpose, the GATT allows some parties to utilize Article XX to keep measures that technically violate Article III.4 of the treaty.³⁵⁶

While the complainant has the burden of evidence under GATT Article III, under GATT Article XX the regulating country bears the burden of requesting an exemption.³⁵⁷ The authors claim that the GATT Appellate Body concluded whether a breach of GATT Article III.1 occurred by examining the Chilean national treatment test—taxes on alcoholic beverages. A panel of judges determined that “the mere proclamation of Chile’s four aims is no substantial response on the part of Chile.”³⁵⁸ Under “Article XX of the GATT”, no consideration was given to whether these aims could be justified. In other words, national tax policies can’t be justified as an exemption to GATT Article XX,³⁵⁹ as implied. Pauwelyn and DiMascio do not address this issue.

The “WTO” has a sense of justice, according to its own ideals. This method is called MFN therapy. It is the GATT’s first provision dealing with goods trade. “MFN is also prioritized in “GATS Article 2 and TRIPS Article 4”. These three agreements cover the “WTO’s” three key trade sectors.³⁶⁰

Where NT’s fairness isn’t obvious. In both cases, developing countries (Mexico and Chile) are punished for seeking to protect local goods from foreign competition. It is clear that it is unfair. That is, it damages domestic industries in countries that compete with industrialized ones. To begin, impoverished countries cannot employ the “Special and Differentiated Treatment” (SDT) concept to correct the NT principle’s unfairness.

2005.

³⁵⁶ DiMascio, N., & Pauwelyn, J. (2008). Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin? *American Journal of International Law*, 102(1), 48-89. doi:10.1017/S000293000003983X.

³⁵⁷ *ibid*

³⁵⁸ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds87_e.htm.

³⁵⁹ *ibid*

³⁶⁰ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

The Mexico-Soft Drinks panel flatly dismissed Mexico's claim:

*"Mexican officials said the Panel must also review the WTO Agreement, which incorporates principles and actions aimed at improving the treatment of disadvantaged countries. The Mexican government has not discovered any provisions that allow it to treat commodities from other "WTO" members less favorably than its own or to discriminate against items from other "WTO" members that are directly competitive or substitute."*³⁶¹

DiMascio and Pauwelyn's appraisal of the GATT and GATS may be considered as NT's fairness. They say: "To liberalize the market access for foreign products and services in order to increase the general welfare of foreigners by making the allocation of the world's resources more effective."³⁶² Efficient NT may easily be: it equitably links all members of the WTO and breaks free trade obstacles. However, it definitely does not "enhance general welfare" when it is trying to challenge the goods of rich nations with local manufacturing in developing ones.

There is no way to undo the harm that the NT and MFN principles provide to "developing countries" since they apply to all "WTO" members, regardless of economic or development gaps. The concept of 'different' only applies in these principles (in Rawls' understanding) as a conditional exemption from MFN requirements. This exception is called the Generalized Preferences System (GSP). The voluntary benefit to which this exception applies (developed countries must not, however, provide development States with particular and favorable terms of market access) is precisely Rawls/ Nozick's stance in the international setting that Pogge opposes. In view of the fact that the "WTO" is stating this stance in the above-mentioned "voluntary benevolence" of the MFN and NT duties exemption, the possibilities of pursuing distributive justice (in the sense of Pogge) inside the "WTO" framework are ipso facto precluded. The principle of MFN defines the character of "WTO" law much like the concept of NT.

A development commitment presupposes a distributive justice commitment. As noted before, Rawls/Garcia/Pogge views take into consideration that certain parts of a

³⁶¹ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm.

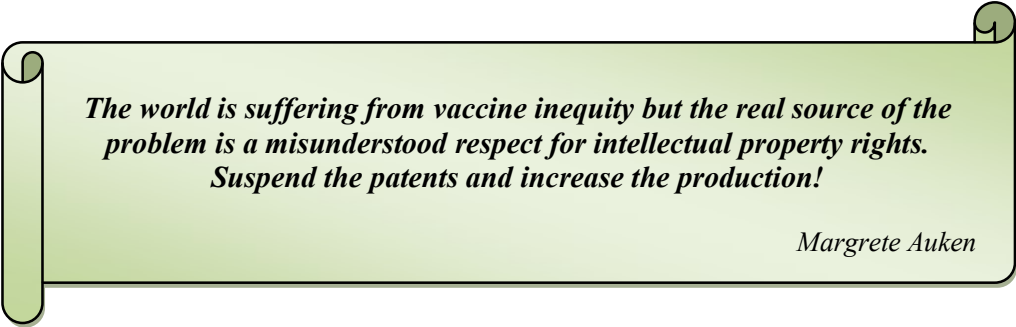
³⁶² DiMascio, N., & Pauwelyn, J. (2008). Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin? *American Journal of International Law*, 102(1).p. 88.

community are less resourceful than others. In the international context they recognize the same disparity of wealth-generating resources. Some nations just have an excess of these resources, others very little. As a result, some countries are in a situation where economic progress can only be accomplished by resource sharing with their rich counterparts. As Pogge puts it, this sharing may be achieved via a distribution mechanism. The essence of distributive justice is, in his opinion, to distribute the profits of resources. Distributive justice accomplishes fairness because it provides low resources a rich basis on which they may build whatever they have commercial ability. Distributive justice should be the “World Trade Organization” principle. It isn’t, of course. This is evident in the manner that “WTO” agreements impact Member States: they benefit the wealthy in resources, the poor in resources, from “WTO” accords. The next chapters will confirm this comment by highlighting the impact of the main “WTO” agreements on three nations: India, Pakistan and few other developing countries. Achieving distributive fairness through sharing responsibilities, not resources, is stated to be the solution under “WTO” law.

3.11 Summary

This Chapter explored the proper standards to determine if the complaints of “developing countries” about their status in the “WTO” are legitimate. A summary of these concerns was followed up by a review of the performance of the “WTO’s” opponents and proponents with respect to developing nations. It was suggested that this kind of activity would accomplish little more than ‘finger pointing.’ Therefore, no judgment can be made as to whether the concerns of developing nations are legitimate. According to the second assumption, moral philosophers work provides a theoretical foundation for the desired result. In order to show that state theory does not include normative norms, Patterson and Afilalo’s work was originally analyzed. Rather, in the writings of Rawls, García and Pogge, these values are proposed because of their suggestions on the nature of the justice and fairness linked to wealth, notions that are inextricable in the concept of ‘trade law.’ Pogge’s distributive fairness concept provides a normative framework for evaluating the validity of developing country concerns. This chapter ascribed the position of “legitimate complainant” to poor nations, citing Narlikar’s successful refusal to allow for result-related justice and even procedural justice inside the “WTO” system. However, the justification of the concerns of poor nations is not the primary criticism of the “WTO”. Rather, this criticism is that the “WTO” system has no built-in development objective. Simple logic demands that the distributive fairness concept must infuse “WTO” legislation for the growth of Developing and LDCs to be feasible.

Chapter 4 will demonstrate that a redefinition of the ‘Developing Countries’ purely on resources, per capita income and GDP, and a framework of international distributive justice is to be developed in order not to destroy the development of low-resource countries and “WTO” legislation and agreements to promote developed countries, will not be used to support.



The world is suffering from vaccine inequity but the real source of the problem is a misunderstood respect for intellectual property rights. Suspend the patents and increase the production!

Margrete Auken

Chapter 4-TRIPs and Practical Challenges in applicability

4.1 Introduction

As required by the TRIPs Agreement, most countries increased patent protection to 20 years and to all technological fields. Because TRIPs is binding and aims to raise worldwide IP norms, these adjustments are not unexpected. Despite criticism, TRIPs drove IP changes in most developing WTO countries. As of 2007, the duration and extent of IP protection in emerging countries was larger than before. The variance in IP reforms among developing nations needs explanation. In practice, TRIPs implementation took many forms. In order to establish legislation ‘compatible’ with TRIPs, several governments chose a TRIPs-minimum strategy, using TRIPs flexibility. In other circumstances, governments went above TRIPs’ minimal requirements, using a TRIPs-plus strategy. Countries who failed not meet to the minimal TRIPs standards, such as failing to adopt TRIPs within certain deadlines, might be penalized. The LDCs who haven’t met their TRIPs deadlines aren’t TRIPs-minus since their obligations aren’t enforceable until the conclusion of their transition period. Timing of reforms, use of TRIPs flexibilities, and IP administration and enforcement differed across developing countries.

TRIPs legislation revisions vary in time. TRIPs transition periods anticipated variance in IP reform timelines by setting separate deadlines for developing nations and LDCs. Developing nations approved TRIPs-related laws weeks before the January 2000 deadline. Over half of the 73 developing nations with this deadline still had TRIPs implementation legislation pending in their legislatures or hadn’t introduced appropriate laws for consideration. Several of these nations still required

laws to execute key TRIPS commitments in late 2007. Nearly half of the WTO's 30 founding LDC countries approved TRIPS legislation well before the 2006 deadline.³⁶³

A group of developing nations had established IP legislation that satisfied most TRIPS requirements before the agreement was signed. Moreover, several developing nations strengthened their IP laws via many rounds of reform.

Developing nations vary in how they put laws into effect via regulatory and administrative procedures. IP laws need executive branch regulatory or administrative measures to take effect. Administrative decisions may change the effect of legislation and vary the impact of comparable IP rules. Most developing nations had TRIPS provisions on compulsory licencing in their national legislation.

Variation also affects TRIPS enforcement. Most developing nations tightened their enforcement rules due to TRIPS deadlines, although legal methods and resources differed.³⁶⁴ Few nations collect their own data, making it difficult to trace country differences.³⁶⁵ TRIPS permit nations to execute enforcement provisions within their respective legal traditions and provide no legal or quantitative criteria for law enforcement.³⁶⁶ While attention to IP enforcement rose after TRIPS went into effect, the rise in counterfeit and pirated items meant that effective protection of IP rights, especially copyright and trademarks did not. Critics noted that industry approaches dramatically overstated the extent of IP enforcement losses, although many developing nation governments complained of low resources and admitted faults in their judiciary and customs systems.

When it came to "Article 5(A)(2) of the Paris Convention" and its pertinent component "Article 6 of Paris Convention", it was widely acknowledged that member states³⁶⁷ basic power to award compulsory licences was safeguarded. To the extent that such measures must comply with WTO rules on trade and environmental

³⁶³ Correa, C. (2019). 7. Intellectual Property: A Regulatory Constraint to Redress Inequalities. In Ocampo, José Antonio (Ed.), *International Policy Rules and Inequality: Implications for Global Economic Governance* (pp. 179-211).

³⁶⁴ Birkbeck, Carolyn. (2009). *The Implementation Game: The TRIPS Agreement & the Global Politics of Intellectual Property Reform in Developing Countries*.

³⁶⁵ Watal, Jayashree. (2001). *Intellectual Property Rights in the WTO and Developing Countries*.

³⁶⁶ *ibid*

³⁶⁷ "Doha Ministerial 2001, WT/MIN(01)/DEC/1, 20 November 2001, WTO website, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#electronic. Accessed on 28-06-2021."

protection, among other requirements.³⁶⁸ A compulsory licence may be used as a means of government intervention in monopolies in the public interest, such as patent monopolies. It is now “set in stone” by Articles 8 and 31 of the TRIPs. Unlike the terms of the Paris Convention, that is clear and straight forward. Each member state has the power to enact legislation requiring compulsory licencing to avoid abuses of the patent's exclusive rights, such as neglect to work. The TRIPs clauses are vague and open to attempts to reduce their scope. Only then can the world's poorest nations have access to life-saving medicines. This chapter argues that TRIPs clauses requiring forced licencing inadvertently assist human rights breaches. A forced licence may be issued under TRIPs Article 31 in cases of patent monopoly abuse or public interest. For developing nations, TRIP's flexibility may also be a concern, since the LDCs are unable to benefit from it. Assumptions will be made concerning the TRIPs provisions, which Colleen Chien³⁶⁹ suggests might serve to limit the reduction of medical prices via compelled licencing to the point where their cheap cost precludes innovation. Even if Chien's argument is correct, it falls short since she fails to provide any actual data to back up her claim that R&D decreases as pharmaceuticals get cheaper. She, like her fellow supporters, simply contends that the motivation for research and development spending decreases as the price of pharmaceuticals falls. Although Scherer's account³⁷⁰ of the study on this issue severely weakens that statement, it is nevertheless held to be correct. Compulsory licencing was addressed in a well-intentioned “WTO” resolution in 2003, and the “WTO” understands that least-developed nation's need more flexibility is a wise move. Although Article 31 of the TRIPs was amended to provide a compulsory licencing option for LDC's, “WTO” officials have not taken this into account. The TRIPs are, as a result, far from recognizing and promoting the human right to health as a fundamental human right. As a result of this investigation, an argument will be made for enforcing the TRIPs compulsory licencing requirements in developing countries and LDC's.

³⁶⁸ *ibid*

³⁶⁹Chien, C. (2003). Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of pharmaceuticals Hurt Innovation? *Berkeley Technology Law Journal*, 18(3), 853–907. <http://www.jstor.org/stable/24116860>.

³⁷⁰Scherer, F.M., & Watal, J. (2002). Post-TRIPs Options for Access to Patented Medicines in Developing Nations. *Journal of International Economic Law*, 5, 913-939.

4.2 TRIPs in general

As a result of the “WTO’s” 1994 “Uruguay round” negotiations, the TRIPs Agreement was drafted to protect IPR. GATT was established in 1947 and lasted until 1993, when it was superseded by the WTO. The original GATT 1947 is still in force under the WTO, with GATT 1994 revisions. The GATT looks to have aided global trade development. The GATT has overseen eight successful rounds of MTNs on lowering trade barriers. Between 1947 and 1973, the amount of global commerce rose at an extraordinary 8% annual pace. Although the yearly rate of growth fell to 3.7% from 1973 to 1980 and 4.3% from 1980 to 1990 as a result of the two oil shocks. From 1990 to 1999, it rose to 6.5%. In all times, it grew faster than global production. In fact, from 1954 to 1990, total merchandise commerce increased roughly 15 times, whereas total production increased six times. Against this backdrop, India's share in global commerce fell from over 2% in the early 1950s to under 0.7% in 2000.³⁷¹ In the field of IP, the “TRIPs Agreement” is often recognized as the most important international pact. It has firmly established IP protection in international trade. This was a difficult accomplishment to pull off, but it was accomplished. The goal of the United States was to move “IPR” talks to the “GATT” platform. It was stymied by a common belief that the “WIPO” rather than the “GATT” should be the primary platform for debate of intellectual property. Discussions of IPRs were finally moved to the GATT conference in 1989 when Brazil and India agreed.³⁷² The WTO thereafter took over as the exclusive authority. TRIPs accomplish the following, according to the WTO:

The agreement covers five broad issues:

- (i) In order to ensure that IPR are adequately protected in their respective countries, and
- (ii) to ensure that the WTO and other international IP accords are enforced,

³⁷¹ Goldar. B, (2005). “Impact on India of Tariff & Quantitative Restrictions under WTO,” Indian Council for Research on International Economic Relations, New Delhi Working Papers 172.

³⁷² Reiling, Ron, 1997 ‘Intellectual Property Regimes for the Information Age: Policies of the United States, the European Union and the World Intellectual Property Organization’, Boston University Journal of Science & Technology Law, vol. 3, no. 9, pp. 9 - 11.

- (iii) whether or if governments can successfully enforce these rights inside their own borders, and
- (iv) how “WTO” members would resolve intellectual property disputes, and
- (v) Particular transitional arrangements for the time being while the new system is put into place.³⁷³

Members of the WTO are obligated to adhere to TRIPS in text and spirit. “TRIPS” regulate the registration, protection, and exploitation of patents and IPR’s, as well as the administrative elements of copyright exploitation, protection, and exploitation. By classifying computer programming advances as “literary” works, the Agreement, among other things, provides for the protection of computer programming inventions. India and China, as well as the US, benefit most from this protection because of their reliance on the information and communication technology industries, as well as their exports of entertainment items.

Patent rules must be developed in all “WTO” member countries, particularly in light of recent technical advancements and botanical discoveries, in accordance with the provisions of the agreement. Agreement provisions also call for a reduction in the amount of national protection granted to patents and intellectual property rights. Citizens should not be treated preferentially by national governments when it comes to these rights.³⁷⁴

To respond to the industrialized nation’s strong demands, the Uruguay Round included in its Final Act a particular agreement on the availability and enforcement of such rights: the Amendment on TRIPS. The TRIPS Agreement covers all types of IPRs.³⁷⁵ These conventions are founded on and supplemented by the Agreement. And it gives “convention-plus” protection for IPRs. They cover both the availability of rights and their enforcement. This implies that member nations cannot give less protection than the Agreement provides in the areas and topics covered by the Agreement. Paradoxically, members cannot be compelled to give “extended”

³⁷³“World Trade Organisation, Intellectual Property: Protection and Enforcement’ https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm. Assessed on 25-08-2021.”

³⁷⁴ Incorporated into the Code de la Consommation (Law No 93-949 of July 23, 1993, Journal Officiel, July 27, 1993, amended in 1994, Journal Officiel, January 4, 1994.

³⁷⁵ Gandhi. G, (2005) “IPR and India-A Viewpoint” Journal of Intellectual Property Rights, 10 pp.359-360.

protection (Article 1.1).

The TRIPS Agreement's comprehensive enforcement provisions differ significantly from previous IPR treaties. The Agreement specifies administrative and judicial procedures, including proof, injunctions, damages, border anti-counterfeiting measures, and penalties for violations. According to the TRIPS Agreement, any disagreement concerning compliance with minimum requirements shall be handled multilaterally. Once a breach is established, the impacted nation may apply cross-retaliation to the non-compliant country in any WTO-regulated field (for instance, it may apply quotas to export from the non-complying country). To resolve IPR disputes, the suggested system offers an organized, multilateral approach. She wants to stop unilateral measures like the US's Trade Act's Section 301.³⁷⁶

In order to universalize the standard of IPR protection that developed nations had included into their laws, developed countries required “developing countries” to negotiate a “TRIPS agreement” with developed countries. France, Switzerland, Japan, Spain, and other industrialized nations have all introduced pharmaceutical product patents late in response to changes in relative industry power. They grudgingly agreed to make substantial concessions in terms of reforming their IP laws without receiving any compensation from developed nations.

A variety of events during the previous decade explain why certain nations, particularly the US, priorities a global intellectual property reform. As a result, technology has gained significance in international competitiveness, notably in the production of high-tech products and services, which are the most active sectors of global commerce. To develop or strengthen exclusive rights, large externalities in the creation of knowledge linked with new technologies motivated IPR changes.³⁷⁷ The US led the way in extending IPR protection to emerging technology. US corporations and governments aggressively pushed globalization of new norms of protection by unilateral action and proposals in multilateral forums like as the WIPO and GATT.

³⁷⁶ Ahuja V. K. (2008)., Intellectual Property Rights in India (Regal Publication, New Delhi,

³⁷⁷ Gupta V. K., (2008) “India: IPR and the National Security” Journal of Intellectual PropertyRights, 13 pp. 318-325.

4.3 Legal and administrative requirements of TRIPs

A minimal set of requirements for developing enforcement mechanisms and principles to be adopted in the member nations legal systems. There are several aspects of the TRIPs that aren't directly related to the negotiation of IPRs, such as enforcement mechanisms, the resolution of disputes and transitional provisions.³⁷⁸ "WTO" participation necessitates ratification of the TRIPs Agreement. The "WTO's" dispute resolution processes, the DSU, are the foundation of this agreement. WIPO has been tasked with monitoring specific IPR issues, whereas the Council for TRIPs monitors TRIPs compliance.

4.4 Limitation of TRIPS

Despite the origins and driving factors behind the TRIPS Agreement, it nevertheless has components that, when properly implemented, may allow for some balance in its execution. The Agreement's principal purpose is to "remove distortion and barriers to international trade", according to the preamble. Recognizing that IPRs are "private rights," the national framework for protecting intellectual property includes development and technical aims. Articles 7 and 8 establish a framework for interpreting and implementing IPRs.³⁷⁹ Furthermore, the ideas of Article 7 entail that the recognition and enforcement of IPRs are not objectives in themselves, but are designed to allow each country within the constraints set by the Agreement to create a balanced regime of protection, to the benefit of all parties. Article 8.1 is a key component for drafting national IPR laws that address public health issues, as well as interpreting the "TRIPS Agreement". While adhering to the TRIPS Agreement's obligations, developing nations may use the flexibility allowed to build legislation that fits their particular level of development and economic and technical strategies.

In the end, the TRIPS Agreement was a big success for the industrialized nations and their powerful industry lobbies. It reflects the amount of IPR protection appropriate for developed nations at present. In order to meet social and economic demands, such an

³⁷⁸ <https://digitallibrary.un.org/record/518125?ln=en>.

³⁷⁹ Teruo Doi, (1980) The Intellectual Property Law of Japan (Sijthoff and Noordhoff,).

agreement gives for some freedom in developing domestic laws.³⁸⁰ Achieving this requires time, talent, and political will. While reforming national laws, they should aim to strike a balance between the rights of titleholders and the public interest, notably between the preservation of technological innovation and its transmission and dissemination “.”³⁸¹

4.5 Introduction to the notion of compulsory licencing

In the case of pharmaceutical items, the compulsory licensing system is applicable, and as with other TRIPs rules, it must be implemented by “WTO” member countries. Patent-right holders may be forced to give up their rights under compulsory licensing if the national government grants them a license so that they can produce and sell their products. The amount of compensation to be paid to the right-holder, as well as the length of time for which the compulsory license is valid, are determined by the government in question. A number of scenarios necessitate the use of “compulsory licensing” under the “TRIPs agreement”. Some criteria of ‘national interest’ are included under these cases; however they are not strictly defined.³⁸²

As a result of the TRIPS Agreement, developing nations are now permitted to adopt compulsory licensing as long as their respective governments compensate the patent holder in an acceptable and sufficient manner. To preserve the public’s health and well-being while also advancing their own socioeconomic and technical advancements, members are allowed, under “Article 8.1 of the Agreement”, to adopt steps that promote public interest. An “Other Use without Authorization” of the Right-holder is defined in “Article 31 of the Agreement” as “any other use of the subject matter of a patent that is not approved by the right-holder.”

In order for the compulsory licence to be granted, certain criteria must be met, the most important of which is that royalties be paid back to the original patent holder by

³⁸⁰ Verma S. K.,(2004) “Enforcement of Intellectual Property Rights: TRIPS Procedure and India” *Journal of Indian Law Institute*, 43, pp. 183-206.

³⁸¹ Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options. (2002). *Capital & Class*, 26(1), 188–189. <https://doi.org/10.1177/030981680207600112>

³⁸² Buchner, Sara, ‘Trade Briefs: Compulsory Licensing’, Trade Law Centre for South Africa, <http://www.tralac.org/scripts/content.php?id=19>.

the company that has the compulsory licence.

For the sake of promoting public health, compulsory licencing is designed to guarantee that low-cost medications are accessible in developing countries. Article 1 of the Agreement provides strong protection for the compulsory licencing privileges of countries such as India and Pakistan against resistance from countries such as the United States. According to this article, “WTO” members are obligated to “take into account” the agreement’s requirements. Consequently, Articles 8 and 31 must be implemented without hesitation. The issue of adopting more wide protection than that provided by this Agreement is the only area in which they may exercise their choice. The fact that TRIPs allows for a number of solutions effectively decreases the probability that LDCs would benefit from TRIPs compulsory licencing provision.

4.5.1 “WTO” ruling on compulsory licencing

The WTO approved a series of new regulations on August 30, 2003, with the goal of enhancing access to patent medicines for developing nations with serious public health challenges. In the meanwhile, the regulations to alter “Article 31 of the TRIPs” have been implemented. This was the “WTO’s” answer to growing outrage that the TRIPs regulations were actually erecting barriers to the availability of least-developed nations to key medicines. So far, this is the first time a “WTO” agreement has been amended.

- (i) Among the three provisions that the “WTO’s” 30 August 2003 resolution introduced were: Compulsory licencing rights may only be utilized for local supply, and
- (ii) importing nations must pay the original patent holder under 31(h) and
- (iii) The export of medicines obtained via compulsory licencing is forbidden by 31(f).

However, there is a snag. Before any action can be taken on the new regulations, they must first be enacted at the national level. And participation in their execution is entirely optional. Canada, India, Norway, and the European Union are the only

“WTO” member nations that export medicines that have implemented them so far. Despite the fact that China and Korea have made certain modifications to their domestic laws, they have not informed the WTO of these changes.³⁸³ There has been no implementation of the new Article 31 modifications in developing nations, nor have any prospective importing countries modified their domestic legislation to reflect them.³⁸⁴

4.5.2 Criticism to compulsory licensing

These are the main points made by those who are opposed to the idea of compulsory licensing: It is not likely to have a favourable influence on pharmaceutical pricing in the immediate future. This legal phenomenon reduces the motivation for pharmaceutical corporations to develop and market novel treatments. TRIPs resolves certain issues connected to forced licensing, but lacks legal clarity, increasing the probability of litigation.

The “WTO’s” carelessness in enforcing the TRIPs requirements for compulsory licensing is far more serious than the objections of compulsory licensing previously described. According to one main critique of this kind, the TRIPs utterly fail to control selling tactics and licensing requirements. The exploitation of intellectual property rights through cartelization of horizontal rivals via licensing agreements that control prices, restrict production, or split markets is noted by Keith Maskus³⁸⁵. Patents or compulsory licences may be used by cartels to gain exclusive rights to items and technology that were formerly rivals. There has been minimal emphasis placed on eliminating loopholes that allow for the exploitation of obligatory licences by third parties. As previously stated, the GATT panel that failed to protect GIs in the wine industry should be censured in light of the meticulously crafted rules for GI protection that were explained above.

³⁸³Nottage, Hunter & Sebastian, Thomas. (2006). Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law. *Journal of International Economic Law*. 9. 989-1016. 10.1093/jiel/jgl028.

³⁸⁴Musungu, Sisule. (2008). The Use of Flexibilities in TRIPS by Developing Countries: Can They Promote Access to Medicines?.

³⁸⁵Maskus, K.E. (2000). Competition Policy and Intellectual Property Rights in Developing Countries : Interests in Unilateral Initiatives and a WTO Agreement.

According to a prevalent belief, the TRIPS Agreement has been ineffective in lowering the price of medications to a level that allows poor nations to produce and sell them. The TRIPs, on the other hand, has enabled the cost of patented medications to skyrocket since it has left pricing fully uncontrolled.³⁸⁶ TRIPs, which provides for a minimum patent protection length of twenty years for pharmaceutical items and methods, has been criticized for this reason. For pharmaceutical companies, this long-term exclusivity period equates to a monopoly grant, allowing them to exclude competition from lower-cost suppliers.

Colleen Chien³⁸⁷ avoids making sweeping statements about how compulsory licencing hinders medical device innovation in her essay. She insinuates the idea as aggressively as she can give the circumstances. However, she asserts definitely that it has a significant propensity to limit research and development spending. According to what has previously been said, her proof for this assertion is so scant that it is nearly non-existent in places. Her argument is based on the fact that the “developed country” markets for “Covid-19”, “HIV/AIDS”, and “cancer drugs” subsidize pharmaceutical companies' research and development. Consequently, compulsory licences do not hinder research and development in the developing world, but they would do so in the rich world if medications manufactured under compulsory licencing were to make their way onto the market there.³⁸⁸ Pharmaceutical corporations don't spend their earnings on the development of these illnesses; since the WHO reports that very little private funding is available for this kind of research.³⁸⁹

A debunking of compulsory licencing is awful to read at any time, but it is particularly pitiful when the debunking is forced to relying on fictitious threats. So the case for compulsory licencing is organically tied to making life-saving pharmaceuticals available to those in LDC's who cannot afford to buy them at developed-world prices. It's also important to remember that the “WTO” has a

³⁸⁶ Abbott, Frederick M, (2006), ‘The cycle of action and reaction: developments and trends in intellectual property and health, Negotiating health: Intellectual property and access to medicines, International Centre for Trade and Development, pp. 28-29.

³⁸⁷ Ibid

³⁸⁸ Chien, C. (2003). Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation? Berkeley Technology Law Journal, 18(3), 853–907. <http://www.jstor.org/stable/24116860>

³⁸⁹ World Health Organisation, ‘Public health, innovation and intellectual property rights’, Commission for Intellectual Property, Innovation and Public Health, 2006, p.25.

significant commitment to human rights: As Pogge³⁹⁰ and a slew of other commenter's have pointed out, the initial preamble of the Marrakech Agreement cannot be understood otherwise than as a commitment to this end. Furthermore, this promise was unambiguously reaffirmed in the Doha Declaration, which stated:

Nothing under the "WTO" prevents any country from adopting actions to preserve the health of people, animals and plants. The "WTO" does not prohibit these acts if they do not represent an unreasonable form of discrimination among states with similar circumstances or a concealed limitation on international trade.³⁹¹

As far as Chien is concerned, the "WTO's" 2003 decision on compulsory licencing does not take into consideration the right to life of victims of any pandemic diseases or life taking disease in the world's least developed nations. Scholars are often cautious about making declarations in an area that has previously been well explored, unless they can make a significant contribution to that discipline. Professor Scherer has made a significant contribution to the field, and in this instance, Chien has done nothing to diminish that accomplishment.

Susan DeSanti³⁹² summarizes the scenario. It is important citing Scherer's account in full since it indicates that Scherer had dealt with the 'compulsory licencing' concerns, which would have it that this facility somehow affects the pharmaceutical industry, long before such arguments became heated reactions to the 2003 "WTO" conference.

DeSanti summarizes Scherer's study in the following way:

'An expert from Harvard University, Professor FM Scherer, spoke before the Senate Judiciary Committee on a number of studies examining whether or not incentives received via patent protection serve as the primary motivators for innovation. In general, such research evaluated the utility of patents in terms of stimulating early innovation.'

Many studies have revealed that most corporations don't regard patents as highly significant assets, which is surprising 'Edwin Mansfield's 1986 research revealed that just 14% of discoveries would have been created without patent protection in a period

³⁹⁰Pogge, Thomas. (2006). World Poverty and Human Rights. *Ethics & International Affairs*. 19. 1 - 7. 10.1111/j.1747-7093.2005.tb00484.x.

³⁹¹ https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

³⁹² <https://www.ftc.gov/es/public-statements/1996/02/intersection-antitrust-and-intellectual-property-issues-report-ftc>.

from 1981 to 1983, according to Professor Scherer.’ Professor Scherer came to the conclusion that major firms have other motivations to invest in research and development, apart from the opportunity for patent protection. In his words, the most fundamental motivation is:

‘The treadmill is a dangerous place to stop moving if you don’t keep going. A word of caution: if patentable inventions have amazing outcomes, it may serve as a demonstration effect and a hook for other smaller enterprises hoping to make it big. A few winners will offset the losses of many unsuccessful R&D investments, resulting in a highly skewed distribution of rewards for technical advances. Professor Scherer contends that the Federal Circuit’s creation has resulted in large and substantial modifications to the law that Congress did not want to see. As a consequence, he claims, patents have been significantly enhanced, and businesses are beginning to recognize that a well-drafted patent is a formidable tool in their arsenal. According to Professor Scherer, the result of this shift in the legal climate is that smaller businesses, as well as some larger corporations, who are attempting to produce a new product are finding themselves in a legal minefield. For him, there is an abundance of untapped patents out there, which may lead to the loss of your company should you come into one. According to Professor Scherer, the findings of different research he carried out to establish the competitive consequences of compulsory licencing were presented in his presentation. During his research on the impact of antitrust consent decrees that subjected numerous firms to forced licencing of patents in the late 1940s and early 1950s, Professor Scheraer discovered that compulsory licencing had only a very tiny negative influence on follow-on innovation. Following are some of the results that he discovered during his research. Most companies claimed that compulsory licencing orders had only a very minimal negative effect on their R&D expenditures, which is good news. Patenting by enterprises exposed to compulsory licencing decrees, on the other hand, showed a statistically significant drop, particularly for those that were required to licence future licences as well as previous licences. Firms that applied for fewer patents, on the other hand, relied on secrecy to safeguard their discoveries. Finally,

Professor Scherer questions the degree to which such decrees genuinely corrected competitive difficulties, notwithstanding a few notable outliers, the fact that compulsory licencing decrees typically did not result in any changes to the market structure. In the 1950s and 1960s, the United States did not experience a time of significant productivity growth due to extensive compulsory licencing of patents, according to Professor Scherer.’

In light of Scherer’s solid empirical results, it may be difficult for Chien and others to understand why they feel free to express their concerns about compulsory licensing are impact on pharmaceuticals innovation. It seems that Scherer had already decided on the outcome of the discussion on the “adverse effects of compulsory licencing on the pharmaceutical sector” before it ever started. This is something that should not be forgotten by anybody, especially not by academics.

4.5.3 Compulsory licencing and the pharmaceutical sector in India and Pakistan

It’s interesting that the pharmaceutical sector was able to profit from the freedom granted to the compulsory licencing facility by the Paris Convention. To be sure, the advantage did not go to the pharmaceutical behemoths in the United States. Instead, it accrued benefits to “developing countries” like India and Pakistan. There was no domestic law controlling the protection of patents in India and Pakistan before TRIPS came into effect, and there was no way for anybody to force them to establish such legislation because of Paris Convention on patent protection, which was then the preeminent treaty in the field of patent protection.

A transition period for “developing countries” to comply with TRIPs was introduced in 2005, allowing India to make creative use of its Article 65.4.³⁹³ Because it had been granted a lengthy transition time, India and Pakistan or we can say “developing countries” were permitted to continue operating without being restricted by TRIPs until January 2005. In the meanwhile, it had built a substantial business in generic medications as a result of being allowed to practice reverse engineering and copying

³⁹³ TRIPs Article 65(2) and (4).

of pharmaceuticals that had been previously patented.

However, since India is not a least-developed nation, it will not get any further direct benefits from the TRIPs clauses relating to compulsory licencing in the future. At least, that's how it seems. In fact, one has to wonder what would happen if India's supply of low-cost generic pharmaceuticals begins to deplete in the near future. When it comes to the global pharmaceutical sector, India has a significant and quickly expanding position. It is the world's biggest supplier of generic medications, with a 20 percent share of worldwide supply by volume. It also delivers 62 percent of global demand for vaccinations, according to the World Health Organization. India is the third-largest producer in terms of volume and the fourteenth-largest producer in terms of value. With more than 3,000 pharmaceutical businesses and a robust network of over 10,500 production facilities, India has the biggest number of US-FDA approved pharmaceutical plants outside the United States. There are 60,000 generic products available in 60 pharmaceutical formulations in the Indian pharmaceutical market. The API sector is the third-largest in the world, accounting for 57 percent of all APIs listed by the WHO. Indian pharmaceutical companies have been granted incentives of INR 21,940 Crore (\$3 million). By 2024, the pharmaceutical business is expected to reach \$65 billion, with a growth rate of 10 to 12 percent. Manufacturer's costs are around 33% less expensive than in Western markets. An increase in exports of 18.7% year on year.³⁹⁴

India, along with China, is a significant producer of active medicinal components and a key provider of vaccines.³⁹⁵ "More over half of India's pharmaceutical exports go to Developing and LDC's."³⁹⁶ Clearly, the TRIPS Agreement does not permit future supply restrictions on Indian pharmaceuticals. Will the WTO enable India's pharmaceutical industry to function without TRIPs regulations? Unlocking the pharmaceutical patent system will be necessary to prevent another COVID-19 in the "developing world" and the "Least Developed Countries".

³⁹⁴<https://www.investindia.gov.in/sector/pharmaceuticals>. accessed on 14-11-2021.

³⁹⁵ Grace, Cheri, (2004), 'The effect of changing intellectual property on pharmaceutical industry prospects in India and China', <https://assets.publishing.service.gov.uk/media/57a08cd6ed915d3cfd00164c/The-effect-of-changing-Intellectual-property-in-India-and-China.pdf>.

³⁹⁶ Médecins Sans Frontières, 'Examples of the importance of India as the "pharmacy for the developing world" ', 29 January 2007.

According to the commonly held belief, the Doha Declaration paved the way for more affordable medications for the world's poorest nations.³⁹⁷ However, the 2003 “WTO” Decision, which implemented that same declaration, proved that this was not the case. Implementation’s sense-making logic would very probably involve the idea of making feasible in some manner. A working capacity was explicitly stated in the Doha Declaration, which is correct. The Council for TRIPs is tasked with this role under Article 6 of the Convention:

“This agreement’s compulsory licencing restrictions may be difficult to execute for “WTO” members with little or no pharmaceutical manufacturing capability. This is why we want the Council for TRIPs to come up with a speedy fix and submit a report to the General Council before the year’s end.”

Article 8 of the “WTO” Decision of 2003 stipulates that the updated Article 13 of the TRIPs would be monitored for operational compliance.

“In order to ensure that the system outlined in this Decision operates effectively, the Council for TRIPs shall assess its operation on a yearly basis and provide an annual report to the General Council on the system’s operation. This evaluation satisfies the review criteria of “WTO” Article IX: 4.”

However the fact that the Council on TRIPS has not taken any action in this regard is patently evident. It had its most recent meetings on the 13-14th of March and the 17-18th of June 2008.³⁹⁸ As of 2003, the Council for TRIPs has not had any meetings, and as a result, there is no way of knowing what it thinks about the market efficacy of the forced licence adjustments. Doctors without Borders have long said that MSF is ineffective and that the organisation should be shut down. However, it’s difficult to see what the Council might do to allow the US’s Special 301 rule to be circumvented by compulsory licencing.

It’s well-known in the trade world that Special 301 is a potent weapon for delaying

³⁹⁷ Doha Declaration on Trade-Related Aspects of Intellectual Property Rights and Public Health, 2001

³⁹⁸ Intellectual Property Watch, ‘WTO TRIPs Council To Meet Amid Broader Negotiation Backdrop’, 13 June 2008, <http://www.ip-watch.org/weblog/index.php?p=1098>.

applications for compulsory licencing, even if they're fully compliant with the Trade-Related Aspects. US Trading Representative (USTR) periodically evaluates trade partner's intellectual property protection policies and 'lists' those that, in the USTR's perspective, provide inadequate protection for US intellectual property.³⁹⁹ If the offending nations do not change their behavior, the EU will impose trade penalties on them. If they do not comply, the EU will threaten trade measures on them. According to the US Trade Representative, Thailand was put on its "priority watch list" after acquiring three mandatory licences for HIV/AIDS drugs and one for a heart disease therapy. Compliance with TRIP regulations was maintained on all three occasions. The TRIPs is powerless in the face of this apparent undercutting of its rules on compulsory licencing. Alternatively, the US Senate has said that "Special 301" would not be used to undermine the 2003 "Doha Declaration" on forced licensure. The Senate has resolved that the following steps should be taken by the United States of America in this regard:

- i. To preserve public health and ensure universal access to medicines, this resolution was approved in accordance with the "WTO" "Doha Declaration" on IPR and Public Health.⁴⁰⁰
- ii. In line with the Doha Declaration, the US will not put any nations on a "Special 301 Priority Watch List" created under "Section 182 of the 1974 Trade Act" (19 United States Code 2242).⁴⁰¹
- iii. In addition, the TRIPS Agreement does not oblige poor nations to take efforts to preserve intellectual property rights that are incompatible with the TRIPS Agreement.⁴⁰²
- iv. New criteria for medical research and development should be proposed to build a foundation for a need-driven, vital health agenda.⁴⁰³

In addition to the inertness of China's compulsory licencing rules, it is believed that

³⁹⁹ Special 301 report.

⁴⁰⁰ "Senate Resolution 241/House Resolution 525, 110th Congress, 1st Session, In the Senate of the United States, (House of Representatives) June 20, 2007 (June 28, 2007)."

⁴⁰¹ Ibid

⁴⁰² ibid

⁴⁰³ Ibid

Special 301 is the root reason of the inability of the LDCs to take use of them on a widespread basis. A “WTO” ruling in 2003 changed Article 31 of TRIPs, but not the whole legal system.

There would be no repercussions at the “WTO” from the US Senate resolution cited above, which would normally be viewed as an admission by the US of a breach of an international treaty by the US government. Nobody has expressed optimism that this significant flaw would be addressed, and no one has yet criticized the Agreement for failing to address it on a merely legal basis. “Lacuna” is very sure used in an odd manner in the context of TRIP’s “compulsory licencing,” considering that the key to success in this context is voluntary adoption of enabling laws. To put it another way, member states may implement enabling laws but are not required to do so. As a result, the term “lacuna” is not frequently used in the sense of binding law. If the TRIP’s compulsory licencing clauses are to be consequential, they should be binding legislation.

Even while the “WTO’s DSU” lives not by the “rule of law”, but by the “rule by law,” no reference of “not truly legal” voluntary domestication is made in TRIPs.⁴⁰⁴

To be effective, the “WTO” Decision on compulsory licencing should be adopted as entire legislation, not as voluntary adoption into domestic law. That’s what the “Doha Declaration” and the 2003 “WTO” Decision were created to do: benefit individuals in developing and “LDC” countries who desperately need medicine. With no functional legislation, they cannot expect all “WTO” member nations with competent pharmaceutical sectors to react. That is, the TRIPs do not impose any obligations on member nations in terms of having a response in place in the event of a compulsory licencing request. Moreover, without effective laws, there is no recourse to justice.⁴⁰⁵

TRIP’s compulsory licencing scheme provides no enforceable rights to the most vulnerable of the world’s poorest people. When nations that have patents may seek a compulsory licencing right, but are not required to do so, no statute affords them rights that they can take to an arbitrator or the “WTO’s” dispute resolution system. Nations who lack the ability to make their own drugs and must rely on imports from

⁴⁰⁴“Ramli, Intan Murnira, (2008), Development and the Rule of Law in the WTO: The Case for Developing Countries and Their Use of Dispute Settlement Procedures, Cameron.p-148.”

⁴⁰⁵ Ibid p-118.

other countries are most likely to benefit from this programme.⁴⁰⁶ What happens when a portion of an agreement (the “compulsory licencing” clause) lacks legal power, as with the TRIPs Agreement? Despite the fact that the “WTO” Decision was supposed to accomplish so, this flaw prevents justice for the same persons from being achieved. Legal espionage is not amused by the aforementioned. But rather than shedding light on a dark reality, it serves to highlight it. For example, there is nothing in the TRIPs rules about compulsory licencing that gives a country like Ghana the authority to compel a country like Canada into granting it patent rights for importing medicine that the country so desperately needs. Doctors without Borders said that they tried to get medicines in Canada under Bill C-9.⁴⁰⁷ They went through the lengthy application procedure that was made necessary by the TRIPS Agreement as well as Canadian local law, and a Canadian generic drug producer indicated interest in delivering the medications sought, but Médecins Sans Frontières was forced to quit the search and go elsewhere, namely to India.⁴⁰⁸

Médecins Sans Frontières’ assertion that the TRIP’s clauses on forced licencing are not operating is supported by this evidence. It also serves as an example of how even a group as resourceful and prominent as they are is unable to make a difference in the situation. Doctors Without Borders, for example, might have brought Canada before the “WTO” DSM if the TRIP’s compulsory licencing requirements were as forceful as the prescriptive rules affecting GIs, with Doctors Without Borders participating as an *amicus curiae* (Friend of the Court). However, under the current situation, the TRIPs provides a path to justice for GI concerns, but none at all for grievances relating to forced licencing. As a result, forced licencing does not fall within the purview of the rule of law.

⁴⁰⁶ Ibid p-189.

⁴⁰⁷ Médecins Sans Frontières, ‘Neither expeditious nor a solution: the WTO August 30th Decision is unworkable. An illustration through Canada’s Jean Chrétien “Pledge to Africa”’, paper prepared for the XVI International AIDS Conference, Toronto, August 2006.

⁴⁰⁸ Ibid

4.6 The Right to health and the pharmaceutical patenting

Humans have a basic right to health, according to international law: “The right to health is a fundamental right for everyone.” An important component in guaranteeing a person’s right to good health is adhering to international human rights standards, such as those set out by the CESC. The ICESCR was ratified by 153 nations out of 192 total countries, according to Lisa Foreman.⁴⁰⁹ Although this Convention is a formal legal document, it is not binding on the parties involved. A lack of access to life-saving antiretroviral drugs for the great majority of people afflicted with AIDS shows that the disease has only a normative influence on society. In Sub-Saharan Africa, home to more than two-thirds of the world’s HIV-positive population, just 28% of those living with the virus have access to antiretroviral medication.⁴¹⁰

With regard to human rights and TRIPs duties, there is no “well-established legal relationship” according to Foreman.”⁴¹¹ Despite Holger Hestermeyer's compelling argument that the TRIPs laws themselves represent this legal connection, this thesis writer agrees with Foreman.⁴¹² According to Hestermeyer, patent rights for pharmaceutical products are amended by particular clauses that take into account the human right to health of people living in underdeveloped countries. These are the legislative adjustments that have been made:

- (i) Patents must be granted for “all breakthroughs in all sectors of technology, provided that they are distinctive, constitute an innovative step, and may be put to practical use in industry,” as stated in Article 27 of the “WTO” Agreement.
- (ii) As stated in Article 29 of the Paris Treaty, an inventor who files a patentable invention is entitled to a patent for at least twenty years.

⁴⁰⁹ Foreman, Lisa, (2007) ‘Trade Rules, Intellectual Property, and the Right to Health’, *Ethics & International Affairs*, vol. 21, no. 3, p.345

⁴¹⁰ *Ibid.* p.337

⁴¹¹ *Ibid.* p.346

⁴¹² Sell, S. (2008). *Human Rights and the WTO: The Case of Patents and Access to Medicines* by Holger P. Hestermeyer Oxford: Oxford University Press, 2007. *World Trade Review*, 7(3), 584-586. doi:10.1017/S1474745608003935

- (iii) Article 33 of the Patent and Trademark Act of 1946 gives the patent owners the authority to ban “making, using, offering for sale, selling, or importing” the items.

These limitations, however, as noted in the Doha Declaration⁴¹³ in 2001, provide for significant ‘flexibilities’ that help impoverished nations in “developing countries” to have access to patent medicines. The following are examples of ‘flexibilities’:

For members to be granted compulsory licences, they must demonstrate that they need such a licence and that they can pay the charge for it in an acceptable time period to the patent’s holder, as stated in Article 31 of the Treaty. It may be essential to disregard the ‘reasonable time’ condition in the event of a national emergency. By definition, a compulsory licence restricts access to patent medicines to the local market that got it. It is not possible to export items that need a “compulsory licence”. Naturally, nations without suitable industrial capabilities were severely disadvantaged as a result of the export prohibition. This was acknowledged by the Doha Declaration, which claimed to have taken steps to address the problem under Paragraph 6⁴¹⁴ of the Doha Declaration.

