Distributive Justice in International Law

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Abstract:

The theory of justice which is an influential school of thought in legal theory advocates for the concept of distributive justice and the unequal distribution of wealth among the members of society due to their unequal standings. The extension of the theory of justice to the arena of international relations and to the idea which seeks the reduction of the concept of basic structure from the ideal concept of “Global Government” has resulted in the development of the concepts of “Global Governance” in structure and “International Difference Principle” as the strategy to be applied to meet the goals of the international justice-centered approach. In this theoretical context, the WTO and its trade-based policies have been adopted as the international structure and international strategy to address the problem of inequality. This research examines the numerous features and aspects of the WTO and international trade and with specific regard to the theory of justice it studies the paths which the WTO and international trade could take in order to better fulfill the requirements of the principles of justice.

Key Words:

Theory of Justice- First Principle of Justice- Difference Principle- Distributive Justice- Global Government- Global Governance- International Distributive Justice- World Trade Organization- Procedural Justice- International Difference Principle- Free Trade- Trade-Based Policies- Doha Round- Balanced Outcome- Special and Differential Treatment- Core Labour Standards- Parallelism- Non-Violation Complaints- Reasonable Expectation- Interpretive Guideline

Mots Clés:

Théorie de la justice- Premier Principe de Justice- Principe de Différence-Justice Distributive- Gouvernement Mondial- Gouvernance Mondiale- Justice distributive International- Organisation Mondiale du Commerce- Procédure Justice- International- Principe de Différence International- Libre-échange- Les Politiques Fondées sur le Commerce- Cycle de Doha- Résultat équilibré- Dispositions relatives au Traitement Spécial et Différencié- Normes Fondamentales du Travail- Parallélisme- Plaintes en Situation de Non Violation- L'attente Raisonnable- Lignes Directrices d'Interprétation

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List of Abbreviations:

APEC	Asia-Pacific Economic Cooperation
CACM	Central American Common Market
CARICOM	Caribbean Community
CLS	Core Labour Standards
CLS	Core Labour Standards
COMECON	Council for Mutual Economic Assistance
DSU	Dispute Settlement Understanding (
EEC	European Economic Community
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GPPN	Global Public Policy Networks
GSP	General System of Preferences
IBRD	International Bank for Reconstruction and Development
IDJ	International Distributive Justice
ILO	International Labour Organization

IMF	International Monetary Fund
ITO	International Trade Organization
LDC	Least Developed Countries
MDG	Millennium Development Goals
MFN	Most-Favored Nation
MNC	Multinational Companies
NGO	Non-Governmental Organization
NIEO	New International Economic Order
PTA	Preferential Trade Agreement
R&D	Research and Development
RTA	Regional Trade Agreement
S&D	Special and Differential Treatment
TRIPS	Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
WHO	World Health Organization
WTO	World Trade Organization

Preamble

The history of the concept of justice goes back to the time when human beings realized that isolation was not a practical option for living and that guidelines were needed for the interaction that resulted from a social existence. The ideal of equal entitlement and equal standing goes back to the time when human being started to live together as part of the first steps towards civilization. The requirement to be able to compare one-self with other members of society from an economic and social perspectives inspired people to look for a concept or framework which met their demands. Justice is a naturally-desirable goal which seeks to address the undesirability of injustice. All human beings and all members of a society recognize justice as a good and desirable end and acknowledge injustice in its conceptual sense, as an undesirable situation. This sense of looking for equality in opportunities is one of the most ancient social goals which has been targeted by social movements and reformists and it can therefore be claimed that no other social target could have taken precedence over the concept of justice.

The most critical and significant issue addressed by justice is inequality. The problem of inequality in several aspects of social life has motivated society to effect change by the introduction of justice to be part and parcel of their lives affected. Despite the fact that inequality can be seen and experienced from several different angles including social, political and economic, it is economic inequality, which this research concentrates on, that has been studied as the most important aspect of inequality or contributor to inequality; the sort of inequality which could be highlighted as the facilitator or even creator of different other inequalities. The economy is an important factor in determining political position and an advanced and developed economy strengthens one’s position in political bargaining and decision-making. Therefore, political and social inequality cannot be dealt with comprehensively unless economic inequality has been addressed and dealt with.

Through the progression of the social lives of human beings and the increasing complexity of the social relationships, many new issues were raised and differing attitudes of acceptance as well as various interpretations were put forward as a means of passing judgment on the desirability of certain situations, acts and the absence or omission of certain acts. Several social movements and lots of social reformists aimed at bringing justice to what they believed was an unjust order. The development of societies and complexity of the ensuing social relations made passing judgment on whether or not actions were just or unjust difficult and often resulted in contradictory judgments pertaining to examples of just and unjust actions. The development of other social values such as freedom contributed to the complexity of the situation and the conflict of social values based on different views towards social issues resulted in different views toward justice.

The problem of inequality on a global level is a global problem which can be classified as a root cause for many other global problems. In fact inequality is the mother of all problems which involve human suffering and from a liberal perspective is a sort of market externality which requires collective action. Economic inequality is an issue which requires an urgent response. A report by Action Aid has revealed that hunger could be costing poor nations USD 450 billion a year which is more than ten times the amount needed to halve hunger by 2015 and meet the Millennium Development Goal.[1] The importance of economic inequality highlights the urgency with which this problem should be dealt with, as the later it is tackled, the greater will be the gap between the rich and poor and the more difficult it will be to solve the problem.

As a consequence of the legal and de facto denationalization, due mainly as a result of globalization, many new problems have been generated and many

[1] Report Action Aid, "Who's Really Fighting Hunger," *available at: http://www.actionaid.org.uk/doc_lib/scorecard.pdf*.

existing problems have increased.[2] The process of globalization has caused global problems and today's world is faced with several complex and multi-aspect problems which require coordination and cooperation on a global level. These global problems are different in nature and exhibit difficult features; some involve human suffering around the world, some refer to the problem of the behavior of individual states in terms of war and oppressiveness and some others to market externalities and mainly environmental issues such as climate change which calls out for a collective action plan.[3] The problem of inequality is one of the global problems which has been exacerbated during the years of globalization.

A considerable number of international solutions have been initiated to deal with the global problems in general and specifically the problem of inequality. The solutions have been put forward and international arrangements have been set up to direct the global efforts for dealing with these problems. However, the solutions and proposals should all be dealt with in a theoretical framework. The initiatives presented in dealing with the problem of inequality fall short of a theoretical perspective and lack coherency or enforceability and mostly focus on financial foreign aid and therefore as a result of the lack of comprehensive framework of governance to tackle the problem on a global scale and to manage the initiatives and proposals, they often act against each other. A theoretical framework serves as an input for comparing what could be rationally acceptable as just based on people being in equal situations. In this way, we are able to develop reasonable parameters for a comparison with what actually occurs and for proposing changes in the actual functioning of society and in the principles of justice that should govern the system as a whole in which we are socially and economically integrated and form a part of.[4]

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[2] Public Forum 2009 WTO, "Global Problems, Global Solutions: Toward Better Global Governance," *available at: http://www.wto.org/english/forums_e/public_forum09_e/public_forum09_e.htm*.

[3] Charles R. Beitz, "Cosmpolitanism and Global Justice," *The Journal of Ethics* 9(2005). p.11

[4] Rafael Rosa Cedro, "John Rawls Justice as Fairness and the Wto," *The Law and Development Review* (2010). p.125

Currently the world is witnessing significant inequality in the distribution of wealth across the globe. Technological progress and the invention of various instruments of communication such as the internet have contributed to the call for global initiatives in order to address the global problems. The end of the cold war and the rise of new energy being channeled into setting a new structure of international relations together with the serious will of nation-states to deal with the global problems in a global manner, have accelerated the endorsements and development of global governance.[5]