In Hestermeyer’s opinion, the waiver was granted in line with “Article IX of the WTO Agreement”, which amounted to an almost complete rewriting of the TRIPS Agreements.⁴¹⁵ In essence, the waiver removed the Article 31 export prohibition on pharmaceuticals manufactured under compulsory licence, which had previously been in effect. But the waiver comes with strict limitations, such as:

TRIPs mandates

- (i) inform them of the name and anticipated amount that he wish to import.
- (ii) Furthermore, show that it does not have the ability to produce what it plans to import.
- (iii) Also, if the drug is going to be patented in the nation where it will be

⁴¹³ “Declaration on the TRIPs Agreement and Public Health, Doc. WT/MIN(01)/DEC/2, 20 November 2001.”

⁴¹⁴ Doha Declaration on the TRIPs Agreement and Public Health, Doc. WT/L/540, 2 September 2003.

⁴¹⁵ Sell, S. (2008). Human Rights and the WTO: The Case of Patents and Access to Medicines by Holger P. Hestermeyer Oxford: Oxford University Press, 2007. World Trade Review, 7(3), 584-586. doi:10.1017/S1474745608003935

imported, the company must indicate that it has or will provide a compulsory licence. In this case, the exporting Member may give a compulsory licence that is confined to the importing Member's declared needs and oblige the importing Member to color-code the drugs that have been imported in order to prevent their re-export. Pools of importers may be formed by members.

The Council for TRIPs reviews this mechanism on an annual basis.

To make it operate, exporting members' national patent laws must be amended to allow it. The TRIPs were updated with Article 31 bis in Document WT/L/641 (8 December 2005), which made this system permanent.

It is true, according to Hestermeyer, that when MSF tried to buy the HIV treatment TriAvir from the Canadian business Apotex, the new TRIPs provision proved to be extremely burdensome and, in fact, much more costly than importing the medication from India. Although he believes that this is a procedural issue rather than a fault inherent in the TRIPs, he does not believe that this is so.⁴¹⁶ According to Médecins Sans Frontières. The WHO approach has not resulted in a single tablet reaching a single patient in any LDC.⁴¹⁷

However, even if the MSF Rwanda experience is due to procedural mistakes, Article 31 bis and the Doha Declaration did not take into consideration the "TRIPS-plus" restrictions that limit rather than facilitate compelled licencing. The FTAA and CAFTA, two free trade accords including the UN and Central America, were forerunners to TRIPs-plus obligations for patent pharmaceuticals, since they explicitly renounce TRIPs compulsory licensing waivers.⁴¹⁸ It's unlikely that the human right to health will become binding international law as long as bilateral trade agreements can undermine even modest initiatives like the Doha Declaration and TRIPS Article 31 bis.

⁴¹⁶ Ibid

⁴¹⁷ "Médecins Sans Frontières, 'Neither expeditious, nor a solution: The WTO August 30th decision is unworkable' Canada, MSF, 2006, <https://msfaccess.org/neither-expeditious-nor-solution-wto-august-30th-decision-unworkable>."

⁴¹⁸ <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/sixth-annual-top-ten-list-years-most-underreported-humanitarian>.

4.7 Compulsory Licence and Covid -19 Pandemic

During the COVID-19 pandemic, members of the WTO might elect not to apply, enforce, or execute certain intellectual property restrictions pertaining to COVID-19 drugs, vaccines, diagnostic tests and other connected technologies or materials if a temporary waiver was presented in October 2020 to the “WTO”.⁴¹⁹ More than 100 governments, UN have already endorsed the proposal.⁴²⁰ After the US announced its participation in the text-based discussions on May 5, 2021, additional high-income nations may join. Until the waiver option is created, the countries shall employ all TRIPS legal flexibilities to promote access to COVID-19 therapeutic commodities.⁴²¹ According to TRIPS Article 73,⁴²² these flexibilities may include the power to suspend the enforcement of intellectual property rights for reasons of national security.

Compulsory licencing is a kind of licencing issued by the government to enable the manufacturing or import of generic copies of patent-protected medical items. The Doha Declaration on the TRIPS Agreement and Public Health⁴²³ specifically acknowledges the need for mandatory licencing and other flexibility in protecting public health, and emphasizes that countries may determine the grounds for such licencing.⁴²⁴ Many factors may justify the granting of mandatory licences, including but not limited to the following:⁴²⁵

1. When the patented drug is prohibitively expensive or unavailable to patients, making it impossible for them to get it.
2. For non-commercial usage in the general public.

⁴¹⁹ https://www.wto.org/english/news_e/news21_e/trip_20jul21_e.htm.

⁴²⁰ <https://msfaccess.org/india-and-south-africa-proposal-wto-waiver-ip-protections-covid-19-related-medical-technologies>

⁴²¹ “USTR. Statement from Ambassador Katherine Tai on the COVID-19 TRIPS Waiver. Press release. 2021 May 5.” Accessed on :

“<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>.”

⁴²² Abbott, Frederick M (2020), The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic. Research Paper 116, South Centre, Geneva (August 2020), FSU College of Law, Public Law Research Paper No. 930, FSU College of Law, Law, Business & Economics Paper No. 20-16, Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3682260>.

⁴²³ “Paragraph 4, Doha Declaration on TRIPS and Public Health.”

⁴²⁴ “Paragraph 5(b), Doha Declaration on TRIPS and Public Health.”

⁴²⁵ Article 31(b) of the TRIPS Agreement.

3. The patent is deemed invalid if the owner refuses to provide licences to other eligible manufacturers, including domestic ones.
4. When there's a chance of a shortage.

In the case of a public health emergency or other situation requiring immediate attention, such as an epidemic, a public health emergency or other situation requiring immediate attention should be considered.

Before government agencies may issue a compulsory licence, they must first seek to negotiate a voluntary licence on fair conditions. This is required in certain instances before issuing a compulsory licence. Agreement with the patent owners is not required in cases of national emergencies, public non-commercial use, or competition violations. The refusal to issue injunctions in patent infringement cases and instead allowing continuous infringement subject to the payment of royalties are examples of how judicial authorities may enable previously illegal use of intellectual rights in patent infringement cases.⁴²⁶

Compulsion licences came to light in the early 2000s as countries tried to circumvent patent restrictions in order to allow the importation or manufacture of generic antiretroviral treatments for “HIV/AIDS”. Governments have explored or adopted compulsory licences about a hundred times in the past two decades to address difficulties of access to HIV/AIDS, hepatitis C, and cancer medicines.⁴²⁷

In 2017, Malaysia authorized a government use licence for sofosbuvir to help the country's approximately 400,000 hepatitis C patients get treatment.⁴²⁸ After failing in their attempts to be included in the voluntary licencing agreement and pricing talks with the patent owners, the Ministry of Health took the decision to withdraw from the agreement.⁴²⁹ The patent stumbling block was knocked down by the mandatory

⁴²⁶ F. Hoffmann-La Roche Ltd. & Anr. v. Cipla Limited, I.A 642/2008 IN CS (OS) 89/2008, Delhi High Court, Order dated 19 March 2008.

⁴²⁷ FM'tHoen, E. (2016), Private patents and public health: changing intellectual property rules for access to medicines. AMB Publishers.

⁴²⁸ DNDi. DNDi welcomes Malaysia's move to secure more affordable treatments for hepatitis C. Accessed on : <https://dndi.org/press-releases/2017/dndi-welcomes-malaysia-move-access-affordable-treatments-hepc/>

⁴²⁹ Malaysia Director-General of Health. Implementation of the rights of government for sofosbuvir tablet to increase access for hepatitis C treatment in Malaysia. Press statement. Accessed on : <https://kpkesehatan.com/2017/09/20/press-statement-minister-of-health-20th-september-2017-implementation-of-the-rights-of-government-for->

licence. Because sofosbuvir's patented price has dropped by 99.7 percent, it is now feasible to get hepatitis C treatment at public hospitals in Malaysia, as the generic version costs just R1, 248 for a full course of treatment.⁴³⁰

4.8 National Legislation that enhanced compulsory licencing during COVID-19

As the need for COVID-19 medical items and technology grows, compulsory licencing is becoming an increasingly significant strategy.⁴³¹ Several nations have altered their legislation to make the process of obtaining obligatory licences or government usage permits in the wake of the epidemic simpler and faster for citizens.

4.8.1 Australia:

In February 2020, the Australian Patents Act was revised to provide adjustments to the laws governing the use of patents by the Crown (the government).⁴³² With the amendment, it becomes clearer under what conditions Crown use may be invoked, such as in an emergency or when an innovation is not reasonably accessible to the public on a reasonable basis.

4.8.2 Brazil:

The Brazilian Federal Senate adopted a law in April 2021 that would make it easier to get compulsory licensure in the event of a health crisis.⁴³³ Compulsory licencing of

sofosbuvir-tablet-to-increase-access-for-hepatitis-c- treatment-in-malaysia/

⁴³⁰ Su-Lyn B. Malaysia not rich, affordable remdesivir needed, MPs tell Gilead. Accessed on : <https://codeblue.galencentre.org/2020/05/21/malaysia-not-rich-affordable-remdesivir-needed-mps-tell-gilead/>

⁴³¹ Perchudoff, K., 'tHoen, E., & Boulet, P. (2021). Overriding drug and medical technology patents for pandemic recovery: a legitimate move for high-income countries, too. *BMJ Global Health*, 6(4). <https://doi.org/10.1136/bmjgh-2021-005518>

⁴³² IP Australia. Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures) Act 2020. Accessed on : <https://www.ipaustralia.gov.au/about-us/public-consultations/archived-public-consultations/intellectual-property-laws-amendment-productivity-commission-response#:~:text=The%2520Intellectual%2520Property%2520Laws%2520Amendment,out%2520the%2520innovation%2520patent%2520system.>

⁴³³ Senado Federal. Parecer N° 79 , DE 2021 - PLEN/SF. Accessed on : <https://legis.senado.leg.br/sdleg->

patent applications and the mechanism for simultaneous licencing of multiple technologies will be included in this proposal. This proposal includes a list of technologies that must be made available to civil society contributions within 30 days of the proclamation. That's not all: The law mandates that patent holders must disclose all of the technical information (including biological components) that is necessary for third-party replication of the process.⁴³⁴ According to the National Congress, the measure is now being considered by the lower chamber.

4.8.3 Indonesia:

According to Indonesian Patent Law, Presidential Regulation No. 77 of 2020, which was released in July 2020, sets out the procedures for the implementation of patents and takes effect immediately. The new law broadens the breadth of the government's power to utilize patents in the public interest when there is a very pressing necessity. It is permissible to licence pharmaceutical and biotechnology items that are expensive and/or essential to treat a disease that is anticipated to cause large numbers of fatalities or major disabilities in the near future and represents a global public health emergency.⁴³⁵ Compulsory licences for HIV treatments may be granted by Indonesia's government under the country's patent laws, and they have done so before. Currently, the Indonesian government has the authority to grant compulsory licence under the country's patent rules, and it has done so in the past for HIV medications.

4.8.4 Canada:

A forced licence may be issued in the case of a public health emergency under the COVID-19 Emergency Response Act, which came into effect in March 2020 and simplified and expedited the procedure of getting a compulsory licence.⁴³⁶ Any person

getter/documento?dm=8961493&ts=1620838840116&disposition=inline

⁴³⁴ TBR Newsroom. Brazilian Senate approves lifting of patents for Covid vaccines. The Brazilian Report. Accessed on : <https://brazilian.report/liveblog/2021/04/30/brazilian-senate-approves-lifting-of-patents-covid-vaccines/>

⁴³⁵ Adiati MF, Mogesmiranti W. Government introduces regulation dealing with compulsory licences. Accessed on : <https://www.managingip.com/article/b1n8qnbclzqnh0/government-introduces-regulation-dealing-with-compulsory-licences>

⁴³⁶ COVID-19 Emergency Response Act, Act of March 25, 2020, S.C. 2020, c.5. Accessed on :

mentioned in a Minister of Health's request for a patented invention was given the power to make and sell a patentable innovation in accordance with this Act. The amendment was set to expire on September 30, 2020.

4.8.5 Chile:

When the corona virus pandemic struck in March 2020, the country's lower house of Congress (the Chamber of Deputies) voted to provide compulsory licences for patented medications, vaccines, and diagnostic tests needed to fight the epidemic. The resolution was signed by the president of Chile, Salvador Allende.⁴³⁷

4.8.6 Colombia:

The Colombian government issued a decree in March 2020 authorizing for the execution of measures to prevent, diagnose, and treat COVID-19. COVID-19 is a disease that may be diagnosed, prevented, or treated with the use of certain medical equipment, vaccines, and other health technologies that are required by the "Ministry of Health and Social Protection". Colombian law permits the issuing of a forced licence in advance of a declaration of public interest.⁴³⁸ It is the duty of the Superintendence of Industry and Commerce to grant and issue mandatory licences for the particular commodities in question once a decision of public interest has been made.⁴³⁹

4.8.7 Equatorial Guinea:

"CoVID-19-related preventative, diagnostic, and therapeutic technologies will be licensed in Equatorial Guinea in March 2020 after a committee of the National

https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2020_5/page-1.html

⁴³⁷ KEI. English translation of Chile "Resolution for the granting of non-voluntary licenses referred to in article 51° N° 2 of industrial property law N° 19.030 to facilitate access and availability of medicines and technologies for the prevention, treatment and cure of coronavirus COVID-19." Accessed on : <https://www.keionline.org/chilean-covid-resolution>

⁴³⁸ New W. Leaked Letter Shows Pressure on Colombia Not To Issue Compulsory Licence for Glivec. Accessed on : <https://www.ip-watch.org/2018/02/06/leaked-letter-shows-pressure-colombia-not-issue-compulsory-licence-glivec>

⁴³⁹ WIPO. COVID-19 IP policy tracker. Accessed on : <https://www.wipo.int/covid19-policy-tracker/#/covid19-policy-tracker/access>

Assembly adopted a resolution authorizing the Minister of Health to do so.”⁴⁴⁰

4.8.8 Germany:

When an epidemic situation of national significance arises, German lawmakers passed a new law known as “Act on Protecting the Population in the Event Of an Epidemic Situation of National Significance” in March 2020. Patents on drugs, medical devices, laboratory tests, aids, and other commodities like personal protection equipment and disinfection products⁴⁴¹ may be used by the government under the terms of a new legislation that was just signed into effect. Once an outbreak of national concern has been declared, the limitations should remain in place.

4.8.9 Hungary:

The Hungarian government granted remdesivir an obligatory licence in late 2020 based on newly passed legislation. Lawfully, the licence was granted. Hungarian Richter, which had been contacted by government authorities, was awarded a forced licence to make the medicine during its initial wave of manufacturing.⁴⁴² Citing a recently issued legislation, the Hungarian government awarded a mandatory licence for remdesivir in late 2020. The licence was given in accordance with the law.⁴⁴³ “A compulsory licence was granted to the Hungarian company Richter, which had been approached by government officials to produce the drug during its first wave of production.”⁴⁴⁴

⁴⁴⁰ Abinader L. Legislative Committee in Ecuador approves resolution on compulsory licensing of patents relating to the coronavirus. KEI. Accessed on :<https://www.keionline.org/32429>

⁴⁴¹ Musmann T. Update on patent-related measures in Germany in view of corona pandemic. Kluwer Patent Blog. Accessed on : <http://patentblog.kluweriplaw.com/2020/04/02/update-on-patent-related-measures-in-germany-in-view-of-corona-pandemic/>

⁴⁴² WTO TRIPS Council (October 2020): Hungary answers queries posed by South Africa regarding Hungarian compulsory licensing provisions (KEI); see also Hungary: Government Decree 212/2020 on public health compulsory license (WIPO).

⁴⁴³ PhRMA. PhRMA Special 301 Submission 2021. Accessed on :<https://www.phrma.org/en/Policy-Paper/PhRMA-Special-301-Submission-2021>

⁴⁴⁴ Reuters Staff. Hungary's Richter has manufactured remdesivir for 3,000 COVID-19 patients. Accessed on : <https://www.reuters.com/article/us-health-coronavirus-remdesivir-richter-idUSKBN26S283>

4.8.10 Israel:

In March 2020, Israel became the first country to get a “compulsory licence” for the HIV drug “lopinavir/ritonavir”. Due to AbbVie's inability to provide enough lopinavir/ritonavir at the time, Israel was compelled to get a licence from India. Then AbbVie announced that its lopinavir/ritonavir patents, including HIV and corona virus, will no longer be enforced internationally.

4.8.11 Russia:

According to Article 1360 of Russian Civil Code, Russia approved an ordinance in December 2020 that allows the government to grant a compulsory licence without the approval of the patent holder, provided that the licensee agrees to pay a proportionate amount of compensation.⁴⁴⁵

Civil society organizations in Russia requested that the Russian government provide an obligatory licence for remdesivir in August of that year. An open licence to sell Gilead Sciences' generic medication to Pharmasintez, a Russian firm, was refused by the patent-holding corporation. Russia is also prohibited from importing a generic version of remdesivir from Egypt, India, and Pakistan because of bilateral voluntary licence agreements with nine generic businesses. The Russian pharmaceutical company Pharmasintez finally received a compulsory licence in December 2020 that allows it to manufacture and distribute generic versions of remdesivir to the Russian public without obtaining permission from Gilead. This is the equivalent of an obligatory licence under Russian law.⁴⁴⁶

In the end, both lopinavir/ritonavir and remdesivir were deemed ineffective by the World Health Organization for the treatment of COVID-19 (WHO),⁴⁴⁷ the foregoing

⁴⁴⁵Osipenko N. Russia to expand grounds for granting compulsory licenses. Accessed on : <https://www.petosevic.com/resources/news/2021/01/4419>

⁴⁴⁶ Make Medicines Affordable. Russian government issues its first health-related compulsory license. Accessed on : <https://makemedicinesaffordable.org/russian-government-issues-its-first-ever-compulsory-license-for-covid-19-treatment/>

⁴⁴⁷Mermelstein E. WHO: Remdesivir, Hydroxychloroquine, Lopinavir, Interferon Ineffective for COVID-19. Infectious Disease Advisor. Accessed on : <https://www.infectiousdiseaseadvisor.com/home/topics/covid19/remdesivir-hydroxychloroquine-lopinavir-interferon-beta-1a-ineffective-for-coronavirus/>

obligatory licences demonstrate that governments may support local manufacturing and importation of a cheaper generic pharmaceutical for the benefit of the general population.

4.9 Compulsory licenses challenges faced by Developing Nations during Covid-19

Countries have relied on compulsory licencing as a vital public health protection for a long time. In order to more effectively overcome IP hurdles in this pandemic, nations will also need a temporary concession of IP rights. A worldwide pandemic presents a number of unique issues that the existing rules of “compulsory licencing” under the “TRIPS Agreement” were not intended to solve, and several clauses have limitations that are inapplicable in the case of a “pandemic or other emergency”. The use of “compulsory licencing” for access to medications has also been incorrectly politicized, and nations are deterred from using it out of fear of trade reprisal, which is unjustified. Due to demands from their trade partners and pharmaceutical industries, poor nations have historically been deliberately prevented from using compulsory licencing for access to medications. Pharmaceutical firms are continuing to exert pressure on governments in the wake of the COVID-19 outbreak, urging them to utilize compulsory licencing. For example, Gilead is challenging the Russian government for giving a forced licence for the drug remdesivir without the company’s consent.⁴⁴⁸ PHRMA and BIO, the trade association for the pharmaceutical sector in the United States, each year submit complaints with the (USTR) citing foreign governments’ consideration and implementation of compulsory licencing policies. As pharmaceutical companies insisted, the annual US Trade Representative “Special 301 Report” on intellectual property enforcement has threatened trade sanctions against various other nations for issuing compulsory licences to permit the delivery of lower-priced copies of desperately needed “HIV, cancer, viral hepatitis and other diseases” medications while treatment was being provided for The EU’s main regulatory agency

⁴⁴⁸ Make Medicines Affordable. Gilead sues Russia: Private Company challenges a country’s right to protect public health. Accessed on : <https://makemedicinesaffordable.org/gilead-sues-russia-private-company-challenges-a-countrys-right-to-protect-public-health/>

has also raised alarm and given warnings to countries that have embraced the practice of compulsory licencing.⁴⁴⁹

Countries may also be hesitant to even contemplate taking legal action to enforce compulsory licences out of fear of retaliatory measures. Compulsory licencing would have “serious, severe, and unforeseen detrimental repercussions,” the Indian government claimed recently before the country’s Supreme Court in a brief filed in New Delhi.⁴⁵⁰ Recent developments have been more encouraging. The USTR acknowledged for the first time in more than a decade that all countries had the authority to use compulsory licences in its “2021 Special 301 Report”.⁴⁵¹ This is a great step forward in the right direction. Even if COVID-19 is an exception because of this practice, it must be abolished in order for this to be really successful in eliminating political and trade pressures on nations that provide “compulsory licences” medical items.

When governments use compulsory licencing, the TRIPS Agreement establishes some procedural and substantive requirements for them to follow, some of which may prove to be prohibitive in the event of a global pandemic. As a result, when it comes to the use of compulsory licencing, TRIPS rules necessitate that it be done on a case by case and product by product basis. A potential licensee must endeavor to get a voluntary licence on commercially acceptable conditions before applying for a licence. This may result in time delays, except in instances of emergency and other circumstances of extreme urgency, public non-commercial usage, or competition violations. After that, the licensee must have an opportunity to analyze the reasons for the licence and the royalty rate, which has resulted in various legal battles being made against generic manufacturers that receive a licence or government bodies that grant a licence. A global pandemic may necessitate an enormous coordination problem if patent-free supply chains for things with a high number of components and complex underlying

⁴⁴⁹ Program on Information Justice and Intellectual Property Law. Timeline for US-Thailand compulsory license dispute. Accessed on :<http://infojustice.org/wp-content/uploads/2012/11/pijip-thailand-timeline.pdf>

⁴⁵⁰ Scroll. Why is India calling for a global vaccine patent waiver, but against discussing one at home?. Accessed on :<https://scroll.in/article/994672/why-is-india-calling-for-a-global-vaccine-patent-waiver-but-against-discussing-one-at-home>

⁴⁵¹ Samal A. Special 301 Report 2021: US’s great U-turn on compulsory licensing. Accessed on : <https://spicyip.com/2021/05/special-301-report-2021-uss-great-u-turn-on-compulsory-licensing.html>

IP landscapes, such as vaccines, were established.⁴⁵² Some countries may have additional regulations in place that may work against compulsory licencing. A rule governing pharmaceutical items in the European Union, for example, might make it more difficult for EU member states to make efficient use of mandatory licencing.⁴⁵³

Compliance with compulsory licencing is only possible if patent obstacles on particular medical items have been created, preventing the manufacture and distribution of such products. At this time of pandemic, it is wasteful to wait until a barrier has established before taking measures to combat the changing intellectual property environment. It is also possible that new patents will go unpublished as a result of the time lapse between application and publication, at a time when preparations for ramping up production and supply are already required. In order to remove legal risk as quickly as possible, it is essential to provide a faster alternative to compulsory licences in addition to mandatory licences.

Trade Agreement Article 31(f) states that unless the licence is granted to address competition violations, compulsory licencing should be utilized largely to serve the domestic market. For nations seeking to export generic items manufactured under compulsory licencing, this involves demonstrating that the amount available for export represents a small proportion of total domestic supply. Article 31(f) is insufficient and very difficult in the event of a pandemic like Covid-19 when large-scale and quick humanitarian aid is needed.

“The Russian media reported in April 2021 that Gilead has filed a lawsuit against the Russian government, disputing the compulsory licence given to remdesivir.”⁴⁵⁴ In order to assist India, the Russian government was willing to provide generic remdesivir manufactured under its compulsory licence as part of a Russian humanitarian aid package.⁴⁵⁵ Due of worries over the patent of Gilead, however, the

⁴⁵² Gaviria, M., Kilic, B. (2021). A network analysis of COVID-19 mRNA vaccine patents. *Nat Biotechnol* 39, 546–548. <https://doi.org/10.1038/s41587-021-00912-9>

⁴⁵³ tHoen, E.F.M., Boulet, P. & Baker, B.K. (2017). Data exclusivity exceptions and compulsory licensing to promote generic medicines in the European Union: A proposal for greater coherence in European pharmaceutical legislation. *J of Pharm Policy and Pract* 10, 19 <https://doi.org/10.1186/s40545-017-0107-9>

⁴⁵⁴ Silverman E. Gilead sues Russia over a compulsory license issued to a company making remdesivir. Accessed on : <https://www.statnews.com/pharmalot/2021/05/04/gilead-sues-russia-over-a-compulsory-license-issued-to-a-company-making-remdesivir/>

⁴⁵⁵ Nikolskaya P. Russian firm awaits government approval to ship remdesivir to India. Accessed on :

final consignment was not shipped to India.⁴⁵⁶ This implies that Russia's obligatory licence is only for domestic use, with exports, even for humanitarian aid, being restricted to the absolute minimum. This is in compliance with "Article 31 of the TRIPS". It is difficult to give humanitarian aid with generic medications supplied through compulsory licencing in India because of worries about patent infringement, the dangers posed by pharmaceutical firms suing governments, and the potential limits imposed by the present system of TRIPS laws. There is no practicable alternative to the special obligatory licence provided under "Article 31bis of the TRIPS Agreement" that allows manufacture, export, and importing to countries with inadequate industrial capacity. The TRIPS Council was authorized by the Doha Declaration to provide an expedited solution to make it easier for countries to use compulsory licences for export and import in order to alleviate the difficulties that countries with little or no manufacturing capacity face in efficiently using Article 31(f). But the revision that resulted, Article 31bis of the TRIPS Agreement, falls short of providing a speedy remedy to the problems that have been recognized thus far.⁴⁵⁷ As a result, Article 31bis provides unnecessarily complex and time-consuming processes for obtaining a compulsory licence for exports that are not adequate for dealing with public health crises.⁴⁵⁸

Among other things, the provision requires that importing and exporting countries follow a notification procedure and that for each "compulsory licence" issued, only a specified quantity of products is produced, and that the specified products must be colored and packaged in a different manner before shipment. Those criteria under Article 31bis are obviously impracticable in the context of a pandemic, given the mounting demands to mobilize all available resources at breakneck speed.

The "WTO" TRIPS Council received a general notice from Bolivia on February 19, 2021, announcing the nation's desire to become an importing country under the

<https://www.reuters.com/world/india/russias-pharmasyntez-ready-ship-1-mln-packs-remdesivir-india-2021-04-26/>

⁴⁵⁶Haidar S. 22 tonnes of COVID-19 supplies from Russia arrive in India. Accessed on : <https://www.thehindu.com/news/national/22-tonnes-of-covid-19-supplies-from-russia-arrive-in-india/article34437019.ece>

⁴⁵⁷ <https://msfaccess.org/never-expedient-solution-wto-august-30th-decision-unworkable>.

⁴⁵⁸ MSF. WTO COVID-19 TRIPS Waiver: Canada briefing note. Accessed on : <https://msfaccess.org/sites/default/files/2021-03/COVID-IP-TRIPMSF%20Canada%20Briefing%20on%20TRIPS%20Waiver-Feb%202021-ENG.pdf>

Article 31bis process.⁴⁵⁹

Biolyse, a Canadian vaccine maker, said on March 12th, 2021, that it was unsuccessful in its quest to secure an intellectual property licence agreement with “Johnson & Johnson” to manufacture the single-dose “COVID-19” vaccine for domestic and worldwide distribution. Adenovirus vectored vaccine developed by Johnson & Johnson, which Biolyse claims it has the ability to make if patent constraints on the vaccine are eliminated, in order to assist fulfil the rising demand for COVID-19 vaccine.⁴⁶⁰ Thus, the company is trying to get an export licence under the “Canadian Access to Medicines Regime” (CAMR), which was formed to carry out the Paragraph 6 mechanism in the nation presently under Article 31bis of the TRIPS Agreement. Some Canadian experts put in an application to the government in late April, asking that “COVID-19 vaccine” be included as an exempt innovation in Schedule 1 as a first step toward getting a compulsory licence under CAMR. The government accepted their request in early May.⁴⁶¹ Bolivia signed a contract with Biolyse on May 10, 2021, under which the company would manufacture and provide 15 million doses of vaccine if a voluntary licence is secured from the United States or an obligatory licence for exports is given by Canada.⁴⁶² There has been no development or decision from the Canadian government in the roughly two months after Biolyse began the procedure required to secure a compulsory licence, and three months since Bolivia issued a public notice. Though this approach has limits and has been shown again and again to be ineffective in times of crisis, it is nevertheless utilized in emergency settings despite these facts.⁴⁶³ With respect to the TRIPS waiver, Canada has said that Article 31bis is sufficient. The TRIPS Agreement and

⁴⁵⁹ WTO. Notification of intention to use the special compulsory licensing system as an importing member (IP/N/8/BOL/1). Accessed on:

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/N/8BOL1.pdf&Open=True>.

⁴⁶⁰ Biolyse Pharma. Canadian-pharma solution to aid worldwide COVID vaccine access. Accessed on : <https://www.newswire.ca/news-releases/canadian-pharma-solution-to-aid-worldwide-covid-vaccine-access-831681238.html>

⁴⁶¹ Schouten A. 41 Canadian Experts Request Amendment to Schedule 1 of the Patent Act to include COVID-19 vaccines. Accessed on : <https://www.keionline.org/36017>

⁴⁶² Bolivia agreement with Biolyse. Accessed on : <https://www.keionline.org/wp-content/uploads/Biolyse-Bolivia-English.pdf>

⁴⁶³ WTO COVID-19 TRIPS Waiver: Canada briefing note. Accessed on :

<https://msfaccess.org/sites/default/files/2021-03/COVID-IP-TRIPSMSP%20Canada%20Briefing%20on%20TRIPS%20Waiver-Feb%202021-ENG.pdf>

Canadian legislation do not address the necessity for export licences to meet healthcare demands, particularly in an emergency pandemic crisis.⁴⁶⁴

When it comes to small molecule medications, just overriding patents is frequently sufficient to enable alternative companies to create them quickly. Alternative manufacturers, on the other hand, need fast access to other intellectual property-protected assets in order to develop and get regulatory clearance for complicated medical items such as vaccines and monoclonal antibodies in the event of a pandemic. There are additional types of intellectual property that are used in diagnostics, like as trade secrets and copyrights on software, along with the patents mentioned above.

⁴⁶⁴ Review of the Canadian Access to Medicines Regime Submission to the Government of Canada. Accessed on: https://www.canada.ca/content/dam/hc-sc/migration/camr-rcam/review-reviser/camr_rcam_msf_11-eng.pdf.

4.10 Summary

The argument is made that domestic lawmakers should be bound by certain requirements in order to respond to requests from “LDC’s” and “Developing Countries” operating under the TRIPS Agreement’s compulsory licencing mechanism. There is nothing stopping the TRIPs from making similar demands for the protection of “geographical indications” (GIs) in order to make its compulsory licencing function operational. (i) For me, the Paris Convention’s requirements for requiring compulsory licensure were more important than the TRIPs clauses. (ii) Chien’s allegation that mandatory licencing is bad for the pharmaceutical business was contested. (iii) Comparisons between the TRIP’s GI system and those of its compulsory licencing regimes were made. (iv) India’s transition from the Paris Convention to the TRIPs was lauded for its skilful management of this time, which led to a strong pharmaceutical sector. When it came to the argument between “the rule of law” and “government by law.” A counterargument is made, claiming that while “WTO” members may use domestic law or not, this capability is not founded on precedent when responding to requests for pharmaceutical manufacture and imports under the compulsory licencing facility. Only law grants rights, and only legislation allows remedies if these rights are denied. Consequently, the compulsory licencing facility under TRIPs is not a legally binding agreement. To just one example, there is now official legislation governing the use of geographical indicators in the wine and spirits business. Supporters of TRIPs said the pact can produce actual laws to defend the right of people in impoverished countries to access critical medicines if it can protect wines and spirits. Although the Doha Declaration recognized the human right to health, a thorough review of the TRIPs indicated that this agreement was still a long way from acknowledging this human right.

The “WTO” member states’ claims against TRIMs will be explored in the next chapter, which will also tackle the problem of trade from multinational businesses using transfer pricing, restricted business techniques, and other unfair practices. Import/export balance rules, which will be covered in more detail under TRIMs, force all “WTO” members to eliminate restrictions on local content. There are several grounds to indicate that the TRIMs are very restricted in scope and that the WTO has not yet decided on topics such as foreign investment entrance, tax reductions,

financial incentives, and the most favourable grading of land and other services.

The present requirements of compulsory licencing and the TRIPS waiver do not conflict. Each nation has its own grounds for giving a forced licencing, and in non-emergency circumstances, it may be an effective and probably appropriate tool. Permitting the Patent Office, Ministry of Health or Competition to give a compulsory licence under specific conditions is in conformity with “TRIPS Agreement and Paris Convention for the Protection of Industrial Property”. Countries should do more to ensure that intellectual property barriers do not restrict access to “COVID-19”-related medical devices.

To solve intellectual property issues quickly and efficiently during global health crises like the COVID-19 epidemic, governments should automate and streamline processes. Encouraging all parties to openly share health innovations, for example, means suspending some responsibilities under the “TRIPS Agreement” and other trade agreements. South Africa and India’s interim TRIPS waiver proposal for COVID-19, which is being pushed by the two countries, presents a critical legal option for states seeking to unite and combat IP monopolies in the face of an epidemic. In spite of this, a tiny group of nations has continued to use delay tactics to obstruct the idea seven months after it was initially submitted. As the COVID-19 epidemic continues to flare over the globe, all countries should embrace and back this essential proposition.

I don't think anyone sets out to malign poor people but certainly that's what we do through organizations such as the World Trade Organization, the World Bank and the International Monetary Fund.

Bob Geldof

Chapter 5- The “Dispute Settlement Mechanism” and its Effect on Developing Countries related to Foreign Investment and Trade

5.1 Introduction

As the heart of the multilateral trade system, the WTO's unique contribution to global economic stability is dispute settlement. Because the rules cannot be enforced without a mechanism of resolving conflicts, the rules-based system is less successful. By following the “WTO's” procedures, the trade system becomes more safe and predictable. There are well established procedures and deadlines for finishing a case under the system. The “WTO's” full membership reviews and approves (or rejects) any initial decisions made by a panel. Points of law may be used to appeal a decision.⁴⁶⁵

Even under a system of multilateral trading agreements, smooth and clear transactions owe their existence to dispute resolution bodies because without a dispute settlement body to resolve disagreements in trade and economics, as well as without the rules that govern the agreement itself, nothing would be accomplished. The dispute resolution system is activated whenever a member believes another member has broken the rules. In most cases, this occurs when a member country's trade policy violates the trade agreements and “WTO” accords that the parties have signed. Even the third group of nations might express their involvement in the issue in accordance with this.⁴⁶⁶

⁴⁶⁵ Madhumitha, D. S. (2020). WTO-Analysis of Issues with the “Dispute Settlement Mechanism”. Beijing Law Review, 11, 879-888.

⁴⁶⁶ Ibid

International distributive justice cannot be implemented in the “WTO” setting unless the UN intervenes to regulate the arbitration procedures of investment tribunals, which hinder its implementation. This chapter of the thesis shows that international distributive justice may be applied under the “WTO” system, but it is necessary to describe the impact of investment-tribunal regulations on “WTO” member states. There are various investment-related agreements, such as the BITs that have arisen as significant international law and this chapter will explore the development of such agreements and the “WTO’s” dispute resolution mechanism (DSM) (BITs).⁴⁶⁷ If you’re looking for an example of how an international arbitration tribunal has been successful at enumerating international law related to investment and how their judgments have achieved solid results in terms of foreign direct investment (FDI), you should look no further than Bangladesh and the UAE’s. On compared it to the “WTO’s” DSM to highlight the legal weaknesses inherent in the primary assumption of non-discrimination. The WTO's efficient dispute resolution mechanism was developed during the Uruguay Round in 1994. According to some, it is the “jewel in the crown” of “Uruguay round” negotiations.⁴⁶⁸ The understanding of DSU was a huge stride in the framework of the international trade system. While serving as DG of GATT and Trade at the time, Peter Sutherland said that the future of the “WTO” depended on its dispute-resolution system’s performance.⁴⁶⁹ A new DSM has replaced the GATT system.⁴⁷⁰ The DSU, which was negotiated at the “Uruguay round”,⁴⁷¹ sets out the processes for “WTO” DSM. It is the “WTO’s” responsibility, among others, to mediate international trade disputes. There are frequently competing interests in a commercial relationship. There is a healthy method to resolve these disagreements that is based on a strong and agreed upon legal

⁴⁶⁷ Schreuer, C. (2004). Travelling the BIT route: Of waiting periods, umbrella clauses and forks in the road. *The journal of world investment & trade : law, economics, politics*, 5(2).

⁴⁶⁸ V.S Seshadri, (SpringerNature, 2016) “WTO and its Dispute Settlement Mechanism in Abhijit Das, James J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty: Insiders’ Reflections on India’s Participation* ,34.

⁴⁶⁹ Zaracostas. J (1994 “Dispute Process Crucial to WTO, Sutherland Says,” Vol.1 *Journal of commerce*.

⁴⁷⁰ Rao, M.B. and Guru Manjula,(2004), *WTO Dispute Settlement and Developing Countries*, (Lexis NexisButterworths, p. 10.

⁴⁷¹ Marrakesh Agreement Establishing the World Trade Organization [WTO Agreement], Apr. 15, 1994 in *World Trade Organization*, available online <http://www.wto.org>. visited on 15-06-2021.

framework. This is the rationale behind the “WTO’s” Dispute Settlement Process.⁴⁷² As part of the DSU,⁴⁷³ the “WTO Dispute Settlement System” is administered by three bodies: It was formed under “Article 2 of the DSU” to manage the DSU’s rules and procedures as well as any exceptions set out in any Covered Agreements, unless otherwise stated. Second, under “Article 6 of the DSU”, this DSB has the authority to organize Dispute Settlement Panels. After a failed attempt to consult, a panel is formed by the party. Dispute resolution is outlined in great depth in the DSU and is governed by a set of rules and timetables.

5.2 Dispute settlement understanding

The WTO’s DSM is a critical component of the organisation. Increasing trade and commerce also raises the likelihood of disagreements. The best method to resolve these issues peacefully and amicably is to use a neutral process based on an agreed-upon legal basis. As a result, during the “Uruguay round” negotiations, the “WTO’s” dispute resolution charter was included as a component of the agreement. The Dispute Settlement Charter, which was signed in Marrakesh in 1995, is sometimes referred to as the DSU.⁴⁷⁴

According to the DSU charter, “WTO” dispute resolution is largely controlled and regulated by the rules and procedures set therein (DSU).⁴⁷⁵ The primary goal of the “WTO’s” DSS is to quickly resolve disputes between “WTO” members on their rights and responsibilities under covered agreements by ensuring the security and predictability of DSS via satisfying settlements.⁴⁷⁶

27 Articles, 143 paragraphs, and 4 appendices make up the DSU charter may be The Uruguay Round’s most important accomplishment. Article 3(2) of the DSU explicitly

⁴⁷² Kantchevski, P.D. (2006), ‘The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement’, *BYU International Law & Management Review*, Vol.3(1),79.

⁴⁷³ Chakraborty. D and Khan. AU,(2008) *The WTO Deadlock: Understanding the Dynamics of International Trade*, (Sage publication, New Delhi, 1st ed) 175.

⁴⁷⁴ Henrik, H. (1999), ‘Remedies in the WTO Dispute Settlement Understanding and Developing Country Interests’, available at: <http://www.econ-law.se/Papers/Remedies%20990611-1.pdf>, Accessed on 20-06-2021.

⁴⁷⁵ Annex 2 to the Agreement Establishing the World Trade Organization.

⁴⁷⁶ Article III.2 of the DSU.

states that the “WTO” dispute resolution system serves to explain the provisions of the “WTO” Agreements in line with the usual norm of interpretation of public international law. It is stated in Article 1 of the agreement that if any member of the group affirms a breach of trade regulation, it will be decided by the institution and mechanism created under the understanding.⁴⁷⁷

Members are not allowed to create their own rules and processes in order to resolve any issues or conflicts that may arise. Developing and LDC’s are given particular protection in the understanding. A number of unique provisions are provided by the DSU, including measures for requesting compensation, obtaining authorization for retaliation, as well as timeframes and legal advice and support for dispute resolution involving poor and least developed nations.⁴⁷⁸

Consultations, Panel procedure, Appellate Body, and Implementation and enforcement of Panel and Appellate Body decisions are four distinct steps of the “WTO” dispute resolution process. Consultation between the parties is the first step in the DSU’s conflict resolution process.⁴⁷⁹ During the consultation stage, the conflicting parties are able to better comprehend the facts and legal claims in the dispute.⁴⁸⁰

When a member believes another member has violated its responsibilities under a Covered Agreement, it may seek discussions to address the situation without resort to further proceedings. Consultations are needed of the Member who responds.⁴⁸¹ Members may seek consultations if they believe another member has violated the terms of their Covered Agreement; the parties may address the situation without resort to further proceedings.⁴⁸²

Complaining parties and replying parties have 60 days to reach an agreement on a resolution for their issue. The parties may then ask the “WTO” DG to mediate or attempt to settle the disagreement in any other manner if the consultation fails to yield an agreed solution for the issue. “Good offices, conciliation, and mediation” are

⁴⁷⁷ https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. Accessed on 20-06-2021.

⁴⁷⁸ Garvery, Jack J (1995), ‘Trade Law and Quality of Life’-Dispute Resolution under the NAFTA side; Accord on the Labour and the Environment’, *American Journal of International Law*, Vol. 89, 448.

⁴⁷⁹ Article 4 of the DSU available at <http://www.WTO.org.net>. Accessed on 20-06-2021.

⁴⁸⁰ P. V. Bossche, (2005) *The Law and Policy of WTO, Text Case and Material*, (Cambridge University Press, 256.

⁴⁸¹ Article 4.2 of the DSU

⁴⁸² World Trade Organisation, *A Handbook on the Dispute Settlement System*, 24 (Cambridge University Press, 2004)

commonly offered to the parties as a means of settling their issues amicably. There are no restrictions on the form, timing, or technique for alternative conflict resolution.⁴⁸³

Members and the goals of the agreements shall not be harmed by consultation or conflict resolution that is inconsistent with the covered agreements.

A panel may be established if the respondent fails to answer within ten days or engage into discussions within thirty days of the complaint being filed. In order to fulfill its commitment to the DSB, a panel must submit its conclusions in writing.⁴⁸⁴

The time from panel establishment to report submission to the DSB is often limited to six months.⁴⁸⁵ The parties get an intermediate report from the panel during the interim review stage.⁴⁸⁶ The panel will meet with the parties again if the parties submit any written remarks. The final report will be disseminated to the members as soon as possible if no comments are received from the parties within the comment period.⁴⁸⁷ After sixty days, the report will be disseminated and accepted at a DSB meeting, unless either one of the disputing parties' files an appeal or the board of directors concludes by agreement that it does not need to change it.⁴⁸⁸

It is possible to appeal a panel's findings to a standing appellate body based on matters of law, such as legal interpretation, after a panel has given its findings and recommendations to both parties. Re-examination of existing evidence or examination of fresh evidence cannot be requested by the parties. There are 90 days in which to issue the Appellate Body's reports. As part of the dispute resolution process, the Appellate Body may either further support or challenge the panel's legal findings and conclusions.⁴⁸⁹

The "WTO Dispute Settlement" Charter specifies the authority of the multilateral forum over the regional forums. It is within the "WTO's" competence to resolve any disputes that arise between "WTO" members who are covered by the accords. If a

⁴⁸³ *ibid*

⁴⁸⁴ Article 12.7 of the DSU.

⁴⁸⁵ Article 12.8 of the DSU.

⁴⁸⁶ Article 15.2 of the DSU.

⁴⁸⁷ Article 15.2 of the DSU. available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, Accessed on 20-06-2021.

⁴⁸⁸ Article 16.4 of the DSU. available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, Accessed on 20-06-2021.

⁴⁸⁹ Article 12.7 of the DSU, available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, Accessed on 20-06-2021.

disagreement arises between two parties in accordance with the consultation and dispute resolution requirements of an agreement stated in Appendix 1 to this Understanding, then the DSU's rules and procedures apply.⁴⁹⁰

There is a Dispute Resolution Understanding and the "WTO" agreements themselves inside "WTO" character that allow members to seek recourse to a dispute settlement procedure for concerns that come within the jurisdiction of other "WTO" agreements on goods, including the GATS and TRIPs agreements, as well as the plurilateral agreements, as those agreements stipulated it in the DSU.⁴⁹¹ However, the charter includes four crucial Annexes in its institutional measures section. Annexes serve distinct objectives and have varied legal implications. There is a multilateral agreement in Annex 1, which is obligatory in the sense that it requires all "WTO" members to adhere to it. All Members must comply with the provisions in Annex 2, which outlines the process for resolving disputes. "WTO" members' trade policies will be reviewed on a regular basis by the TPRM established in Annex 3 of the "WTO" Agreement. Plurilateral agreements are also included in Annex 4, however they are optional.⁴⁹²

This procedure is mandatory for all "WTO" members, and they must follow it for any issues that arise from their participation in the "WTO". Membership in the WTO entails an agreement to submit to "WTO" arbitration. According to the interpretation of "compelling jurisdiction," this means that when a Member seeks recourse to remedy for a breach in accordance with the covered agreements, they must follow and adhere to the rules and processes set out in that agreement.⁴⁹³

Thus, under this Article, a complaining party must submit any disagreement arising under covered agreements to the "WTO dispute settlement system", and the replying party must recognize the "WTO's" authority.

Members have access only to the "WTO's" dispute resolution system, and no other

⁴⁹⁰ Article 1.1 of the DSU. available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, Accessed on 20-06-2021.

⁴⁹¹ Yerxa, R. and B. Wilson,(2005) Key Issues in WTO Dispute Settlement System, the First Ten Years. (Cambridge University Press) 25-26.

⁴⁹² P. K. Vasudeva(2000), India and World Trade Organization: Planning and Development, (A.P.H. Pub.Corp., Delhi,17-18.

⁴⁹³ Article 23.1 of the DSU. available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, Accessed on 20-06-2021.

mechanism will be allowed to intervene in their cases. “WTO’s” Dispute Settlement Understanding was mandated for this reason. Members will no longer be able to determine whether or not any benefits provided under the covered agreement have been revoked or diminished on their own, without first resorting to the DSU’s rules and processes for dispute resolution.⁴⁹⁴

However, unlike a sovereign state that has authority to enact, adjudicate, and enforce its laws, the “WTO” is an international organisation that does not have the same jurisdictional responsibilities as a sovereign state. Despite this, in the context of “WTO” dispute resolution, the authority to judge and apply law is vested in the DSU established entities. It is not the primary role of the DSU to wield authority, but rather to protect and explain the current “WTO” Agreements and their provisions.⁴⁹⁵

In accordance with the “WTO” Agreements, the following bodies comprise the “WTO”:

1. the DSB,
2. an appellate body to review appeals from DSB panel reports, and
3. a dispute resolution panel constituted by the DSB to consider the issues raised by the state complaint.
4. An arbitrator who may be informed of specific matters in accordance with the DSU.

Panel and appellate body rulings are not binding in and of them, but only take effect when they are adopted by the DSB.

5.3 Mechanisms for protecting foreign investment

Trade disputes were the focus of early international dispute resolution procedures, not international trade. It was consequently common to have disputes about expropriation rights as the crux of the argument. Foreign owners of property that the host state has expropriated are entitled to ‘rapid and sufficient recompense,’ which is a norm of compensation recognized as customary international law. “The PCIJ, established by

⁴⁹⁴ Palmeter, D., & Mavroidis, P. (2004). *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2nd ed.). Cambridge: Cambridge University Press. doi:10.1017/CBO9781139177931

⁴⁹⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, Accessed on 20-06-2021.

the League of Nations in 1922”, proclaimed this criterion international law in its judgment in the Chorzow Factory Case. The Court’s decision was based on the 1919 “Treaty of Versailles”.⁴⁹⁶ Upon signing this treaty, the League of Nations Covenant (Article 1–26) was established, which stated that the PCIJ would be established in accordance with Article 14. Founded in 1921, the Court is one of the oldest in the country.

Germany gave Poland Upper Silesia's Chorzow area under Article 27(7) of the Treaty. Article 120 of the “Treaty of Versailles” empowered annexing states to seize German government property and use the proceeds to pay Germany's war reparation commitments, But not to seize privately owned German property. As soon as the Polish military gained control of Chorzow, the privately held “Oberschlesische Stickstoffwerrke AG” was forced to surrender its entire asset base.⁴⁹⁷ As a result of this, a case was brought before the PCIJ in which it was found that the Polish Government had violated ‘the principle of respect for vested right’s by appropriating funds meant for foreigners. For Oberschlesische Stickstoffwerrke AG, the Treaty would have acted against them had the property been state-owned. Compensation for Oberschlesische Stickstoffwerrke AG was determined by this Court to be sufficient to re-establish the condition that would have been if the unlawful conduct had not been performed and “wipe away all the effects of the illegal act.”⁴⁹⁸

Notably, the Court found that the factory owner’s property, as well as the firm, Bayerische, which possessed the contractual rights to its administration, had been expropriated.⁴⁹⁹ That power came from Article 23 of the Restitution and Compensation Convention, which defined both direct and indirect expropriation of foreign-owned property by a host state. Expropriation isn't illegal, but refusing to compensate is. This Court was perhaps the first modern forum for addressing international conflicts.

⁴⁹⁶ http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm.

⁴⁹⁷ Ibid

⁴⁹⁸ Ibid

⁴⁹⁹ Ibid

5.4 Emergence of “bilateral investment treaty” (BIT)

FDI programmes are protected by BITs, which have led to the formation of organizations such as the ICSID. These organizations have power because international investor-host state problems are arbitrated through agreements between governments and member nations and member-state private enterprises.⁵⁰⁰

International legal safeguards against government seizure of foreign individuals' property rights remain distressingly vague notwithstanding the existence of BITs and associated dispute-resolution mechanisms.⁵⁰¹

Not even academics who have studied court rulings on whether renegotiating contracts constitutes an act of expropriation are unanimous in their findings, according to Choharis' conclusion. As a side issue, he observes that 'discrimination is a significant indicium that international law has been broken.'⁵⁰²

The Multilateral Agreement on Investment (MAI) was proposed as a solution to a lack of international legislation controlling foreign investment. An international agreement on the protection of investment was to be used as a method of liberalizing governments' investment regimes. The MAI was supposed to have its own arbitration mechanism for disputes. With France's departure from the MAI in 1988, discussions on the parameters of the agreement fell down. As a result, investment legislation that is based only on international law has been lacking to until. Inter-state treaties (BITs) and the arbitral bodies they appoint generate on-the-fly international investment law. ICSID, ICC, MIGA, and OPIC are prominent forums (OPIC). BITs may employ the ICJ,⁵⁰³ UNCITRAL, or the PCA⁵⁰⁴ to settle disputes. States, not private corporations and states, are assumed to be the contesting parties in cases where the ICJ is the BIT specified forum creator.⁵⁰⁵ The ECJ cannot hear investment issues. While the TFEU⁵⁰⁶

⁵⁰⁰ <https://www.dw.com/en/germany-and-pakistan-sign-trade-deal/a-4955765>.

⁵⁰¹ Choharis, PC, (2006) 'US Courts and the International Law of Expropriation: Towards a New Model for Brach of Contract', Southern California Law Review, vol. 80, no. 1, p.4.

⁵⁰² Ibid

⁵⁰³ "If the parties agree, the ICJ has jurisdiction: 'The Court must be open to all states party to this Statute,' specifies Article 35. (1). According to the ICJ, "the Court may only exercise jurisdiction against a State with its consent." ICJ Reports 1954, 19, para. 32; ICJ Reports 1995, 87, 101, para.26."

⁵⁰⁴ <https://www.jus.uio.no/english/services/library/treaties/01/1-09/settlement-international-disputes.xml>.

⁵⁰⁵ "See Article 9(4) of the Russian-Hungarian BIT of 1996 for an example of an ICJ-specific BIT.

says that only the Union may legislate and approve legally obligatory acts, Member States can only do so if so authorized by the Union or to execute Union actions. This only applies to pre-establishment market access control and national treatment, which is the goal of investment liberalisation. Investment protection is still included in EU BITs.⁵⁰⁷

5.5 “International Centre for Settlement of Investment Disputes” (ICSID)

As an unbiased venue for settling investment disputes, the ICSID is available. It was founded by the ICSID Convention, a convention that came into effect in 1966 and has since been signed and approved by 156 countries. ICSID was created to settle investment disputes. Since its inception, ICSID has maintained its relevance, with more members more cases than ever before.⁵⁰⁸ To put it another way, the ICSID and the WTO’s DSB both serve the same purpose: they are often utilized to settle international disputes.⁵⁰⁹

One of the most astonishing economic developments of recent years has been the growth of overseas investment. This is advantageous to nations since it allows them to have access to foreign funding, technology, and knowledge. As a side effect, this implies that disputes between investors and governments are more likely to develop.⁵¹⁰

The World Bank was able to establish ICSID under its auspices in 1965 after signing the ICSID Convention, Regulations, and Rules. The “Convention on the Settlement of Investment Disputes” and its “Article 25(1)” expressly handle issues over investments

Article 8(1)(c) of the BIT specifies UNCITRAL as the appointing body.”

⁵⁰⁶ It was signed on December 13, 2007 in Lisbon and came into force on December 1, 2009 as an amendment to the EU Treaty and the EC Treaty. A new pact replaces the Maastricht Treaty, but not the EC Treaty or the Rome Treaty. The Treaty on the Functioning of the European Union supersedes both texts.

⁵⁰⁷ Maydell, N. (2007) ‘The European Community’s Minimum Platform on Investment or the Trojan Horse of Investment Competence’, in Reinisch, A. and Knahr, Ch. (eds.), *International Investment Law in Context*, Boom Eleven International, p. 73.

⁵⁰⁸ <https://icsid.worldbank.org/resources/publications/introducing-icsid>

⁵⁰⁹ Romano, Alessandro & Sotis, Chiara & Yan, Yifei. (2015). *ICSID vs. WTO: An Economic Analysis of Procedural Rules*. *North Carolina Journal of International Law and Commercial Regulation*. 41. 31.

⁵¹⁰ *Ibid*

between nations and international investors. En vertu of Article 25(1), the Centre has jurisdiction over any legal issue that arises from an investment between a Contracting State (or any component entity or agency authorized by that State) and a citizen of another Contracting State

However, the Convention does not attempt to define ‘investment’. When it comes to defining what constitutes a “investment,” Article 25(4) accepts that no effort was made due to the need of the parties’ agreement, as well as the system by which Contracting States may make known beforehand the categories of disputes they want to refer to the Centre.

When the ICSID tribunal summed up in paragraph 72 the requirements for what constituted an investment in its judgment in “*LESI Spa & ASTALDI Spa v. Algeria 2006*”⁵¹¹, “The contractor has made an investment in the country in question, this investment is made for a certain length of time and it comes with an inherent element of risk for the investor,” Dominique Grisay concluded.

For everything that the above-mentioned criteria of what defines an investment could suggest, Grisay argues that “the contribution to the economic advancement of a nation” isn’t a part of that decision’s vision. Grisay points out that this has surprised the developing world. To put it another way: The Philippines, after losing a legal battle with SCG,⁵¹² opted to abandon “arbitration with foreign corporations” in favour of “a new bilateral investment treaty.” “If we had understood how the ICSID convention would be enforced, we would not have signed it or significantly reduced its area of applicability,” Pakistan’s Attorney General recently said at an ICSID conference. There are some discrepancies here, however, between the findings of Grisay and the findings of the ICSID tribunal in the “*LESI Spa and ASTALDI Spa case*”.⁵¹³ Because Mitchell's firm did not contribute to ‘economic progress or at least the interests of the state,’ the tribunal denied him investment status. For an investment to be considered investment, the ad hoc Committee believes that it must have some connection to the economic growth or, at least, the interests of a particular state, such

⁵¹¹ <https://www.italaw.com/cases/618>.

⁵¹² *Société Générale de Surveillance SA v. Republic of the Philippines*, case No ARB/02/6 of January 29, 2004.

⁵¹³ *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, 2006.

as the Democratic Republic of Congo.⁵¹⁴

This annulment does not address Grisay's concerns about the ICSID tribunal's 'investment' deficiency. When it comes to the issue of whether 'development' is a pre-requisite for an investment, the ICSID tribunals are notorious for their inconsistency; hence the decision in "Mitchell v. DCR" cannot be relied upon as the ultimate instance. Credibility is undermined when the first ICSID panel awarded favour to Mitchell. That's hard to believe considering how much emphasis is placed on international collaboration for economic growth, and how important private international investment is to that process. As a matter of fact,

There can be no justification for the ICSID purposefully ambiguous definition of "investment," which excludes non-national economic activity in a state that serves just their own self-interest. In the context of the World Bank, ICSID's 'investment' status should be based on its ability to achieve development outcomes. Whether or if it will become a standard requirement is still up in the air.

The ICSID courts' attitudes about "development" as a pre-requisite for "investment" may be more hopeful than previously thought. For Malik,⁵¹⁵ Schreuer's perspective that: "the fundamental qualities of an investment have been characterized as including a definite term, some regularity of profit and return, the assumption or risk of major commitments and relevance for the host state's development⁵¹⁶," is still relevant today.

The ICSID tribunal concurred with this view in Fedax⁵¹⁷ and has done so regularly afterwards. The case studies and analysis of Malik's "investment" selections are also noteworthy. It would have been fascinating to hear Malik's explanation for why he departed from the Schreuer position. Remembering that "there is no binding precedent in international investment law" is helpful.⁵¹⁸ Using this method, it is impossible for

⁵¹⁴ Ibid

⁵¹⁵ Malik, Mahnaz, https://www.academia.edu/4735630/Recent_Developments_in_the_Definition_of_Investment_in_International_Investment_Agreements.

⁵¹⁶ Schreuer, Christof, (2001), *The ICSID Convention: A Commentary*, Cambridge University Press, p. 89.

⁵¹⁷ Fedax NV v Republic of Venezuela (Jurisdiction) 5 ICSID Rep 183, 1997.

⁵¹⁸ Malik, Mahnaz, 'Recent Developments in the Definition of Investment in International Investment Agreements', International Institute for Sustainable Development, 2nd Annual Forum of Developing Country Investment Negotiators, Marrakech-Maroc, 3-4 November 2008.

different people to arrive to fundamentally different conclusions on the same subject.

5.6 Analysis of developing nations and dispute settlement

The “WTO’s” DSM has made a significant contribution to the global economy, and it cannot be questioned. It has greatly expanded the scope of the Dispute resolution system by expanding the reach of law in relation to the politics of power.⁵¹⁹

Data from 1995 to 2015 indicates that there have been 492 requests for consultations with the Dispute Settlement Body. There are exceptions to this rule, though. Between 1995 and 2015, 245 panels were created.⁵²⁰ Too far, just one LDC (UN)⁵²¹ has filed a complaint with the DSB.⁵²² A total of 180 complaints were filed by governments in the developing world as of February 29, 2012. There were 106 suits against affluent nations and 74 against poor countries. Thirty-six nations from the developing world have filed objections so far. Only 12 of these nations made a single complaint; 18 made two complaints, and seven made ten or more complaints. Brazil had the most disagreements with twenty-five (25) and Mexico had the most with twenty-one (21). India had twenty (20) problems with the DSU in developing nations.⁵²³

The irony of the situation is that the majority of “WTO” members are from poor nations, while the bulk of disputes are initiated by a minority of affluent countries.⁵²⁴ Consequently, only Brazil, India, Argentina, Chile, and Mexico participated in this DSM. The US and the EU remain the most common users of the “WTO” legal

⁵¹⁹ Habib Kazzi, (2015) “Reshaping the WTO Dispute Settlement System: Challenges and opportunities for Developing Countries in the Doha Round Negotiation”, *European Scientific Journal* Vol.11,199 .

⁵²⁰ WTO Dispute Settlement Body, Annual Report (2015), online available <http://www.wto.org/disputes>, visited on 20th July 21.

⁵²¹ WTO.org, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited 20th July 21)

⁵²² In January of 2004 Bangladesh requested consultations with India concerning an Indian anti-dumping measure on lead acid batteries from Bangladesh. Request for Consultations, India – Anti-Dumping Measure on Batteries from Bangladesh, WT/DS306/1 (January 28, 2004). http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm (last visited 20th July 21).

⁵²³ A.Hoda, ‘Dispute Settlement in the WTO, Developing Countries and India’, ICRIER No.15 April 2012.

Available at: http://www.icrier.org/pdf/Policy_Series_No_15.pdf, visited on 20th July 21.

⁵²⁴ Article 17.14 of DSU.

system, according to statistics.⁵²⁵

Developing nations are concerned about the duration of the dispute resolution process. Dispute resolution processes have been criticized by some developing nations for taking too long and failing to provide timely remedies.⁵²⁶ It has been stated that the rules and processes of the DSU require parties to wait a considerable period before their dispute is resolved. DSU Article 3.3 states that settlement must be expeditious and effective, although it is a long procedure. The DSU procedure typically takes 15 months from the time of the request for consultations to the time of the Appellate Body's findings; however this timeframe is constantly being extended. The ten-month 'reasonable length of time' to execute suggestions is also included.⁵²⁷ Delays in resolving disputes have been proven to have an impact on enterprises and on developing countries' participation in the global economy.⁵²⁸

Also included in the agreement is Article 21, which states that disagreements must be resolved within a reasonable amount of time. Only once the decision has been made by the DSB can it be implemented.⁵²⁹ A panel's assessment of a dispute's facts and circumstances may need a longer or shorter time frame for a decision to be made. There are many problems and dangers associated with a lengthy process without safeguards for the interests of developing countries, making it even more difficult for them to engage effectively.⁵³⁰

The limited involvement of developing states in the Dispute resolution system, on the other hand, may conflict with the supposed purposes of the DS accord.⁵³¹

As part of their efforts to encourage developing nations to utilize the "WTO" system,

⁵²⁵ Article 17.13 of the DSU

⁵²⁶ Torres, R. A., (2012), 'Use of the WTO trade "Dispute Settlement Mechanism"' by the Latin American countries-dispelling myths and breaking down barriers', Available on http://www.wto.org/english/res_e/reser_e/ersd201203_e.htm, visited on 22 July 21.

⁵²⁷ World Trade Organization 2015: Understanding the WTO: available from: <https://www.wto.org/> visited on 22-07-21.

⁵²⁸ Freneau, A., (2001) "WTO Dispute Settlement System and Implementation of Decision: A Developing Country Perspective". Thesis submitted for the Degree of LLM in International Business Law, School of Law, University of Manchester. Available online at <http://lafrique.free.fr/memoires/pdf/200107AF.pdf> visited on 22-07-21.

⁵²⁹ *ibid*

⁵³⁰ C. P. Gleason, & P. D. Walther, (2005) "The WTO Dispute Settlement Implementation Procedures: A System In Need of Reform", Law and Policy in International Business, Vol. 31(3), pp. 714-715.

⁵³¹ Article 17.14 of DSU.

the “WTO” negotiators have included numerous attractive elements into the DSU (Article 21.8).⁵³² These Articles provide particular consideration to developing and LDCs.⁵³³ But in reality, it’s merely a stark contrast. At least eleven similar clauses may be found in the text of the DSU alone. For example, Article 4.10 mandates that poor nations be given special consideration throughout the consultation period. The author of this piece, on the other hand, fails to specify exactly what elements and how much “particular attention” should be given.⁵³⁴

In addition, Article 21.7 specifies that the “DSB” shall examine what further and appropriate measures it could take if a “developing nation” has raised the issue. However, no developing nation has ever employed it. The panel must include at least one panelist from a “developing nation” in the event of a dispute between a “developing country and a developed country” member of the Organization.⁵³⁵ “A number of elements in the Dispute Resolution Understanding Charter are intended to ensure that states in development are able to participate fully in the dispute settlement system; although some restrictions mean that this is not always possible.”⁵³⁶

⁵³² Ibid

⁵³³ WTO.org, Work on special and differential provisions
http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions (last visited 22-07-21).

⁵³⁴ H.Nottage, (2009) ‘Developing Countries in the WTO Dispute Settlement System’, The Global Economic Governance Programme. Available from:
<http://www.globaleconomicgovernance.org/wpcontent/uploads/nottage-working-paper-final1.pdf>. visited on 22-07-21 .

⁵³⁵ Gosego Rockfall Lekgowe , (2012) “The WTO Dispute Settlement System: Does it Work for Developing Countries?”, University of Botswana (2012). Available online <https://www.researchgate.net/publication/255697342>, visited on 23-07-21.

⁵³⁶ Valentina .D, (2002), “Developing Countries and the WTO Dispute Settlement System,” in Development, Trade, and the WTO: A Handbook, ed. Bernard Hoekman, Aaditya Mattoo and Philip English p.73 (Washington: The World Bank, 2002).

5.7 Organisational Limitations and constraints in the “WTO Dispute Settlement System”

With regard to the “WTO” dispute-resolution mechanism formed under “WTO”, the institutionist theory holds that political institutions once established tend to remain around for a long time and resist change.⁵³⁷ As a result, the creation of the “WTO” Dispute Settlement System marks the end of 25 years during which no substantial changes have occurred. According to the “WTO’s” DG Roberto Azevedo, the “WTO’s” dispute resolution system has immense trust among the membership, who appreciate it as a fair, effective and efficient instrument to handle trade concerns.⁵³⁸ Because the “WTO’s” DSS has become a victim of its own success, this part of the institutionalism theory is to be accepted because the DSS has become a victim of its own success due to the increasing number and complexity of disputes brought to the system by increasing numbers of members.⁵³⁹ “WTO” dispute settlement is becoming more complex as more countries participate in the system, which necessitates efficient personnel and a well-established dispute resolution framework. “Disputes filed at the “WTO” have grown dramatically in recent years and have resulted to severe delays in panel hearings due to shortages of senior Secretariat employees.”⁵⁴⁰ The “WTO’s” dispute resolution mechanism has been harmed by an institutional shortfall.

“WTO” delays today are due to two bigger structural issues:

- i. the growing number, size, and complexity of disputes; and
- ii. the Secretariat’s resource restrictions.⁵⁴¹

The WTO’s first twenty years saw 251 panelists sit in 201 cases. As the number of cases rises, so does the complexity of the procedure since panelists aren’t well-versed

⁵³⁷ James Smith, (Aug., 2004). “Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement”, *Review of International Political Economy*, Vol. 11, No. 3.

⁵³⁸ Giorgio Sacerdoti, (2016), “The WTO In 2015: Systemic Issues of The Dispute Settlement System and The Appellate Body’s Case Law”, *Italian Year Book of International Law*, Vol.16.

⁵³⁹ *ibid*

⁵⁴⁰ Scott Lincomine and Davida Connon, “WTO dispute settlement—long delays hit the system”, (2014). Available at <https://www.lexology.com/library/detail.aspx?g=13fe0fa8-2e4c-45ca-b619-c4609ae96797>, Visited on 25-07-21.

⁵⁴¹ Valentina Delich, (2002) “Developing Countries and the WTO Dispute Settlement System,” in *Development, Trade, and the WTO: A Handbook*, ed. Bernard Hoekman, Aaditya Mattoo and Philip English (Washington: The World Bank, 2002) p.73.

on all of the agreements and technical variances that are presented in each case. The vast majority of “WTO” panelists have a history in government.⁵⁴² There is a lack of legal expertise among the panel members since most of them work as trade diplomats and ambassadors,⁵⁴³ and their lack of understanding of the issue eventually impairs the system’s ability to adjudicate conflicts.⁵⁴⁴

Panelists are paid just a tiny per diem if they labour outside of typical office hours, and they are not compensated if they are government employees. In some way or another, the panel’s ad hoc character hinders the panel’s efficiency since it is counter-productive when dealing with the issue.⁵⁴⁵

Due to a paucity of legal resources in the Secretariat, dispute resolution has been delayed. The secretariat has two key sections, namely the rule-making and the legal division. In order to help the panel and the Appellate Body, these divisions play a crucial role. Disputes are piling up, but there aren’t enough people to handle them, so the process is being slowed down even more.⁵⁴⁶

Another problem is the politicization of the selection process for the “WTO” Appellate Body, which has weakened its credibility.⁵⁴⁷ It is possible for the more powerful “WTO” members to interfere in the appointment process of the Appellate Body since it is done by consensus, and this gives them the ability to veto nominations or force through candidates who are seen to be more difficult to support.⁵⁴⁸

There are 162 “WTO” members on the DSB,⁵⁴⁹ which selects the appellate body members. A formal protest by any member of the DSB may prevent an appointment

⁵⁴² Busch. M and Eric Reinhardt, (2003) ‘Developing Countries and the GATT/WTO Dispute Settlement’, *Journal of World Trade*, Vol.37 (4).

⁵⁴³ Ibid

⁵⁴⁴ Becroft. R,(2012) *The Standard of Review in WTO Dispute Settlement: Critique and Contention*, (Edward Elgar Publishing Ltd., ed. 2012).

⁵⁴⁵ Shaffer. G (2016), Manfred Elsig, et.al.,*The Law and Politics of WTO Dispute Settlement*, (oxford University press, California, Irvine, ed. 2016).

⁵⁴⁶ World Trade Organization 2015: *Understanding the WTO*: available from: <https://www.wto.org/> visited on 30-07-2021.

⁵⁴⁷ Arthur E. Appleton, (2016) ‘Judging the Judges or Judging the Members?’, in L. Choukroune (ed.), *Judging the State in International Trade and Investment Law*, (Springer Nature Singapore Ltd., ed. 2016).

⁵⁴⁸ Ibid

⁵⁴⁹ Article 17 of DSU.

or re-appointment from being made.⁵⁵⁰ Allows the strong country to block any nomination of an Appellate Body member they believe is not in their best interest. Even though Professor James Gathii, a Kenyan candidate, had a resounding majority of support from the United States, this Kenyan candidate was unable to be nominated because the United States declined to endorse his nomination.⁵⁵¹ Richard Steinberg emphasizes this limitation when he claims that strong people are constrained by this restriction. Members of the “WTO” have a virtual veto over the appointment of members of the Appellate Body.⁵⁵² In this approach, the nation with the most clout is able to control the appointments and promotions of the members of the Appellate Body.

One of the international appellate bodies is the “WTO” Appellate Body. Its primary function is to evaluate the legal interpretations established by panels and to “uphold, alter, or overturn the legal findings and conclusions of the panel,” as stated in its charter.⁵⁵³ As a result, it is sometimes questioned as to whether the Appellate Body’s findings are really helpful since they are non-binding in nature.⁵⁵⁴ The Appellate Body does not adhere to a precedent-setting policy. There is no matter how many times a similar argument is brought up, the process of resolving it is slowed down by the Vienna Convention’s interpretation of the relevant treaty language.⁵⁵⁵

Trade disputes are handled by members of the “WTO” Secretariat. It provides personnel for the panel and the Appellate Body. Because of this, the DSB’s secretariat is able to influence the selection of panel and appellate body members,⁵⁵⁶ so introducing politics into the working framework of the panel and appellate body. For dispute resolution in the WTO, panel members are an ad-hoc group that is

⁵⁵⁰ Art. 2(4) DSU.

⁵⁵¹ Gosego Rockfall Lekgowe, “The WTO Dispute Settlement System: Does it Work for Developing Countries?”, University of Botswana (2012). Available online <https://www.researchgate.net/publication/255697342>, visited on 23-07-21.

⁵⁵² Goldstein, Judith, et al.,(2000). 'Introduction: Legalization and World Politics', International Organization, Vol. 54 (03),385-99

⁵⁵³ Article 17 of DSU.

⁵⁵⁴ AB report on US–Stainless Steel (Mexico), para.158.

⁵⁵⁵ Joost Pauwelyn, ,(2014), ‘Minority Rules: Precedent and Participation Before the WTO Appellate Body’, Institute Of International and Development Studies.

⁵⁵⁶ World Trade Organisation,(2004)A Handbook on the Dispute Settlement System, (Cambridge University Press, 20.

constituted.⁵⁵⁷ Secretariat recommendations are critical to the selection of panellists.⁵⁵⁸ In addition, members of the panel typically have other full-time occupations while hearing the case and have little or no prior knowledge of jurisprudence thus they must rely on the secretariat for some references, and any members of the panel who desire to serve on a future panel must also rely on the secretariat for certain references. The secretariat recommends “WTO” panellists to future parties and the DG of the WTO.⁵⁵⁹ Because there is no such prospectus under the “WTO’s” dispute resolution system, panellists are less likely to commit to the issue with more energy and resolve. So long as the secretariat has faith in a panelist, they are employed by the institution.

The opinions of the secretariat will be reflected in the panel’s decision-making process, according to Weiler, who has worked as a panelist for the legal division and spoken to others participating in panels.⁵⁶⁰ Because of the Secretariat’s unpredictable whims, it is possible that the panel will have to resolve this disagreement in some fashion.

Panel adjudication and “WTO” Appellate Body review are the primary means by which disputes are resolved in the current “WTO” system. In order to ensure that the “WTO’s” obligations are met, the panel reviews the steps taken by other members. In this regard, the question of what standard of review should be used by a “WTO” panel in defining its position in the “WTO” dispute resolution system is critical.⁵⁶¹ There may be fewer powers for panels to examine domestic measures if the norm is less invasive in its nature. There are several substantive and institutional repercussions to the standard of review, thus it is important to understand how it works.⁵⁶² Standard of review refers to how an adjudicative body evaluates a party’s compliance with some

⁵⁵⁷ James Smith, (2004), “Inequality in international trade? Developing countries and institutional change in WTO dispute settlement”, *Review of International Political Economy* Vol. 11, No. 3.

⁵⁵⁸ Ibid

⁵⁵⁹ Ernest Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System*, (Kluwer Law International, London, 1997).

⁵⁶⁰ H. H Joseph Weiler. (2001) 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Journal of World Trade*, 35 (2), 191-207

⁵⁶¹ James Headen Pfitzer and Sheila Sabune, (2009), “Burden of Proof in WTO Dispute Settlement: https://www.files.ethz.ch/isn/102283/2009-04_burden_of_proof.pdf.

⁵⁶² Article 17.14 of DSU.

sort of rule and the validity of earlier rulings in a similar subject.⁵⁶³

Since they directly affect or are a component in the process by which a proceeding or review is performed, generally standards of review are governed as instruments of legal procedure.⁵⁶⁴ “Standard of review” is defined by the WTO in a somewhat different way.⁵⁶⁵ Review of national policies or rulings by “WTO” panels or the Appellate Body is what the word refers to here.⁵⁶⁶ Under the “WTO”, the standard of review is a topic for discussion. Due to the fact that most cases arise at the panel level when a domestic administrative decision must be reviewed and whether or not it complies with “WTO” rules and commitments. De nova and absolute deference are two kinds of standards for assessing judgments. In most cases, de nova refers to a circumstance where the reviewer does not have to accept or defer to the original decision-makers.⁵⁶⁷ An independent decision is produced when the adjudicating authority examines the matter as though no earlier judgment has been made, and the level of review is not specified.⁵⁶⁸ Absolute deference, however, implies abdicating any duty for thoroughly examining the relevant legal matter.⁵⁶⁹

While arguing that the de nova standard of fact review is the best, Professor Spamann restricted its applicability to trade remedy issues alone, thereby limiting the scope of this standard of fact assessment. However, he attempts to justify this level of review by arguing that the de novo review is primarily a reasoning exercise in which more complicated facts are inferred from the domestic authority’s record and conclusions are reached in a basic manner. If you are looking for a straightforward method to determine the rights and responsibilities of parties rather than relying on procedural considerations like how to file an appeal, then this approach is for you.⁵⁷⁰

⁵⁶³ Ibid

⁵⁶⁴ Stefan Zleptnig, (2002). “The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority” European Integration online Papers (EIOP), Vol. 6 ,p.6,13.

⁵⁶⁵ Matthias Oesch, (2003), “Standards of Review in WTO Dispute Resolution”, Journal of International Economic. Law , Vol.6 ,P.637-39.

⁵⁶⁶ Ibid

⁵⁶⁷ De nova has a literal English translation of ‘ Anew’. See Concise Law Dictionary, Sweet and Maxwell, (2005).

⁵⁶⁸ William Wade, (2009), Administrative Law, 309-10 (Oxford University Press, 10th ed..

⁵⁶⁹ Macquarie Dictionary (5th ed. 2009).

⁵⁷⁰ Holgar Spamann, (2004), “Standard of Review for World Trade Organisation Panels in Trade Remedy Cases: A Critical Analysis”, Journal of World Trade, Vol. 38(3) ,p. 81-82.

However, this criterion was not exempt from the skepticism. Many members are unable to retain the degree of reverence to the terminology relevant, reasoned, and appropriate since these words are so wide-ranging. The inability to clearly identify the fact-finding responsibilities of the panel and the Appellate Body in a de novo review is another important drawback. When it comes to seeking expert evidence, there is no clear direction from the panel.⁵⁷¹

There is a great deal of scholarly discussion that contends that the current charter of DSU does not specify a specific standard of review for the settlement of disputes. A similar argument was made by the Appellate Body, which declared that there is no explicit theory of stare decisis in the “WTO” standard of review for resolving the cases and complaints.⁵⁷² As a result, members cannot fulfill the ultimate purpose of the dispute settlement system, which is to promote multilateral trade stability and predictability.⁵⁷³ Member trust can only be achieved if the DSU’s charter is properly written and implemented by the various governmental bodies.

Agreement interpretation is an important part of “WTO” dispute resolution. “Article 11 of the DSU” mandates an impartial evaluation of the facts by the panels. In their reports, they analyze the facts and evidence and provide the DSB with their findings. An appellate authority examined a panel judgment examining whether European Union restrictions limiting the importation of hormone treated beef were compliant with the SPS Agreement,⁵⁷⁴ bringing the level of review and function of panel into question. Panels should be able to describe with considerable succinctness but with adequate clarity, under Article 11 of the DSU, a standard of review suited to both the ascertainment of facts and their legal categorization under applicable agreements,’ Appellate body said after hearing both sides’ arguments.

Panels and their operations are circumscribed by the mandate of “Article 11 of the DSU”: the relevant criterion is neither de novo review as such, nor absolute deference, but rather objective examination of the facts.⁵⁷⁵ Objective evaluation was the standard

⁵⁷¹ Article 12.7 of the DSU.

⁵⁷² Appellate Body Report , Japan-Alcoholic Beverage II, 13-14.

⁵⁷³ Article 3.2 of DSU.

⁵⁷⁴ Appellate Body Report, European Community- Measures Concerning Meat and Meat Products (Hormones), 115, WT/DS26/AB/R, WT/DS48/AB/R Jan. 16, 1998).

⁵⁷⁵ Garvery, Jack J., ‘Trade Law and Quality of Life’-Dispute Resolution under the NAFTA side; Accord on the Labour and the Environment’, (1995), American Journal of International Law, Vol. 89,

of review for both fact and law in this case. However, there is no clear meaning of the word ‘objective evaluation’, and this is a matter that goes outside the scope of this determination. It is thus problematic to employ the idea of objective evaluation without the inclusion of additional criteria since it does not truly represent any specific degree of deference or intervention for the panel to adopt in evaluating measures. So the panel’s examination of measures will be hindered by a lack of conceptual understanding. It is Holgar Spamann’s opinion that the “objective evaluation” approach does not assist the Appellate Body in making a decision as to whether to favour “de novo review or entire deference”.⁵⁷⁶ Neither the panel nor the Appellate Body will benefit from this information. The adoption of Article 11 as a criterion of review has also been criticized by other commentators for being vague, missing the target philosophically, and causing confusion.⁵⁷⁷

Post-EC-Hormones Case was the first of many cases where an Appellate Body endeavored to extend the area of standard of review and define its authority under DSU Article 11 in subsequent rulings and verdicts US-wool shirt and blouse for the appellate body Only allegations that must be addressed in order for a dispute to be resolved may go before a panel,⁵⁷⁸ ruled.⁵⁷⁹ It is up to the panel to decide which claims it must consider in order to properly resolving the disagreement between the parties. A panel has been advised by the Appellate Body, however, to use prudence when deciding whether or not to save money. In order to settle a conflict in a partial manner, it is possible that the unresolved problems might lead to a new one.⁵⁸⁰

In US-Carbon Steel,⁵⁸¹ the Appellate Body decided that Article 11 requires panels to take into consideration the material presented and prohibits them from deliberately disregarding or distorting such evidence. However, it has been said that ‘it is normally

448.

⁵⁷⁶ Button.C, (2004) *The Power to Protect: Trade Health and Uncertainty in the WTO*, , (Hart publishing, p.168

⁵⁷⁷ Ibid

⁵⁷⁸ Panel Report, United States-Measure Affecting Import of Woven Wool Shirt and Blouses from India, WT/DS33/R, adopted 23 May 1997, as upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, 343.

⁵⁷⁹ Appellate Body Report, US-Wool shirts and Blouses, para340.

⁵⁸⁰ Appellate Body Report Japan-Agricultural product II, WT/DS7/R, adopted 19th March 1999, as modified by Appellate Body Report WT/DS7/AB/R, DSR 1999:I, 315.

⁵⁸¹ Appellate Body Report, United States-Anti Dumping Measures on Certain Hot-Rolled Steelproducts from Japan, WT/DS184/AB/R adopted 23 August 2001, DSR2001: X, 4697.

at the discretion of the Panel to select which evidence it chooses to employ in establishing conclusions, and an appeal, we will not interfere lightly with a panels exercise of its direction' if the panel's actions stay within these boundaries.

This methodology for reviewing facts was derived from the judgments of Argentina-Footwear (EC)⁵⁸², US Lamb and US Wheat Gluten⁵⁸³, which were cited by the Appellate Body in US-Cotton Yarn⁵⁸⁴.

To summarize the criterion, the panel must review the competent authority's explanation of the data to see whether it appropriately addresses the data's nature and complexity, as well as reacts to other potential interpretations of the data. No new evidence review or panel judgment may be substituted for competent authority.⁵⁸⁵

The Appellate Body in US-Continued Zeroing⁵⁸⁶ said that Article 11 requires a panel to: analyze evidence in the totality, which is the responsibility to consider collectively all the evidence and in connection to one another, even if no piece of evidence is by itself determinative of an alleged fact or claim. A panel's responsibility to perform a fair and objective evaluation has been said to be insufficient because of the present level of review or "WTO's" DSM.⁵⁸⁷ Both the facts of a case and whether a measure is in accordance with the "WTO" Agreement are covered by this requirement. For the panel, this norm does not provide any useful direction on the manner in which and to what degree they may examine both the facts and the law. As a result, the panel may either 'over' or 'under' examine the cases.

The current "WTO" framework favors adversarial rather than inquisitorial panel proceedings. This implies that the panel focuses largely on the problems and arguments given by the parties while adjudicating disputes. Unlike under a more inquisitorial system, the panel does not begin or sustain the carriage of disputes. The

⁵⁸² Appellate Body Report, Argentina-Safeguard Measures on Import of Footwear Footwear(EC), WT/DS121/AB/R, adopted 12th Jan 2000, DSR2000:I:515.

⁵⁸³ Appellate Body Report, United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19th Jan 2001, DSR2001:II 717.

⁵⁸⁴ Appellate Body Report US-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan. WT/DS192/AB/R, adopted 5th nov 2001: XII, 6027.

⁵⁸⁵ Appellate Body Report, United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19th Jan 2001, DSR2001:II 717.

⁵⁸⁶ Appellate Body Report, United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/R, DSR2007:I:3.

⁵⁸⁷ Marc Busch and Eric Reinhardt, (2003) 'Developing Countries and the GATT/WTO Dispute Settlement', Journal of World Trade, Vol.37 (4).

threshold of review will be lowered regardless of the extent of the examination if the factual record is based primarily on information provided by the parties. As a result, the general standard of review does not necessitate that the factual record be constrained by prescription. DSU's panel working processes, as well as a number of other elements, reflect its underlying dispute-resolution approach. 'A panel's results may be supported by this structure, which allows the parties a reasonably high degree of influence over the process. Article 11, a source of a general standard of review, is the second aspect of the dispute resolution system that limits the scope of standard panel review. Despite the inclusion of an objective evaluation test in Article 11 of the DSU, this exam has no jurisprudential foundation to guide its operation or future development. A more universal standard of review is not possible under Article 11 since the objective evaluation criteria are unclear whether and to what degree the "WTO" requirement should be altered. A test that depends on an appellate body ruling to operate is thus unclear. It is possible to read this essay without prejudice if you do it on a regular basis. When applying Article 11 to the issue of EC-Hormones, an appellate body found that panel members had a responsibility to evaluate disputes in good faith.⁵⁸⁸ Panels are required to conduct their reviews in good faith, but this is quite different from dictating exactly how they must do so.⁵⁸⁹

A standard of review that takes into account the wording of the agreement under review was thus necessary since there was no genuine framework for review provided by the objective evaluation test. This means that without the adoption of an overall standard of review, the standard may continue to be implemented in an arbitrary fashion, or it may continue to break into separate "WTO" agreement-specific standards due to insufficient direction from the objective assessment test. As a last point, panel review involves an in-depth factual and legal analysis.⁵⁹⁰ A common criticism is that a panel may not have given the matter sufficient thought, or that its thinking is logical and cohesive, or that it has given certain pieces of evidence the proper weight or priority. To make matters more difficult, panels must constantly

⁵⁸⁸ Appellate Body Report, EC-Hormones (Para 133.)

⁵⁸⁹ Andrew D. Mitchell, (2006) 'Good Faith in WTO Dispute Settlement', *Melbourne Journal of International Law*, Vol.7(2), 339.

⁵⁹⁰ Tania S. Voon and Alan Yanovich, (2009) "The Fact aside :The Limitation of WTO Appeals to Issues of Law' *Journal of World Trade*, Vol.40(2), p. 251-258.

defend their work against accusations that they have either “over” or “under” examined conflicts. International courts are ill-equipped to evaluate evidence effectively, combined with the reality that “developing countries” have difficulty analyzing the evidence of the industrialized opponents, and creates an unsatisfactory scenario for poor countries.⁵⁹¹ So the new standard of review should be developed to meet three key criteria: it should be consistent to the “WTO’s” primary goal of dispute settlement, it should enhance “WTO” legitimacy, and it should be a component of more advanced and user friendly dispute resolution processes.

5.8 Burden of Producing Evidence

The issue of burden of evidence has gotten more divisive as the “WTO” dispute resolution system becomes more technical and legal.⁵⁹² “WTO” dispute resolution relies heavily on determining who has the burden of evidence. The lack of a DSU standard that explicitly addresses the burden of evidence issue frequently causes delays for “developing countries” when they bring their disputes for settlement. As a result of the “WTO’s” dispute resolution mechanism, parties will have fewer opportunities to prove their burden.⁵⁹³ This means that the adjudicating authority generally uses the method of persuasion rather than fact-finding in order to resolve conflicts, since the parties are unable to present their case sequentially in a short period of time.⁵⁹⁴

Law’s answer to ignorance is essentially the burden of evidence in dispute settlement.⁵⁹⁵ To put it another way, there’s a burden of proof. It’s critical to know who bears the burden of evidence when it comes to the “WTO” panel procedure, since it has a significant influence on the parties’ substantive rights and responsibilities, as

⁵⁹¹ D.M. McRae, (2000) “The WTO in International Law: Tradition Continued or New Frontier?” *Journal of International Economic Law*, Vol.3(27),pp. 32-33.

⁵⁹² “Das.A and Raghuram.J,(2016) ‘One Too Many: Significant Contributions of India to the WTO Dispute Settlement Jurisprudence’, in A. Das and J.J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty*, (Springer Nature, Singapore, 75.”

⁵⁹³ DSU arts. 3.12, 12.8. the WTO website. World Trade Organization 2015: *Understanding the WTO*: available from: <https://www.wto.org/> visited on 02-08-2021.

⁵⁹⁴ John J. Barceló III, (2009), ‘Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement’, Cornell Law Faculty Publications, Research Paper 119.

⁵⁹⁵ H. Richard, Gaskin, (1992) *Burdens of Proof in Modern Discourse*, (Yale University Press ,p.4.

well as determining the result of a dispute.⁵⁹⁶

“WTO” rules do not specifically address who has the burden of evidence in a case like this. The conclusions and observations of the committees and the Appellate Body have greatly improved our understanding of these ideas. In “Wool Shirts and Blouses”,⁵⁹⁷ The AB’s Observations and EC—GSP⁵⁹⁸ formed the cornerstone of “WTO” case law on the burden of evidence. In the US, the problem of shirts and blouses is examined. Many international organizations, notably the ICJ, have recognized and applied the norm that the party that declares a fact must prove it.⁵⁹⁹ Furthermore, the burden of proof is on the person stating the affirmative of a given claim or defence, whether complaining or defending. After then, the duty transfers to the opposing party, who will fail until it provides adequate evidence to disprove the assumption, the Appellate Body stated in its decision.⁶⁰⁰

As a result, it has been argued that the idea of *prima facie* standard or presumption might be directly tied to the decision of the right burden of evidence. Presumption favors the parties involved in the disagreement, shifting the burden of evidence to the other side. It is incumbent upon the party making the claim to provide evidence to support their claim, and the party contesting their claim must then present evidence demonstrating that their claim is false.⁶⁰¹

The lack of an adequate response by the defending party may result in a decision in favour of the complaint party making the case in “EC Measures Concerning Meat and Meat Products” (Hormones Case).⁶⁰² In this case, the Appellate Body clarified that when a dispute arises under the “SPS Agreement”, the burden of proof falls on the complaining party to establish *prima facie* that the defending party has violated a specific provision of the SPS Agreement, or more specifically, its SPS measure or

⁵⁹⁶ D. Petko Kantchevski, (2006), *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement*, 3 *BYU Int’l L. & Mgmt. Rev.* 79, 97.

⁵⁹⁷ Appellate Body Report on United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India WT/AB/DS33/R.

⁵⁹⁸ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm.

⁵⁹⁹ *ibid*

⁶⁰⁰ *Ibid*

⁶⁰¹ Abhijit Das and Jayant Raghuram, (2016), *One Too Many: Significant Contributions of India to the WTO Dispute Settlement Jurisprudence*, Springer Nature, Singapore, p.71-73.

⁶⁰² https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm , visited on 02-08-2021.

measures. After the prima facie case is established, the defence must question or deny the purported inconsistency.

A conflict arose between this concept and the power of panels to obtain information or assistance from any person or entity granted by Article 13 of the DSU in *Japan-Measures Affecting Agricultural Products*,⁶⁰³ which was decided by the Appellate Body. It was argued that the panel might make a decision based on the opinion or advice of experts about a specific subject, if neither party had made a claim or arguments relevant to that matter.⁶⁰⁴

An appeals court overturned its earlier position on the burden-shifting test in relation to evidence considered by a panel, but it did so without citing any precedent. “To receive and assess information from parties or anyone else, a panel is allowed to gather and analyze material from the parties or anyone else, and the panel is not required to wait until the complaint party establishes a prima facie case before conducting its own investigation.”⁶⁰⁵ The Appellate Body further stressed that the panel may require outside information to evaluate whether the aggrieved party has established a prima facie case for a hearing.

A panel may conduct an independent investigation during the application of the prima facie requirements for the burden of production, as the Appellate Body said in *Japan – Agriculture*. The Appellate Body’s judgment in *India Quantitative Restrictions*⁶⁰⁶ has added to the confusion. Before judging whether prima facie has been established, a panel must evaluate the evidence supplied by all parties. According to the Appellate Body, instead of merely accepting the allegations of either side, the panel should undertake its own evaluation of the facts and arguments.⁶⁰⁷ The Panel carefully considered the evidence and arguments presented by the EU and the US.⁶⁰⁸ Direct communication between the parties and the “WTO” arbitration panel is strictly restricted.⁶⁰⁹ The “WTO” panel method does not like the common law's formal

⁶⁰³ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds76_e.htm.

⁶⁰⁴ Ibid

⁶⁰⁵ *Canada – Measures Affecting The Export of Civilian Aircraft*, WT/DS70/AB/R (2 August 1999).

⁶⁰⁶ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds90_e.htm.

⁶⁰⁷ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds302_e.htm.

⁶⁰⁸ Appellate Body Report, *United States – Laws, Regulations and Methodology For Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R (18 April 2006) Para. 220.

⁶⁰⁹ https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm, visited on 02-

motion practice, which evaluates the proponent's evidence.⁶¹⁰ With regard to shifting the burden of proof, a procedural limitation in “WTO” dispute settlement has led to much confusion. “WTO” dispute settlement procedures are complicated for developing and least developed nations because they cannot keep up with the procedural intricacies of the “WTO” “Dispute Settlement Mechanism” constitutional framework.

5.9 Development of “WTO” “Dispute Settlement Mechanism”

In multilateral trade agreements like the GATT and the “WTO”, the purpose of a DSM is to promote efficient global business by reducing tariff protection. This goal is widely accepted.

Trade DSM, in contrast to Investment DSM, aims to correct trade circumstances in a jurisdiction that are detrimental to international trade efficiency rather than awarding compensation for financial losses. The theoretical gap between the two types of DSMs is stark. Because it was founded on this foundation of diplomatic engagement rather than legal activity, the Trade DSM has always been focused on international trade.