1.1. The Theoretical Framework

This research has been done within the paradigm of Realism in international law[6] and the liberalism school which distinguish itself from other theoretical schools within the paradigm of Realism by advocating and promoting the absence of state intervention in the national economy and fostering the theory of comparative advantage and free trade in the international and global economy.[7] In liberalism, state intervention in the national economy is rejected and it provides a free-based framework to remove all barriers to trade and to enable all sectors of the economy on national and international levels to compete on an equal basis. The liberal school justifies itself not only based on rights-based justifications but also on consequential-based arguments by asserting that the theory of comparative advantage and free trade will bring about the integration of national economies

[5] Tanja Bruhl and Volker Rittberger, "From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of the Twenty First Century," *Volker Rittberger, ed., Global Governance and the United Nations System (Tokyo: United Nations University Press)* (2002). p.3

[6] For more on other paradigms such as Fiduciary Realism and Legal Nihilism look at *The Oxford Handbook of Jurisprudence and Philosophy of Law, Edited By: Jules Coleman and Scott Shapiro, Oxford University Press, 2002, New York*

[7] The other competitive approaches either support the strategic trade theory or solely criticize capitalism for the regression of developed countries. The Nationalism approach, also known as Statism, Mercantilism and Economic Nationalism, foster the strategic trade theory by rendering a modern variant of an infant industry and by providing the theoretical framework for the governments to assist their national firms and industries to capture rents by protecting domestic markets with tariffs and non-tariff barriers and also subsidizing their input or output or exports.

resulting not only in the maximization of economic welfare but also guaranteeing peaceful relations in the political arena.

The relevancy of the liberal school of thinking to our research goes back to the relationship between political theory and law and the fact that the theory of justice as a theory developed mostly through the links or association of political philosophy with international law (and international trade law). Additionally, to apply a more practical approach to this theoretical subject and to avoid the critique of ethical relativism,[8] liberalism, as the theoretical pattern of the majority of wealthy states, will be utilized as the political approach of this research.

While the well-known approach towards the school of liberalism believes in the commitment of liberalism to liberty in a general sense, this research believes in the lesser known approach which argues that liberalism as the adopted school in western societies is more committed to equality than liberty.[9] Equality looks for fairness in access to opportunities which determine the level by which one profits from liberty. Therefore a duty would be established for developed countries to remove inequality as they are committed to liberalism.

However the problem of inequality on an international level has been analyzed in the school of liberalism mainly through two different approaches. The first approach bases its argument on human rights and several international human rights such as right to food and right to shelter which are all acceptable international norms and which all have implications for the problem of inequality. These implications, though important, have not provided a coherent and comprehensive solution for the problem of inequality and they cannot be turned from a minimalistic concept of inequality into a comprehensive and binding framework. To fill this gap, developing countries and a considerable number of

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[8] Frank J. Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade," *Transnational Publishers* (2003). p.53
[9] Ibid. p.56

academics and researchers have developed a new type of human rights namely "the right to development" to present a more comprehensive solution for the problem of inequality. However, this type of human rights needs to be worked on further and the developed countries have not agreed to give more than an ethical value to this.

However the liberal school and the equality-oriented concept of this school present the theory of justice as a comprehensive and theoretical framework in addressing inequality. The justice-centered approach, as the adopted framework in this research, addresses the problem of inequality and details the requirements of its implementation and lots of theories, dating from Socrates, Plato and Aristotle right up until the present day, have been rendered in order to detail several aspects of the concept of justice and its requirements in social life, economy and politics.

1.2. The Concept of Justice in International Law

The Law as a system of rules and regulations which aims at regulating the relations among social actors and resolving their conflicts has been based on two major premises: order and justice. In certain situations order has been ignored while honoring the requirements of justice and in certain other situations, justice has been put in second place when it has been in conflict with requirements of order. As a result of the development of the human society and the entering by the human civilization into more complex environments, different branches and subsidiaries of the science of law have been originated and consequently, the general sense and definition of justice seemed insufficient to fix the orientation of several subjects of law.