In the current legalistic “WTO” age, many notable analysts believe that there is still potential for discussion in the DSM.⁶¹¹ In addition, Weiss believes that the DSM is more concerned with balancing interests than vindicating rights in a win-or-lose pattern, even if this results in less legal consistency. “WTO”⁶¹² supporter John Jackson⁶¹³, like Hudec⁶¹⁴, praises the non-legalistic role of the DSM⁶¹⁵.

In 1947, after the collapse of the ITO, the GATT was established, which spawned this “diplomatic” image of the “WTO” DSM. Its objective is to ‘substantially reduce

08-2021.

⁶¹⁰ Ibid

⁶¹¹ “White, Eric L, (2000), ‘Written and Oral Submissions in WTO Dispute Settlement’, in Improving WTO Dispute Settlement Procedures, Weiss, F (ed.), Cameron May, pp. 121-33.”

⁶¹² Ramli, Intan Murnira, (2008), Development and the Rule of Law in the WTO: The Case for Developing Countries and Their Use of Dispute Settlement Procedures, Cameron May.

⁶¹³ Jackson, John, (1998), ‘Dispute Settlement in the WTO: Policy and Jurisprudential Considerations’, Research Seminar in International Economics Discussion Paper, University of Michigan School of Public Policy, 419, pp. 1 -2.

⁶¹⁴ Ibid

⁶¹⁵ Hudec, Robert, (1999), Essays on the Nature of International Trade Law, Cameron May, p. 17.

tariffs and other trade obstacles, and to eliminate favoritism, on a reciprocal and mutually beneficial basis’, according to the GATT Preamble.

To put it simply, signatories to the original GATT ‘just granted themselves the authority to make whatever choices were required to execute the agreement’.

A diplomatic strategy was used by the GATT from 1963 and 1969.⁶¹⁶ So the “Tokyo Round 1973-1979” produced two texts, the “Agreed Description of Customary Practice” and the “Understanding on Dispute Settlement”, sparking interest in grievance recording and requests for panel construction.⁶¹⁷ This task was completed by the Uruguay Agreement. GATT’s DSM and the Final Act’s DSM are described in the Marrakech-signed Final Act on the “Uruguay round” (1986–93).

Broken pledges are at the heart of most “WTO” disputes. Trade disputes will be settled in accordance with multilateral norms rather than via unilateral action by the “WTO” members themselves.

Following the agreed-upon rules and heeding the decisions of the courts is essential: “There are no more ‘losing’ states that may obstruct the adoption of a judgment, after the Uruguay Round. The prior GATT system meant that a single objection might prevent a judgment from being accepted. A “WTO” veto requires all other members to concur, including the case’s opponent, rather than a mere majority vote.”⁶¹⁸

It is evident that the diplomatic DSM of the GATT has been replaced by the legalistic DSM of the “WTO” with the Uruguay Round. How legalistic can a DSM be if it lacks the authority of a regular court? Is the Trade DSM’s role in international diplomacy predetermined? This question has just one answer, which is detailed below.

⁶¹⁶ Ibid

⁶¹⁷ Ibid

⁶¹⁸ https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm.

5.10 The legal grounds of the “WTO” “Dispute Settlement Mechanism”

Annexe 2, Section 2 of the “WTO” Agreement, provides the legal framework for the “WTO’s DSM, which aims to resolve disputes between member countries. These are the key clauses: Article 21(3), which requires the violating member state to give up its infringing attitude; Article 22(1), which requires negotiations on compensating the affected member states; and Article 22(2), which requires the affected member states to withdraw ‘substantially equivalent’ concessions from the violating member state. Specific articles (Articles 6–8) deal with how a panel is formed in the event that one is sought due to the collapse of pre-litigation negotiations between the parties. According to Article 2 of this treaty, a DSB will be responsible for appointing the panel of judges and the permanent AB.

Key clauses are defined here as Articles 21(3) (as well as Articles 22(1) and 22(2)), which together and alone define “WTO” DSM legal clout. As a result of specific GATT provisions, the “WTO” is compelled to return to “international diplomacy” mode.

In order to maintain the same degree of mutually beneficial concessions, the GATT Article XXVIII mandates re-negotiations of trade agreements. “According to Bagwell and Staiger’s analysis of GATT’s Article XXII, the founding of the GATT may be seen as an effort to transition from non-cooperative to cooperative equilibrium outcomes by restricting the use of retaliation along the equilibrium route and shifting retribution to an off-equilibrium path threat that imposes co-operative equilibrium path norms.”⁶¹⁹

The “escape clause,” sometimes known as the “licensed breach” clause, is a GATT Article XIX provision that permits a member nation to raise import duties if the prospect of increasing competition from similar imports threatens local industry. “What Sykes says makes sense in light of these GATT regulations and how the DSM works to comply with them. A penalty equal to expected damages under the “WTO’s” DSM is carefully safeguarded for non-compliance in situations where the system

⁶¹⁹ Bagwell, K., & Staiger, R. W. (2002). *The economics of the world trading system*. Cambridge, Mass: MIT Press. p.98.

seems to favour compliance.⁶²⁰

A tolerance of violation seems to be a feature of both GATT and the “WTO’s” DSM, based on the assumption that not all breaches are harmful to other member states. When it comes to diplomacy rather than legislation, this is a matter of real politic. The “WTO” DSM’s implementation of the second and third Preambles with regard to economic growth is open to debate.

In light of the fact that emerging nations, particularly those that are least developed, must be given a share of the rise in international commerce commensurate with their economic development, it is clear that constructive measures are needed. As a means of achieving these goals, we are interested in engaging into reciprocal and mutually beneficial agreements that aim to reduce tariffs and other obstacles to trade and eliminate discriminatory treatment in international trade relations.⁶²¹

5.11 The “Special and Differential Treatment” obligations of the “WTO”

As stated in the WTO preamble, “positive efforts” by “developed nation” members are encouraged to achieve this goal.⁶²² Aiming to assist developing nations in their growth and incorporation into the global commercial system, WTO accords reflect this objective. SDT provisions are designed to help developing nation’s trade more effectively, safeguard their interests, and employ trade policy tools more effectively.⁶²³ A majority of experts say WTO regulations do not really serve developing countries’ interests. Agricultural subsidies are exempt from WTO requirements.⁶²⁴ Historically, governments like the UK and the USA allowed countries to employ preferential treatment to grow certain industries. Both nations enabled their former colonies to utilize export subsidies to grow their textile and train

⁶²⁰ Sykes, Alan O, (2000), ‘The Remedy for Breach of Obligations Under the Dispute Settlement Understanding: Damages or Specific Performance’, in Bronckers, M and Quick, R (eds) *New Directions in International Economic Law*, Kluwer Law International, p. 97.

⁶²¹ Preamble, Marrakesh Agreement Establishing the World Trade Organization, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm.

⁶²² https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_preamble_jur.pdf

⁶²³ Lee, Y. (2016), “The long and winding road – path towards facilitation of development in the WTO: reflections on the Doha round and beyond”, *Law and Development Review*, Vol. 9 Issue No. 2, pp. 437-456 at 448

⁶²⁴ *Ibid* p.451

industries in the 18th and 19th centuries, but SDT denies this to emerging countries.⁶²⁵ WTO regulations also ban trade-related investment policies like local content requirements, which many developing nations utilize to enhance local inputs in industrial processes.⁶²⁶ Several established WTO members have employed comparable investment and protectionist strategies to assist industrial growth. Given the dwindling value of preferential programmes, emerging nations have questioned the economic relevance of conventional SDT. Lower tariffs due to WTO discussions have deprived developing nations and LDCs of benefits.⁶²⁷ For their primary exports, the LDCs have been subjected to competition from highly efficient rich nation rivals. Developed nations' attitudes about SDT have clearly shifted. SDT is less ready to be accorded to developing economies, which have grown into important trade powers over time, as developed nations do. SDT's legitimacy is questioned by developing countries like Mexico and Turkey. With about half of all global exports coming from emerging countries, and roughly three-quarters of those coming from the top 15 developing nations.⁶²⁸ All of these points highlight the need for WTO members to agree on review criteria for the present SDT framework.⁶²⁹

The GATT's willingness to allow tariff horse trading is a positive sign of the agreement's adaptability. It also aligns with "WTO" regulations for developing, least developed, landlocked, net-food-importing, and small and fragile economies. However, the "WTO" DSM judicial bodies never executed the SDT clauses in these nations' interests. Qureshi⁶³⁰ and Roessler⁶³¹ claim that the "WTO" system's SDT provisions are just procedural, and do not address the fundamental imbalances in access to fair arbitration between poor and wealthy countries. However, it is true that the DSU offers particular provisions for "developing countries" at least at three

⁶²⁵ *ibid*

⁶²⁶ *ibid*

⁶²⁷ Francois, J., et al. (2006), "Preference erosion and multilateral liberalization", *The World Bank Economic Review*, Vol. 20 No. 2, pp. 197-216.

⁶²⁸ UNCTAD (2019), *Key Statistics and Trends in International Trade 2018*, UNCTAD, Geneva.

⁶²⁹ Ukpe, A., & Khorana, S. (2021). Special and differential treatment in the WTO: framing differential treatment to achieve (real) development. *Journal of International Trade Law and Policy*, 20(2), 83-100.

⁶³⁰ "Qureshi, AH, (2003)'Interpreting World Trade Organization Agreements for the Development Objective', *Journal of World Trade*, vol. 37, issue 5 , p.864."

⁶³¹ Roessler, F, 2005, F, 2004, 'Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System', in Ortino, F and Petersmann, E (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International.

points:

- (i) A “developing country” may utilize the Decision of 5 April 1966⁶³² against a developed nation in lieu of the DSU guidelines for the DSM consultation phase. This kind of evocation has never been tried.
- (ii) Article 4(10) states that ‘... members shall devote special attention to the unique challenges and interests of developing nation Members throughout the consultation phase’.
- (iii) According to Article 12(11), the reporting panel is required to explain how the applicable “WTO” requirements relating to differentiated and preferential treatment of “developing countries” have been respected.

As a result, Alavi⁶³³ has deemed all three clauses to be virtually useless, because neither a Panel decision nor an Appellate Body decision is of the slightest importance. The absence of a panel or AB decision to question it makes this a compelling viewpoint. For now, this developing country may at least claim that the DSU’s provisions exist, something the ICSID’s dispute-resolution process cannot claim.

Too far, the WTO has considered nations like Chile, Brazil, India, and Korea as developing countries despite significant variations in size, population, economic, and trade capacity.⁶³⁴ It is important to strike a balance between legal consistency and economic variety. In this perspective, distinction stems from the necessity to treat developing nations equally.⁶³⁵ With differentiation, the political and economic dilemmas associated with diverse developing country preferences are reduced. To maintain the benefits from reciprocal concessions, poor nations might still claim needs-based preferences.⁶³⁶

According to the WTO, differentiated treatment is inherent in the SDT framework. A “one size fits all” strategy cannot handle the diverse demands of developing nations due to their differing degrees of development and needs.

Developing countries must fulfill specific requirements to qualify for preferential

⁶³² https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a2s1p1_e.htm.

⁶³³ Alavi, A. (2007) ‘On the (Non-)Effectiveness of the WTO’s Special and Differential Treatments in the Dispute Settlement Process’, , *Journal of World Trade*, vol. 41, issue 2, p.136.

⁶³⁴ Rolland, S. (2012), *Development at the WTO*, p. 80, Oxford University Press. Oxford.

⁶³⁵ WT/DS246/AB/R (7 April 2004).

⁶³⁶ Rolland, S.E. (2012), “Considering development in the implementation of panel and appellate body reports”, *Trade, Law and Development*, Vol. 4 No. 1, pp. 150-199.

trade accords, according to the AB. This means that governments that provide preferential tariff treatment must ensure that all similarly situated recipients of a generalized preference system are treated equally (GSP). That is, all GSP recipients with similar “development, financial, and trade needs” are treated equally. Misconception: non-discrimination does not preclude developed countries from differentially taxing GSP recipients’ products.⁶³⁷ It also offers legal backing to proposals that suggest distinguishing between developing nations to provide SDT exclusively to those who really need it.

A specific purpose or application, as defined by the WTO tribunal in the US Copyright dispute.⁶³⁸ This implies that a therapy must be unique to a person, nation, or circumstance to qualify as special under SDT. In other words, a situation cannot be deemed to be unusual just because it falls within a large and subjectively defined group, such as developing nations in the WTO. The contrast between differentiated therapy and “special” treatment seems to be in the emphasis of each word,⁶³⁹ with the former focusing on various categories, while the latter focuses on the uniqueness of a person or a situation. Existing “categories” will get preferential attention, but not universally. According to factual facts or circumstances, it examines the “category” to determine worthy individual instances. While it is true that all nations in a given category have a common (and frequently wide) distinguishing element, this does not entitle all WTO members in that category to the same preferential treatment. Nonetheless, this is possible if all nations in a particular group have similar traits that justify special consideration.

Despite their similarity in the WTO, “special” and “differential” treatment is distinct concepts. This sparked a controversy in the WTO about linking the phrases “special” and “differential”. A closer look at why nations utilize the Enabling Clause may help explain the disparities.⁶⁴⁰

The Enabling Clause solely refers to LDCs and their “special economic challenges and specialized development, financial, and trade needs”. A greater spectrum is

⁶³⁷ WT/DS246/AB/R (7 April 2004) paras. 160-62.

⁶³⁸ WT/DS160/R, 15 June 2000.

⁶³⁹ Paugam, J. and Novel, A. (2005), “Why and how differentiate developing countries in the WTO? Theoretical options and negotiating solutions”, paper presented at Ifri/AFD Conference 28 October 2005, Paris

⁶⁴⁰ Ibid p 4

employed in the authors' analysis.⁶⁴¹ The Enabling Clause therefore distinguishes between LDCs and all other WTO members. For these reasons, the Enabling Clause offers significant difference. By "Special", we mean that it is not accessible to everyone who qualifies for SDT. Thus, LDCs are given particular attention based on their unique characteristics, circumstances, or requirements, not only because they are developing nations. The latter merely qualifies them.⁶⁴² Sovereign Debt Treaty Exemption for Poor Nations That is, it differentiates rising countries based on objective criteria. Even if it did, the Enabling Clause doesn't establish such objective criteria⁶⁴³

5.12 DSM and the least-developed countries

When a dispute is taken to the "WTO" DSM, the words "non-discrimination," "equal treatment," "national treatment," and "most-favored-nation treatment" appear in the "WTO" Charter and bilateral treaties. On these provisions, BITs are brought before their different dispute-resolution authorities. Nationality discrimination is prohibited under the Convention. Unexpectedly, the term has a completely different connotation in business than in foreign investment cases.

DiMascio and Pauwelyn sum up the distinction in the following way: National treatment under the GATT/"WTO" is centered on efficiency considerations, with an emphasis on market access and liberalisation: safeguarding tariff obligations against circumvention and ensuring that imported goods have equal competitive possibilities. "Assuring security and fairness to individual business activities while barring discriminatory abuses by local governments are some of the key elements of investment law."⁶⁴⁴

As evidence, these writers point to a tribunal's ruling in a case involving the US-Egypt BIT:

⁶⁴¹ *ibid*

⁶⁴² Ukpe, A., & Khorana, S. (2021). Special and differential treatment in the WTO: framing differential treatment to achieve (real) development. *Journal of International Trade Law and Policy*, 20(2), 83-100.

⁶⁴³ *ibid*

⁶⁴⁴ DiMascio, N., & Pauwelyn, J. (2008). Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin? *American Journal of International Law*, 102(1), 48-89. doi:10.1017/S000293000003983X.

“It is the goal of the US-Egypt Bilateral Investment Treaty’s national treatment clause to encourage foreign investment and ensure that investments made by foreign nationals are not subjected to less favourable treatment than those made by other investors in similar situations.”⁶⁴⁵

It’s difficult to apply nondiscrimination laws when there’s no clear definition of what it means to say “equal treatment” or “equal treatment under the law.” If an investor is also a trader who is involved in an investment dispute, the BITs and trade agreements may overlap. Furthermore, the people of a country may believe that their government has acted against the interests of the country by signing a bilateral investment treaty. That these agreements may be hijacked and used to harm the national interest is a scary capability. Disagreements might be difficult to resolve because of the “WTO” DSU’s role as a trade law body and not a political one. If an agreement is signed in secrecy, it may not be able to determine the actual substance of the agreement at any given moment. BITs Legislation does not restrict this level of privacy.

For the time being, it may seem that the non-discrimination principle’s flaws are limited to investment law. Due to the relative clarity of trade law, this is a legitimate conclusion to draw. As opposed to commerce law, which depends on multilateral treaties, investment law is a bilateral field that draws on customary international law for its case law. This holds the possibility of making a commitment that neither party will keep. For private investors have realized, as Hamilton⁶⁴⁶ and Verhoorsel⁶⁴⁷ show out, that trade disagreements may be turned into considerably more profitable investment disputes.

GATS Article 12(c) defines “trades in services” as “the commercial presence in the territory of any other member.” This clause is the main reason for the trade-investment legislation overlap. Due to the fact that the “WTO” DSM does not compensate investors for harm caused by a host state, foreign investors prefer to use a specialist investment arbitration venue over it. As an alternative, it gives investors the

⁶⁴⁵ *Champion Trading Company v. Arab Republic of Egypt*, ICSID case No. ARB/02/9. para. 126.

⁶⁴⁶ “Hamilton, CA and Rochwerger, Paula, (2005) ‘Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties’, *New York International Law Review*, vol.18, no.1,pp. 36-38.”

⁶⁴⁷ Verhoorsel, Gaetan, (2003) ‘The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law’, *Journal of International Economic Law*, vol. 6, pp. 493-496.

chance to have the host state make good on a possible “WTO” violation. However, only states are authorized to submit complaints against host governments in investment dispute forums.

If ‘non-discrimination,’ understood broadly to mean “fair and equal treatment,” helps investors, then developing-country hosts face significant danger. Fair and equal treatment, according to Professor Muchlinski, is “a word that relies on the interpretation of particular situations.”⁶⁴⁸ To win compensation from a less-developed host state, an international investment tribunal must be convinced that a well-heeled multinational investor is entitled to a ‘fair and equitable treatment’. The tribunal's preference for defending the investor or the least developed host state will be decisive in this case.

⁶⁴⁸ Muchlinski, Peter,(2007), *Multinational Enterprises and the Law*, (2nd ed.) Oxford University Press, p.625.

5.13 Summary

It's impossible not to conclude that despite its flaws, the “WTO's” multilateral agreement provides a substantially fairer DSM for foreign investment disputes than the bilateral agreements. The “WTO” DSM's primary goal is correcting local circumstances that do not comply with the “WTO” accords. BITs, on the other hand, are only concerned with monetary recompense, particularly when the ICSID is the agreed-upon venue. As the Bangladeshi experience has shown, this is a big danger for the host nations, particularly those that are less developed. No matter how innocuous the “WTO” DSM may appear, there is still confusion about how the “non-discrimination” clause should be interpreted in “WTO” panel rulings. Uncertainty seems to be a chronic situation based on Professors Muchlinski and Maniruzzaman's observations on this concept's legal applicability. The “WTO” is mostly devoid of investment conflicts, therefore this doesn't matter all that much. Because host countries are subject to ICSID tribunal interpretation, it matters in this situation. A better strategy for poor nations would be to follow Brazil's lead and avoid signing any BITs, especially those that subject them to obligations under the ICJ.

The GATT was the first agreement to provide procedures for international trade dispute resolution. “Articles XXII and XXIII of the GATT dispute resolution mechanism” were regarded as its beating heart and spirit. For many member countries with small economies, the GATT's dependence on consultation and consensus decision-making was insufficient. Any disputant may halt the procedure at any time. There were no time limits for the settlement procedure, such as consultations. The binding character of the judgments was questioned, as was their quality. The GATT dispute resolution was arguably power-oriented, with strong nations dictating terms by veto. These flaws hampered GATT's dispute resolution method. All of these issues were raised during the “Uruguay round” negotiations. With the “WTO”, international trade regulations became more comprehensive and practical. The DSU improved the “WTO's dispute settlement procedure” over the GATT. However, when new issues arose, the DSU's efficacy waned. It finally impacted poor countries' participation in

“WTO” dispute resolution. The present “WTO” dispute resolution mechanism fails to address concerns connected to developing country members’ involvement in all stages of the dispute resolution system, putting them at a disadvantage relative to wealthier nations. Without the financial and legal means to properly pursue dispute resolution, they cannot launch conflicts. This discourages emerging nations from joining the dispute.

The new method reversed the positive consensus norm, allowing for an interim review at the panel stage, and introduced a new litigation stage by forming an Appellate Body to evaluate appeals on the law in panel reports. The “WTO’s” mandated, rule-based dispute resolution mechanism offered certainty and security that the prior system lacked.

The “WTO” dispute resolution procedure comprises four distinct stages.⁶⁴⁹ The process of resolving disputes begins with a request for a panel from the disputed party. The panel then makes recommendations. If a party is not satisfied, they may appeal to the “WTO’s” AB. This body has seven permanent members, three of whom compose the AB. The AB then makes findings and recommendations to the DSB. The DSB’s responsibility is next to implement and enforces the conclusions.

In order to preserve the interests of the member states, the Appellate Body was established. However, the secretariat and prominent member states have influenced this institution, making it difficult for member nations to appeal when the system is unjust.

The framework also promotes alternate conflict resolution methods. The DSU provides in its second chapter that parties may resolve conflicts via conciliation, mediation, and Good Offices. This feature was included to make the system more user-friendly and to assist developing member nations settle disputes more peacefully and amicably. Perhaps the DSU included mechanisms for alternative dispute settlement to increase the involvement of “developing nations” in the system.

The panel and the AB are essential aspects of the system. Thus, the functioning of this organ influences the whole “WTO” dispute settlement system. However, the industrialized countries’ political outsourcing of members has hampered the dispute

⁶⁴⁹ consultations, panel proceedings, appellate body, and implementation and enforcement of panel and Appellate Body conclusions

resolution mechanism. The “WTO” DG, who is essentially the protector of developed countries, selects the panel, Appellate Body, and secretariat. Nominated by industrialized countries like the US, UK, or Japan. So his decisions are constantly biased in favour of wealthy countries, affecting the credibility of the system.

The panel is made up of diplomats and ambassadors, not lawyers. These panellists know the case but not the “WTO” principles, rules, and norms. Its complexity impacts their knowledge of how cases should be taken and presented in a “WTO”. Because the panellists are ad hoc members, they know that their position in the “WTO” is temporary and do not actively engage in the panel procedure. However, as the panel is charged with gathering information and initiating the process, a lack of familiarity with the system would ultimately harm the system as a whole and the interests of “developing countries” in particular.

The developed nation’s political power reaches the Appellate Body. The Appellate member is chosen by a committee consisting of the Director General and five additional officials. However, strong countries de facto dominate the Appellate members’ appointment.

The Dispute Settlement Understanding lacks specific standards for adjudicative processes. Panel is in responsible of starting the adjudication procedure. They must gather information, make evaluations, and report to the conflict resolution body. The dispute resolution body makes conclusions based on these facts and evidence. As a result of the lack of sufficient guidance, the panel frequently over or under-scrutinizes the fact in order to decide the disagreement.

In “WTO” dispute resolution, shifting the burden of evidence is crucial. The Dispute Settlement Understanding has no guiding standards to explain the claims. Difficulty in justifying claims by poor nations due to DSU Determining the reason of grievance requires the panel and the appeal body to be accountable. In Wool and Blouse Case, the panel held that the party bringing the claim must show the case prima facie, or fulfill the burden of evidence. The burden of proof in a prima facie case is on the complaint party, and in the absence of counter evidence, the decision-maker must rule in its favour.

The main obstacle for “developing countries” is resource inefficiency. The poor nations are not financially stable and cannot afford to join an international

organisation to air their problems. Developed nations have a financial advantage over undeveloped ones. Others believe that the “WTO’s” DSU is “overly difficult and costly.”

The emerging nations lack legal knowledge. Lack of funds also impacts the availability of legal specialists. They need to engage lawyers from developed nations to participate in “WTO” disputes. However, in recent years, the expense of employing private legal counsel has become prohibitive for developing nations. Brazil spent approximately two million dollars in legal expenses to Sidley Austin Brown & Wood, a law firm, in the Cotton and Sugar Subsidies cases.

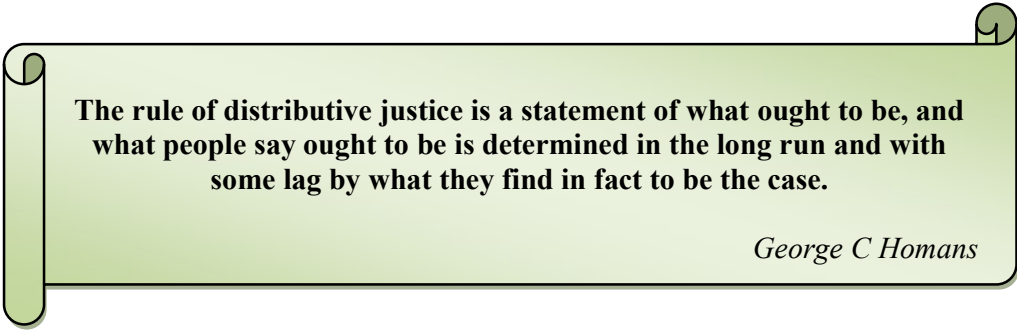
As a result, poor nations cannot fully defend their rights under “WTO” regulations. Low-qualified specialists with limited experience cannot compete with better-qualified experts from developed nations. The conflict is unfair due to the disparity in resources between developing and rich nations.

Any organization’s performance may be measured by the involvement of its weakest member. However, the “WTO’s” dispute resolution mechanism still limits the involvement of the poorest members. From 1995 to 2005, there were 492 requests for consultation, 180 from developing countries, 106 from rich countries, and 74 from emerging countries. Concerning the LDCs, Bangladesh has just one disagreement. Only a few nations like India, South Africa, Argentina, Thailand, etc. have engaged entirely in the system. Because of these limits and flaws, few members have ventured to submit their disputes to this “WTO” venue. The absence of guiding principles in the DSU has substantially damaged the efficacy of the DSU and therefore the involvement of the member states.

- i. The system’s organs must be free of political concerns in order to maximize participation and trust from member states. They must be impartial and efficient. The processes should be impartial and fair to all members. It should be intended to achieve an objective and friendly outcome. Thus, revamping the DSU might improve the involvement of “developing countries” in “WTO” dispute resolution.
- ii. Since retaliatory action by developing nations is difficult after DSB approval, a mechanism for collective retaliatory action by poor countries should be developed.

- iii. The preponderance of evidence technique explains the procedure by forcing a panel to hear all evidence at the same time. This criterion of preponderance of evidence is stated to be a holistic approach. In this case, the panel is actively involved in gathering evidence.
- iv. In this case, the panel is actively involved in gathering evidence. If the conflict resolution system is to be effective, it must be reformulated such that it contributes to the creation of a fair, objective, and rule-based system for resolving complaints.
- v. The “WTO” Advisory Centre should improve its effectiveness and establish programmes and training modules to help developing country members comprehend the legal complexity of “WTO” legislation.
- vi. A permanent panel is recommended. A permanent panelist would avoid system politicization. The panellists should be chosen based on their qualifications. The panellists and Appellate Body members should be law-abiding persons of integrity. Not only should that, but the function of the Director General be limited.

Alternative dispute resolution should be supported for hassle-free and quick resolution of conflicts. This will strengthen their representation, relieve financial strains, and increase their chances of obtaining developed country conformity.



The rule of distributive justice is a statement of what ought to be, and what people say ought to be is determined in the long run and with some lag by what they find in fact to be the case.

George C Homans

Chapter 6- “WTO” and International distributive justice

6.1 Introduction

Order and justice are the two pillars upon which the law rests as a system of rules governing social interactions and resolving their conflicts. In some cases, order was sacrificed in order to meet the demands of justice, while in other cases; justice was put ahead of order in a battle. Human society and civilization have evolved through time, resulting in a wide range of sub-branches and sub-subdivisions of law, and the overall concept and meaning of justice has become more difficult to define. Literature in the field of justice and legal theory is extensive and diverse. A fair standard of justice in tort law is defined as a distinction between those standards and those that are judged unfair. Few repercussions are expected and have a significant influence on the concept of fairness in property, tax, criminal, and contract law.

In international law, however, the issue is distinct. Too far, there has been no true and unified approach to international law, which has resulted in a great deal of conflict across theoretical schools in political and economic order. Several well-known justice school theorists questioned the importance, inspiration, and supremacy of the ideals of justice in international order in the international arena. Fairness is important in all human interactions and transactions, but the most major theory of justice rules out adopting fairness principles in international relations since there is no global basic framework in place to execute them.

The emergence of international problems and global challenges, on the other hand, necessitated a global approach to problem solving. Global frameworks are no longer

possible to advocate for because of the rise of international organizations and activities in recent decades. It is also important to note that in the current world context, justice is more important than ever. International law has inherited many injustices and unfairness's as a basis for regulating international actors' actions, which makes it even more critical. Confederalism's dubious past and subsequent pervasive and systematic human rights crimes unjustly impacted the present international order. New international institutions emerged after WWII, changing the international legal system, which altered worldwide income distribution.

The global justice movement has its adherents who refuse to acknowledge that the basic structure of a system is a precondition for participation in the application process. Although existing institutions and methodologies like as efficiency and freedom cannot lead to an optimal allocation of limited commodities, concepts of fairness and distributive justice have been proven to be significant when there is disparity in the distribution of resources.⁶⁵⁰

According to the justice theory, a major philosophical school in legal theory, the uneven distribution of income among society's members is due to their unequal standing. The ideal notion of "global government" in structure led to the concept of "international difference as strategy for achieving the goals of the international justice system theory of justice." The "WTO" was established as an international organisation and tool to combat inequality.

The inequities enshrined in international law have led contemporary researchers and academics to turn more than ever to justice theories. Although people are divided by national limits, economic connections have united them and may influence one another's wellbeing. The idea of justice was sparked by this interplay and its consequences along with the great disparity caused by economic globalization. As a consequence, international law's attitude to justice has matured from its early immaturity to a position that is today considered acceptable. Some academics and researchers have sought to distinguish between international and global justice, focusing on Rawl's approach to international justice. This effort usually stems from the perspective that considers international justice to be a neutral concept that solely

⁶⁵⁰ Breyer, Friedrich, (2009), Health Care Rationing and Distributive Justice, Rationality, Markets and Morals, 0, issue 27, number 27, p.394 <https://EconPapers.repec.org/RePEc:rmm:journl:v:0:y:2009:i:27>.

governs the international players that engage with each other. As seen from this stance, a widely recognized and well-accepted concept of international justice underpins liberal foreign policy whereas a hazy notion of global justice lacks any evident and unique features. Global boundaries have both economic and moral value, according to this perspective. As a result, the transition from individuals to nations and governments would be limited to fundamental foreign policy rules, not a substitute for global governance.⁶⁵¹

Global justice, which emphasizes people and equality amongst all human beings, is a powerful idea that cannot be hindered by political boundaries and neither have political borders the ability and legitimacy to restrict the application of the principle of justice to international interactions. Colonization has resulted in numerous geographic divisions, with diverse ethnic groups and cultures grouped together in a single state in some cases, and one single community split into many states in others. Globalization is eroding the importance of national borders, even in countries like Europe.

Despite the fact that global justice is an essential concept and notion, political boundaries cannot be ignored in this process. To put it another way, the principles of justice are legitimate and vital to apply internationally, but the difficulty is how the theory of justice can reach the international domain with an existing idea of states and political boundaries. In order to address these issues and to fulfill these criteria, the idea of “global governance” was created to offer the foundational basis for the principles of justice.

⁶⁵¹ Saladin Melcked-Garcia, (2004) “International Justice, Human Rights and Neutrality,” Kluwer Academic Publishers 10). p.170

6.2 Theories of Distributive Justice

The ideas underlying conventional conceptions of corrective and distributive justice typically vary for people and society. The primary objective of corrective justice deals with the problem of functionality in order to remedy breaches of individual rights that may occur in transactions.

People are treated as political citizens under the core principles of distributive justice. Corrective justice relies on individual transactions and only applies to those directly engaged, but distributive justice considers all members of society as a whole, as well as the things they own, rather than only those directly involved in a transaction.⁶⁵²

The concept of “corrective justice” was also considered as distinct from the rights it was supposed to uphold. The purpose of corrective justice is to make sure that no one’s rights or freedoms are harmed in any way, whether intentionally or unintentionally, whereas distributive justice is concerned with defining the rights and freedoms of all people equally. Distributive justice providers, on the other hand, are not bound to a single sector of society’s population. There are five basic columns in the system of distributive justice: first, those who distribute the company’s gains and losses among its members; second, those who distribute societal losses and benefits; third, the items and things that are to be dispersed among society’s members. It’s not only about the possessions of the individuals involved; it’s about the well-being of society as a whole as well as the happiness of those involved.⁶⁵³ While there have been numerous debates and arguments about the distribution of justice, the conditions for corrective justice is perfect moral equality and equal treatment between persons and transactions that do not conflict with this principle.

The Corrective Justice component of a distributive justice framework aims to curtail unequal treatment among the parties to a transaction and the rights of third parties. Distributive justice, on the other hand, is concerned with a broad variety of implementation problems, including how losses and profits from transactions are distributed among individuals who have been affected, while correctional claims

⁶⁵² Weinrib, E. (2012-09-20). *Corrective Justice*. In *The Idea of Private Law*. : Oxford University Press.

⁶⁵³ Hockett. R, (2006) “Minding the Gaps: Fairness, Welfare and the Constitutive Structure of Distributive Assessment,” *Cornell Law School Working Paper Series Paper:21,p.8*

address just losses and profits from transactions. Claims arising from a breach of corrective justice are made in the form of cross-claims and counter-claims in a transactional relationship. Consequently, any divergence from the equal rights of the parties, whether in the non-imposition of the requirement to bear the liability or in the imposition of the responsibility of the person not accountable under the transactional system, would be considered as a violation of “corrective justice”. When it comes to corrective justice, the contractual parties are obliged, instead of having a positive responsibility to respect the rights and entitlements of others, not deprive others from what they have earned so far. This is a negative notion of entitlement.⁶⁵⁴

So in corrective judicial claims, there are always two parties involved: one who has suffered because of another party’s actions that violate moral equality, and the other who has been responsible for bringing about the negative consequence.⁶⁵⁵

Formalists consider justice and equality as two independent mental ideas used in different ethical settings.⁶⁵⁶ Corrective justice is concerned with individual transactions and justice for the person, regardless of whether distributive justice is met.⁶⁵⁷ It is Aristotle’s position that corrective and distributive justice is complimentary, but the position of formalists is that they are interchangeable. Distributive and corrective justice cannot coexist under the same legal framework; hence according to the school of formalism, both must be administered separately.⁶⁵⁸

So both the Aristotelian and formalist systems get to the same practical conclusion: distributive principles are better suited to political theory and corrective justice for private transactions. As a result of a lack of knowledge about society’s wealth and its members, the tritirates are unable to execute the notion of distributive justice, even if the court is responsible for implementing the corrective justice system. Even when courts and other judicial institutions are involved, the legislature should influence and shape public law according to distributive justice principles.⁶⁵⁹

⁶⁵⁴ Benson, P. (1992) “The Basis of Corrective Justice and Its Relation to Distributive Justice.” p.539

⁶⁵⁵ Weinrib, E. J. (1994). The Gains and Losses of Corrective Justice. *Duke Law Journal*, 44(2), p.277. <https://doi.org/10.2307/1372873>

⁶⁵⁶ Dagan, H. (1999). The Distributive Foundation of Corrective Justice. *Michigan Law Review*, 98(1), 138–166. <https://doi.org/10.2307/1290197>

⁶⁵⁷ Weinrib, E. (2012-09-20). *The Idea of Private Law*. : Oxford University Press.

⁶⁵⁸ Wright, R.W. (2002). Substantive Corrective Justice, *Iowa Law Review* 77: 625- 710.

⁶⁵⁹ Ibid

In the absence of a singular incidence, neither a low-income community member nor a rich member of that society may sue in a distributive justice lawsuit. Distributive justice ensures that no one has more rights than anyone else, and no one has more responsibilities than anyone else. Accepting just one person's claim would lead to a bias for the wealthy over the poor, which is why distributive justice was rejected outright by its proponents. It would not, however, validate a poor person's unilateral claim against a single wealthy person or society's whole wealth and would not define its degree of authority with regard to the community.⁶⁶⁰

As a result of Aristotle's correctional and distributive justice doctrines, a wide range of legal theories have developed to explain how and why these two types of justice operate. These ideas have a long history dating back over two thousand years, and many scholars and academics have utilized them as a starting point since then. Famous philosophers of the day had already debated and researched the concept of justice. In contrast to the Platonic conception of justice, which solely acknowledged social life and the interconnectedness of the whole, Socrates saw justice as both an individual and a societal order.⁶⁶¹ Two independent ideas of justice were extracted by Aristotle in order to enhance his Platonic view. Aristotle's traditional legal theory was shaped by the conflict and interaction between two concepts of justice, distribution and corrective justice, which each have their own concepts in the history of legal philosophy, namely reciprocal justice, retributive justice, distributary justice and remedial justice. Theoretical approaches to distributive and corrective justice were divided into three categories: Aristotelian and Thomas Aquinas, Hobbes and Grotius, and Kantian and Hegel. Among these numerous conceptions to justice, Aristotelian justice was the most widely accepted and oldest and most significant.

⁶⁶⁰ Ibid, p.706

⁶⁶¹ Garcia, F. J. (2003). Trade, inequality, and justice: Towards a liberal theory of just trade. Ardsley, N.Y: Transnational Publishers..

6.2.1 Plato's philosophy of justice

Plato has made numerous contributions to civilization, but his philosophy of justice is regarded his greatest achievement. Most of Plato's Republic is devoted to justice. Justice, he believes, is what holds a community together. The Republic is about individuals and the true meaning of social life. In this book Plato, the rule of law is upheld. Rule of law failure will always lead to civilization failure. In order to maintain justice, the philosopher-king would go to any length. He created the philosophy of justice to combat the sophists' fallacious views. Justice cannot be subordinated in a modern culture that values decency, fairness, and idealism.⁶⁶²

The ultimate goal is for the compact of justice to unify disparate social groupings. Achieving peace, stability, social order, and security are the main goals of Plato's Republic, as are all the opportunities for social engagement. Plato viewed a healthy society's traits. He thinks society is great if it has the four Greek qualities.⁶⁶³ Justice is a result of these three virtues: intelligence, bravery, and temperance Plato believes that each nation has its own values, and the Greeks hold fast to them.⁶⁶⁴ He then investigates the qualities. The most important of these three values is justice.⁶⁶⁵

Plato's civilization is built on these three personal characteristics. Wisdom would be an appropriate attribute for this specific type of thinkers. This class's virtue is temperance, which is why traders must have a strong hunger. A society will naturally achieve justice if the classes work together in line with the prevailing traits and virtues.⁶⁶⁶

Plato defined bravery as "the defence of a sound judgment in all circumstances", which R. L. Nettleship extends to include situations other than combat. By saying courage, Plato typically indicates confidence and resolve. As a consequence of their convictions, people are inspired to fight injustice and irrationality. Next is self-control in a healthy society. Unlikely, Plato described self-control. He says the human spirit

⁶⁶² Maurya, S. K. (2020). "Onto Nature and Forms of Affirmative Action." Volume:1, Issue: 3, Journal of Social Science, Innovation and Educational Technologies (online), 1(3).

⁶⁶³ Dahl, N. O. (1991). Plato's Defense of Justice. Philosophy and Phenomenological Research, 51(4), 809–834. <https://doi.org/10.2307/2108183>

⁶⁶⁴ ibid

⁶⁶⁵ ibid

⁶⁶⁶ ibid

has two parts: low and superior. In self-control, the inferior portion obeys the dominant section.⁶⁶⁷

In a state, there are dominant and inferior groups, and the latter should surrender to the former. For the province to be self-reliant, the inferior must obey the dominant. Plato's philosophy teaches that environmental responsibility is justice. To ensure that no one interferes with other's activities. People should be employed for the purpose for which they were created, according to Plato's "Republic".⁶⁶⁸ Plotinus claims that life has bestowed some people with physical strength and others with insight and wisdom. It made any guy brave.

Normally, one person cannot do the task of another. We should expect a man to collaborate with nature if we accept this weather phenomenon. This is the essence of law. By doing so, Plato believes, civilization will develop. Plato concluded that justice is completely applicable in society after examining the notion of justice from a larger perspective. Justice is served.⁶⁶⁹ Plato emphasized that this must be done in a prosperous state.⁶⁷⁰

In Plato's Republic, fairness necessitates that everyone else perform his business, possibly the only one, for which he is equipped. Plato claims that interfering and interference increase inequality.⁶⁷¹ So just activities result in retribution, whereas unfair ones result in injustice. There would be less reason for unhappiness if each group participated in its inherent responsibility. His faith was that specialization would eliminate personal ambitions for political power and interference in other's tasks. He also gave no legal definition to the term. Bravery, self-control, and intellect are all qualities. The principles of spiritual perfection make up the ideal society. Again, both the individual and the state share this ethical honesty. Thus, ethical

⁶⁶⁷ Bhandari, D. R. (1963). History of European political philosophy. Bangalore: Bangalore Print. & Pub. Co.

⁶⁶⁸ Dunning, William Archibald (2019). A History of Political Theories: Ancient and Mediaeval. [New York, Johnson Reprint.

⁶⁶⁹ Anderson, E. (2014). The fundamental disagreement between luck egalitarians and relational egalitarians. In A. Kaufman (Ed.), Distributive Justice and Access to Advantage: G. A. Cohen's Egalitarianism (pp. 21-39). Cambridge: Cambridge University Press.

⁶⁷⁰ *ibid*

⁶⁷¹ Garthoff, J. (2018-10-25). The Dialectical Activity of Becoming Just. In Justice. : Oxford University Press.

honesty is logical justice. The two are not separate.⁶⁷² Justice, not law, ties the individual and the area Plato's idea of justice forbids against legislation interfering with justice.

Purpose, soul, and hunger are components of the spirit according to Plato.⁶⁷³ Among these three aspects of spirit, morality is linked to justice.⁶⁷⁴ Similarly, we may say that the society's fairness is connected to the state's justice. What comes to mind initially when considering justice is its structural core. In the framework of architecture, the architect's authority limits lesser crafts people zeal, reach, and autonomy.⁶⁷⁵ To put it simply, justice limits a person's authority, prohibiting them from doing things they want to do but lack the ability to do so.

One of Plato's ideal world's foundations or perfections is justice. But it acts as an artist. Architectonic in compared to other accomplishments. Plato's justice is an architect. Political science studies how human culture is shaped by the ability to interact with others. It deters many people from dangerous social behaviors. Any political culture requires self-control. One expert stated this about the bill: Plato's philosophy of justice "connects people in the province". These are accomplished and social individuals. Plato's earliest and most basic democratic idea. The Sophists saw justice as political but not moral or spiritual. That harmed the Sophists. The Sophists felt political existence needed justice or virtue.

⁶⁷² Annas, J. (1976). Plato's "Republic" and Feminism. *Philosophy*, 51(197), 307–321. <http://www.jstor.org/stable/3749607>

⁶⁷³ *ibid*

⁶⁷⁴ *ibid*

⁶⁷⁵ John Hacker-Wright. (2007). Moral Status in Virtue Ethics. *Philosophy*, 82(321), 449–473. <http://www.jstor.org/stable/4619741>

6.2.2 Aristotle's corrective justice

According to the philosophy of Aristotle, corrective justice contains a specific notion of justice, which is equitable behavior and recompense for the victim of misconduct. Corrective justice involves interacting with the various participants in a transaction regardless of their differences in order to correct and eliminate any wrongdoings.⁶⁷⁶ The criteria for judgment is accordingly whether or not a Party infringed the rights of another party and the other party is entitled or not to compensation. Distributive justice is the opposing concept of Aristotle's first development of corrective justice. Distributive justice, as opposed to corrective justice, considers the assets of several individuals and the community as a whole, rather than just one person's. Aristotle's theory of corrective justice supports a form of equality that Aristotle names Arithmetical Proportion and seeks to redress violations in the transaction through various means, such as compensation, without taking into account the specific characteristics of the parties involved in the transaction in wealth, sex, race, and so forth.

Fairness is a key ideal in Greek political ideology. Philosophers understand it clearly, yet it is a difficult subject to convey. However, Aristotle distinguished between two types of justice: universal and individual.⁶⁷⁷ The former relates to morality. To put it another way, Aristotle calls lawfulness "justice". Human brains sense enjoyment in many ways and methods, according to Aristotle. In the *Nicomachean Ethics*, Aristotle differentiates between distributive and corrective or penal justice. So, according to Ross⁶⁷⁸ "justice is separated into distributive and rectificatory justice". To ensure equitable distribution of resources, the province should categorize individuals according to their abilities. There are two types of remedial justice: voluntary and coerced.⁶⁷⁹

Aristotle added economic and collective justice to the foregoing types.⁶⁸⁰ By trusting

⁶⁷⁶ Deng, "Corrective Justice in the Confucian Legal Tradition: A Non-existent Concept!." p.8

⁶⁷⁷ Aristotle. (2009). *The Nicomachean ethics* D. Ross & L. Brown (Eds.) (Rev. ed.). (Oxford World's Classics). Oxford: Oxford University Press. Oxford Scholarly Editions Online (2020). doi:10.1093/actrade/9780199213610.book.1

⁶⁷⁸ *ibid*

⁶⁷⁹ *ibid*

⁶⁸⁰ *ibid*

on the equitable distribution of posts, honors, commodities, and resources, Aristotle claims that this method of justice is the most effective norm for averting revolutionary upheaval. This justice deals mostly with political rights. The distributive fairness of Aristotle's political arrangement.

He slammed egalitarian and oligarchic justice demands. He chooses just the best since honorable individuals are few.⁶⁸¹ He stated that most jobs could be rescued.⁶⁸² This is a fascinating hypothesis. Lawfulness was a belief held by individuals and governments throughout history. Philosophers may differ. It was arbitrary to diminish the repercussions of equality by unethical or unlawful conduct and laws. The morally acceptable and desirable distribution of similar goods, drawbacks, and benefits among ordinary persons appears to be Aristotle's definition of particular justice. It is clear from this discussion that unlike broad justice, specialized justice is a system of norms that unites society. So Aristotle distinguishes distributive and corrective justices.⁶⁸³

This is Aristotle's particular justice. That everyone should be paid for their contributions to the authority is distributive justice. Distributive justice therefore requires the state to allocate consumables fairly.⁶⁸⁴ It is the core of distributive justice to determine a person's right, responsibility, and reward based on their merit and contribution to the state. Hence, proportional things signify right and proportionate things are synonymous according to this understanding of justice. Between too big and too little, it's a happy medium.⁶⁸⁵ Also, the distribution is neither random nor blind. Agent must consider his or her share in accordance to the individual's value or quality. The distribution would occur according to the ratio shown. This distribution follows the geometric proportions.⁶⁸⁶ There are other occasions when society makes distributions based on an individual's characteristics.

The second is commutative or reparative justice.⁶⁸⁷ The need for this justice arises

⁶⁸¹ Nielsen, K. (1981). Impediments to Radical Egalitarianism. *American Philosophical Quarterly*, 18(2), 121–129. <http://www.jstor.org/stable/20013902>

⁶⁸² *ibid*

⁶⁸³ Aristotle. (2009). *The Nicomachean ethics* D. Ross & L. Brown (Eds.) (Rev. ed.). (Oxford World's Classics). Oxford: Oxford University Press. Oxford Scholarly Editions Online (2020). doi:10.1093/actrade/9780199213610.book.1

⁶⁸⁴ *ibid*

⁶⁸⁵ *ibid*

⁶⁸⁶ *ibid*

⁶⁸⁷ *ibid*

when one person acts against another in an unfair manner. The greatest solution to remedy uneven benefits and losses is to apply the main notion of this form of justice. The agent's morally reprehensible advantages must be returned to the victims. Retribution and compensation for victims restores equality.⁶⁸⁸ Notably, restorative justice does not consider an individual's standing when determining punishment or restitution, but rather the nature of the harms suffered by victims and the gains made by perpetrators, as shown below.⁶⁸⁹ Individuals are not considered in this procedure. As a result, justice is arithmetical proportional.

A simple comparison of the individuals' pre-transaction possessions and their post-transaction possessions is what he refers to as an arithmetic proportion in this context.⁶⁹⁰ Property equals property equals equal arithmetic in a circumstance in which the two amounts of property are equal.⁶⁹¹ In corrective justice, the execution of justice is regulated by the equality of an individual's property before and after a transaction, but in distributive justice, equality should be the duty of similar individuals, who are two or more people. According to Aristotle, the clash between distributive and corrective theories of justice is what led to his view of justice. The fair approach in this school of thought is to discover the applicability of each term in different sectors of law, with their own principles, to the entitlements and individuals defined by these definitions.

⁶⁸⁸ *ibid*

⁶⁸⁹ *ibid*

⁶⁹⁰ Benson. P (1992) "The Basis of Corrective Justice and Its Relation to Distributive Justice," *Iowa Law Review* 77,p.538

⁶⁹¹ *Ibid*

6.2.3 Jeremy Bentham's utilitarianism

Utilitarianism was the main philosophy created by Jeremy Bentham throughout his lifetime. A fundamental tenet of utilitarianism is that goods should be distributed based on their value to society as a whole, not only on their intrinsic value to the individual who receives them. Therefore, rather than increasing overall well-being, money and social assets should be divided such that each member's portion is maximized.⁶⁹² "The history of utilitarianism reveals the development of both a conventional understanding of utilitarianism⁶⁹³ and a modern utilitarian school of thought."⁶⁹⁴ Additionally, Bentham's theory includes a utilitarian formula that takes into account the interests of the whole community as well as an individual's own egoism. The common perspective is that everything that increases or promotes pleasure and enjoyment is morally desirable, whereas anything that decreases it is morally bad.⁶⁹⁵

Consequently, "traditional utilitarianism", which was the dominant theory until "John Rawls", was predicated on the concept of pleasure and utility, and the morality of every action was judged according to its influence on the aggregate of individual utility.⁶⁹⁶ However, neo-utilitarianism is a current utilitarian viewpoint.⁶⁹⁷

A rational human being is seen by the law school of economics to pursue maximization of his wealth and advantages and that law imposes pricing on all actions, even non-market activities as regards altering laws.⁶⁹⁸ Law and economics think that, if the social players behave well on their own, regulatory action would be unnecessary and that legislation would in such a scenario because the company extra

⁶⁹² Mill, J. S., Bentham, J., & In Ryan, A. (1987). *Utilitarianism and other essays*. Harmondsworth, Middlesex, England: Penguin Books

⁶⁹³ Viner, J, Bentham and Mill J.S. (1973) *The Utilitarian Background- Economic Justice*, ed. Edmund S. Phelps (Penguin Education, England,). p.197.

⁶⁹⁴ *ibid*

⁶⁹⁵ William C Powers, (1979) "Structural Aspects of the Impact of Law on Moral Duty within Utilitarianism and Social Contract Theory," *UCLA Law Review* 26. p.1270

⁶⁹⁶ Garcia .P,(2003) "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.57

⁶⁹⁷ Gammage, C. (2017). "Lessons from the CARIFORUM EPA,chapter-9". In *North-South Regional Trade Agreements as Legal Regimes*. Cheltenham, UK: Edward Elgar Publishing.

⁶⁹⁸ Posner, R. A. (1987). *The Law and Economics Movement*. *The American Economic Review*, 77(2), 1–13.

costs.⁶⁹⁹ The approach to law and economy was offered at several schools throughout its brief time of existence.⁷⁰⁰

6.2.4 Robert Nozick's Libertarianism

They were primarily developed by Robert Nozick, and considered the basic question of the right to property for an individual as fundamental and therefore positively rejected the distributional character of justice.⁷⁰¹ Libertarians are often referred to as “radical libertarians,”⁷⁰² and they believe that people should be able to transact freely without violating the rights of third parties.

If you're making somebody do something they don't want to do because you've have to, it's a violation of their privacy and consequently a kind of theft.

If the Libertarians are concerned with parental and social welfare, or if they are concerned about distributing society's resources in a more equitable manner, they reject any legislative participation.⁷⁰³ When it comes to the concept of distributive justice, they advocate a minimal state that would violate individual rights if it were extended.⁷⁰⁴ Individual freedom and liberalism are at stake here, and any discussion of extra prerequisites for justice in the liberal sense would violate this basic premise.

⁶⁹⁹ McAdams. R , Rasmussen E.B , (2007) ,“Norms in Law and Economics,” Handbook of Law and Economics. A. Mitchell Polinsky and Steven Shavell, editors 1-2. p.2

⁷⁰⁰ Parisi, F. (2004)Positive, Normative and Functional Schools in Law and Economics. Eur J Law Econ 18, 259–272 .

⁷⁰¹Jonathan Wolff, (1991), Robert Nozick: Property, Justice, and the Minimal State (Stanford University Press,. p.3.

⁷⁰² Kennedy. D, (1982)“Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power,” Maryland Law Review 41. p.571

⁷⁰³ ibid

⁷⁰⁴ Jones.C (2005) “Institutions with Global Scope: Moral Cosmopolitanism and Political Practice,” Global Institutions Edited by Daniel Weinstock, The Canadian Journal of Philosophy Supplementary Volume 31. p.3

6.2.5 John Rawl's "Principles of Justice"

The first "principle of justice" calls for every member of society to have the same right to equal and sufficient fundamental freedoms, and therefore, the laws that define fundamental freedoms apply equally to all people.

If a member of society has a fundamental right that conflicts with another member of society's fundamental right, that member's fundamental right must be limited to the extent that it conflicts with another member of society's fundamental right.⁷⁰⁵ The Concept of Differences, the second guiding principle, says that inequitable distribution of society's basic commodities is permissible provided it benefits the least developed members of society. It is for this reason that the people who live in society have chosen to uphold concepts such as fairness since the distribution of benefits and duties is unfair.

To back up his theory of justice, Rawls used the term "Original Position." Because of this "veil of ignorance," he believes that people in their initial position have no idea what social class they belong to or what the consequences of their choices will be for the rest of their lives. As a result, they would accept the two tenets of fairness despite their lack of knowledge about their current predicament.⁷⁰⁶ Justice would be applied regardless of one's social, economic, or even fortune status in the future, and no one would be spared because of their social, economic, or even fortune status. Rather than focusing on what has already been decided. Hence, it provides an argument against the decision-making process based on self-interest and an ideal justification for the definition of justice needs and principles to be accepted by all members of society.⁷⁰⁷ As soon as people accept justice as a principle, they select the structural "principles of justice", and the legislature works to incorporate these principles into laws and

⁷⁰⁵ Cedro, R. & Vieira, B. (2010). John Rawls' Justice as Fairness and the WTO: A Critical Analysis on the Initial Position of the Multilateral Agricultural Negotiation. *The Law and Development Review*, 3(2),124.

⁷⁰⁶ Rawls, J. (2020). *A Theory of Justice: Original Edition*. Cambridge, MA and London, England: Harvard University Press. <https://doi.org/10.4159/9780674042605>

⁷⁰⁷ Cedro, R. & Vieira, B. (2010). John Rawls' Justice as Fairness and the WTO: A Critical Analysis on the Initial Position of the Multilateral Agricultural Negotiation. *The Law and Development Review*, 3(2),p.123

regulations.⁷⁰⁸

There must be an invisible hand and market direction in order to apply the principles of justice in opposition to justice's demands and to maintain a political society under these conditions, according to Rawls. So institutions that supply the fundamental structure of justice should construct the foundation of society's justice framework.⁷⁰⁹ Fundamentally, political society functions as a company whose members are free and equal participants in a plan designed for their mutual advantage. This is how the system works.⁷¹⁰ In Rawls' perspective, the most important political and social institutions in a society create the social cooperation mechanism and the technique of distributing rights and fundamental obligations, which form the basic framework of society.⁷¹¹ As far as the essential structure and primary goods are concerned, both of justice's tenets apply.⁷¹²

The theory of Rawls has been limited to liberal countries because of the requirement for political and social frameworks. As a non-liberal and non-democratic society lacks such a subject, Rawls believes that the absence of such a subject leads to the idea that justice is the function of fundamental institutions inside democratic societies.⁷¹³ In addition, Rawls theory focuses largely on the equitable distribution of benefits and obligations among society's members and ignores the issue of decreasing resources and increasing wealth. Equality would be seen as a source of the egalitarian justice school's framework and justice as a set of principles that everyone must agree on in order for the theory to exist.

Rawlsian worldview gives several unique starting-points in society's basic structure, which is altered by natural, social, and economic events, or simply by coincidence. But the gap would not be innately unjust in this regard. Thus, the core structure, meaning the institutions, represents the notion of fair and unjust, while the "concept of justice" in this sense relates to whether the fundamental structure adheres to the two

⁷⁰⁸ Schmidt.V. H , (1997). "Procedural Aspects of Distributive Justice,"Darmouth, England , p.161

⁷⁰⁹ Kordana.K , Tabachnick.D, (2005)"Rawls and Contract Law," University of Virginia Law School 15. p.7

⁷¹⁰ Rawls, J. (1958). Justice as Fairness. The Philosophical Review, 67(2), 164–194. p.4

⁷¹¹ Rawls, J. (2020). A Theory of Justice: Original Edition. Cambridge, MA and London, England: Harvard University Press. <https://doi.org/10.4159/9780674042605>

⁷¹² Ibid p 332

⁷¹³ Kemp.B (2005) "International Distributive Justice: Evaluating Cosmopolitan Challenges to the Law of Peoples," Harvard University, Gov 2030: Political Concept. p.7

“principles of justice” in the distribution of burdens and rewards.⁷¹⁴ In “Rawls’ theory” of justice, outcomes are evaluated as results using semi-pure procedural justice. Four methods exist for implementing procedural justice: There are two types of procedural justice: Perfect Procedural Justice, which assures fair outcomes, and Imperfect Procedural Justice, which leaves room for unfair outcomes. However, outside of the application of laws and principles, no external factors for evaluating procedural justice are taken into account in pure procedural justice, and thus should only result in virtually pure procedural justice.⁷¹⁵ So the quasi-pure procedural justice aims to establish the bounds of freedom and the environment in which outcomes are considered as fair results in this fashion. It follows that when laws or regulations are adopted and allowed, they are regarded fair until and until it can be shown to be unjust based on nearly pure procedural fairness.⁷¹⁶

Individual rights are the just end result for utilitarian’s and libertarians alike. The second principle of justice, however, reflects the egalitarian version of the just end result by seeking to differentiate the allocation of resources for society’s weaker and poorer members. When it comes to addressing inequality from a utilitarian standpoint, standing and the value of those who contribute aren’t enough of a solution. This means that the concept of fairness in each of the numerous modern approaches to justice in dealing with the problem of inequality gives a significant argument for selecting the egalitarian form of justice.

⁷¹⁴Benson. P (1991) “The Basis of Corrective Justice and Its Relation to Distributive Justice.” p.605

⁷¹⁵ Tschenter. A, (1997), *The Function of Procedural Justice in Theories of Justice- Procedural Justice*, ed. Edit by Klaus F. Rohl and Stefan Machura (Darmouth, England,). p.105

⁷¹⁶ Rawls, J. (2020). *A Theory of Justice: Original Edition*. Cambridge, MA and London, England: Harvard University Press, p.201. <https://doi.org/10.4159/9780674042605>.

6.2.6 “Amartya Sen’s Idea of Justice”

“Amartya Sen’s” Nobel Prize-winning book, “The Idea of Justice”⁷¹⁷ is a groundbreaking study of the notion of justice. It is a criticism as well as an expansion of “John Rawls” “Theory of Justice”. He discusses the concepts of “niti” and “nyaya”, the former referring to regulations and the latter to realization. A comprehensive implementation of “Niti” would result in optimum public welfare and justice if it were carried out in its entirety. Laws and regulations are enforced by “Nyaya”, on the other hand. Rather of offering answers to concerns regarding the nature of perfect justice, the discussion on justice has focused on how we may go forward in addressing issues of strengthening justice and eliminating injustice. Professor Sen questions Rawl’s reliance on universal and adaptable “ideal theory”.

Unlike Rawls, he thinks justice is a matter of personal preference. There are three key principles that make up Rawl’s theory of justice: a belief that “justice” is defined by the maximizing of liberty, equality, and opportunity, and that these three principles are important to this definition. When it comes to understanding Rawl’s idea of justice, Sen points out that it hinges on various preconditions, such as the older conceptions of social contract, such a flawless arrangement, which Sen contends is simply unachievable since there are so many diverse perspectives. Efforts should be made to reduce injustice, and justice will naturally progress, unfold, and flourish.

His most important argument against Rawls’s “transcendental institutionalism” is that it is nothing more than a moral speculation on which to base his theory and that eventually becomes plagued with constraints.

A primary concern raised by Senator Kamala Sen is that Rawls’ so-called ‘original position’ produces a hypothetical scenario that in actuality may never be able to take into account the many-sided needs of a huge number of people.⁷¹⁸ Because of limited resources, we may not be able to respond to all of the legitimate voices who are expressing their real needs.⁷¹⁹ Since transcendental concepts of justice depend on comparing judgments of alternatives, Professor Sen argues they should not be applied

⁷¹⁷ Sen, Amartya Kumar (2009), The Idea of Justice. Belknap Press of Harvard University Press.

⁷¹⁸ Commers, Ronald (1984). Marx’s Concept of Justice and the two Traditions in the European Political Thought. *Philosophica*, 33 (1):107-129.

⁷¹⁹ Ibid

to people's lives in general. Sen argues that Rawls's "principles of justice" have an intrinsic contradiction with his liberty principle.

Before, the second principle of equality and fairness in resource allocation for all purposes was prioritized above equality of opportunity as previously stated.⁷²⁰ To put it another way, liberty is that sacred value that people would not compromise on even if it means bettering the distribution of riches or furthering prosperity, i.e., Liberty is not a convenience.⁷²¹ We can see that liberty has arrived, but only in front of a simple convenience. The notion of liberty is being considered as both a king and a slave at the same time, which is evident. Again, why is personal liberty given such a high priority? Aren't things like hunger, malnutrition, and medical negligence less important?

We must remember that in his quest to further his ideas of justice, he did not include concepts such as merits and fair deserts or property ownership. Only those inequities that benefit the most vulnerable are acceptable to him. Is there a way that incentives may be provided for the members so that they can be instilled with a renewed sense of energy and vitality? Sen makes the case here that the principles embraced at the initial position should not abolish the necessity for incentives, as he claims. One strides forward, two steps back, we can clearly observe in Rawls' actions.

This transcendental justice system has a basic problem in that it does not concentrate on eliminating injustice, but rather prioritizes the advancement of justice without considering that the variety of demands will not enable this perfect justice system to stand on its own two feet, as it has been described. Sen argues that rather than structural flaws, the existence of remediable injustice may be linked to a person's actions. Ultimately, justice is a function of how people's lives progress, and not only the institutions that surround them.⁷²²

By drawing on the 'Niti' and the 'Nyaya,' Professor Sen clarified the differences between these two ideas of justice in ancient Indian law. When it comes to 'nyaya' (what really happens), we are more interested in what individuals are actually able to

⁷²⁰ V.R. Krishna Iyer, 1987, *Social Justice – Sunset or Sun dawn*, Eastern Book Co., Lucknow, 28 .

⁷²¹ Raymond Wacks, 2009, *Understanding Jurisprudence*, Oxford University Press, New York, 2nd edn. 222.

⁷²² Sen, Amartya Kumar (2009), *The Idea of Justice*. Belknap Press of Harvard University Press.

do in their everyday lives than we are in what the organisation does.⁷²³ We need to look at the functions of institutions from a larger viewpoint of “Nyaya”, which refers to the world as it truly is and not simply the institutions that we have, in order to see how inclusive they are. In order to demonstrate the distinction between “niti” and “nyayah”, Sen provides an example. According to Roman Emperor Ferdinand I: “Fiat justitia et pereat mundus,” which means “Let justice be done, even though the world perishes,” the sixteenth-century monarch said. One of the most extreme forms of Nitism advocated here is a call for disaster, but without regard for how justice might be served in such an event. It is also simpler to appreciate, in “Professor Sen’s” view, more important than the pursuit of perfection is the need to prevent injustice from occurring in the world.⁷²⁴ He went on to explain how the anti-slavery crusade in the 18th and 19th centuries failed because they thought removing slavery would create a totally egalitarian society. Slavery has to be abolished as a matter of urgency because of the sickening unfairness of it all.⁷²⁵ In addition to researching what social realizations are created by that institutional framework, the larger perspective of “nyaya” would emphasize the necessity of exploring what social realizations are formed by that institutional framework.⁷²⁶ Incorporating and accommodating many points of view is possible with such a framework. Sen is not the first to suggest a set of modern-day justice principles that avoids provincialism while tackling the most severe global injustices.

As Sen points out, institutions help us refine our ability to analyze values and priorities, especially via public discussion, and democracy is one such institution. A democratic institution should be judged on the standard that measures the amount to which various voices from varied sectors may put up their voice and be heard. Despite the fact that Sen’s work rejects the concept of perfect justice, this very idea may be contested. Perfect justice is an unattainable goal, but there are numerous possible situations of injustice that are considerably more nuanced.⁷²⁷ Gender inequality is a

⁷²³ Ibid

⁷²⁴ Ibid

⁷²⁵ ibid

⁷²⁶ Sen, Amartya Kumar (2010). *The Idea of Justice*. Penguin Book Ltd.

⁷²⁷ Satz Debra (2012) “Amartya Sen’s *The Idea Of Justice* : What Approach , Which Capabilities” Rutgers Law Journal, 277.

complicated issue, and our definitions of what constitutes injustice may vary when it comes to gender. When it comes to raising children and taking care of their home, fathers are increasingly being asked whether or not they should be entitled to the same benefits as women, and whether or not they should be granted paternity leave. To achieve equal opportunities for men and women, some believe that the legal barrier must be removed. To address these issues, men and women alike may feel that they are victims of injustice. When it comes to moving up the ladder of justice, a person must consider and formulate her own ideals of what it means to be “perfectly” fair. This is true in many situations. In certain cases, the Mona Lisa serves as a compass for evaluating Picasso and Dali.⁷²⁸

It is not needed that the vision be realized, but at least some of its foundations are. The idea of a perfect society, in which workers were no longer the oppressed class, was derided as utopian and unrealistic, but it prepared the way for economic changes to be reversed and legal provisions like the Workmen’s Compensation Act and labour regulations to be implemented. Having an ideal society decreases injustice.

While Rawls and Sen are on opposing sides, they agree that a society that only promotes the well-being of the great majority is wrong. A comparison of Rawls “Concept of Justice” with Sen’s “Idea of Justice” is difficult and unnecessary. In some aspects, Sen’s “Idea of Justice” completes and expands Rawls “Concept of Justice.” Sen’s project isn’t actually an alternate perspective.

⁷²⁸ Ibid

6.2.7 International Distributive Justice

Globalization has created a complex web of international relations structures that enable a judicial approach to globalization as software. For worldwide, distributive justice must be paired with the structure and international agent accountable for distribution. It is thus essential that any framework or agent used to achieve redistribution and justice have at the very least a fair mechanism capable of handling politics based on distribution.

Philosophical issues arise when discussing the worldwide distribution of justice in this structural environment. Many of these issues revolve on defining the theoretical framework's starting point and the various states' roles as international players. It is fairly uncommon for scholars to apply the concepts that underlie Rawls' national justice theory to international relations; some keep the same criteria but from a global viewpoint; others substitute persons with nation states.⁷²⁹

To legitimize the expansion of justice concepts to international relations, persons must be retained as the counting unit of international distributive justice, along with political borders and sovereign governments. National self-determination and autonomous nation-states are fundamental concerns that cannot be addressed by ignoring the realities of international relations. Additionally, the notion of a global government is proposed as an appropriate and single agent for distributing money in a structural system of worldwide distributive justice in addition to being an ultra-national need. It was the constructivist approach that influenced the conceptualization of the global government as a significant agent of global justice since it emphasizes the importance of organisation as a key component of all theories.⁷³⁰ Rawlsianism and constructivism meet at a crossroads in the belief that a basic structure is necessary for the implementation of the “principles of justice”, which necessitates a global basic structure.

However, others have questioned whether or not a global government is an acceptable tool for distributing justice internationally. This economic structure is beneficial in

⁷²⁹ Cedro, “John Rawls Justice as Fairness and the Wto.” p.152

⁷³⁰ Andrew Gavin Marshall, “Global Power and Global Government,” Research Associate with the Centre for Research on Globalization (CRG). p.64

international relations, according to some writers, but the global government is undesirable as a coercive body that determines the world economic order in all redistributive concerns.⁷³¹ The proponents of a global government acting as an agent for international justice argue that no international entity has been able to reap the benefits of “global government” since all “international organizations” are based on a horizontal state agreement.⁷³² It would be difficult to allocate funds in the absence of global governance, making it difficult to rehabilitate low-income countries. The question of international justice principles and theoretical patterns emerges in the lack of international coercive mechanisms to mandate distributive commitments.⁷³³ While a worldwide government may never be established, it is still possible for the international community and international actors to alleviate disparities and injustices by adopting an IDJ agent that is akin to the global government.⁷³⁴

Alternative methods of global justice and governance include the Rawlsian approach in international relations, which holds that global laws governing all interactions should be established to control the current “international order”.⁷³⁵ In rejecting the international role of sovereign nations, this perspective sees the absence of a global government as the foundation for the refusal to apply the principles of justice and suggests some soft and broad rules to control or regulate current international interactions, particularly the foreign policy of states. As a result, liberal states foreign policies should be regulated by norms that are quite wide in scope.⁷³⁶

The first approach to the international justice system is based on the traditional theory of international relations, while the second method takes into consideration the transformative idea of justice by acknowledging the existing states as actors for the accomplishment of global justice. Governments are seen not just as representatives of their nations in this paradigm, but also as agents of individuals who respect moral responsibilities and cross-border activities affected and induced by moral obligations.

⁷³¹ Collier, “The Bottom Billion (Why the Poorest Countries Are Failing & What Can Be Done About It).” p.176

⁷³² Melcked-Garcia, “International Justice, Human Rights and Neutrality.”

⁷³³ Garcia, F. J. (2003). Trade, inequality, and justice: Towards a liberal theory of just trade. Ardsley, N.Y: Transnational Publishers. p.145

⁷³⁴ Ibid p.127

⁷³⁵ Rawls. J (1999) “The Law of Peoples.” Harvard University Press.

⁷³⁶ Ibid p.48

This approach is founded on this paradigm.⁷³⁷ A liberal society is considered the best and most effective agent of global justice, according to this perspective. Liberal nations must have the strength to carry out trans-border activities without jeopardizing world peace and security.⁷³⁸

Individuals or citizens of nation-states are not the starting point for Rawls Theory without global government. This model of international distributive justice has been comprehensively questioned in light of political society's self-governance and fair treatment in international interactions.⁷³⁹ This method is unsustainable since it relies on liberal states desire and competence to act internationally. As a consequence, international collaboration is threatened. Not only would liberal states imperil peace and security, but they will also threaten sovereignty's political independence without a shared set of authoritative institutions.⁷⁴⁰

6.3 “WTO” and International Distributive Justice

The WTO was created after nine rounds of negotiations under the guise of the “GATT”. After Bretton Woods and the WTO, GATT was founded as the first forum for managing international trade before the WTO. GATT was not formed by developed countries as a way to circumvent the ITO, which was established after the Bretton Woods Agreement. A restricted number of countries joined the GATT, which was sponsored by the developed nations to allow free movement across national borders. ITO's material was only one chapter and many other aspects of the growth and needs of poor countries were preserved.⁷⁴¹ Welfare growth did not occur as a result of this plan since it failed to account for the present economic imbalance between countries throughout the world.⁷⁴²

Development and less developed countries joined the GATT because of earlier

⁷³⁷ Garcia, F. J. (2003). Trade, inequality, and justice: Towards a liberal theory of just trade. Ardsley, N.Y: Transnational Publishers. p.67

⁷³⁸ Ibid p.72

⁷³⁹ Melcked-Garcia, “International Justice, Human Rights and Neutrality.” p.168

⁷⁴⁰ Ibid p. 170

⁷⁴¹ Cedro, “John Rawls Justice as Fairness and the Wto.” p.127

⁷⁴² Garcia, F. J. (2003). Trade, inequality, and justice: Towards a liberal theory of just trade. Ardsley, N.Y: Transnational Publishers. p.26

attempts to reduce trade barriers failing, and they want decision-making to take their economic situation into consideration. In the first four rounds of discussions, the emphasis shifted from specific institutional concerns to codifying legal behavior in the “Kennedy Round and the Tokyo Round”. In the wake of “WTO” rules violations, “developing countries” have been able to incorporate agricultural and textile goods into the global trade regime and construct an efficient and effective dispute resolution mechanism. Other countries have been able to include services into the “WTO” regulations, as well as TRIPS as a third pillar and the implementation of certain general practices, such as “anti-dumping measures” that are forbidden by “WTO” rules. They have also succeeded to incorporate the TRIPS. To put it another way, the “Uruguay round” was a major step toward establishing an international trading system based on rules, rather than one based on the exercise of political power, which has strengthened the security of small and medium-sized nations.⁷⁴³ The WTO was established in 1995 after the conclusion of the “Uruguay Round”, and has been in charge of international trade ever since.

The WTO has proven an excellent track record of cooperation and regulation based on the idea of fairness. It is a member driven organisation where decisions are determined by consensus rather than a strong executive and governing body influenced by powerful players and developed countries. In addition, it features a good dispute resolution mechanism that enables all members to protest and reply to their claims, regardless of their economic size.⁷⁴⁴ It is a matter of substantive justice that economic and political clouts have had an influence on the decision-making and dispute resolution processes at the “WTO”, for instance.⁷⁴⁵ “WTO” accomplishments are unparalleled in the history of international relations and we are devoted to providing relative procedural justice with respect to structure.

“WTO” and the “single undertaking” characteristic of the linked economies have established the “WTO” a single set of rules and principles as well as promises and

⁷⁴³ Ravenhill, “Global Political Economy.”, p.105

⁷⁴⁴ Wolfgang .H.M , Feuerhake. W,(2002)“Core Labour Standards in World Trade Law: The Necessity for Incorporation of Core Labor Standards in the World Trade Organization,” *Journal of World Trade* 36(5) p.895

⁷⁴⁵ Reinhardt , Shaffer.G,(2008) “Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the Wto,” *International Center for Trade and Sustainable Development paper* n.4.

concessions, making it almost impossible to quit the “WTO”.⁷⁴⁶ It is possible that many people view the WTO as the most effective and efficient inter-institutional collaboration with other international institutions to deal and play out global problems, given its strong mechanism of punitive measures and the significant role it plays, as well as the strong conformity and record on opening markets.⁷⁴⁷ Concerning distributional issues, the “WTO” is now the only international institution whose structure and agenda have consistently improved. The “WTO,” on the other hand, needs significant and fundamental adjustments in both its structure and its agenda and strategy in order to fulfill procedural justice requirements and substantive justice requirements. Not only would a robust and effective “WTO” promote economic growth, but it would also contribute to long-term social progress.⁷⁴⁸

Procedural justice, or formal equality, is a term used in international relations to refer to the necessity to apply the notions of fairness and justice in international economic exchanges. For a fair decision to be made and for a fair conclusion to be reached, the framework of formal equality or procedural justice must be established. That’s not to say that formal equal procedures don’t matter, but they don’t go far enough when it comes to ensuring that international players and national governments are treated fairly in the WTO’s decision-making processes, the dispute resolution system, and the overall framework. Accordingly, a second phase attempts to implement substantive justice in international relations, which not only requires that choices be made in accordance with the demands for justice, but also demands that decisions and their outcomes adhere to the principles of fairness.

An ideal theoretical perspective on the global economy should be created by these decisions, which should establish a set of rules and standards that can replace the current semi-mercantilist approach in the international economy, breaking up cartels and opening the global market to all individuals in equal measure.⁷⁴⁹ The framework for international distributive justice includes principles, rules, and procedures that are

⁷⁴⁶ Guzman, A. T. (2001) “Global Governance and the Wto.” p.315

⁷⁴⁷ Wolfgang .H.M , Feuerhake. W,(2002)“Core Labour Standards in World Trade Law: The Necessity for Incorporation of Core Labor Standards in the World Trade Organization,” *Journal of World Trade* 36(5) ,p.901.

⁷⁴⁸ Shaw.S , Schwartz.R ,(2002) “Trade and Environment in the Wto. State of Play,”36(1).p.154

⁷⁴⁹ Clyde V. Prestowitz, “Testimony,
http://waysandmeans.house.gov/media/pdf/111/10-03-24_prestowitz_testimony.pdf.

part of the strategy in the international notion of justice. Global wealth redistribution is the goal of the international judicial system's strategy and approach to the substance of individual decisions.⁷⁵⁰ As outlined by Rawls, the second principle of justice offers a framework that allows for the allocation of money to be unevenly distributed. When it comes to international governance, the Rawlsian theory gives the broad idea of the international principle of difference as direction for global strategy.

In order to better understand the idea of international difference, these efforts concentrated on the large gap between the worldwide community and distinct classes in countries. After many decades of strife, the nation states emerged as fundamental components and prominent players in international affairs during the “post-World War II period”. Following the post-colonial era of independence movements in Africa, a group of low-income nations was created that suffered from the injustices of international relations caused by colonialism and the unjust acquisition by certain wealthy countries and this group continues to suffer now as well. Unfair linkages compelled emerging and low-income countries to amend existing international agreements in order to achieve a more equitable and fair standing.

International economic relations may be improved for “developing countries” if an organisation of emerging nations, inspired by Marxist theory, established a new economic order. As part of the “New International Economic Order NIEO” programme, wealthier countries that satisfy the standards of fairness will get greater development funds and lower tariffs.⁷⁵¹ While low-income countries were trying to implement NIEO, their efforts were stymied due to the lack of necessary factual support. Because of its political and economic roots, as well as its implementation’s economic implications, it failed, resulting in unacceptable affects on primary commodities and the development of high barriers for low-income manufactured products to enter. In the wake of Marxism's demise, emerging and underdeveloped countries had no choice but to go to the liberal ideal of justice and equality for solutions and efforts. Initiatives have been proposed to reduce the gap between the rich and the poor and to address the inequality problem. International disparities,

⁷⁵⁰ Butt, “Global Equality of Opportunity as an Institutional Standard of Distributive Justice.”

⁷⁵¹ Garcia, F. J. (2003). Trade, inequality, and justice: Towards a liberal theory of just trade. Ardsley, N.Y: Transnational Publishers. p.9

which were developed as a result of this discrepancy, should be explored and assessed for their effect on inequality, in line with principles of justice, via these activities.

Denationalization has been accelerated by the trend of globalization, which has removed economic barriers and made it easier for goods, money, and labour to move throughout the world. Accordingly, the expanding gap between high and low-income nations was facilitated by the quick speed of globalization. Some scholars believe that international cooperation should be halted or delayed because of the growing gap it has created and because of the diminished influence it has had on that disparity, in part because of the velocity with which globalization has occurred.⁷⁵²

International relations now illustrate that perspectives that focus on eliminating causes rather than solving problems are incompatible with the global system. As an ideal global government with total discretion over the distribution of costs and benefits, it is hard to stem the rising flood of international cooperation with connected economies in today's globalised world. No matter how serious the problem is, the correct response is not to stop globalization altogether. Based on justice, it's only logical that policies and approaches to inequality should be studied based on the the process of globalization as an international relations paradigm, and the paradigm that supports a progressive leverage. In order to successfully deal with global concerns, global cooperation and global management are required.⁷⁵³ Even while justice principles at global level are based on human rights, reality and international restrictions are also taken into account as crucial components of an ideal theory that is practical and practicable. A new paradigm for income redistribution is proposed by global governance, which recognizes the "real nation States and political boundaries" as a fundamental impediment to international fairness. Securing a larger share of global wealth may be accomplished via a two-stage process that starts with strengthening the present participants in international society, namely sovereign states. It is true that the current international order has placed some form of prerequisite and constraint on the

⁷⁵² Howse.R , Makau Mutua, (2001)"Protecting Human Rights in a Global Economy. Challenges for the World Trade Organization," Human Rights in Development Yearbook 1999/2000: The Millennium Edition, Hugo Stokke, Anne Tostensen, eds., Buffalo Legal Studies Research Paper No. 2010-008. p.81

⁷⁵³ Guzman. A.T,(2001) "Global Governance and the Wto." Boalt Working Papers in Public Law, p.307

distribution of riches, by which the current sovereign nations must first be given a more equitable and proportional part of the world's wealth.

However, riches generated on a global scale aren't the end of the road. In order to enhance the existing well-being of persons in less developed nations, money generated in developing countries should be dispersed domestically among citizens and members of each community. However, although the first stage of the redistribution mechanism is to allow the next distributional step, the second stage includes developed and advanced nations with a large or low income difference.

That is to say, the second stage of wealth redistribution deals with inequality that arises as a result of unjust international contacts, either prior to globalization or that affects not only citizens and members of low and medium-income groups. The current consideration of existing facts calls for a two-phase global redistribution process: first, wealth creation for low-income and LDCs in the international order, and second, national wealth distribution to improve people's and citizens living standards in these countries.

6.4 International Trade and the "Theory of Justice"

It has been argued that trade-based development plans are the most important policy package for developing nations to advance toward international wealth sharing and wealth growth. As a result of the commercial pessimism approach and the idea that the import substitution strategy to safeguard their baby industries had to be prescribed for developing nations industrial and manufacturing capacity as well as for diversifying the productivity of such countries.⁷⁵⁴ This international trade liberalisation deal, known as GATT, is commonly seen as an alliance of affluent and industrialized countries. They were formed by rich countries and their nature led to marginalization of "LDC's and Developing countries", encouraging consequently "developing nations" to reduce their influence through Havana Charter of "GATT" agreement, which was however not effective very well at. This decision by poor

⁷⁵⁴Hoekman, Bernard & Ozden, Caglar, 2005. "Trade preferences and differential treatment of developing countries : a selective survey," Policy Research Working Paper Series 3566, The World Bank.p.2

countries to restrict their GATT membership was a result of the Havana Charter proposal's failure. As a result of this decision, the United Nation's framework was transferred to the only option at the moment.⁷⁵⁵

According to the United Nation's dominant paradigm at the time, developing the LDC's was done by substituting imports for exports in regional and global trade, rather than the pareto-efficiency school and GATT's comparative approach to liberalizing international trade and eliminating all tariffs.⁷⁵⁶ To give a new competitive scope with distinct laws and regulations that provide new development chances, UNCTAD initiatives proposed the broad notion of differentiated treatment for the most undeveloped and developing nations.

LDCs export capacity was lowered by high-income countries domestic policies, according to a 1958 Haberler research. Small domestic markets in low-income countries have led them to believe that GATT trade conditions favour wealthy nations, despite the fact that low-income countries traditionally produce the bulk of the world's primary raw materials. Because of this belief, they have become more assertive in their advocacy of favourable trade conditions. Dissatisfaction with GATT led to the development of GATT flexibility, which encouraged the participation of both Developed and developing nations.⁷⁵⁷ Thus, the UNCTAD devised the idea of differentiated treatment, which was used to justify the broader system of preferential trade treatment (GSP).⁷⁵⁸

Despite the UNCTAD's failure, developing and LDC's were urged to rejoin the GATT.⁷⁵⁹ The multilateral GATT trade system was reinforced and "poor nations" were motivated to alter the current GATT framework by the failure to embrace an import substitution model. Since then, there have been a slew of discussions,

⁷⁵⁵ Hudec R.E. (1992) "Gatt and the Developing Countries," COLUM. Bus. L. REV. 1. p.67

⁷⁵⁶ Michele Di Maio, "Industrial Policies in Developing Countries: History and Perspectives," available at: http://vi.unctad.org/files/wksp/tanzaniadar2011/files/suggested_reading/DiMaio-2008-%20industrial%20policies%20in%20DCs%202008.pdf p.12

⁷⁵⁷ Michalopoulos, C. (2000) The role of special and differential treatment for developing countries in GATT and the World Trade Organization. [Washington, DC: World Bank, Development Research Group, Trade] [Web.] Retrieved from the Library of Congress, p.4.

⁷⁵⁸ Norma Breda dos SANTOS, Rogerio FARIAS, and Raphael CUNHA, "Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues," Journal of World Trade 39(4)(2005).p.639.

⁷⁵⁹ Garcia, F. J. (2003). Trade, inequality, and justice: Towards a liberal theory of just trade. Ardsley, N.Y: Transnational Publishers. p.29

culminating in an agreement known as the WTO, which effectively integrated textile and agricultural commodities into the general system and brought intellectual property into a global arena. Using commercial strategies, the “WTO” has been able to come up with a new solution to the problem of inequality.

It has been widely accepted in developing countries that trade liberalisation has had the opposite impact on income distribution as finance liberalisation. In contrast to trade liberalisation and export growth, enhanced transparency has been shown to increase inequality and widen the gap between the affluent and the poor.⁷⁶⁰ When it comes to assisting low-income nations, commercial strategies have shown to be the most beneficial, rather than support-based economies.⁷⁶¹ The removal of tariffs and non-tariff trade barriers has improved the global economic condition, and as a result, trade-based policies have been embraced as strategic measures to execute justice’s needs, namely the concept of international difference.

Before applying the “theory of justice” to the chosen structure and strategy of “international relations”, the principles of justice must be examined twice. The first stage focuses on implementing the first principle of justice in leadership, organisational structure, and specific measures to reduce disparity. Contrary to the first principle of justice, the corrective element promotes fairness and equality for all people in society. Ensuring equal rights, obligations, opportunities and treatment for everyone should be the international community's first priority with this equitable treatment as a foundation, the “WTO” can develop a better model based on fairness. Procedural justice is the ideal paradigm and goal for justice. In this way, procedural justice may be reconciled with the concept of equal treatment. This is followed by examining the strategy using the second principle of justice, substantive justice.

As the most suitable global governing organisation, the WTO structure must be examined in accordance with procedural fairness criteria and principles before commercial policies may be taken into account as substantive justice methods in a comprehensive judicial examination. In the “WTO” decision-making process, procedural fairness demands for decisions to be made by legitimate actors and also in

⁷⁶⁰ IMF, “World Economic Outlook.” p.32

⁷⁶¹ Garcia, F. J. (2003). Trade, inequality, and justice: Towards a liberal theory of just trade. Ardsley, N.Y: Transnational Publishers. p.209

a transparent manner. For the “WTO” executive branch to be regarded compatible with procedural justice principles, key stakeholders should be allowed to participate in the application of the legislative authority by a legitimated democracy. Lastly, judges should make rulings congruent with legislative choices.⁷⁶² The “WTO” and GATT were able to create a rule-based framework in which all members, strong or weak, were treated equally. All WTO members have access to dispute resolution. A regulatory system was established to allow all members to participate in decision-making on an equal basis, unlike previous models of international organizations that were based on outcomes and lacked procedural fairness in decision-making, performance and governance, or dispute resolution procedures.

6.5 International neo-liberal and global justice

All countries in the contemporary world, especially the most powerful, must explain and justify their actions. State compliance with international responsibilities has evolved over the course of 400 years. International commitments and generally recognized rules may be traced back to two significant events in European history. The Thirty Years War ended in 1648 with the Treaty of Westphalia, which recognised the sovereign sovereignty of numerous European kings.⁷⁶³ The emergence of classical international law based on territoriality and state sovereignty was heralded by this occurrence. In 1945, with the outbreak of two major European wars, governments started to integrate on a worldwide basis. Sovereignty and non-intervention were incorporated in international law according to the UN Charter.⁷⁶⁴ It is now possible to spread international law and recognized standards over the world because of contemporary technology, such as communication, transportation, and more, and the ongoing process of Globalization, “The internationalization of the world.”⁷⁶⁵ International law and established conventions have evolved, but they haven’t

⁷⁶² F.Breyer (2009) “Health Care Rationing and Distributive Justice Author.” p.400

⁷⁶³ Lesaffer, R. (Ed.). (2004). *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511494239

⁷⁶⁴ Simmons, Beth (1998) “Compliance with International Agreements”, *Annual Review of Political Science*, vol 1, p. 75.

⁷⁶⁵ Nye, J. (2003-03-27). *The Paradox of American Power: Why the World’s Only Superpower Can’t Go It Alone*. : Oxford University Press.

mandated that all governments abide by its provisions constantly.

As a result, during the last 400 years, nations have increasingly been forced to defend their actions in light of established legal standards and socially acceptable norms. The word “primarily” has to be emphasized. Despite the UN Charter’s ban against aggression, the extent to which states adhere to their international commitments varies greatly. Louis Henkin’s *How Nations Behave* discusses compliance. In his words, “Almost all states obey virtually all principles of international law and almost all of their commitments almost always.”⁷⁶⁶ He stated this. As a result, war is still a possibility, but it is no longer as widely accepted as it was a century or even half a century ago. As a consequence, states may act predictably.⁷⁶⁷ Conflicts arise when governments fail to act. States employ *pacta sunt servanda* to ensure ongoing compliance.

As a result, sovereignty has decreased, international institutions have grown, non-state actors have emerged, and the present customary and treaty-based rules system has swiftly expanded.⁷⁶⁸ As the World Trade Organization’s dispute resolution mechanisms have evolved, the International Criminal Court has been established, and several global treaties have been established, governments have shown that they are willing to give up some of their sovereignty.

State-to-state compliance varies. Variation isn’t restricted to weak and strong nations, but also comparable states. Tanja Börzel et al. found that EU member states’ compliance varies.⁷⁶⁹ Despite having the identical legal criteria, this is the case. The UK and Italy are comparable in size, population, and EU membership. Italy’s non-compliance record is three times the UK’s.

Realist, libertarian, and constructivist perspectives combine to explain why governments obey international law.⁷⁷⁰ Realists are sceptics by nature and do not believe that formal agreements such as treaties have a substantial impact on state

⁷⁶⁶ Henkin, Louis (1979) *How Nations Behave*, New York, Columbia University Press.

⁷⁶⁷ *ibid*

⁷⁶⁸ Simmons, Beth (1998) “Compliance with International Agreements”, p. 75-76.

⁷⁶⁹ Börzel, Tanja, Hofmann, Tobias, Panke, Diana & Sprungk, Carina (2010) “Obstinate and Inefficient: Why Member States Do Not Comply with European Law”, *Comparative Political Studies*, vol 43, no. 11, pp. 1363-1390.

⁷⁷⁰ Morrow’s (2007) analysis examines Realism, Liberalism and Constructivism; Simmons (1998) analysis examines a fourth strand – Functionalism; and Whitaker’s (2010) study specifically focuses on the liberal regime type argument.

behavior. Realists emphasize self-interest. Mearsheimer says a state abides by an international treaty for self-interest.⁷⁷¹ He suspected congruent interests or dominant power ties. Morgenthau, another realist, says international law has been honored in most situations over 400 years.⁷⁷² As in Whitaker's African study, compliance was highest among countries with common ideals. One may argue that defining one's interests requires knowing one's regime.⁷⁷³

Jean-Jacques Rousseau thought international law was ineffective in limiting global competition. A more optimistic Hobbes thought international law would allow states to cohabit in harmony.⁷⁷⁴ Nations may have responsibilities under international law, although this affects state conduct only when it's in the interests of people (in democracies) or autocrats.⁷⁷⁵ States may or may not follow international law, but a treaty's legal status has no impact. Self-interest influences nation-state behavior.

Unlike realists, liberals believe that the primary concern of the state should always come first. There is a belief among some who advocate for the use of institutions to enforce international accords. In order to grasp the significance of law in international relations, one must first determine the sort of regime that exists.⁷⁷⁶ What matters is whether or not the government and judiciary adhere to the rule of law, according to this position. If the government and judiciary don't, then there is no guarantee that compliance will take place.

Liberals like Keohane, on the other hand, say that international anarchy may be mitigated by the formation of international accords.⁷⁷⁷ According to James Morrow's research, ratification by democracies corresponds with higher conformity with the

⁷⁷¹ Mearsheimer, J. J. (1994). The False Promise of International Institutions. *International Security*, 19(3), 5–49. <https://doi.org/10.2307/2539078>

⁷⁷² Morgenthau, Hans (1985) *Politics Among Nations: The Struggle for Power and Peace*, New York, Knopf, 6th edn.

⁷⁷³ Whitaker, Beth (2010) "Compliance among weak states: Africa and the counter-terrorism regime", p. 662.

⁷⁷⁴ Hoffman, Stanley (1963) "Rousseau on War and Peace", *The American Political Science Review*, vol 57, no. 2, pp. 217-333, p. 324.

⁷⁷⁵ Goldsmith, Jack & Posner, Eric (2005) *The Limits of International Law*, New York, Oxford University Press, p. 188.

⁷⁷⁶ Slaughter, Anne-Marie (1995) "International law in a world of liberal states", *European Journal of International Law*, vol 6, pp. 503-538.

⁷⁷⁷ Keohane, Robert (1984) *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, Princeton University Press.

rules of war.⁷⁷⁸ Democracy is more likely than totalitarian states to uphold international norms. According to democratic peace theory, democracy does not wage war against other democracy. This hypothesis supports this idea In turn; a country's behavior is impacted by its government.⁷⁷⁹

Many scholars rely on normative criteria to analyze state behavior. Constructivists think states and their interests are socially formed by "philosophical notions, identities, norms of behavior, or common terms of language." Constructivism Socially created norms of acceptable behavior guide states to expected levels of conduct.⁷⁸⁰ In the view of constructivists like Wendt and Finnemore, nations comply with treaties because they respect norms that are more important than the treaties themselves.⁷⁸¹

According to Finnemore, the efficacy of force is contingent upon its being seen as legitimate. According to what is regarded appropriate, states assess their interests. Since international law and norms are acceptable, states are more likely to follow them.

The quality of human existence varies dramatically from one location to location. Food, housing, health care, and education are some of the most fundamental requirements that many people in wealthy nations are deprived of. Birthplace that is ethically arbitrary may lead to a short, wretched life. Human rights and the role of global non-state institutions like the IMF, World Bank, and WTO are part of global justice's focus on material and health deprivation, as is the operation and duty of global non-state organizations like the World Trade Organization. Not health disparities, but global distributive justice will be the emphasis of this paper. Realism, particularism, social contractarianism, and cosmopolitanism are the four primary approaches to global justice. The concept of "global justice" causes friction. Others argue that global justice is inconceivable.⁷⁸²

Even while state players in anarchy pursue their own self-interest under neo-

⁷⁷⁸ Morrow, James (2007) "When Do States Follow the Laws of War?", *American political Science Review*, vol 101, no. 3, p. 559.

⁷⁷⁹ Owen, John (1994) "How Liberalism Produces Democratic Peace", *International Security*, vol 19, no. 2, pp. 87-125, p. 87.

⁷⁸⁰ Simmons, Beth (1998) "Compliance with International Agreements", p. 86.

⁷⁸¹ Wendt, Alexander (1992) "Anarchy is what States Make of it: The Social Construction of Power Politics", *International Organization*, vol 46, no. 2, pp. 391-425;

⁷⁸² "Ruger JP. Global health justice and governance. *Am J Bioeth.* 2012;12(12):35-54." doi: 10.1080/15265161.2012.733060. PMID: 23215931.

liberalism, the emphasis is on absolute profits rather than relative gains, allowing governments to work together to further their own interests. Both realism and neo-liberalism have ties to the rational self-interest model. IOs and non-governmental organizations (NGOs) are included in this category (NGOs). Actors may provide assistance, but it is not based on justice or the needs of those who receive it. Help is driven by the goals of the actors, not the needs of the receivers.

With the WTO, neoliberal practices might be forced on member nations, challenging conventional theories of international relations (IR) that say institutional power is limited and has no substantive repercussions. According to the majority of globalization researchers, national sovereignty cannot be infringed upon by multinational firms. States' power is defined by an unequal distribution of resources, such as economic and military might. It has no effect on how the state wields power via its institutions. Social constructivists and neoliberal institutions both hold to a conception of state authority that is similar to that of neo-realists: a disdain for the common social objective.

Scholars of international relations have lately begun to pay more attention to international organizations, in part because of their fast development. Growing evidence reveals that international organizations are self-governing entities with their own purpose and identity, which may impose their will on member governments without approval. As a result of this practice, far too many false claims are produced. Certain nations' participation in the United Nations has long been linked with autonomy and competence.

By underlining the relevance of institutional structures, the researcher illustrates that international organizations may have an impact on domestic policy outcomes. When it comes to international relations (IR), there is no set amount of "power" that states may use in negotiations or legal issues. In a conflict, a lack of military resources would have a greater impact on the result than in diplomatic discussions, assuming it had an impact at all. Diplomacy is a more important arena than the courtroom when it comes to balancing the books. When resources are distributed unequally between competing organizations, the outcomes might be skewed. In order for a group to operate properly, it must have the backing and supervision of an established organization.

The transition from GATT to WTO has resulted in four major institutional effects.

Member nations' influence is first affected by institutions. There are consequences for government decision-making in international organizations based on logic, rather than political disputes, because of these developments. It is also possible that institutional frameworks may determine how much influence is exerted at both the local and global levels. The institutional structure of international organizations may also have an impact on state organization and the influence agencies have. When political power shifts, so do non-official players on the national and international arena. Institutional frameworks have an impact on social dynamics, which in turn influence government agencies, non-state actors, and member states.

It was made feasible by structural changes at the international level, such as GATT's transition to the World Trade Organization in 1995. For more than half a century since it was established in 1947, GATT has worked to lower trade barriers throughout the world. For affluent nations, GATT provides a way to avoid their international commitments while implementing free trade agreements. Countries like the United States were able to impose internal protectionist policies in the absence of international law. When the World Trade Organization was established in 1995, developed nations were obliged to renounce their protectionist practices. According to Researcher, instead of using the word "trade liberalization," he prefers to use the term "trade neo-liberalization," which focuses on ignoring domestic demands to encourage economic development and safeguard failed companies, instead of the more conventional term.

The Globe Trade Organization (WTO) pushed neo-liberalism over the world by empowering conflicting interests. New institutional frameworks, such as better conflict resolution processes, are influenced by member states and other interested parties in diverse ways. For a variety of reasons, processes were established for transferring power from one level of government to another, changing the way members of an international organization engage with one another, and transferring national authority to organizations with a global emphasis.

6.6 Summary

This should be taken into consideration by the “WTO” as the primary global governing organisation and guarantee that international commerce's advantages contribute to individual people's well-being. In order to find a multilateral solution to wealth distribution, the WTO's acceptance as the world leadership organisation” boosts the chances of finding a multilateral solution by supporting policies that assist national governments in achieving the distributional aim. When it comes to non-trade concerns and international labour standards, the topic of philosophy of justice becomes crucial for a multilateral solution to international trade difficulties and the second stage of national wealth distribution.

Since the developed nations favour the linkage between international trade and labour standards and since NGOs are active actors on the global stage, their support has sparked debate among developing countries over whether or not this linkage should be made explicit. A suitable level of social standards should be created based on the strength and weakness of each country's economy. “Social and economic development” should be considered together since the idea of justice plays an important role in the debate over labour standards when considering international variations. The WTO cannot simultaneously restrict its effect on non-trade issues while prioritizing international law above local laws, therefore any strategy to improve labour standards must take this paradox into consideration. If the “WTO” wants to deal with non-trade issues, it must avoid the conundrum of legitimacy vs. effectiveness, and any solution to the labour standards issue must not put the legitimacy of the global trading forum in jeopardy. Experience at the shows that large negotiations involving so many different interests and member states cannot be easily achieved within this framework, and the new “WTO” age is the period of minute but steady progress in the “WTO's” judicial procedure, which emphasizes this point. To be sure, even the legal system is not without flaws. In the end, it's the only way to get out of the situation. Legal interpretations of existing articles and provisions may reflect progress and growth.

For example, a greater quality from a low-income country shouldn't be anticipated since the notion of international disparities states that countries with different levels of

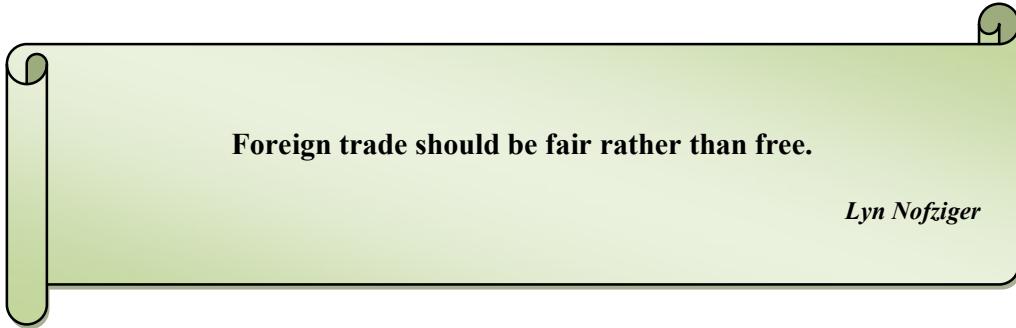
economic development shouldn't expect the same standards. Since the "WTO" Agreement lacked the parallelism and failed to observe the parallel social development of economic development, legal terms like "public morals," "like products," and others were interpreted to show that the "WTO" Agreement had a significant potential to solve the labour standard problem. International standards are not enforced only by agreement, which is why it's called an agreement method.

According to the GATT Art. XXIII:1 definition, "any measure" is defined to include "any measure that is implemented in accordance with and is not improved or increased in conjunction with the economic growth of a certain nation," and this is what parallelism demands (b).

Members of the WTO have a reasonable expectation that non-violation will not occur, and thus serves as a basis for justifying the second principle of fairness and social growth in parallel with economic progress. "WTO" members should not be expected to follow the social standards that were in place before they entered the "WTO." Due to the fact that the principle of international difference stipulates that social standards should rise in lockstep with economic growth among "WTO" members, a non-violation complaint can be filed in cases where it can be demonstrated that the allegedly violated social standards have not done so.

It is not enough to just label a challenged conduct as unfair and unlawful, but it is one step closer to establishing a prominent "WTO" stance. When it comes to "WTO" dispute settlement, there aren't enough rules to distinguish between measures which weren't anticipated fairly at the time of agreement and those which were expected to be implemented. An "interpretive development guide" was proposed to fill the void, which would categorize "international labour standards" based on the different economic levels of "WTO" members. An appeals body might use this to suggest fairness-based actions that members of the "WTO" can be forced to take, as well as to provide legal justification for such measures. In an "interpretive guideline," parallelism is taken into account and the potential for conformity is increased by specifying the characteristics of acceptable expectations realistically. Even in non-contentious cases, this Guideline would result in external public pressure and offer a multilateral response. Although it will serve as an example of fair expectations, there is no need for a consensus-based decision-making process since it would not involve

new substantive measures or an additional burden or commitment. The judicial body of the “WTO” is not bound by this treaty. Unambiguous presumption in favour of plaintiff may be enhanced by an Interpretive Guideline decision. With the Interpretive Guideline in place, developed countries would be able to decide whether or not to improve their low but legitimate standards during negotiations by making equal concessions and would have criteria to distinguish between legitimate humanitarian demands and comparative requirements that are not genuine.



Foreign trade should be fair rather than free.

Lyn Nofziger

Chapter 7- GATS: Benefits to Developing Countries

7.1 Introduction

The service industry includes classic industries like transportation, communication, and tourism as well as emerging and dynamic fields like software, environmental, and educational services. When it comes to national and international economics, the service sector is becoming an increasingly significant part of both. Many service sector operations have been deregulated or liberalized as a result of a growing number of multinational firms, increasing global demand for services, and the fast development of new technologies. Because services have already revolutionized national economies, we are seeing a delayed mirror of that change in global economies. The “Industrial Revolution” occurred in the nineteenth century, when agricultural economies began to give way to more industrial ones.

“The Services Revolution” refers to the quick and deep transition of industrial economies throughout the 20th century into service-oriented economies. As an example, in the US, the service sector grew from 43% of GDP in 1950 to 61% in 1990 and is now approximately 80% of GDP (BEA, 2021).⁷⁸³ In industrialized countries, services accounted for 76% of GDP in 2015, up from 61% in 1980, and this percentage seems to be on the increase (UNCTAD, 2017). The service sector accounts for 68% of GDP in Japan, 72% in New Zealand, and approximately 80% in the United States, to name just a few countries (OECD, 2019).⁷⁸⁴ Economic activity is shifting

⁷⁸³ <https://www.bea.gov/news/2021/us-international-investment-position-third-quarter-2021>.

⁷⁸⁴ https://www.wto.org/english/res_e/booksp_e/02_wtr19_1_e.pdf

from goods to services in emerging nations as well, often even more rapidly than in industrialized economies. Contrary to popular belief, China's economy is moving away from manufacturing and toward services. In 2005, manufacturing accounted for 41% of GDP; now, services account for 52% of GDP, a larger percentage than manufacturing. Services currently account for about half of India's GDP, up from only 30 percent in 1970.⁷⁸⁵ Similar changes seem to be occurring today in international commerce as a result of the rise of services. In spite of their small share in cross-border commerce, they are now the fastest-growing sector ("WTO", 2017). Exports of commercial services have grown at a pace three times that of products at a moderate yearly rate since 2011, from 1% to 3%. (see Figure A.1). This analysis predicts that services will account for up to a third of global commerce by 2040, a dramatic increase from only 9 percent in 1970. In only two decades, services would account for a 50% rise in global commerce.⁷⁸⁶

63 percent of GDP in Brazil is accounted for by services (World Bank, 2019). Services expanded from 42% to 55% of total developing nations' GDP between 1980 and 2015. (UNCTAD, 2017).

As part of the Uruguay Round, the GATS negotiations commenced on January 1, 2002.⁷⁸⁷ It's clear from this statement that the OECD is fighting back against the GATT's efforts to liberalise services trade (GATS).⁷⁸⁸ GATS has helped underdeveloped nations more than developed ones, according to Radesh Chadha's⁷⁸⁹ statistical abstraction, to the effect that improvements in welfare expressed as a percentage of GDP from a "implied" 25% decrease of a vector of service-sector protection were calculated to constitute 1.2% for the US and Japan, and 1.0% for the EU. For the remainder of South Asia, the comparable percentages were 3%, for ASEAN nations, 2.9 percent, for industrialized economies, 2.5 percent, and for India, 1.4 percent of the GDP was allocated. Liberalization of trade in services and products resulted in greater advantages for OECD nations.

⁷⁸⁵ Ibid

⁷⁸⁶ https://www.wto.org/english/res_e/booksp_e/02_wtr19_1_e.pdf

⁷⁸⁷ OECD, 2002, GATS: The Open Case for Service Markets, OECD Publishing, p.13.

⁷⁸⁸ Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments - Results of the Uruguay Round, vol. 31, 33 I.L.M. 1167 (1994).

⁷⁸⁹ Chadha, Radesh, (1999), Gats and Developing Countries: A Case Study of India, Centre for Advanced Economic Research, New Delhi

Neither “Chadha’s abstractions” nor the OECD’s endorsement of them are under scrutiny in this chapter. However, it is tempting to point out that the last phrase of the article mentioned above really ‘gives away’ that the OECD nations genuinely gained from the GATS after all of the preceding paragraphs.

The OECD’s description of the GATS is more interesting from the standpoint of this chapter’s discussion: According to the GATS framework, the following statements are true: numerous important GATT principles, such as the most-favored country treatment, openness in domestic regulation and the equitable application of domestic legislation.

The OECD, on the other hand, readily acknowledges this:

Rule-making initiatives are ongoing on a number of subjects including government procurement, emergency protections, subsidies, and domestic regulation.⁵³²

It’s unclear how the GATS function as international law since its framework is itself insufficient. This chapter’s task includes making progress toward an answer to that question. Thus, the GATS architecture, including its rules on supply and market access commitments, the MFN concept, and the legal basis of the duties it imposes, will be commented on.

When the Doha prohibition on taxing e-commerce-delivered items is debated, the much-touted benefit that GATS provides poor countries will be called into question. Given the ‘national treatment’ requirement, which contradicts the MFN concept, and the GATS Article XIV(a) privacy limits, this ban would call into doubt the GATS’ legality as international law.

Developing countries’ DSB experiences will be examined as well. It seems that the “GATS”, together with the “TRIPs Agreement and Article 22 of the Understanding on Rules and Procedures for the Settlement of Disputes”, may help developing nations implement favourable DSB judgments, according to the research. The GATT and the GATS oversee international trade in goods and services.⁷⁹⁰ GATT governs the sale of goods and GATS governs the sale of services under “WTO” regulations. In accordance with Article II of GATS, all “WTO” members must instantly and unconditionally treat every service and service providers with the same level of courtesy afforded to the similar services and service providers of any other member

⁷⁹⁰ https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

state. According to the GATS, Article XVII, a “WTO” member must provide services and service providers from other member states equal treatment to that granted to its own similar services and service providers.

For the first time in the history of global trade talks, the “Uruguay round” included services in its scope. Developed nations’ service industry lobbyists have pushed for more openness in services trade and investment. As rich and developing nations alike began to recognize the vital role that services play in both the global and national economies, they were included in the “Uruguay round” discussions. Group on Negotiations for Services was formed to conduct service negotiations apart from Group on Negotiations for Goods. In order to encourage “orderly” and “transparent” trade and investment in services, an international framework was to be established. Countries had made promises on “market access and national treatment” obligations in service sectors that they were willing to offer for the talks and horizontally across sectors before the conclusion of this inaugural round of discussions on services. Diverse ways of supply each received these pledges. To be fair, most nations made promises that either bound current laws on services trade and investment or committed to less than the existing framework.⁷⁹¹ The basis for liberalizing services was more successfully established throughout the discussions. The GATS 2000 round was significantly responsible for improving GATS rules and regulations, introducing new recommendations, and pushing greater liberalisation of services via deeper and more substantial commitments.

Even if the GATS structure and regulations are in their infancy, their relevance cannot be overstated. Freeing up trade in services has the potential to promote competition and cut costs while also spurring new job creation and enhancing the transparency and predictability of international business dealings. There is a direct link between the competitiveness of products and services and the performance of the economy’s infrastructure, such as transportation, banking, and communication. International competitiveness and a country’s capability of acquiring, integrating, and making use of new technologies are becoming more dependent on knowledge-based services due to fast advancements in information technology. This may have a positive impact on long-term economic growth and development if GATS helps to increase predictability

⁷⁹¹ <https://www.un.org/esa/desa/papers/2002/esa02dp25.pdf>

and transparency in trade and investment in the service sector.

As a result, trade liberalisation must not only promote efficiency aims but also support other valid purposes, such as social, economic growth and equitable objectives. Development of society is inextricably linked to economic growth as stated by the 1995 Copenhagen Declaration on Social Development and agreed to by the UNGA Special Session in Geneva on June 2000 (the “Geneva Declaration”). It is imperative that governmental policies be implemented to remedy market failings and create an environment that is favourable to both efficiency and social growth in the face of globalization and free trade.⁷⁹² In order to strike a balance between these objectives, which may sometimes clash and occasionally complement each other, each country’s national governments must make their own decisions. In terms of the GATS, one of the most pressing questions is how it will alter this balance and the interplay between market mechanisms and state policy. Aside from increasing competition and efficiency, questions have been raised concerning GATS’s impact on human development, prices, distribution, and access to services, as well as governments’ capacity to pursue their national service sector goals. Many of these issues arise in the provision of social services like health and education, where market failings are well-documented and governments have a significant role in regulation, provision, and distribution. Social service liberalisation promises were absent from previous round of discussions, and the limited coverage of these sectors is likely to reflect this.

⁷⁹² Declaration of the 1995 World Summit for Social Development.

7.2 GATS Agreement Overview and Analysis.

It was signed as an annex to the WTO in Marrakesh, Morocco, on April 15, 1994, and went into effect on January 1, 1995 as the GATS. In order to create a worldwide trade convention for service sectors, this agreement is aimed at limiting the involvement of developing countries. GATS, like other “WTO” accords, are binding on all “WTO” members and there is no way to opt out of it. Water, energy and other public services are among those targeted by the GATS, which aims to open up global markets for services. To use a modal approach, the GATS Agreement does not specify what constitutes “service.” All additional services are covered by this agreement, save for those provided by the government in the form of governmental activities.⁷⁹³

Following a Preamble, there are 28 Articles outlining the terms of the GATS Agreement. A total of eight GATS Annexes are included as part of Article XIX. To create a global framework of principles and norms for trade in services in order to expand such trade under circumstances of transparency and gradual liberalisation and to promote economic growth in all trading partners and development in developing countries, the GATS Agreement’s Preamble states. This right must be used by developing countries, given the disparities in the development of service legislation across countries. This ambiguity in the preamble seems to have incorporated uncertainty into the GATS Agreement, requiring a considerable balancing act by the Members to execute. The AB’s report (WT/DS363/AB/R) in DS363: China – “Measures affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products”⁷⁹⁴ seems to have taken this position into account:

“WTO” members are encouraged by the GATS’s structure to gradually liberalise their services markets, rather than totally at the moment of their adoption of the “GATS”. This notion of progressive liberalisation is reflected in the GATS’s design. Another aspect of growing liberalisation is the scheduling of particular commitments by service sectors and supply channels. Certain pledges by Members are not necessary to

⁷⁹³ Kategekwa, Joy, *Opening Markets for Foreign Skills: How Can the WTO Help?: Lessons from the EU and Uganda's Regional Services Deals*. <http://www.springer.com/gp/book/9783319035475>.

⁷⁹⁴ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm,

completely liberalise the selected sector, but may be limited to specific subsectors and modalities of supply, and may include limits, conditions, or qualifiers on “market access and national treatment”, provided that these are inscribed in their Schedules. However, we do not believe that the concept of gradual liberalisation lends credence to an interpretation that would limit the extent and coverage of particular obligations that have already been committed by Members and by which they are bound.”⁷⁹⁵

The GATS Schedule of Specific Commitments and national laws and regulations must be reconciled by the GATS Members in order to create a balance. Because of the wide range of services industries, there may be a contradiction between domestic legislation and GATS regulations when it comes to regulating services. It is the GATS Agreement under the WTO that governs 81 percent of all global trade in services.

When it comes to market access, “WTO” members may choose from four different ‘modes of service provision’ under Article 1 of the GATS framework. A member country’s territory may be reached by any other member country through these modes:

- “(Mode 1): (2)(a) ‘from the territory of one Member into the territory of any other Member’;”
- “(Mode 2): (2)(b) ‘in the territory of one Member to the service consumer of any other Member’;”
- “(Mode 3): (2)(c) ‘by a service supplier of one Member, through commercial presence in the territory of any other Member’;”
- “(Mode 4): (2)(d) ‘by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.’”

Members must agree to a certain amount of market openness. As a consequence, the promise might be “none” or “unbound,” implying that a nation can limit the way of supply. Further limitations on access are prohibited under the Article XVI (2) (a-f) responsibilities outlined for member states. The GATS makes it possible for service providers and enterprises to enter global marketplaces without any barriers at all. Members are not prohibited from controlling the admission or temporary stay of

⁷⁹⁵ Clause 394 Pg 160 of the Appellate Body Report WT/DS363/AB/R in DS363: China – Measures affecting Trading Rights and distribution services for certain Publications and Audio-visual Entertainment Products;

natural people under the Agreement's Annex on the Movement of Natural Persons Supplying Services,⁷⁹⁶ which might fall under Mode 4. There is still room for greater liberalisation of services trade via institutional talks, which GATS offers legally enforceable rights. As a result, both developed and "developing countries" may benefit from the GATS Agreement's integration of their service industries into the global market.⁷⁹⁷

Among the eleven service industries covered by the GATS is:⁷⁹⁸

- i. Construction and associated engineering;
- ii. Distribution;
- iii. Educational;
- iv. Environmental;
- v. Business services, including professional services;
- vi. Health care and social assistance;
- vii. Recreational, culture, and sports;
- viii. tourism, and travel;
- ix. Transportation services, such as marine, waterway, air, and road transportation: and
- x. Financial services, including insurance and banking.
- xi. Communication services, including telecommunication and audio-visual services;

Under "Article I:3 (b) and (c) of the GATS Agreement", governmental services that are not provided commercially or in rivalry with other service providers are excluded from the GATS purview. The first condition, 'supply on a commercial basis', might be connected to profit seeking rather than merely establishing if money is paid for the service.⁷⁹⁹ The Schedule of Specific Obligations of Member nations must balance their individual commitments in order to be in accordance with their local laws, given the vast variety of services sectors included by the Agreement. With regard to this

⁷⁹⁶ Bregt Natens, Prof. Dr. Jan Wouters - The Scope of Gats and of its Obligations

⁷⁹⁷ Rajesh Chadha, GATS and Developing Countries: A case study of India: Services in the International Economy edited by Robert Mitchell Stern

⁷⁹⁸ MTN.GNS/W/120: (10 July 1991): Services Sectoral ,Classification List:
https://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc

⁷⁹⁹ Bregt Natens, Prof. Dr. Jan Wouters - The Scope of Gats and of its Obligations

setting, the “GATS Agreement’s Article I:3 b and (c)” take on more significance. In order for GATS⁸⁰⁰ to encompass almost all services, a wide definition for “commercial basis” and “competition” must be implemented. For example, inter-state bus service in India, which is available to both commercial and state transportation corporations, is subsidized by the government in developing nations. Additionally, in India both public and private enterprises are involved in the provision of services such as residential LPG cylinders, telecommunications, and financial services. Public services under GATS have legal ambiguity because of two possibilities: either they are provided in a sector where explicit obligations have been set, or they are not.⁸⁰¹

As a result of Article II’s MFN commitment, all Member nations are bound to treat service providers regardless of where they are located, with no exceptions. It is up to the Member to impose or maintain any limits on specific services for which no explicit promise has been made. The limitation should be withdrawn for all GATS Members if the Member removes it for any nation, regardless of whether that country is a GATS Member or not. It was in April 1994 that India initially filed its list of exclusions from the Specific Commitments Schedule, and it was amended again in April 1997 and February 1998:

Except as otherwise noted below, there are no exceptions to the Schedule of Specific Commitments.

- i. As a result of bilateral agreements between Videsh Sanchar Nigam Limited and other international operators, GATS/EL/42/Suppl.1 - 11 April 1997 - Telecommunications services - International service was updated to include a list of Article II (MFN) exclusions GATS/EL/42 - 15 April 1994.
- ii. This document’s Financial Services section, included on page 2 of document GATS/EL/42, was removed on February 26th, 1998.
- iii. According to the above-mentioned Schedule of Specific Commitments, the following changes have been made:
- iv. Pages 10-16 of GATS/SC/42 were replaced by GATS/SC/42/Suppl.1, dated 28 July 1995, which dealt with financial services.

⁸⁰⁰ Markus Krajewski, Public Services and the Scope of the General Agreement on Trade in Services, a Research Paper written for Center for International Environmental Law;

⁸⁰¹ Marchetti and Mavroidis, (2004) _What Are the Main Challenges for the GATS Framework? Don’t Talk About Revolution_: European Business Organization Law Review 5: 511-562.

- v. Replaced the entries on pages 1 to 3 of GATS/SC/42 related to the Movement of Natural Persons section, which were replaced by GATS/SC/Suppl.2 on 28 July 1995.
- vi. A supplement to the Telecommunication services part of document GATS/SC/42 (page 7) was added on April 11, 1997 (GATS/SC/42/Suppl.3).
- vii. In February 1998, the Financial Services part of GATS/SC/42/Suppl.1 was replaced by GATS/SC/42/Suppl.4.

Clauses 3 and 4 of the GATS Annex on Article II Exemptions require the Council for Trade in Services to conduct a five-year evaluation of the MFN exemptions:

Review

3. *“The Council for Trade in Services shall review all exemptions granted for a period of more than 5 years.” “The first such review shall take place no more than 5 years after the entry into force of the “WTO” Agreement.”*⁸⁰²

4. *“The Council for Trade in Services in a review shall:*

*(a) examine whether the conditions which created the need for the exemption still prevail;*⁸⁰³ *and*

*(b) determine the date of any further review.”*⁸⁰⁴

However, the “Clause 6 of GATS Annex on Article II Exemptions” explains:

Clause 6 *“In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.”*⁸⁰⁵

⁸⁰² Article II Clauses 3 of the GATS Annex.

⁸⁰³ Article II Clauses 3 of the GATS Annex.

⁸⁰⁴ Ibid

⁸⁰⁵ Article VI Clauses 3 of the GATS Annex.

7.3 The GATS obligations

According to Joost Pauwelyn,⁸⁰⁶ the “WTO’s” obligations are usually bilateral. That only “WTO” members with a major commercial interest in the product or sector concerned may renegotiate “GATT and GATS” concessions is more proof of “WTO” requirements (GATT Article XXVIII and GATS Article XXI).⁸⁰⁷ He continues, saying: “Less than one-third of “WTO” members are affected by breaches of TRIPS, SPS, TBT, or GATS.”⁸⁰⁸

That, of course, makes it conceivable for governments to sign free trade agreements that include “GATS+” type bilateral commitments (FTAs). Although it seems to provide any “WTO” member standing in the case of a GATS violation, “Article XXIII(1) of GATS” says that if any member considers that another “WTO” member fails to carry out its responsibilities or particular commitments under this Agreement, it may have recourse to the DSU with a view to arriving at a mutually agreeable settlement.

It’s not really apparent what this will accomplish. In fact, Article V of the GATS specifically states that “GATS” obligations do not prevent “WTO” members from negotiating inter-member agreements that further liberalise trade. Or, as Pauwelyn suggests,⁸⁰⁹ does the GATS establish a *lex specialis* under which violations of “WTO” duties (one of which is based on the MFN principle)⁸¹⁰ are really permitted? To put it another way, according to Pauwelyn, the “WTO” Agreements are considered to be ‘a bundle of bi-lateral contacts’, which means that “WTO” duties are subject to treaty law and Articles on State Responsibility. Pauwelyn makes a compelling argument that the DSU shares his perspective.⁸¹¹ Given the *lex specialis* character of a “WTO” agreement, it would be reasonable to find that even while an agreement’s provision looks to violate a “WTO” duty, it does not really do so. It is disturbing that even

⁸⁰⁶ Pauwelyn, Joost, (2003)‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ , European Journal of International Law, vol. 14, p.931.

⁸⁰⁷ Ibid. p.932.

⁸⁰⁸ Ibid. p.939

⁸⁰⁹ Ibid. p. 947.

⁸¹⁰ Article 1 of the GATT.

⁸¹¹ Pauwelyn, Joost, (2003)‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ , European Journal of International Law, November, vol. 14,p. 945 and p. 949.

intellectual opinions like Pauwellyn contribute to the disappointment of the fair expectation that a “WTO” would establish shared (*erga omnes partes*) trade obligations rather than allow unique, bilaterally walled ones. “WTO” responsibilities are supposed to be collective, as Carmody⁸¹² ably argues. However, the prevalence of free trade agreements (FTAs) suggests that their bilateral decision has already taken effect. That’s going to be a tough one to undo.

7.4 Doha Ministerial Declaration and Doha Ban

“We proclaim that members will preserve their existing practice of not imposing customs charges on electronic communications until the Fifth Session, as stated in paragraph 34 of the Doha Ministerial Declaration, issued on November 14, 2001.”⁸¹³

The ‘Services Sectoral Classification List’ (W/120)⁸¹⁴ in the GATS classification system lacks a defined framework for categorizing digital items, similar to the ‘Harmonized System’ in the GATT classification system. Doha’s suspension remained in effect during the Ministerial Conference’s Fifth Session due to a lack of consensus among members on what constituted an e-commerce “service” and what a “product.” According to a briefing paper released by the WTO, these cross-cutting concerns have not yet been thoroughly examined by participants in the devoted discussions.⁸¹⁵

The TRIP’s protection of intellectual property in digital items seems to have been unaffected by this categorization discussion. In the Background Note from the Secretariat of the TRIPS Council, this is clear:

‘Included in the Secretariat’s background note are concerns of trademark usage on the Internet, particularly in light of territoriality and product or service specialization, trademark protection, and the interaction between

⁸¹² Carmody, Chios,(2006) ‘WTO Obligations as Collective’, , European Journal of International Law, vol. 17 , pp. 419-443.

⁸¹³ Doha Ministerial 2001, WT/MIN(01)/DEC/1, 20 November 2001, WTO website, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#electronic.

⁸¹⁴ https://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc

⁸¹⁵ “Electronic Commerce: Work continues on issues needing clarification’, Cancun WTO Ministerial, 2003: Briefing Notes, WTO website,”

“http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief15_e.htm.”

trademarks and domain names.’⁸¹⁶

It’s easier to decide if something is an item or service than it is to determine whether an Internet trademark that seems to be identical to a slew of other trademarks is protected by intellectual property rights. Whatever the “WTO” says, this argument says that a moratorium can’t be enforced legally under the “WTO’s” dispute resolution system since it’s only a political promise made by “WTO” members.⁸¹⁷

Moratorium is in force by default because it would be prohibitively expensive for taxing authorities to track and value all electronic commerce transactions, which is why the moratorium is in effect by default, says another observer.⁸¹⁸

‘Scott Budnick further diminishes the relevance of the Doha moratorium for industrialized nations.’⁸¹⁹ However, Burkina Faso, in West Africa, loses tariff money to tax-exempt e-commerce, which only has a minimal influence on income. “WTO” embargo-related income losses in Burkina Faso are bigger than those in developed countries, but the country’s substantial online trade means that these losses constitute just a small percentage of total government tax revenue, according to Budnick.’⁸²⁰

Then, in the next sentence, he claims something even more shocking:

‘As a proportion of overall tax income, the “WTO” prohibition might result in a loss of less than 1% in tariff, surcharge, and consumption revenue. It is not clear from this proportion whether or not continuing the restriction would have a detrimental effect on domestic growth of the country in question. Numbers like this one show that emerging nations will not be adversely affected by present international policies.’⁸²¹

Susanne Teltscher’s work, as Budnick concedes by reference, has had a significant influence on this topic. In the United States, Europe, and the OECD, this debate has

⁸¹⁶ TRIPS Council, Background Note by the Secretariat, Work Programme on Electronic Commerce: Addendum, IP/C/W/128/Add.1, 15 May 2003, para. 7, <http://lists.essential.org/random-bits/msg00183.html>.

⁸¹⁷ US looks for WTO Guidelines on E-commerce by Cancun Ministerial’, Inside U.S. Trade, 20 September 2002.

⁸¹⁸ General Council, Communication from Australia, Work Programme on Electronic Commerce, WT/GC/25, 5 July 1999.

⁸¹⁹ Budnick, Scott, (2004) ‘Internet Taxation and Burkina Faso: A Case Study’, , ILSA Journal of International and Comparative Law vol. 10, no 549,.

⁸²⁰ Ibid

⁸²¹ Ibid

occurred, whereas emerging nations have played a minor part and garnered little attention. He also notes that previous to the “WTO” restriction, “Bangladesh, India, Pakistan, and the Philippines had the highest tariff rates on digit sable products.”

With or without a “WTO” ban, the poorest nations would suffer the most. As a proponent of a global tax system, the GATS get a zero rating under international law. A tax on e-commerce products is not covered by the “WTO's” Doha limitation. Sacha Wunsch- Vincent⁸²² claims that a US digital trade agenda influenced the edict’s creation, and that it is still in place.

According to Wunsch-Vincent, liberalising trade in services “that may be delivered electronically” is a particular US trade approach. This measure was passed by Congress in 2002.⁸²³ In response, the US Trade Representative has been asked to “conclude trade agreements that foresee and avoid the formation of new commerce obstacles that may exist in the digital trade environment.”

Sections 2102(b)(2), (7)(B), (b)(8), (b) and 2103(d), are the relevant sections of this Act . Additionally, the 1998 Internet Tax Freedom Act of the United States calls for ‘activity to minimize the emergence of obstacles to e-commerce through international trade-negotiation fora like the “WTO”’.

Wunsch-Vincent goes on to assume that individual governments are reluctant to offer “the GATS treatment” to some electronic items, particularly those that now come under the “audio-visual services” category. That is to say, the United States does not want to see them reclassified as services free from “general obligation” and “national treatment” requirements. Wunsch-Vincent predicted accurately that the categorization issue keeping e-commerce taxes on hold would last until at least the Fifth Ministerial Conference (Cancun). That is, in fact, what has occurred. In addition, Cancun has ratified the Doha agreement on e-commerce tax exemptions. Wunsch-Vincent predicted the outcome of the Doha Round with a degree of accuracy that was almost uncanny:

Located in Cancun, Mexico, American negotiators may focus only on getting the “WTO” to endorse free-trade principles and rules for global e-commerce expansion.

⁸²² Wunsch-Vincent, Sacha, (2003) ‘The Digital Trade Agenda of the US: Parallel Tracks of Bilateral, Regional and Multilateral Liberalisation’, Institute for International Economics, <http://www.iie.com/publications/papers/wunsch0303.pdf>.

⁸²³ Public Law 107-210.

That's what happened. This “classified” debacle demonstrates that power politics, not the rule of law, “matter” in the drafting of “WTO” law.

7.5 Concept of “National Treatment” and “Most Favored Nation”

Non-national service providers must be given ‘national treatment’ under the GATS. Articles XVI through XVIII outline this. Here, Article II spells out the ‘favored country’ approach. There is a disparity between the two, according to William Thomas Worster.⁸²⁴

Article I(2)(d) of the GATS prescribes a restrictive interpretation of the fourth mode of service supply, and the “Council on Trade and Services”, the entity tasked with monitoring GATS’s implementation, interpreted that provision narrowly. ‘For Mode Four, a person must be employed by a business or other commercial body, according to Worster's Council of Economic Advisers statement. Specifically, Worster cites Article I(2)(d), which is a Mode 4 clause. With this mismatch, the GATS’ “Rule of Law” section is nullified. According to Worster, the GATS does not include ordinary immigration legislation (visa requirements, etc.). The Council made this point despite the DSB having already addressed it in one issue involving US immigration and visa laws. Concerning immigration restrictions, Worster properly asks whether the GATS applies, given the DSB's stated willingness to consider disputes. Rather than Worster's chaotic vision, international lawmaking should aim towards "rule of law" conditions.

⁸²⁴ Worster, William Thomas, (2008) ‘Conflicts Between United States Immigration Law and the General Agreement on Trade in Services: Most-Favoured-Nation Obligation’, Texas International Law Journal, vol. 42, no. 55.

7.6 GATS and “developing countries”

An examination of five developing nations’ GATS experiences, including the India, Pakistan, Brazil, and China, as well as Bangladesh, the world’s least developed country, will reveal India and Brazil’s eagerness to bring issues before the “WTO” DSB. Bangladesh’s distinction as the first LDC to submit a DSB case and China’s refusal to participate are all instances. India and Brazil are the two countries that may be reasonably compared. The GATS offers each of these nations a wide range of options for achieving their respective trade objectives.

The word “services offered on a commercial basis” has been thrown open by the GATS Agreement, creating a slew of new questions. It’s important to understand the GATS Agreement’s Article I (3) (b) and (c).

“In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;”

(b) “services includes any service in any sector except services supplied in the exercise of governmental authority:”

(c) “a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”

Public utility services like electricity, drinking water distribution, postal services, and so on, which are offered on a commercial basis to “consumers” in developing or LDCs, would meet the aforementioned requirements. This would suggest that while “Article I (3) (b) of the GATS Agreement” states “excluding services supplied in the exercise of government power,” “Article I (3) (c)” makes an exemption for services given for a fee. However, even though members may opt out of liberalisation under GATS for any individual service according to their Schedule of Specific Commitments, the other members might exert enormous pressure to prevent them from doing so for any service offered for a fee. This means that every governmental service that may be delivered on a commercial basis would be susceptible to liberalisation, which is true in many developed countries. When it comes to

developing nations, public services are seen as more of a societal right than a paid service. Moreover, in areas where the majority of the population falls below the poverty line, commercializing public utility services may not always be possible. Because of this, there would be trepidation about the ramifications of opening up public utility services to international competition and the influence on their costs in comparison to public policy goals.

To derive any meaningful conclusions from a comparison of the economies and foreign relations of few “developing countries”, we must look at each country separately and in a un-comparable fashion. For all their similarities to India and Brazil in terms of their economy, China has a reluctance to get into a fight because of its concern of losing out on potential customers.

7.6.1 India

“The Indian economy is dominated by the service sector. For the services sector, the GVA at current prices (in 2020-21) is predicted at 96.54 lakh billion Indian rupees. Total India’s GVA of 179.15 lakh crore Indian rupees is 53.89 percent of the services sector’s share. Industry accounts for 25.92 percent of GVA, or Rs. 46.44 lakh crore. Agriculture and related industries account for 20.19 percent of total employment.”⁸²⁵ Aside from skilled labour exports, India is interested in hosting services in accordance with Way 3. In exchange for better Mode 3 market access and higher Mode 1 cross-border supplies, this country are eager to deal. It’s no surprise; therefore, that India takes great care to maintain control over its exports. According to the GATT 1994, the Turkish government has imposed quantitative limits on textile and garment items, alleging that such measures are in conflict with Articles XI and XIII of the GATT 1994. Turkey v. Textiles,⁸²⁶ a well-known “WTO” case, India has ruled that Turkey’s acts violate GATT 1994 Articles XI and XIII. GATT Article XII and GATT Article XIII were interpreted by Turkey as providing a dispensation from Turkey’s GATT

⁸²⁵ <https://statisticstimes.com/economy/country/india-gdp-sectorwise.php#:~:text=Sector%2Dwise%20GDP%20of%20India&text=The%20services%20sector%20accounts%20for,179.15%20lakh%20crore%20Indian%20rupees.&text=46.44%20lakh%20crore%2C%20the%20Industry,and%20allied%20sector%20share%2020.19%25>.

⁸²⁶ “Turkey–Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, 31 May 1999.”

commitments under Article XXIV.⁸²⁷

“Following the EU's customs union, Turkey felt entitled to preserve import restrictions on the same 19 textile and clothing categories.”⁸²⁸ As a result of this “Council Regulation (EEC) 3030/93 on uniform restrictions for imports of certain textile items from foreign countries,” enacted by the “Council of European Communities” on October 12, 1993, panellists decided that: This law applies to the whole EU customs area.⁸²⁹ This precedent-setting decision suggested that regional trade agreements, but not customs unions, enable the suspension of GATT Article XXIV obligations. Using “WTO” precedent, “regional trade agreements” may be ranked in terms of strength (or weakness) (RTAs). Given that “GATS Article V” mirrors “GATT Article XXIV” precisely, it is plausible to presume that a hypothetical Turkish defence would have failed.

“Article V of the GATS” states that RTAs involving services trade must have “significant sectoral scope”. Officially, it is acknowledged that a judgment must be taken on how much ‘sectoral coverage’ is required before it is termed ‘substantial’.⁸³⁰ This was not discussed in Turkey–Textiles. But it gave India a major ‘victory’ against Turkey. DSB jurisprudence on the topic has been formed since this decision, while a “WTO”-sanctioned body is currently discussing the meaning of a crucial phrase (central coverage).

However, this hasn't dimmed India's faith in the “WTO” DSB. India's compliance with the “WTO” isn't shielded from the scrutiny of other Members. More than half of the cases that have been brought against India have been brought by the complainant.⁸³¹ According to Usha Balasubramaniam, India's aviation sector has an opportunity under the GATS.⁸³² According to the WTO's “GATS Reference Paper,” “most aviation regimes are not GATS compliant. Nations are hesitant to apply the

⁸²⁷ Ibid. para 5.5.

⁸²⁸ Ibid. para 9.29.

⁸²⁹ Ibid. para 9.39.

⁸³⁰ Negotiating Group on Rules, Compendium of Issues Related to Regional Trade Agreements, pp. 13-21, TN/RL/W/8/Rev., 1 August 2002.

⁸³¹ “WTO web page, ‘India and the WTO’, http://www.wto.org/english/thewto_e/countries_e/india_e.htm.”

⁸³² Balasubramaniam, Usha, (2007) ‘Market Access and the GATS Transport Annexure: Possible Approaches for India’, , Journal of Air Law and Commerce, vol. 72, no 45.

MFN provision for granting market access while trading traffic rights.”⁸³³ The Commission proposes a number of competition principles in the Telecom Service Sector Annex, which might be used as a model for the Air Transport Annex.⁸³⁴ Despite her reluctance to explicitly declare so, her discourse suggests that she is encouraging an Indian aviation business that is GATS-compliant in order to get market access to other aviations companies.

For the GATS to have the power to demand market access for states’ most important sectors, such as oil and aviation, shows a strange faith in it. The GATS framework, on the other hand, does potentially allow for that kind of market access. A state’s tolerance for trade liberalisation must be tested, however, before it becomes aware of a danger to its own security.

⁸³³ Ibid. p. 57.

⁸³⁴ GATS Reference Paper, 36 I.L.M. 354, 367.

7.6.2 Brazil

According to “Sidney Weintraub”, Argentina is the main member of Mercosur, a customs union with Paraguay and Uruguay.⁸³⁵ “It rejected the US’s Free Trade Offer in favour of an Interregional Framework Cooperation Agreement with the EU, demonstrating its faith in global trade and services.”⁸³⁶ Brazil is clearly in the GATS “eye of the storm”. Contrary to popular belief, the nation is doing quite well⁸³⁷

Brazil requested dialogue in 2002, and a large collection of third parties entered the discussion. Argentina; Australia; Benin; Canada; Chad; China; Chinese Taipei; EU; India; Pakistan; Paraguay; Venezuela; Japan; Thailand. According to Brazil, U.S. cotton subsidies infringe on “WTO” regulations. In favour of Brazil, the panel and the appellate body voted unanimously.⁸³⁸ On appeal, the United States was unsuccessful.⁸³⁹ It is now legal for Brazil to conduct countermeasures against the United States. According to Article 22.2 of the DSU, it may suspend its commitments to the United States under TRIPs and GATS. As a result, Brazil will be allowed to produce generic versions of drugs covered by US patents and otherwise profit from US intellectual property. Following Brazil’s suspension of its GATS responsibilities, the country will be allowed to levy levies on US exports and deny the United States access to its financial services, construction, and distribution sectors. This may be the most significant “WTO” victory against the United States to date. Standard retaliation is limited by “WTO” rules to items in the same sector as the object of the trade dispute.⁸⁴⁰ This means that penalties on agricultural goods of the offending country may only be used if “WTO” agreements pertaining to such items are in place when the issue is over cotton-growers’ national subsidies. Cross-retribution is a kind of retaliation that goes beyond the scope of the original conflict. “WTO” regulations allow cross-retaliation where imposing sanctions only on the broken agreement is

⁸³⁵ Weintraub, Sidney, (2000), *Development and Democracy in the Southern Cone*, Centre for Strategic and International Studies, Significant Issues Series, pp.40-41.

⁸³⁶ Europa website, ‘Interregional Framework Cooperation Agreement between the European Community and Mercosur’, <http://europa.eu/scadplus/leg/en/lvb/r14013.htm>.

⁸³⁷ WT/DS267/AB/R, 3 March 2005.

⁸³⁸ Ibid

⁸³⁹ United States – Subsidies on Upland Cotton, note 41, Appellate Body Report, WT/DS267/AB/RW, 2 June 2008.

⁸⁴⁰ Article 22(3)(a), Dispute Settlement Understanding.

neither ‘practical’ nor ‘effective.’⁸⁴¹

Since the Brazil-favoring judgment in Uplands Cotton, many observers have speculated that the threat of suspending the TRIPs provisions on IPP may be used by developing nations as a means of enforcing DSB rulings against the US. Henning Grosse Ruse-Khan and Arvind Subramanian were both persuaded in their belief that it might,⁸⁴² about 10 years before the judgment in Upland Cotton.⁸⁴³ If Brazil retaliates, it will be the first time in “WTO” history that a poor nation has done so. Even though the Brazilian Chamber of Commerce says “Brazil remains open to a dialogue with the United States that may help achieve a mutually satisfactory solution to this dispute,” as of June 2010, there had been no developments regarding the suspension of pharmaceutical patents. However, IP Watch says it is expected.⁸⁴⁴ The fear of the US pharmaceutical industry losing its patent protection is palpable in this statement from Brazil.

⁸⁴¹ Article 22(3)(b)-(c), Dispute Settlement Understanding.

⁸⁴² Subramanian, Arvind, (2000) ‘Can TRIPS serve as an enforcement device for developing countries in the WTO?’, *Journal of International Economic Law*, , pp. 405-406.

⁸⁴³ Ruse-Khan, Henning Grosse, (2008) ‘A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations’, *Journal of International Economic Law*, vol.11, no. 2 , pp. 341-342.

⁸⁴⁴ “Intellectual Property Watch, ‘Brazil Issues US Retaliation List; Open To Talk’, 8 March 2010.”

7.6.3 Bangladesh

Contrary to US investment treaties, LDCs' GATS schedules cover an average of less than 20 industries.⁸⁴⁵ To conclude investment treaties rather than liberalizing their trade policies, least developed nations are more concerned, as seen by this fact. Least developed nations have few services trades to which anybody is attracted and lack the financial means to get others'. So, to summarize, the GATS serves no use for Bangladesh at this time. Nevertheless, this nation has shown that it is capable of lawsuit.⁸⁴⁶ As its economy and trading capabilities grow, this will be a useful asset.

Bangladesh's services industry is booming and has a lot of room for growth. Services accounted for approximately 53% of Bangladesh's GDP in 2016–2017, while manufacturing contributed 33% and agriculture 15%. (Bangladesh Bureau of Statistics (BBS), 2017). During the same time period, 38% of all jobs in the nation were in the service sector (BBS, 2017). Information and communication technology (ICT) and ICT-related services, tourism, accounting and auditing, architecture and engineering, nursing and midwifery, and nursing and midwifery were the industries with the highest promise (UNCTAD, 2016). Products and services both benefit from each other, and ready-made clothing, which account for 12% of GDP and are the country's top export, are no exception (BBS, 2017). There has also been a considerable increase in cross-border services trade in Bangladesh, with total services trade expanding from US\$ 2.4 billion in 2000 to more than US\$ 13.1 billion in 2017. (ITC, 2018). Commercial services, transportation, financial, and other business services, as well as travel and other business services, dominated imports, while commercial and government services, as well as telecommunications, computer and information services, other business services, and transportation and travel services, dominated exports (ITC, 2018). In order to establish Bangladesh's services trade with certain nations, data gathering problems must be overcome.

Despite Bangladesh's improved performance in the services trade sector, the country's overall trade contribution from services is still relatively low. 2 Bangladesh

⁸⁴⁵ “Adlung, Rudolf and Molinuevo, Martin,(2008) ‘Bilateralism in services trade: is there fire behind the (BIT-) smoke?’, Journal of International Economic Law, , p.371.”

⁸⁴⁶ India–Anti-Dumping Measure on Batteries from Bangladesh, DS306.

imported products worth US\$ 47.7 billion and exported goods worth US\$ 40.5 billion in 2017, but imports of services amounted to just US\$ 9.2 billion and sales of services were only US\$ 3.8 billion (ITC, 2018). This indicates that services only accounted for 14.8% of Bangladesh's entire trade basket³ in that year (ITC, 2018). In spite of the fact that services make up just a tiny portion of the global economy's overall trade volume, they provide a huge possibility for expansion. The country's exports may benefit greatly if Bangladesh took advantage of this chance to diversify its product line. According to GATS, Bangladesh is obligated to treat all service providers equally regardless of where they come from. GATS Article XVII establishes the principle of "national treatment," in which countries pledge to treat foreign services and providers equally under the law and in practice in order to avoid any form of discrimination. This principle allows for a reasonable balance to be struck between the pursuit of socially desirable goals and ensuring that most barriers to market access are not discriminatory (both before and after entry). In addition to nondiscriminatory measures, GATS also targets national treatment. Despite the fact that this might lead to more market access, it also restricts the ability to regulate. In addition to national treatment, there are two GATS regulations that have a far-reaching impact. As a further condition of membership, it was stipulated that trade barriers in a variety of service sectors would be removed.

"Art. XVI of the Treaty on the Elimination of All Forms of Racial Discrimination" prohibits discriminatory measures, but it also prohibits non-discriminatory quantitative measures that limit the functioning of businesses. This extra layer of restraint, notably on domestic regulation, comes into play after a member has made specific "national treatment and market access" obligations. Many service markets have become more competitive worldwide due to technological advancements and a decline in natural monopoly arguments for state-provision of key service sectors. Cross-border trade (mode 1 of the GATS) and foreign direct investment (FDI) (mode 3). Because of their comparative advantages and the fact that their exports confront tariffs and other non-tariff obstacles, nations that had previously confined themselves to domestic business were encouraged to broaden their market access by include services in the GATS round table. The emerging nations, on the other hand, did not reap the rewards they had hoped for in the textiles and apparel industry or in

agriculture. Among the roadblocks that prevent exports from developing nations from reaching developed ones are a lack of agreements on the movement of natural people (leading in restrictions on access to internal transferees, severe and discretionary visa and licencing procedures, and a lack of recognition of qualifications), a ban on foreign access to service markets designated for local providers, and price-based measures (discretionary).⁸⁴⁷

In Article XIX, “developing countries” are given ‘necessary flexibility’ to open fewer sectors and liberalise fewer kinds of transactions based on an agreed upon notion of ‘progressive liberalisation’ rather than a minimum norm of liberalisation. In spite of the GATS’s numerous advantages, developing nations nevertheless confront several difficulties.

⁸⁴⁷ (UNCTAD 1999a: p7).

7.6.4 China

As its economy continues to grow at a fast pace and as part of a massive infrastructure-building effort, China finds itself in a precarious situation. As a result, it must remain “on the side” of energy providers, both inside and outside of the “WTO”. To support its colossal industrial sector, China needs a vast global market. As a result, the United States finds itself in a precarious diplomatic position. As a result, the country’s enormous population is a lucrative target for all major exporters, notably those from the US and the EU. Neither of these industries is content with China’s current policies. Due to DSU action by the US, China receives a lot of attention from the international community. According to Marcia Harpaz⁸⁴⁸, this attention has reached an alarming level: In 2001, China became a member of the “WTO”. There were eight lawsuits filed against China by the end of 2009, seven of them were launched between 2006 and 2009.⁸⁴⁹

As Harpaz points out, China's first preference was to settle before forming a panel. This changed in 2006 after China overcame an American DSB opposition. In 2008 and 2009, it submitted ‘four more complaints,’ including its first independent complaint.⁸⁵⁰ (By July 2010, China had filed seven separate complaints.)⁸⁵¹ Similarly, China complains about the EU and the US, which have received the most criticism. “The use of the WTO dispute settlement process by China and against China may ‘jam’ the system, according to Harpaz.”⁸⁵²

The fact that late-admitted countries like China have to live up to “WTO”+ obligations is less enlightening. The DSB ruled in favour of the US in a historic decision involving protocol duties.⁸⁵³ The US Trade Representative filed two complaints against China in April 2007. “China was accused of not enforcing IP regulations and limiting access to American IP products and services.”⁸⁵⁴ “Australia,

⁸⁴⁸ Harpaz, Marcia Don, (June 2010) ‘Sense and Sensibilities of China and WTO Dispute Settlement’, Society of International Economic Law, 21.

⁸⁴⁹ Ibid. p. 25.

⁸⁵⁰ Ibid. p. 27.

⁸⁵¹ Ibid, p. 35 – 36.

⁸⁵² Ibid. pp. 4-5

⁸⁵³ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm.

⁸⁵⁴ Ibid. WT/DS363.

the EU, Japan, Korea, and Chinese Taipei were all represented.” While affirming the Panel’s conclusions, the Appellate Body Report⁸⁵⁵ allowed that China might invoke “Article XX(a) of the GATT 1994” to defend components found inconsistent with China’s trade rights duties under its “Accession Protocol and Working Party Report”.⁸⁵⁶ Chinese negotiators have failed to show that the relevant measures in “GATT 1994 Article XX(a)” are “necessary” to preserve public morality and, as a consequence, have failed to prove that the provisions in question are justified under GATT 1994.⁸⁵⁷ An appellate body decision on whether an Article XX defence is possible outside of the framework of GATT claims has never been made before, according to Xiaohui Wu, who notes that it’s the first time this has happened.⁸⁵⁸ “China’s Accession Protocol and Accession Working Party Report” are examples of non-GATT obligations that might be used to substantiate this defence, according to the Appellate Body.⁸⁵⁹ Furthermore, this is the first report to rule on requirements imposed on trade rights under the Accession Protocol, rather than only under the wording of “WTO” pacts.⁸⁶⁰ Though it did not change its previous conclusion that China’s regulations preventing foreign-invested companies from participating in the dissemination of sound recordings in electronic form violate “GATS Article XVII”, the AB Report does support the Panel’s findings.⁸⁶¹ However, the Panel’s findings on GATS+ duties imposed by accession are upheld twice. “Paragraph 1.2 and 5.1 of China’s Accession Protocol and Working Party Report”⁸⁶² say that “Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule” respectively breach China’s trade rights responsibilities. The “China’s Accession Protocol” and the “Accession Working Party Report” contradict. Both declare that China must grant

⁸⁵⁵ “China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, Report of the Appellate Body, 21 December 2009.”

⁸⁵⁶ Ibid. para. 414(a).

⁸⁵⁷ Ibid. para 415(e).

⁸⁵⁸ Wu, X. (2010). Case Note: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products . Chinese Journal of International Law, 9(2), p. 427.

⁸⁵⁹ Ibid. p. 428.

⁸⁶⁰ Ibid

⁸⁶¹ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm.

⁸⁶² Ibid

non-discretionary trade rights.⁸⁶³

Because to Article XVII of GATS and the GATS+ (i.e., the pledges in “China's Accession Protocol”), the Appellate Body of the WTO may be able to force China to entirely open up the financial services sector. Foreign banks want access to China's financial system, according to Daniel Crosby's good scientific analysis⁸⁶⁴ Chinese authorities wish to maintain control over their banking industry and are not pleased with this idea. Financial service providers in China are required to meet strict prudential standards that do not restrict the number of licences they may issue, but they are also required to adhere to strict geographical rules: In the beginning, foreign financial institutions were only allowed to operate in a limited number of cities. And only international banks and financial institutions that had been operating in China for at least two years were awarded licences. For joint ventures and branches, financial institutions have to show assets of at least US\$10 billion and US\$20 billion, respectively. Investment banks were not eligible for branch licences.

“By removing the “location” barrier and reducing foreign bank capitalization requirements,” China fulfilled its GATS commitments in 2006.⁸⁶⁵ However, these easing fall short of what the US and EU are hoping for. Aiming towards the ultimate objective As far as international banks are concerned, ownership and control are the most important factors. They want to run their own company without the influence of Chinese joint venture partners or NPLs, with competent employees of their own choice, direct monitoring.⁸⁶⁶

Crosby also points out:

“Members of the “WTO” have high expectations for GATS obligations on financial services from countries that have been negotiating admission to the “WTO” since January 1, 1995. Without making significant commitments in the majority of financial services subsectors, no nation

⁸⁶³ Ibid

⁸⁶⁴ Crosby, Daniel C,(2008) ‘Banking on China's WTO Commitments: “Same Bed, Different Dreams” in China's Financial Services Sector’, Journal of International Economic Law, vol. 11, no. 1 , p. 76.

⁸⁶⁵ Deloitte Touche, ““China's banking sector: Growing towards diversification’, p.4.” [“http://www.deloitte.com/dtt/cda/doc/content/dtt_Boao_BankingEng041807.pdf.”](http://www.deloitte.com/dtt/cda/doc/content/dtt_Boao_BankingEng041807.pdf)

⁸⁶⁶ Crosby, Daniel C, (2008)‘Banking on China's WTO Commitments: “Same Bed, Different Dreams” in China's Financial Services Sector’, Journal of International Economic Law, vol. 11, no. 1 , p. 76.

has ever joined the “WTO”.⁸⁶⁷

Its GATS Schedule⁸⁶⁸ and Accession Protocol bind China to a five-year term ending December 10, 2006, with the full implementation of its duties to a comprehensive financial sector liberalisation, he proceeds to explain. Foreign financial services businesses offering banking services in China must adhere to the GATS timetable, which is referenced in China’s Protocol on Accession to the “WTO,” after this date.⁸⁶⁹ To put it another way, it's important. In China's GATS schedule, there are no national treatment limits in the banking industry as of December 10, 2006. China's regulated financial sector cannot be subjected to special restrictions in order to protect Chinese banks from unfair competition from other countries' banks.⁸⁷⁰

Since China has failed to restrict national treatment in its GATS timetable, Crosby concludes that China is in no position to prevent the complete openness of its banking sector, given “Article XVII of the GATS” and China’s Accession pledges. Even though no “WTO” Member has yet filed a case addressing trade in financial services, it is envisaged that, should one be made, dispute resolution panels and the Appellate Body ‘would undoubtedly reference existing “WTO” precedents [that] give advice on the implementation of crucial “GATS” principles’.⁸⁷¹ However, there are signs that China’s government may not be on board with this proposal. The Protocol of Accession to China has a Transitional Review Mechanism (TRM). China’s “WTO” obligations must be monitored by the “WTO” General Council and its subsidiaries over the next eight years, according to the TRM. (As sought by the US and endorsed by the EU, the TRM was included into Protocol Section 18). Because it only applies to China, the country views it as discriminatory.)⁸⁷²

When the United States voiced its concerns on November 27, 2006,⁸⁷³ According to

⁸⁶⁷ Ibid

⁸⁶⁸ WT/L/432 (23 November 2001), Part II, para 1 and Annex 9, incorporating China’s GATS schedule, WT/MIN(01)/3/Add.2, 10 November 2001.

⁸⁶⁹ Crosby, Daniel C,(2008) ‘Banking on China’s WTO Commitments: “Same Bed, Different Dreams” in China's Financial Services Sector’, *Journal of International Economic Law*, vol. 11, no. 1, p. 76.

⁸⁷⁰ Ibid

⁸⁷¹ Ibid

⁸⁷² “Farah, Paolo and Cima, Elena,(2009,) ‘China’s Participation in the World Trade Organization: Trade in Goods, Services, Intellectual Property Rights and Transparency Issues’, <http://ssrn.com/abstract=1527992>.”

⁸⁷³ Crosby, Daniel C,(2008)‘Banking on China’s WTO Commitments: “Same Bed, Different Dreams”

the Chinese government, “the equity participation of a single foreign investor in a Chinese-foreign joint venture bank should not exceed 20%,” while the equity component of the entire foreign investment shall not exceed 25%.⁸⁷⁴ Investing in Chinese domestic banks by foreign equity holders was not a concern for China since it fell outside of China’s “WTO” requirements and was thus irrelevant to the TRM.⁸⁷⁵

GATS have already been examined by the present thesis writer when it comes to national security. National financial sector control may be a matter of national security, according to some. “How do you know whether you’ve done something wrong?” was his next question. China must enable foreign banks to buy them, whereas the US may ‘get away’ with not giving a port to the UAE as the DSU requires. If the DSB decides to allow this under the GATS national treatment principle, what type of global economic catastrophe would it cause? If China refuses to cooperate, the US and the EU will retaliate.

To put it another way, China would be devastated by this, and it would retaliate by selling its dollar and pound reserves. It’s horrifying to even consider such a scenario. GATS and its Accession responsibilities bear on China, but if the DSB wants to retain “WTO” membership, the GATS weight is unlikely to fall on China.

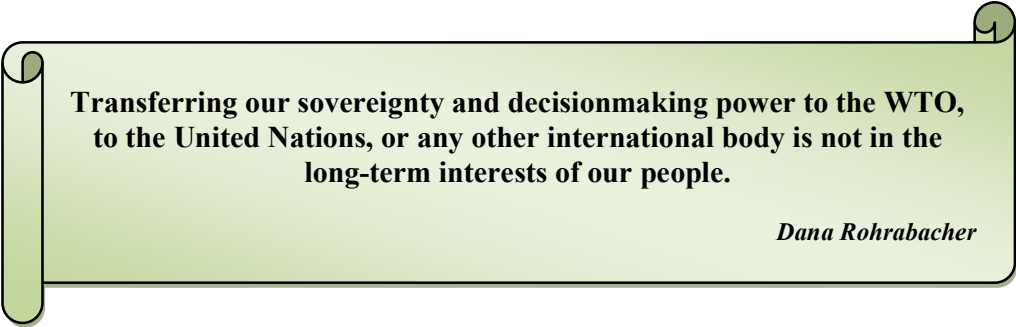
in China’s Financial Services Sector’, *Journal of International Economic Law*, vol. 11, no. 1, p. 76.

⁸⁷⁴ S/FIN/W/53 (18 October 2006) para 17.

⁸⁷⁵ Crosby, Daniel C.(2008) ‘Banking on China’s WTO Commitments: “Same Bed, Different Dreams” in China’s Financial Services Sector’, *Journal of International Economic Law*, vol. 11, no. 1, p. 90.

6.7 Summary

In light of Brazil's victory in the Uplands Cotton case, this chapter argues that the GATS now permits "developing countries" to enforce DSB decisions via the use of cross-retaliation provided they can convince the DSB panel that cross-retaliation is a required remedy. Since the Doha Declaration barred taxation on e-commerce-delivered commodities, the economies of "developing countries" have seen a significant decrease in revenues from taxes, making it clear that the GATS would provide no advantage to these countries. GATS is criticized for being (i) vague on the difference between "good" and "service"; (ii) ambiguous as the "privacy of individuals" idea; and (iii) ineffective as transcontinental treaties, cannot be universalized. In addition, this chapter commended on the Uplands Cotton case, the DSB Panel devised a method for disadvantaged states to execute DSB judgments against wealthier ones. Because India, Brazil, and China are all "developing countries," their WTO experiences are so distinct that GATS compliance (or lack thereof) does not account for the attention each gets as a complainant or defendant. The inconsistencies have been attributed to differences in their views to international relations and economics. An invasion of a nation's secondary sectors by a member state under GATS principles and with DSB authorization might risk the safety of the invaded state and have a severe effect on the economy of that country (such as China), according to the Chapter's study. The Chapter voiced its serious concern about this prospect. Developing nations, in theory, should be allowed to liberalise their services at their own speed and in their own sectors, but in fact they are frequently under pressure to do so. It is impossible for a developing nation to back out of a promise to liberalise, even if the promise is made on the basis of a "voluntary offer." Because of this, it would be very difficult for a government to amend its pledges if it subsequently realized it had made a mistake in making them, or if the country later decided to build the ability of local businesses in certain areas in which it had made commitments. This means that future policy choices are constrained by GATS' obligations. Members are obligated to enhance their commitments to liberalisation under the notion of "progressive liberalisation." With fresh rounds of talks, nations are under the impression that they must 'roll forward' their pledges that are binding, but they cannot do so without offering appropriate compensation.



**Transferring our sovereignty and decisionmaking power to the WTO,
to the United Nations, or any other international body is not in the
long-term interests of our people.**

Dana Rohrabacher

Chapter 8- Analysis and Findings

8.1 Research Design

Analyzing the data acquired in order to answer the research questions is an essential part of this study. Descriptive analysis is used to make sense of the data. This chapter focuses on analysing, presenting, and interpreting the study's findings. The findings of the questionnaire are used to conduct a quantitative analysis of the collected data.

To compute the results, data collected from 176 academicians from “developing and least developed countries”, and data collected from 265 practising doctors from “developing and least developed countries”.

Frequency counts were performed on the data received from the questionnaire. A total number of responses for each individual inquiry, or the total number of times that a specific response is repeated, was used to estimate maximum recurrence. Percentages are used to display the quantitative results of the questions. Tables and charts are used to show this data (Column, Line, and pie, Bar, Bubble, and Doughnut etc). One or more variables may be combined in a single table by the researcher, depending on the nature of the study.

8.2 Analysis of Primary data as collected by researcher

8.2.1 Experts associated with international Trade Law

Q.1. How do you see the concept of Distributive Justice in WTO.

The concept and theories of distributive justice as discussed in Chapter 4 gives the ideas underlying conventional conceptions of corrective and distributive justice typically vary for people and society. The primary objective of corrective justice deals with the problem of functionality in order to remedy breaches of individual rights that may occur in transactions.⁸⁷⁶

Based on equality and procedural justice	Discriminating towards Developing countries and Least developed Countries (LDC)
16	161

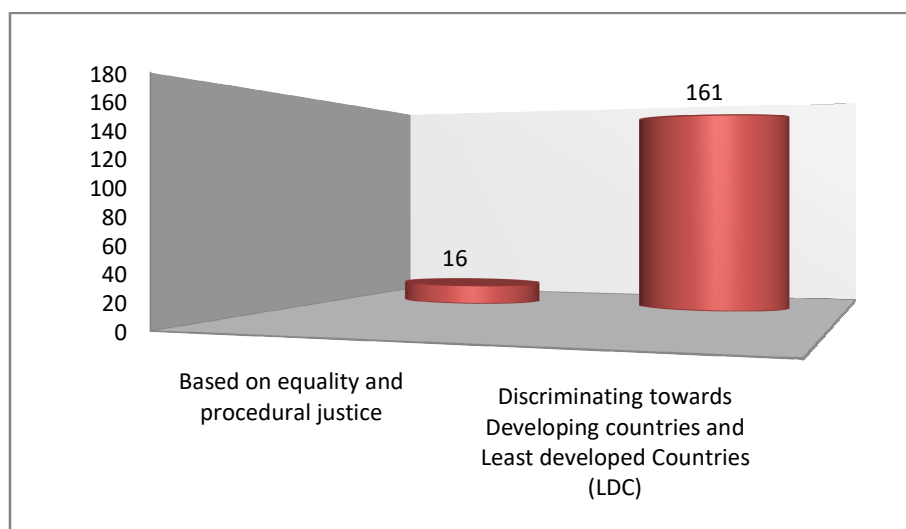


Fig. 8.2.1

Fig. 8.2.1 supports the researchers claim that International distributive justice system as applied by WTO is still bias and has implementation problem towards the members of WTO. The question was raised to the various academicians of the “developing countries and least developed countries” and out of 176, 91.47%⁸⁷⁷ answered that the

⁸⁷⁶ Also see 3.9, 4.2 of this thesis.

⁸⁷⁷ See fig.8.2.1

Distributive Justice in WTO is “Discriminating towards Developing countries and LDC”. People are treated as political citizens under the core principles of distributive justice. Corrective justice relies on individual transactions and only applies to those directly engaged, but distributive justice considers all members of society as a whole, as well as the things they own, rather than only those directly involved in a transaction.⁸⁷⁸

Q.2. Does WTO imposes a burden on Developing countries and LDC's to have their legal systems in line with WTO laws and regulations.

Many developing nations have voiced concerns that in their attempts to comply with international laws, they are forced to conform to rules that were made by foreign entities. The “WTO” was challenged early on for allowing such influence to be given to rich countries in negotiations, and complaints about this had a loud voice. African trade ministers complained about the negotiation strategies used in the “WTO’s” ministerial conferences during the “Seattle Ministerial Conference” in 1999.

S.no	Yes	No	Some times
1.	22	21	134

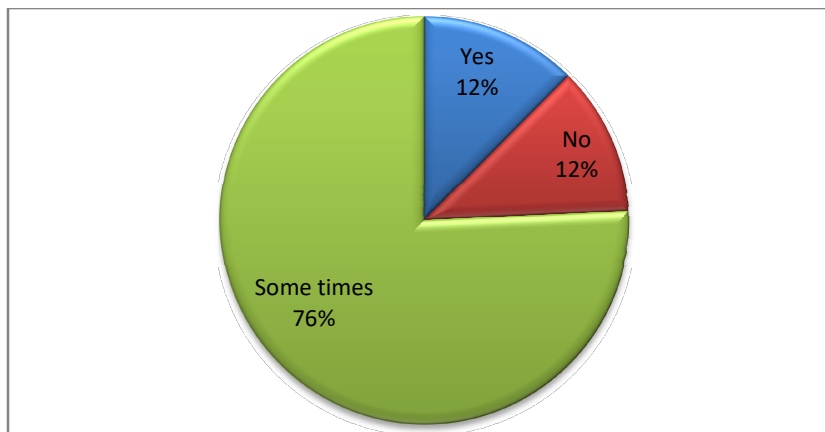


Fig.8.2.2

Fig. 8.2.1 answers the researcher’s question that “Does WTO imposes a burden on Developing countries and LDC’s to have their legal systems in line with WTO laws and regulations.” The question was raised to the various academicians of the

⁸⁷⁸ Also see 4.3 of this thesis.

“developing countries and least developed countries” and out of 176, 76% answered “sometimes”, 12% answered “yes” and 12% answered “No”.⁸⁷⁹ While there is no doubt that the WTO is based on legal systems in the US and EU, this implies that developing country delegates face legal challenges while attending “WTO” meetings.⁸⁸⁰ Developing country delegates find themselves accepting ideas when the legal consequences are unclear, a state of affairs that is due to their lack of legal knowledge, experience, and competency.⁸⁸¹

Q.3. How do you see the proposition ,that if “Developing countries and Least developed Countries” (LDC) will approach to the Dispute Settlement Mechanism(DSM) against a Developed Nation, there are high chances that the developed Nation will impose sanctions on those Developing countries and LDC's.

Even though the DSM’s enforcement mechanism is thought to be more powerful than the GATT’s, a decision in favor of a nation empowers it to respond against the country it opposes. When confronted with a developed nation, a developing country has very little leverage. Even if it rises import taxes on goods from the richer country to fight back, the infringing state’s infringement will likely continue since the other country’s increased economic loss will be too little to put a stop to it.⁸⁸²

S.no	I Agree	I disagree	It may or May not
	14	22	141

⁸⁷⁹ See fig.8.2.2

⁸⁸⁰ Also See 3.3 of this thesis

⁸⁸¹ Also See 3.7 of this thesis

⁸⁸² Also see Chapter 3.7 and Chapter 6 of this thesis.

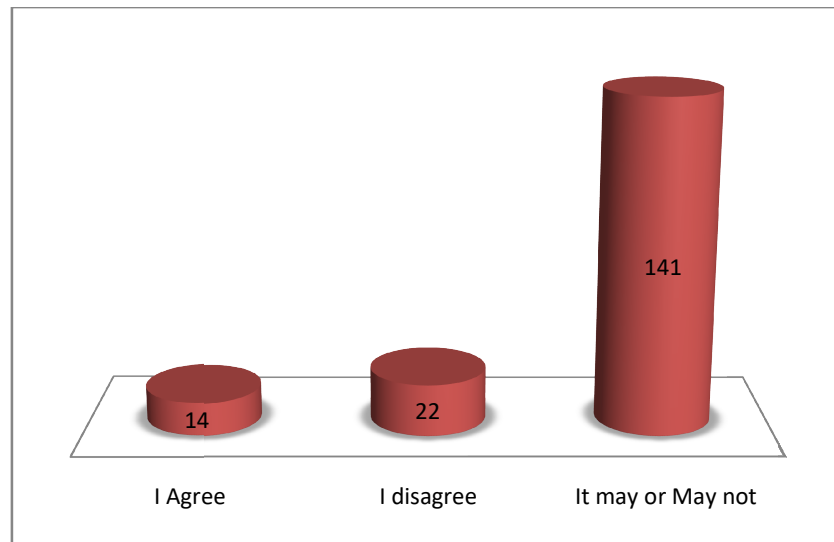


Fig.8.2.3

Fig. 8.2.3 answers the researcher’s question that “How do you see the proposition ,that if Developing countries and Least developed Countries (LDC) will approach to the Dispute Settlement Mechanism(DSM) against a Developed Nation, there are high chances that the developed Nation will impose sanctions on those Developing countries and LDC's.” The question was raised to the various academicians of the “developing countries and least developed countries” and out of 176, 80.11% answered “It may or May not”, 12.5% answered “I disagree” and 7.95% answered “I agree”.

Q.4. Can a Developing countries or Least developed Countries (LDC) could enforce decisions of Dispute settlement Body (DSB) by sanctioning trade retaliation against a developed nation.

The difficulty is that if a smaller nation, such as one in the developing world, is sued by a larger power, it may lack the economic and political incentive to go through with judgments in its favor, particularly if the verdict was against a powerful economic actor such as the United States. The DSB has very limited case history regarding cross-retaliation, which isn’t a requirement under the DSU.⁸⁸³

⁸⁸³ Also see Chapter 3.7 of this thesis.

YES	No	trade retaliation against a developed nation by a developing nation or LDC is always detrimental to the developing nation or LDC
102	53	22

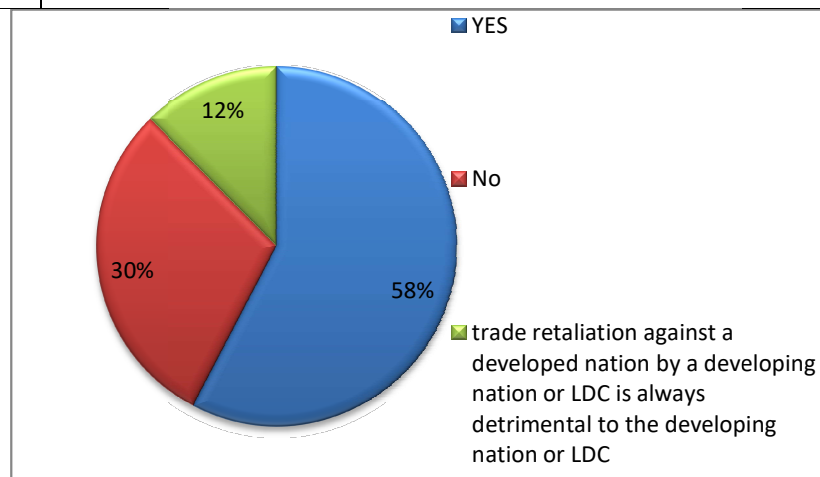


Fig.8.2.4

Fig.8.2.4 answers the researcher's question that "Can a Developing countries or Least developed Countries (LDC) could enforce decisions of Dispute settlement Body (DSB) by sanctioning trade retaliation against a developed nation." The question was raised to the various academicians of the "developing countries and least developed countries" and out of 176, 58% answered "yes", 30% answered "No" and 12% answered "trade retaliation against a developed nation by a developing nation or LDC is always detrimental to the developing nation or LDC."

Q.5. Is there a need to have a "fair and just" new International Trade regime on the principle of international Distributive Justice.

Too far, there has been no true and unified approach to international law, which has resulted in a great deal of conflict across theoretical schools in political and economic order. Several well-known justice school theorists questioned the importance, inspiration, and supremacy of the ideals of justice in international order in the international arena.⁸⁸⁴ The emergence of international problems and global challenges, on the other hand, necessitated a global approach to problem solving. Global

⁸⁸⁴ Also see Chapter 4 of this thesis.

frameworks are no longer possible to advocate for because of the rise of international organizations and activities in recent decades. It is also important to note that in the current world context, justice is more important than ever. International law has inherited many injustices and unfairness's as a basis for regulating international actors' actions, which makes it even more critical.

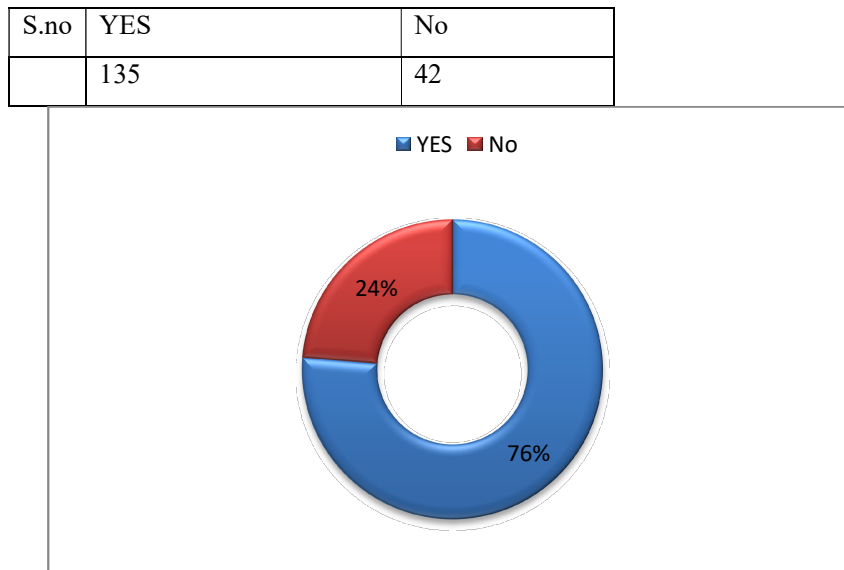


Fig.8.2.5

Fig.8.2.5 answers the researcher's question that "Is there a need to have a "fair and just" new International Trade regime on the principle of "international Distributive Justice". The question was raised to the various academicians of the "developing countries and least developed countries" and out of 176, 76% answered "Yes" and 24% answered "No".

The current international order has been unfairly shaped by colonialism's shady history and the widespread and systematic violations of human rights that followed it. In addition, after the "Second World War", the emergence of new international organizations ushered in a new system of international law, which influenced the process of global wealth distribution.⁸⁸⁵

⁸⁸⁵ Also see Chapter 4 of this thesis.

Q.6. The United States opposition to grant Compulsory licence during COVID-19 pandemic was gross Human Rights Violation and in violation to Article 31 of TRIPS.

The compulsory licensing of patent medicines has met with extreme criticism, and the TRIPs clause is the primary target of that. Article 31 gives members the leeway to pass legislation that enables compulsory licensing under certain conditions. The content of this Article is summarized in the sections which describe how licensing rights are obtained, how long they last, and how much compensation they bring. The waiver on “Article 31(f) of the TRIPS agreement”, which allowed compulsory licensing of critical drugs, including those used to treat HIV/AIDS/ Covid-19 was formalized in 2005 at the “Hong Kong ministerial” meeting of the “WTO”.⁸⁸⁶

YES	No
137	40

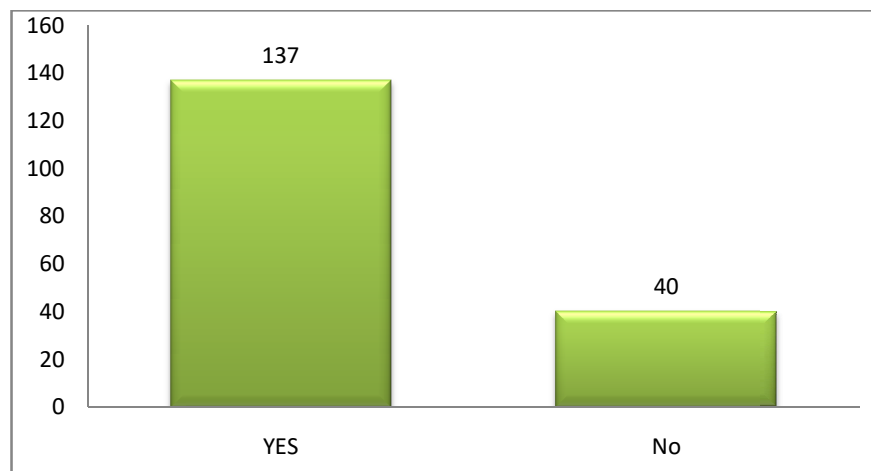


Fig.8.2.6

Fig.8.2.6 answers the researcher’s question that “The United States opposition to grant Compulsory licence during COVID-19 pandemic was gross Human Rights Violation and in violation to Article 31 of TRIPS.” The question was raised to the various academicians of the “developing countries and least developed countries” and out of 176, 77.84% answered “Yes” and 22.72 % answered “No”. In the event of a crisis,

⁸⁸⁶ Also see Chapter 3.5 of this thesis.

compulsory licensing permits the manufacture of the required medicines. The country's government may import medicines if the local pharmaceutical sector is non-existent and they are being produced under compulsory license. On the surface, the "compulsory licensing" exemption seems to be in the interests of the developing nations in improving public health.⁸⁸⁷

Q.7.Had United States (US) not opposed the compulsory licencing during covid-19; we would have got the vaccine as early as to overcome the radical effect of Covid-19.

During a global health crisis like the "COVID-19 pandemic", when pharmaceutical companies refuse to participate in international, non-exclusive licencing agreements, governments should work to find automated and fast solutions to intellectual property problems. For example, certain obligations under the "TRIPS Agreement" and trade agreements concerning the grant and enforcement of intellectual property rights on essential health technologies, materials, and products should be suspended in order to facilitate the open sharing of health technologies by all parties.⁸⁸⁸

S.no	YES	No
	149	28

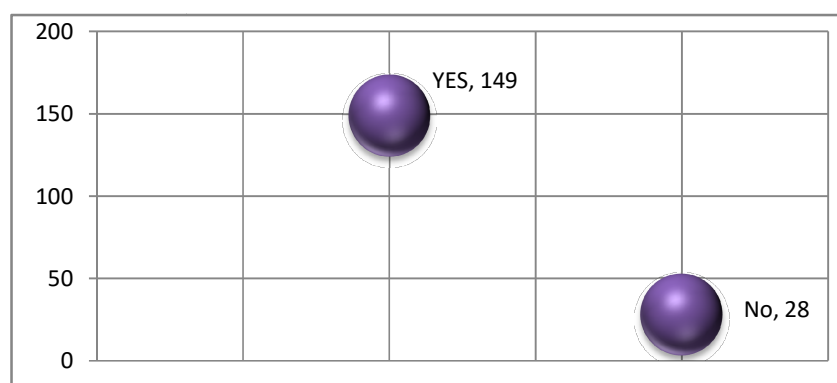


Fig.8.2.7

Fig.8.2.7 answers the researcher's question that "Had United States (US) not opposed the compulsory licencing during covid-19; we would have got the vaccine as early as to overcome

⁸⁸⁷ Also see Chapter 5 of this thesis.

⁸⁸⁸ Also see chapter 5.11 of this thesis.

the radical effect of Covid-19.” The question was raised to the various academicians of the “developing countries and least developed countries” and out of 176, 84.65% answered “Yes” and 15.90% answered “No”.⁸⁸⁹ South Africa and India’s interim TRIPS waiver proposal for COVID-19, which is being pushed by the two countries, presents a critical legal option for states seeking to unite and combat IP monopolies in the face of an epidemic. In spite of this, a tiny group of nations has continued to use delay tactics to obstruct the idea seven months after it was initially submitted. As the COVID-19 epidemic continues to flare over the globe, all countries should embrace and back this essential proposition.⁸⁹⁰

Q.8. United States and other Developed countries opposed Compulsory licensing only to boost and appease their pharmaceutical sector despite the fact that world was in dire need of low cost manufactured Vaccines during pandemic COVID-19.

A worldwide pandemic presents a number of unique issues that the existing rules of compulsory licencing under the “TRIPS Agreement” were not intended to solve, and several clauses have limitations that are inapplicable in the case of a pandemic or other emergency. The use of “compulsory licencing” for access to medications has also been incorrectly politicized, and nations are deterred from using it out of fear of trade reprisal, which is unjustified. Due to demands from their trade partners and pharmaceutical industries, poor nations have historically been deliberately prevented from using compulsory licencing for access to medications. Pharmaceutical firms are continuing to exert pressure on governments in the wake of the COVID-19 outbreak, urging them to utilize compulsory licencing. For example, Gilead is challenging the Russian government for giving a forced licence for the drug remdesivir without the company’s consent.⁸⁹¹

⁸⁸⁹ Fig.8.2.7.

⁸⁹⁰ Also see chapter 5.12 of this thesis.

⁸⁹¹ Also see chapter 5 of this thesis.

S.no	YES	No
1	170	7

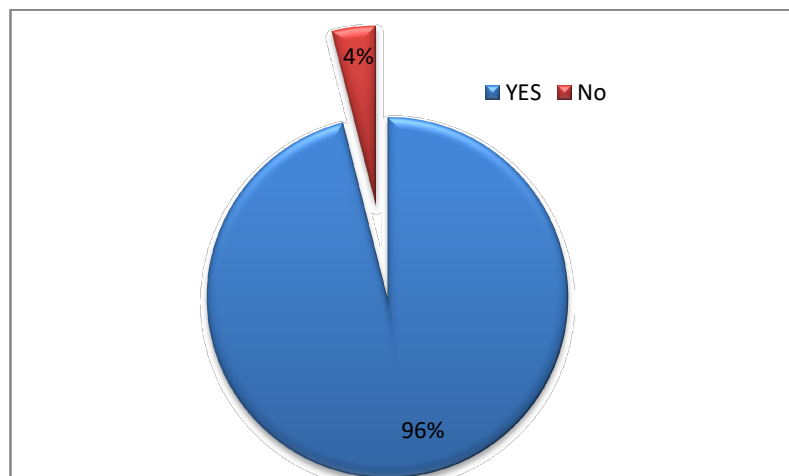


Fig. 8.2.8

Fig.8.2.8 answers the researcher’s question that “United States and other Developed countries opposed Compulsory licensing only to boost and appease their pharmaceutical sector despite the fact that world was in dare need of low cost manufactured Vaccines during pandemic COVID-19.” The question was raised to the various academicians of the “developing countries and least developed countries” and out of 176, 96% answered “Yes” and 4% answered “No”.⁸⁹² PHRMA and BIO, the trade association for the pharmaceutical sector in the United States, each year submit complaints with the United States Trade Representative (USTR) citing foreign governments’ consideration and implementation of compulsory licencing policies. As pharmaceutical companies insisted, the annual United States Trade Representative “Special 301 Report” on intellectual property enforcement has threatened trade sanctions against various other nations for issuing compulsory licences to permit the delivery of lower-priced copies of desperately needed “HIV, cancer, viral hepatitis and other diseases” medications while treatment was being provided for The European Union’s main regulatory agency has also raised alarm and given warnings to countries that have embraced the practice of compulsory licencing.⁸⁹³

⁸⁹² Fig. 8.2.8

⁸⁹³ Also see chapter 5 of this thesis.

Q.9.Dumping the commodities in developing and Least Developed Nations only destroy domestic economy of developing and Least Developed Nations as they are unable to go against any developed Nation (Fair of retaliation).

Dumping is the practise of exporting goods at a lower price than they would be sold for in the domestic market. When dumping harms an industry in the territory of a GATT member, the “General Agreement on Tariffs and Trade” (GATT) allows signatories to impose tariffs on imports to compensate.

S.no	YES	No
	171	6

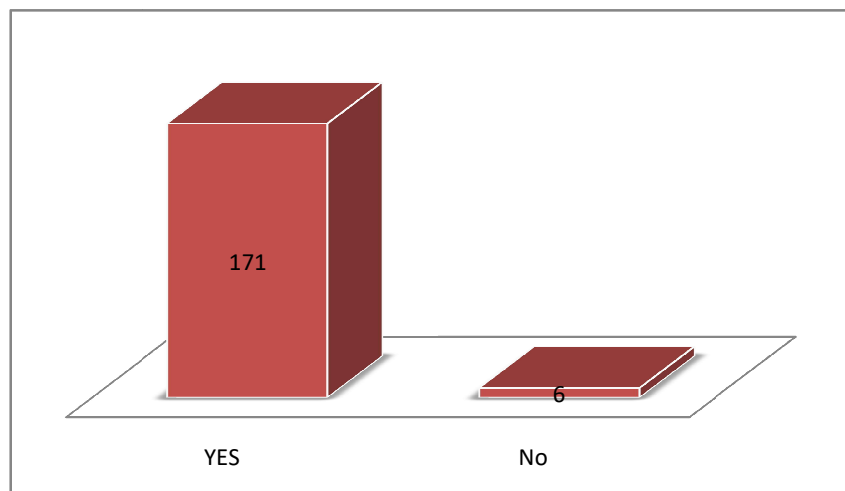


Fig. 8.2.9

Fig.8.2.9 answers the researcher’s question that “Dumping the commodities in developing and Least Developed Nations only destroy domestic economy of developing and Least Developed Nations as they are unable to go against any developed Nation (Fair of retaliation).” The question was raised to the various academicians of the “developing countries and least developed countries” and out of 176, 97% answered “Yes” and 3% answered “No”.⁸⁹⁴ Allowing dumping to proceed unchecked might jeopardise the existing liberal multilateral trade system's political

⁸⁹⁴ See Fig. 8.2.9.

consensus because it can lead national industries to be eroded or destroyed for reasons unrelated to regular market competition. This century has seen many instances of dumping harming or destroying businesses deemed essential to national economic well-being and national security, which may intensify existing friction.

Q.10. Non-granting of Compulsory licence to “developing and Least Developed Nations” adversely affect the economy of these countries.

It is clear that the price of medication may be brought down if developing nations utilise compulsory licencing to increase competition. Assuming this is the case, various markets will likely have different pricing. Strict intellectual property protection laws in industrialised countries have contributed to the stability of this arrangement. As a reminder, pharmaceutical prices are set in accordance with the realities of the global pharmaceutical market in industrialised nations. A major advantage of requiring mandatory licencing is that it allows a large portion of the population greater access to medications.

S.no	YES	No
	141	36

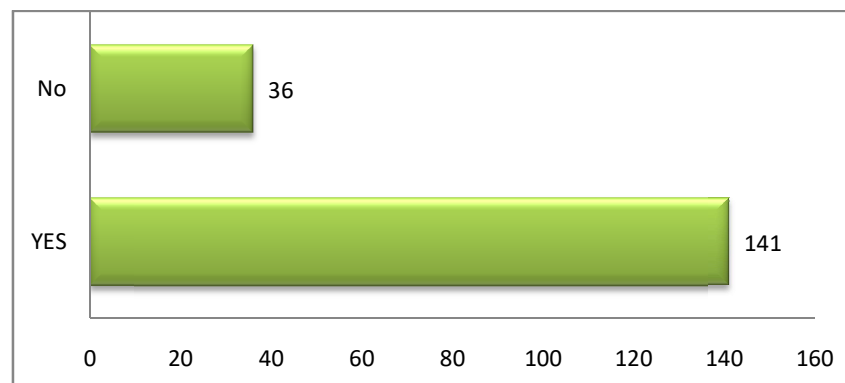


Fig. 8.2.10

Fig.8.2.10 answers the researcher’s question that “Non-granting of Compulsory licence to developing and Least Developed Nations adversely affect the economy of these countries.” The question was raised to the various academicians of the

“developing countries and least developed countries” and out of 176, 80% answered “Yes” and 20% answered “No”.⁸⁹⁵ Compulsory licensing's impact on attracting foreign investment is debatable. Although studies have attempted to correlate intellectual property rights protection with an increase in the flow of foreign capital, none have come up with a solid conclusion as yet. In reality, investment decisions are impacted by an assessment of a country's economic development potential and the quality of its institutions. High intellectual property protection does not ensure that technology will be transferred to underdeveloped nations. According to current legislation, developing nations should adopt compulsory licencing where it is appropriate to do so to prevent exploitation.

⁸⁹⁵ Fig. 8.2.10

8.2.2 Experts from medical Industry

Q.1. How do you see the role of United Nations and its subsidiary bodies during Covid-19 pandemic.

Human life has been devastated by the COVID-19 epidemic, which poses a major threat to public health, food systems, as well as the world of labour. By year's end, the number of people who are undernourished is expected to rise by up to 132 million, putting tens of millions of people at danger of sliding into severe poverty. The economic and social impact is catastrophic. In these emergency situations the UN and its subsidiary bodies was supposed to play an important role to overcome the impact of this catastrophic.

S.no	Satisfactory	Unsatisfactory
	78	187

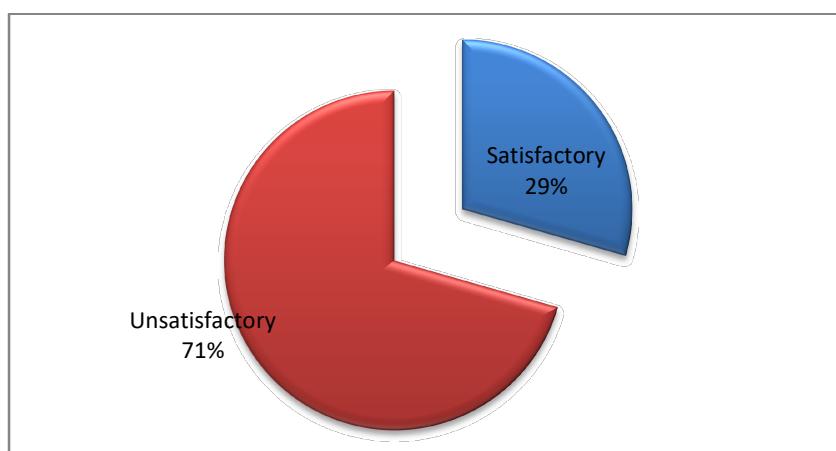


Fig.8.3.1

Fig. 8.3.1 answers the researcher's question that "How do you see the role of United Nations and its subsidiary bodies during Covid-19 pandemic." The question was raised to the various practicing doctors of the "developing countries and least developed countries" and out of 265, 71% answered "Unsatisfactory" and 29% answered "Satisfactory".⁸⁹⁶ COVID-19 has a greater impact on countries who are already coping with humanitarian crises or catastrophes. It is vital to act quickly in the

⁸⁹⁶ Fig.8.3.1

face of the epidemic while also ensuring that humanitarian assistance and recovery aid reach those who need it most.

Q.2. United States and other Developed countries opposed compulsory licensing only to boost and appease their pharmaceutical sector despite the fact that world was in dire need of low cost manufactured Vaccines during pandemic COVID-19.

A worldwide pandemic presents a number of unique issues that the existing rules of compulsory licencing under the “TRIPS Agreement” were not intended to solve, and several clauses have limitations that are inapplicable in the case of a pandemic or other emergency. The use of “compulsory licencing” for access to medications has also been incorrectly politicized, and nations are deterred from using it out of fear of trade reprisal, which is unjustified. Due to demands from their trade partners and pharmaceutical industries, poor nations have historically been deliberately prevented from using compulsory licencing for access to medications. Pharmaceutical firms are continuing to exert pressure on governments in the wake of the COVID-19 outbreak, urging them to utilize compulsory licencing. For example, Gilead is challenging the Russian government for giving a forced licence for the drug remdesivir without the company’s consent.⁸⁹⁷

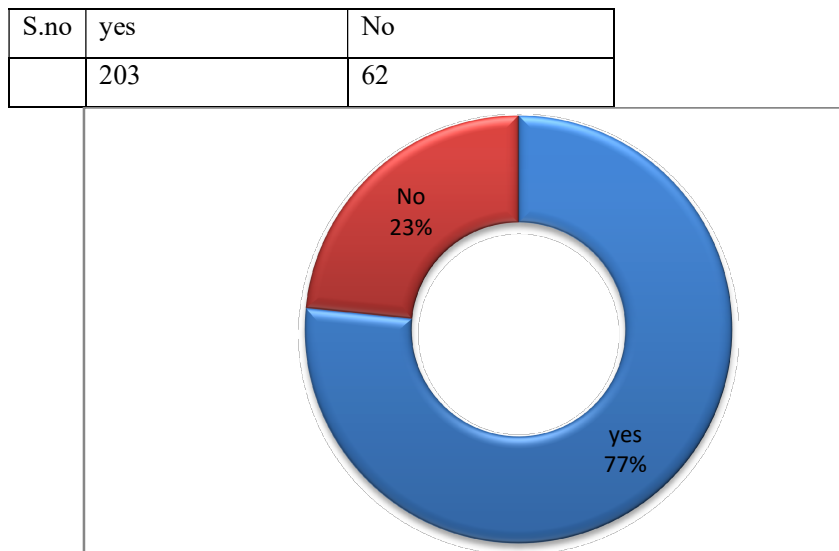


Fig. 8.3.2

⁸⁹⁷ Also see chapter 5 of this thesis.

Fig.8.3.2 answers the researcher’s question that “United States and other Developed countries opposed Compulsory licensing only to boost and appease their pharmaceutical sector despite the fact that world was in dire need of low cost manufactured Vaccines during pandemic COVID-19.” The question was raised to the various practicing doctors of the “developing countries and least developed countries” and out of 265, 77% answered “Yes” and 23% answered “No”.⁸⁹⁸ PHRMA and BIO, the trade association for the pharmaceutical sector in the United States, each year submit complaints with the United States Trade Representative (USTR) citing foreign governments’ consideration and implementation of compulsory licencing policies. As pharmaceutical companies insisted, the annual United States Trade Representative “Special 301 Report” on intellectual property enforcement has threatened trade sanctions against various other nations for issuing compulsory licences to permit the delivery of lower-priced copies of desperately needed HIV, cancer, viral hepatitis and other diseases medications while treatment was being provided for The European Union’s main regulatory agency has also raised alarm and given warnings to countries that have embraced the practice of compulsory licencing.⁸⁹⁹

Q.3. Had United States (US) not opposed the compulsory licencing during covid-19, we would have got the vaccine as early as to overcome the radical effect of Covid-19.

During a global health crisis like the “COVID-19 pandemic”, when pharmaceutical companies refuse to participate in international, non-exclusive licencing agreements, governments should work to find automated and fast solutions to intellectual property problems. For example, certain obligations under the “TRIPS Agreement” and trade agreements concerning the grant and enforcement of intellectual property rights on essential health technologies, materials, and products should be suspended in order to facilitate the open sharing of health technologies by all parties.⁹⁰⁰

⁸⁹⁸ Fig. 8.3.2

⁸⁹⁹ Also see chapter 5 of this thesis.

⁹⁰⁰ Also see chapter 5.11 of this thesis.

S.no	yes	No
	224	41

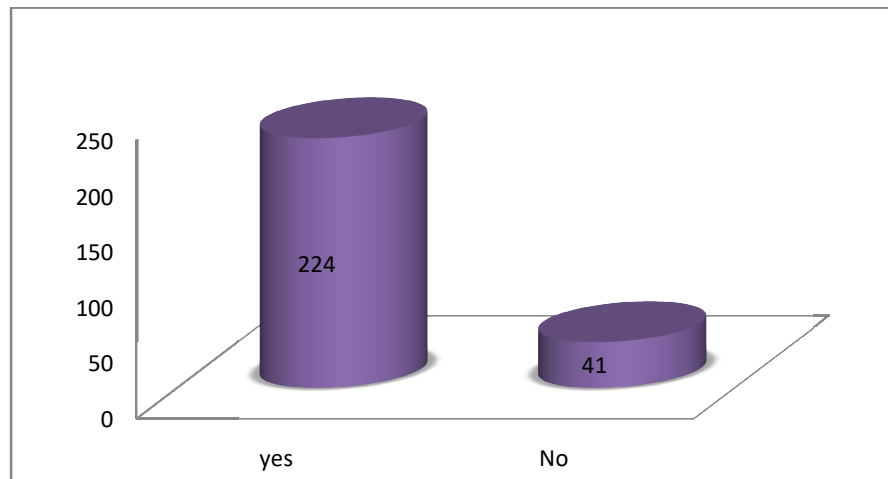


Fig.8.3.3

Fig.8.3.3 answers the researcher’s question that “Had United States (US) not opposed the compulsory licencing during covid-19; we would have got the vaccine as early as to overcome the radical effect of Covid-19.” The question was raised to the various practicing doctors of the “developing countries and least developed countries” and out of 265, 84.53% answered “Yes” and 15.46% answered “No”.⁹⁰¹ South Africa and India’s interim TRIPS waiver proposal for COVID-19, which is being pushed by the two countries, presents a critical legal option for states seeking to unite and combat IP monopolies in the face of an epidemic. In spite of this, a tiny group of nations has continued to use delay tactics to obstruct the idea seven months after it was initially submitted. As the COVID-19 epidemic continues to flare over the globe, all countries should embrace and back this essential proposition.⁹⁰²

⁹⁰¹ Fig.8.3.3

⁹⁰² Also see chapter 5.12 of this thesis.

Q.4. If Developed countries like USA, UK, France etc will share their pharmaceutical research and technology with developing countries like India ,Pakistan , Bangladesh, African countries etc ,there would be low mortality rate during emergencies like a pandemic.

Because of a lack of availability and unequal distribution, vaccine inequality exists. In other cases, wealthy nations acquired twice as many dosages as they needed to cover their whole populations. COVAX, a worldwide effort to acquire and distribute vaccinations, was unable to meet its modest objective of reaching 20% of lower-income country populations this year. When Pfizer committed to sell just 40 million doses of COVAX, they supplied little over 1 million by the middle of May.

S.no	yes	May be	It will not effect
	165	86	14

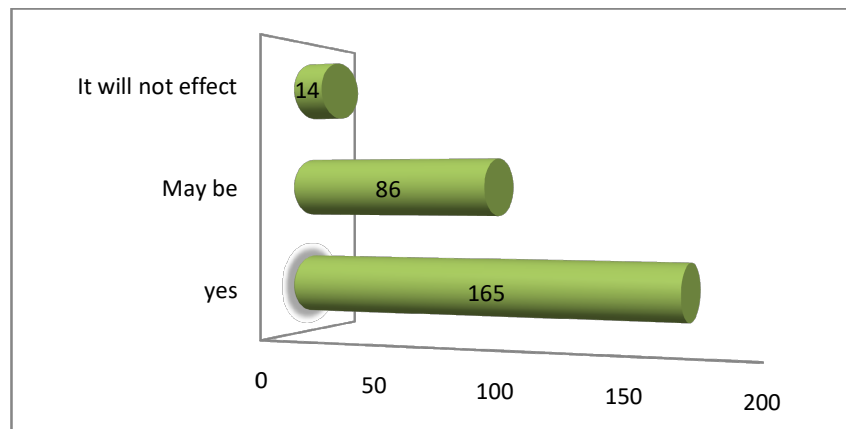


Fig.8.3.4

Fig.8.3.4 answers the researcher’s question that “If Developed countries like USA, UK, France etc will share their pharmaceutical research and technology with developing countries like India, Pakistan, Bangladesh, African countries etc, there would be low mortality rate during emergencies like a pandemic.” The question was raised to the various practicing doctors of the “developing countries and least developed countries” and out of 265, 62% answered “Yes”, 32% answered “May be” and 5% answered “It will not affect”. Uneven distribution of Covid-19 vaccinations persists. According to the World Health Organization (WHO), more than 5 billion vaccination doses have been provided in only 10 nations. Only 2% of Africa's

population is completely vaccinated, despite the fact that several wealthy nations have started administering “booster” doses for the third time. For those who haven't yet received their first dose of vaccination, the WHO director-general has asked for a halt on booster doses of the disease-fighting immunizations. It is via the World Trade Organization (WTO) that states may coordinate their trade policies and procedures. Historically, it has prioritised commerce and intellectual property protection above public health, environmental protection, and human well-being. When a pandemic has already claimed the lives of 4.5 million people, this pattern of public reaction has proved devastating.

Q.5. Despite the formal request from India, the United states showed reluctance to share Covid -19 Vaccine research with developing countries and least developed countries. What is your take on it as a practicing doctor? Was this a gross human rights violation?

S.no	yes	No
	246	20

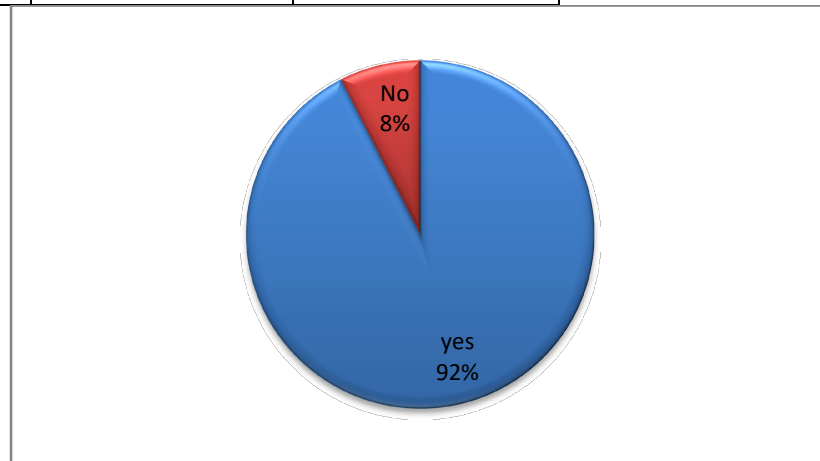


Fig.8.3.5

Fig.8.3.5 answers the researcher’s question that “Despite the formal request from India, the United States showed reluctance to share Covid -19 Vaccine research with developing countries and least developed countries. What is your take on it as a practicing doctor? Was this a gross human rights violation?”. The question was raised

to the various practicing doctors of the “developing countries and least developed countries” and out of 265, 92% answered “Yes” and 8% answered “No”.

Q.6. During emergencies like Covid-19 pandemic, the barriers to use the research of any other country must be totally eradicated to save the humanity and human race.

COVID-19 pandemic reaction requires prompt availability to inexpensive medical supplies such as diagnostic kits; medical masks; other personal protection equipment; and ventilators, Vaccinations and medications, according to the proponents.” As a result of the worldwide demand, several nations are experiencing shortages, making it difficult to react effectively to the epidemic. As novel diagnostics, treatments, and vaccines for COVID-19 were being developed, there were substantial worries regarding how they would be made accessible quickly, in sufficient numbers, and at a reasonable price to fulfil worldwide demand for these products.

S.no	yes	No
	249	16

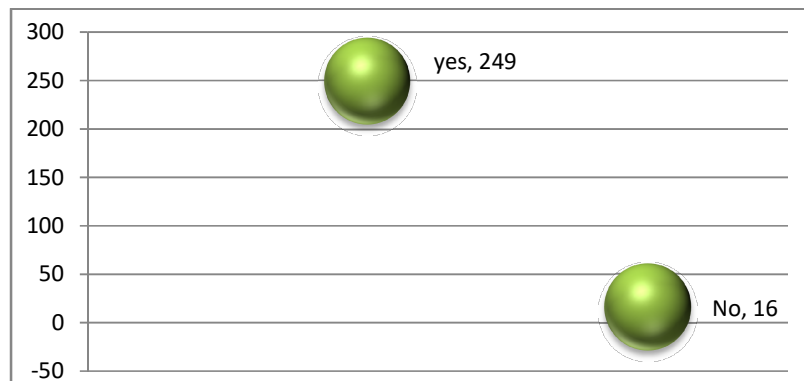


Fig.8.3.6

Fig.8.3.6 answers the researcher’s question that “During emergencies like Covid-19 pandemic, the barriers to use the research of any other country must be totally eradicated to save the humanity and human race.” The question was raised to the various practicing doctors of the “developing countries and least developed countries”

and out of 265, 93% answered “Yes” and 7% answered “No”.⁹⁰³

Sections 1 and 4 of the “TRIPS Agreement”, which deal with copyright and associated rights, as well as Sections 5 and 7 of the agreement, which deal with patents and hidden information, would all be exempt from the waiver. Once the General Council has settled on a period of time, it would endure until universal vaccination has been achieved and the majority of people on Earth are resistant to the disease. The waiver would be reviewed by members every year until it expired. According to the proponents of Article 31bis, an unique obligatory licencing procedure for pharmaceutical items, many governments, particularly those in developing countries, may experience institutional and legal issues when adopting TRIPS flexibilities. The World Trade Organization (WTO) has a responsibility to respond to the global demand to battle the epidemic. The WTO's attempts to reconstruct the economies harmed by COVID-19 will fail if it does not act immediately to safeguard the lives of people who will create these economies. They came to the conclusion that it was time for the members to assume collective responsibility and prioritise the lives of people before everything else.

Q.7. Did United Nations and other intergovernmental organizations like WHO ,WTO have failed to provide help to developing countries and Least developed countries in vaccine manufacturing during Covid -19 Pandemic.

COVID-19 has a greater impact on countries who are already coping with humanitarian crises or catastrophes. It is vital to act quickly in the face of the epidemic while also ensuring that humanitarian assistance and recovery aid reach those who need it most.

S.no	I agree	I disagree
	227	38

⁹⁰³ Fig.8.3.6

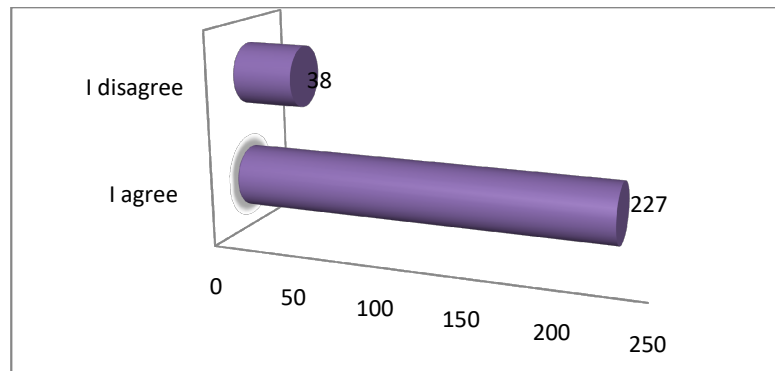
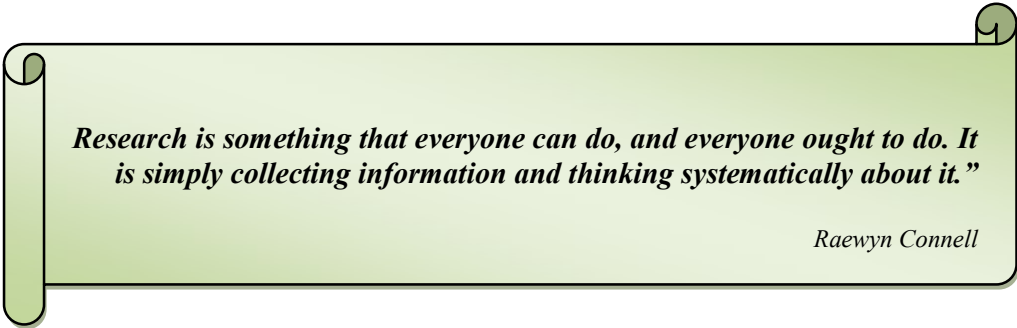


Fig.8.3.7

Fig. 8.3.7 answers the researcher’s question that “Did United Nations and other intergovernmental organizations like WHO ,WTO have failed to provide help to developing countries and Least developed countries in vaccine manufacturing during Covid -19 Pandemic.” The question was raised to the various practicing doctors of the “developing countries and least developed countries” and out of 265, 85% answered “I agree” and 15% answered “I disagree”.⁹⁰⁴

Human life has been devastated by the COVID-19 epidemic, which poses a major threat to public health, food systems, as well as the world of labour. By year's end, the number of people who are undernourished is expected to rise by up to 132 million, putting tens of millions of people at danger of sliding into severe poverty. The economic and social impact is catastrophic. In these emergency situations the UN and its subsidiary bodies was supposed to play an important role to overcome the impact of this catastrophic.

⁹⁰⁴ Fig.8.3.7



Research is something that everyone can do, and everyone ought to do. It is simply collecting information and thinking systematically about it.”

Raewyn Connell

Chapter 9- conclusion and Suggestions

9.1 Conclusion

There are many issues that developing nations have with the “WTO’s” legal framework, all of which are related to the disadvantages that it places on their chances of economic progress via trade. There is a lack of justice and fairness when certain “WTO” members suffer disadvantage. That omission is an indictment of the “WTO’s” legal framework, and it undermines its purpose. However, the adoption of the idea of international distributive justice into the “WTO” legal structure may remedy this issue. For the sake of demonstrating the feasibility of making this concept an overarching guiding principle for “WTO” trade agreements, this thesis advocated all-encompassing climate legislation as a standalone goal in and of itself. UN action is only necessary in order to control the operations of non-state enterprises that are responsible for excessive GHG emissions in order to comply with the new climate legislation, which is fully compliant with the GATT and “WTO” Agreements. With the new climate legislation, BITS can no longer enforce investor/host-state contracts that restrict the host country's capacity to enact environmental protection measures (ICSID).

The research questions:

The answers to five questions⁹⁰⁵ have been recognized as being necessary for this thesis's research endeavors

First Question: "Whether the provisions of "WTO" relating to trade by "Least Developed Countries" and "developing countries" are Discriminative in nature."

Relevant objective: To analyze the framework of WTO in relation to Least developed countries and Developing Countries.

This question is answered in the thesis. this is argued that the GATS now permits "developing countries" to enforce DSB decisions via the use of cross-retaliation, provided they can convince the DSB panel that cross-retaliation is a required remedy, but the cross retaliation by developing country or LDC is always detrimental to the retaliating country as it would have negligible impact on developed country. Developed country having big economy and market can compensate the loss anywhere else if the developing country or LDC will go for retaliation.

The provisions related to SDT, "Generalized System of Preferences" does not recompense the "developing countries". The obligation on "developing countries" and LDC to get their domestic legislation in compliance with WTO agreement actually discourages the development of "developing countries" and "Least Developed Countries". Failure of "WTO" agreements to consider the interests of "developing countries" and LDC relating to TRIPs frustrate the provisions relating to technology transfer and it inversely discourages the trade related to intellectual property. The enforcement of WTO legal regime which is based on legal system of developed countries put a huge burden on "developing countries" financially.

In Doha Round the "developing countries" as well as LDC have expressed many concerns about the inequalities in the WTO system. "The most important is related to substantive law pertaining to Intellectual Property; agriculture and trade Dispute remedies which in "WTO" legal framework is supporting developed countries". The multilateral trade and other concerns expressed by "developing countries" regarding inequalities in "WTO" regime was focal point of "World Trade Organization"

⁹⁰⁵ Section 1.5 of chapter 1

negotiations with developing countries. The inequalities regarding the substantive law like intellectual property and remedies provided by WTO regime in case there is dispute between “developing countries” and developed countries.

The new rules drafted after Doha talks could have been better implemented if there could have been an unbiased enforcing institution in “WTO”.⁹⁰⁶ If the majority of its Members do not have effective ways of enforcing compliance from other Members, it might be considered that the system as a whole has a problem. Contrary to the “WTO” DSB’s multilateral authority, the DSU’s remedies are essentially unilateral in nature, and their effectiveness is based on each country’s economic strength. To put it another way, the DSU is still restricted by politics and does not work in isolation, since present enforcement standards favour nations with economic and political might. As previously stated, the S&D treatment clause does little to address the disparity created by “WTO” “rules.”

The second question “On a level with developed countries, how did developing countries tackle their accession challenges?”

Relevant objective: To appraise the overall influence of WTO on Developing countries and Least developed countries after accession.

The UAE, as a wealthy nation, was able to hire legal experts to oversee the revision of its legal framework in order to meet “WTO” requirements. The duty to guarantee that the pursuit of “WTO” compliance remained compatible with Shariah was no minor task in this attempt. Accreditation was aided rather than impeded by the political stability of the United Arab Emirates. It wasn’t like this in Bangladesh, where a lack of a stable government was a concern. The fact that this nation is a parliamentary democracy did not help it in the process of joining the EU. As a least-developed nation, it has until 2016 to reach full “WTO” compliance, despite the fact that it has yet to do so. In contrast, Bangladesh does not have the same motivation that Brazil did for adopting, for example, TRIPs-compliant policies in order to preserve its own patents and grow its pharmaceutical business. As a result, TRIMs compatibility is not an incentive for the UAE to boost its investment industry.

⁹⁰⁶ Ibid

The Third Question “Whether the “WTO’s” Dispute Settlement process is skewed towards developing nations, and what obstacles does this imbalance generate for them.”

Relevant objective: To analyze the WTO’s Dispute settlement Mechanism and its impact on developing nations by assessing the WTO written documents.

Amrita Narlikar⁹⁰⁷ gave the majority of the information needed. According to her, in the DSM, member states that are manifestly unequal are forced to share the same status. The fairness of the process is certain, but the fairness of the conclusion is not, in her opinion. Article 15 of the Antidumping Agreement requires developed countries to “actively conduct an investigation of options with a desire to attain a good end,” but the Panel in the EC – Bed Linen case⁹⁰⁸ ruled that no “outcome” is anticipated by this clause, but rather a need to follow specific processes in search of an outcome that is helpful. As a matter of fact, the DSM is not concerned in preventing conflicts that impede the development of underdeveloped nations from taking place.⁹⁰⁹ Because it is founded on Western legal notions, the DSM system for resolving disputes is unfamiliar to countries outside of the West. Among other things, this is cited as a contributing factor to the limited frequency of their DSB occurrences. It is likely that Brazil’s recent DSM victory in the US–Upland Cotton case⁹¹⁰ will alter this position. In developing countries, the expense of DSM proceedings often exorbitant, what matters is that a developing nation can only profit from the result if it can retaliate against the rich country that caused the conflict in the first place. In most cases, this is not the case at all, since it possesses the necessary tools of retribution. It has been pointed out by Alavi⁹¹¹ that the SDT requirements have not been implemented by the DSB to their full extent. A third-party complaint before the DSB is allowed under Article 10 of the DSU, and “WTO” regulations 21.2 and 21.2 of the DSE and Article

⁹⁰⁷ See chapter 6 of this thesis

⁹⁰⁸ *ibid*

⁹⁰⁹ *Ibid*

⁹¹⁰ *Ibid*

⁹¹¹ *Ibid*

7 of the SCM Agreement allow for the SDT of LDCs.⁹¹²

The fourth question Whether the “WTO” agreement, TRIPs, GATS, and DSM framework principles be amended to provide equitable opportunities.

Relevant Objective – To analyze the effect of TRIPS on developing nations.

It is simple, the worries of developing nations will not be alleviated by any revisions to Agreements. According to a new definition of “developing nations,”⁹¹³ “developing countries” must be exempted from the responsibilities imposed by “WTO” Agreements based only on their GDP position. In addition to removing obstacles to their economic growth, this absolution shields them against lawsuits brought by the DSM. It is evident from analyzing the advantages of “WTO” agreements on the UAE, Brazil and Bangladesh that they only help emerging states that can trade.⁹¹⁴ A UN commitment to facilitate development was also brought up, and it was speculated that the TCC’s resistance to this obligation is what’s preventing the “WTO” Agreements from fulfilling their obligation.⁹¹⁵ The TRIMs, TRIPs, and GATS were all brought up in response to this question. In 1996, the United Arab Emirates became a member of the WTO. Only a few restrictions on foreign equity involvement and a lack of competition laws kept it from becoming completely “WTO”-compliant by 2006. The country's Agency Act grants “preferential treatment” to GCC countries as part of a RTA. However, no DSB action against the country has been taken, and none is likely in the immediate future. Its most difficult task was ensuring that its overseas banking operations were Shariah compliant.⁹¹⁶ In addition, its obligations for pharmaceutical product compulsory licencing have not yet been completely complied with.⁹¹⁷ However, the DSB has taken no action in this case, possibly because this nation has a generic drug manufacturing sector and is generally a good customer of pharmaceutical corporations in industrialized states.

Anticipating increased R&D and the subsequent growth of the country’s patent and

⁹¹² Ibid

⁹¹³ See chapter 3 of this thesis.

⁹¹⁴ See chapter 3.7 of this thesis.

⁹¹⁵ Ibid

⁹¹⁶ See chapter 3.6 of this thesis.

⁹¹⁷ ibid

pharmaceutical industries, Brazil passed its Industrial Property Law in 1996. It just took a matter of days to becoming TRIPs-compliant.⁹¹⁸

When the MFA expired in 2005 and the ATC went into effect, Bangladesh's biggest industry, the RMG, saw its foreign market base all but obliterated. As a result of the ATC's regulatory barrier to market participation, this nation had to rely on an IMF loan to save its RMG industry.⁹¹⁹ There is a patent legislation in place in this nation, but it only pertains to the manufacturing process of pharmaceuticals, not the actual drugs themselves. Due to the necessity to amend the Patents and Designs Act 1911, it produces generic medications without a licence. Until 2016, the nation is exempt from becoming TRIPs-compliant due to its status as a least-developed country, although it has already drafted its own Patent Act 2007.⁹²⁰ The Drug (Control) Ordinance of 1982 is also non-TRIPS compliant.

The fifth question: 'Whether the legal provisions governing "WTO" function is made to bestow distributive justice in favor of "Least Developed Countries" in matter of international trade.

Relevant objective: To analyze worldwide distributive justice as an ethical imperative and its contribution to the development of international trade law.

- is already answered in the fourth question. "WTO" Agreements are an example of a law of obligations, which distributes obligations in an acceptable manner. Obligations aren't crushing burdens when dispersed depending on GDP capabilities. The "WTO" system does not apportion obligations. This implies that the burden is shared evenly among the member nations. Even the SDT concept is unable to alleviate these problems in this system.⁹²¹ "WTO" "*erga omnes partes*" requirements might be alleviated by the implementation of international distributive justice principles, which would only impact the parties to the extent that they can endure consequences. Besides being sensible, this also serves the interests of justice.

⁹¹⁸ See chapter 3.4 of this thesis.

⁹¹⁹ See chapter 3.10 of this thesis.

⁹²⁰ See chapter 3.5 of this thesis.

⁹²¹ Ibid

9.2 Suggestions

1. There were no presumptions that a profoundly erroneous definition of “developing nation” would emerge from the study questions. As a consequence, the “WTO” framework requires a new definition of this concept. For this reason, it has been proposed to reject self-designation as a “developing country,” which is in direct contradiction to the GATT definition⁹²², and to instead classify nations according to their GDP status. On this arrangement, all nations with a GDP per capita below US\$ 4000 should be labeled ‘least developed’, those between US\$ 4000-8000 ‘developing countries’, and those beyond ‘developed countries’.⁹²³ International distributive justice may be included into “WTO” law using this technique.
2. In addition, the study questions did not take into account the danger to economic growth that comes from BITs that require host countries to adhere to extra-”WTO” jurisdictions, such as the ICSID tribunals. Since the development of bilateral investment treaties (BITs) naming courts like ICSID as dispute-settlement venues, As stated in Chapter 8, FDI-related disputes are resolved outside the DSM by ICSID-style tribunals. Both the ICSID Tribunals’ welfare gap and the BIT’s democratic deficit have been recognized.⁹²⁴ While the World Bank’s ICSID serves as an arm of the organisation, Bangladesh has found itself overwhelmed by foreign-investment dispute litigation and lacking appropriate FDI.⁹²⁵
3. **The essence of international distributive justice:**
Frank Garcia and Thomas Pogge imported the distributive justice principle, whose ancestor was John Rawls, into the international domain and selectively extracted the international distributive justice principle.⁹²⁶ Assisting the least privileged people of society is the first key component of the present researcher's worldwide distributive justice argument. Secondly, the researcher argues that

⁹²² See chapter 2 of this thesis.

⁹²³ Ibid

⁹²⁴ ibid

⁹²⁵ ibid

⁹²⁶ See chapter 3.2 of this thesis.

‘developing nations’ must be re-defined such that their status is determined by ranking all member states according to GDP status.⁹²⁷ There are three main components to this strategy: activating the “differences” concept by allocating responsibility for the “WTO” Agreements amongst member states in three categories: “nil,” “reduced,” and “absolute” for developed nations. This means that the LDC’s are responsible for “nil, “developing Nations” reduced,” and developed countries with “absolute” levels of responsibility.⁹²⁸

Since “WTO” law is a law of duties, not property rights, only obligations may be dispersed.⁹²⁹ For the same reason, this idea cannot be employed to mediate moral disagreements between persons with opposing moral viewpoints.⁹³⁰

According to this theory of international distributive justice, the ‘objectivity’ of criteria is not easily defined, and this is a flaw in the plan put forward. With this critique in mind, the researcher argues that objectivity is not that elusive: To be objective, criteria must be devoid of judgments about entitlement and moral or ethical value. Data from throughout the globe is used to determine and apply objective criteria for international distributive justice goals. In this scenario, the goal is to ensure that the “WTO” Agreements’ responsibilities are distributed fairly. The ‘objectivity’ of criteria may not be easily determined, and this may be a flaw in this thesis’s international distributive justice principle, according to this theory. With this critique in mind, this thesis writer believes that objectivity isn’t quite so elusive as this criticism implies: To be objective, a criteria must be devoid of judgments about entitlement and moral or ethical value. Data from throughout the globe is used to determine and apply objective criteria for international distributive justice goals. In this scenario, the goal is to ensure that the “WTO” Agreements’ responsibilities are distributed fairly.

4. According to the findings, the ‘end’ may be reached by beginning with a fair allocation of responsibilities. Distribution is done using the ‘common but differentiated responsibility’ criteria, which expresses the ‘nil to absolute distribution of burdens’. This study also showed that certain concepts are

⁹²⁷ See chapter 2 of this thesis.

⁹²⁸ See chapter 4 of this thesis.

⁹²⁹ *ibid*

⁹³⁰ *ibid*

compatible with international distributive justice when it comes to responsibilities, but not when it comes to commodities. No sense of (moral/ethical) right to commodities may exist since international distributive justice is built on no criteria that require the allocation of resources. Another key 'objectivity' distinction shown in the research is that the international distributive justice concept does not impinge on sovereign nations' moral/ethical views toward protecting human and animal life and health. Criterion objectivity has been argued to be established when standards are not derived from moral/ethical attitudes or concepts of right to commodities.

5. Developing nations: The victims

The success of the "WTO's" remedial mechanism is directly related to the nature of the remedies and their impact on developing nations, who make up two-thirds of the "WTO's" membership. Non-discrimination is at the heart of the "WTO's" legal framework. Because of the developing nations' incapacity to fulfill their responsibilities on an equal basis, the "WTO" has implemented positive discrimination via preferential treatment. However, the "WTO" DSU's remedies for positive discrimination aren't as comprehensive as they may be. As a result, developing nations would be subject to the same rules and processes controlling remedies as the rest of the "WTO's" members, which would have an even greater impact.

6. In order to satisfy the requirements and concerns of developing nations, certain S&D treatment measures have been introduced. However, these provisions do not enhance circumstances or address the concerns of "developing countries" with respect to remedies. An announcement or withdrawal of an unlawful policy by the developing nations may not be enough for them, since numerous variables are involved in initiating a dispute resolution procedure. Before filing a lawsuit, a developing nation would weigh a variety of considerations, such as the high expense of litigation, the gravity of the infraction, and the potential rewards of a successful challenge. Adjudication's gain-loss balance would be restored. There is no point in pursuing legal action if a developing nation believes that the

eventual remedy they could get is too little or does not adequately alleviate both the impact of the infringement and the expense of litigation. That is to say, most “developing countries” will not pursue a treatment that is not worth pursuing. Developing nations’ involvement in the “WTO” dispute resolution process is a clear indicator of the current state of affairs in the “WTO”.

7. Furthermore, the preferential treatment requirements are often written in vague and ambiguous language, making it difficult to execute and verify compliance with them. As an instance, DSU Article 12.11, a somewhat confusing rule, requires the Panel to specifically state in the report how applicable laws on differentiated and more-favourable treatment have been taken into consideration. Despite the fact that this is a required requirement, the ambiguity of the language has rendered the clause meaningless. DSU Articles 21.2, 21.7, and 21.8 are the same. The fact that most S&D treatment rules are seldom employed by developing nations indicates a lack of confidence in the legal relevance and practical effect of these measures. Because of this, adjudicating authorities have been able to degrade developing country rights, raise their duties, and tip the scales against them by using their substantial interpreting authority. Contrary to the conventional standards of interpretation, the Panel and Appellate Body are more stringent and negative in their reading of the S&D provisions, rendering them worthless and ineffectual. 6 Bias is evident in the decision-making of the adjudicating bodies in the cases of the European Commission on bananas; the US on shrimp (turtle) (India and others); the United States on quantitative restrictions in India; the US on Section 301; the United States on patent protection in India; and the European Commission on tariff preferences in Brazil (Canada).
8. In the end, the “WTO” system disadvantages nations who are economically and politically weak due to the fact that implementation of remedies is left to the affected Member (state-by-state). Despite choosing a system based on rules, compliance with “WTO” judgments is still reliant on ‘power’ connections. In order to be successful, countermeasures must make the person who enacted the “WTO”-inconsistent actions rethink their decision. When it comes to countermeasures, poor countries are unable to do so either as complainants or as defendants. According to EC Banana and Antigua in US - Gambling and Betting,

Ecuador's experience verifies this argument. Each of the parties was granted permission to utilize cross-retaliation against TRIPS requirements, but they declined to do so out of concern about the potential consequences. For obvious reasons (e.g. the US-Offset Act (Byrd Amendment) case), the larger developing nations (Brazil, India, Chile, Korea) that have filed complaints against the US are unwilling to take actions against them. According to our findings, countermeasures are more likely to be deployed against developing nations than by them as a means of enforcement. As a result, for developing nations, the presence or absence of countermeasures as a form of enforcement makes little difference.

9. For the vast majority of "WTO" members, the legal options available to them do not alleviate their problems. In order to be successful, any remedial system must effectively address the concerns of the states. Most developing nations are not well-served by the current remedial framework. Ineffective legal systems are guaranteed to fail the test of effectiveness if remedies are not the natural result of a violation, and if any legal system rejects or cannot guarantee a suitable remedy for the Members of that group, then the system itself might be challenged. In the interest of flexibility, economic independence, and social concerns, international law remedies tend to be restricted. Truth is told, "developing countries" lack the majority of these freedoms in today's geopolitical environment. Rather than a system that provides flexible remedies but does not allow for their use, a dispute resolution system that is based only on the rule of law and backed by a strong enforcement mechanism would be more favourable for developing nations in today's international marketplace.
10. Institutional prejudice and radical liberalisation should be avoided in developing countries. They should be particularly worried about the invasion of their domestic policies and people's wellbeing. A system of power and power relations, however, would be more beneficial to "developing countries" than improving the remedial system in particular and conflict resolution in general. The developing nations might use the internationally recognized concept of "necessity" to preserve measures to defend a vital interest that may be in contradiction with "WTO" requirements in order to address key domestic

problems in a selective and informed manner. They could.

According to Fuller, the purpose of law is to create a just order and fair methods for the settlement of conflicts. The interpretation of law must be done “in line with justice”⁹³¹ According to the “WTO’s” legal framework, this must be the case. This institution and its DSU mechanism will collapse if the concepts of equality and justice are not included in its design. A lack of credibility in the “WTO” institution and its laws will endure unless the “WTO” legal system tackles this holistically.

11. “WTO” regulations prevent many developing nations’ tariffs from rising higher. The development provides additional competitiveness in the export sector. With increased competition in global export markets, emerging nations may find it challenging to maintain a sustainable BOP in certain countries. Tariffs may only be raised beyond the bound rate by a country’s investigative authorities when evidence of domestic harm has been provided to the government. In order to preserve their industries, the government will have to get “WTO” clearance before imposing protective measures. If the obligation is not obligated, it must inform the “WTO” and discuss with the member nations before taking any action. Retaliatory measures may be used if the member nations are not granted the go-ahead.
12. Trade liberalisation under the WTO has been widely expected to bring up equitable trade possibilities for all nations. In spite of the fact that rich countries had a greater degree of commitment to removing import barriers than developing nations, the bound rates in most affluent countries were proclaimed to be far higher. As a consequence, the final tariff remained high even after it was reduced. Thus, the developed nations took advantage of this by reducing imports from “developing countries” by a small percentage in regions that needed more protection, while increasing reductions in areas of least importance to guarantee a broader percentage drop was achieved as stipulated in agreement.
13. Members of the WTO have shown a significant disparity in their viewpoints on key issues, which might complicate future negotiations. The growing number of

⁹³¹ Fuller, Lon L. (1969), *The Morality of Law*, 2nd ed. New Haven, CT: Yale University Press.

disputes and complaints filed with the DSB over topics such as subsidies, customs taxes, sanitary and Phyto-sanitary measures, and patent protection, among other things, reveals that member nations have radically divergent views and viewpoints.

14. “WTO” regulations allow exporting companies to testify in anti-dumping or countervailing duty inquiries. Many developing nations have difficulty defending themselves against claims of dumping in other countries because of complicated anti-dumping statutes that are based on the practices of the most affluent countries.
15. Currently, globalization is very unequal and skewed in favour of developing countries. The developing nations have expressed concern about certain inequalities and asymmetries in “WTO” regulations. Subsidies used by affluent nations are permitted by the SCM whereas those used by underdeveloped countries may be taken action against. This means that, notwithstanding the AOA, affluent nations who have been distorting trade by offering substantial domestic subsidies have more freedom than poor countries that haven’t previously given big subsidies, as long as their aggregate total AMS is below their obligations.
16. No clear definitions or operationalisation have been offered in several “WTO” agreements on special or differentiated treatment for developing countries. This is all that the developed nations have left as “best attempt” provisions. GATT (1994) states, for example, that while assessing the implementation of anti-dumping measures, industrialized nations must pay particular regard to developing country members’ situations. Before imposing antidumping duties that might harm the interests of developing nations, it states that creative solutions should be considered. There is no information on how these requirements will be implemented.
17. Over the previous several years, the “WTO” has encountered a number of implementation-related issues. High tariffs and tariff escalations on goods of importance to developing nations have been maintained by most wealthy countries. According to the WTO, a tariff rise is not permitted; hence many nations are turning to non-tariff obstacles. However, developed countries such as

the USA, Japan, and the EU have implemented NTBs on Indian goods in various ways. Trade in agricultural commodities can never be fair or just outside of textbooks unless rich nations decrease domestic and export subsidies. Big firms in industrialized nations have been stealing the natural biological resources of underdeveloped countries and patenting their goods with just minor alterations. This is quite concerning. Frequently, firms from affluent countries have copyrighted natural items from poor nations. The TRIPS agreement does not specify what cannot be patented, thus this is all conceivable. Many in the developing world are alarmed by the granting of patents on non-original ideas, such as traditional remedies, which are based on what is already a part of the traditional knowledge of the developing world.

18. In addition to tariff and non-tariff obstacles imposed on the importation of agricultural goods, developed countries' agriculture industries received substantial domestic and export subsidies. However, in many emerging countries, macroeconomic policies have discouraged agriculture, and structural changes have favored agriculture above other aims like increasing agricultural productivity, diversification, and domestic food production.
19. Developing nations have had a difficult time taking use of the AOA rules that aim to assure minimum market access since developed countries have kept the total quota size low while simultaneously assigning the quota to partner countries under various preferential trade agreements. Above-quota tariffs allow for more imports, but these rates are usually so high that they discourage importers from going over their allotted amount.
20. With reference to the TRIMs Agreement in the "Uruguay round" negotiations, rich and developing nations disagreed strongly on the handling of foreign investments. Despite the objections of poor nations, the pact covers key investment problems. These rules would certainly impede any strategy of self-sufficient development based on own technology, capital goods, and raw resources.
21. Additionally, there is a clause in the TRIMs to assess whether it should be supplemented by measures on investment and competition policy. The OECD's version of the MAI (International Monetary Fund) has been favored by developed

countries in the “WTO”. The nature of the OECD proposal suggests that MAI might be more than just a stricter “WTO”, and no longer would each member country be able to set its own specific blend of policies and restrictions on foreign investment.. As a result of the international investment regulations, important policy decisions would have already been made, leaving just a small number of details up for grabs. It would be impossible for the host nations to restrict FDI in accordance with their development goals if they agreed to such an agreement. As a result, poorer nations may become even more underrepresented in the allocation of FDI. Trade in financial services under the “WTO” has given developing nations additional insight into their attempts to further regulate the financial services industry.

22. In addition to safeguarding a country’s financial stability and stability, it is necessary to comply with and make promises under the FSA. It’s possible to deal in financial services while keeping a large amount of money in reserve. Over the 1990s, a number of developing nations (such as India) began examining capital account liberalisation initiatives. Unfortunately, most of these nations’ financial sector vulnerabilities were not sufficiently addressed and financial liberalisation was implemented in a number of situations without providing enough regulation and supervision for the financial sector. Despite a decade of financial sector reforms in India, banking sector deficiencies remain one of the most pressing issues. Most domestic banks in India remain inefficient in their use of resources despite reforms and growing market involvement by private and international competitors. This is despite the fact that the market share remains concentrated in the hands of a few public sector banks. Increasing the number of non-performing loans has been determined to be the biggest hurdle to increasing bank profits and decreasing interest rate spreads in the nation. India has been following considerably more liberal loan classification criteria and has failed to apply international standards, even though data shows that classified loans from Indian domestic banks have dropped over time. India should be noticed. They also have lowered their provisions for non-performing assets at several public sector banks in India. Bad debts were not recovered enough by the legal system of the economies, and the banking sector was not protected from moral hazard by

adequate regulatory measures.

9.3 Contribution to the literature

As a law of obligations, the thesis writer argues that the WTO commitments be allocated based on objective GDP criteria, in accordance with the idea of international distributive justice developed from “Rawls”, “Pogge”, and “Garcia’s” “distributive justice” discourses.

Other contributions include a call for an objective classification based on GDP status to replace the existing “WTO” legal scheme’s self-designated “developing country” status. To demonstrate a country’s ability to meet its “WTO” responsibilities, GDP status is used, but self-designation has lost its meaning since the only function it served in the past, allowing “developing countries” to delay “WTO” compliance, is no longer accessible to anybody except the world’s poorest countries. As the UAE, Brazil, and Bangladesh have proven, this designation for “developing countries” has outlived its usefulness as an umbrella for “similar” entities. And this thesis found no advantage for the LDCs from SDT implementation in the DSM or WTO agreements on their economy. Finding these weaknesses demonstrates the need for international distributive justice concepts to be incorporated in the WTO legal framework. According to this thesis’ findings, “WTO”-compliant international trade law must be based on principles of distributive fairness while still respecting national sovereignty and the GATT Article XX chapeau clauses for moral/ethical judgments.