The justice school and approach in private law and public law enjoys a longstanding and diverse literature. In tort law, the theory of justice rules that certain principles and rules are considered as just rules and at the same time certain others as unjust provisions. In property law and contract law, few implications of the concept of justice are envisaged and it has a deep effect on subject matters of public law such as tax law. Even in Criminal law, the justice approach has been one of the most influential academic schools.

On the other hand, the issue is different in international law. Due to its recent establishment, there has not been a real and coherent justice approach and international law in political and economic order envisages lots of dilemmas between different theoretical schools. Several aspects of the Justice approach have been unsuccessful in the international arena and even some well-known theorists of justice school have denied the importance, inspiring and the dominance of justice principles in international order. The most important theory of justice, while admitting the importance of the requirements of justice in all human-centered relations and transactions, rules out the possibility of the implementation of justice principles in international relations due to the absence of a global basic structure.

However the rise of global problems and global issues has called for some sort of global management to deal with these issues. The establishment of international institutions and initiatives in recent decades has made the argument of the absence of a global basic structure unacceptable. On the other hand, the current international situation highlights more than ever the need for the implementation of the concept of justice in international law. This issue becomes more critical when one realizes that international law as the basis for regulating the behavior of international actors has inherited lots of inequalities and injustice. The dark history of colonialism and also the massive and systematic violation of human rights in the following era of the industrial revolution have shaped the current form of international order in an unjust manner. Moreover, the evolution of international institutions after the Second World War, introduced a new scheme of international law which to some extent affected the process of wealth distribution on an international scale.

On the other hand, some academics who believe in cosmopolitan concept of justice even refused to accept the basic structure as the pre-condition for applying principles of justice and have ruled for the relevance of the concept of justice and distributive justice whenever inequality exists in the distribution of goods; these goods are considered to be scarce in an absolute sense and yet the dominant schools and approaches such as the efficiency-centered and liberty-oriented principles could not result in optimized allocation of these scarce goods.[10]

The inequalities embedded in international law have motivated the recent scholars and academics to resort to the justice theories more than before. Despite the fact that individuals are separated by national boundaries, economic relations have brought them together and they are able to affect each other's welfare. This interaction and its consequential effects together with the major inequality resulting from economic globalization have triggered the concept of justice. Therefore, the justice approach in international law is now in the process of evolution and has moved from its inception and related immaturity to an acceptable and more developed position.

Some academics and researchers, mainly Rawls approach to international justice, have looked for a clear distinction between international justice and global justice. This attempt normally originates from the approach which looks at justice on an international scale as a neutral notion governing only the international actors which interact with each other. According to this view, international justice is a well-known and well-accepted concept on an international scale which sets out to explain and provide detailed principles for liberal foreign policy and in contrast, global justice is a nebulous conception of justice on an international scale which does not have any clear and distinct subject. This approach is rooted in the theory surrounding the significance and moral value of international boundaries. Therefore, the point of departure would shift from individuals and persons to Peoples and nations and international justice would be limited to certain general

[10] Friedrich Breyer, "Health Care Rationing and Distributive Justice Author," *Rationality, Markets and Morals* 0(2009). p.394

principles in foreign policy as a guide for just relations with other societies rather than being a proxy global governance structure.[11]

This research is based on the unimportance of political boundaries from a moral and theoretical point of view. Global justice which puts its emphasis on individuals and equality among all human beings is an influential concept; the application of which cannot be impeded by political boundaries and neither do the political boundaries have the capacity and legitimacy of limiting the application of justice principles to international relations. In fact many borders across the world are divisions generated during colonial times which in some cases has lumped diverse communities and cultures into one state while in other cases it has split a single community into more than one state. Even in regions such as Europe in which the states generally represent nations with same culture, language or history, due to the globalization process the national borders are losing their importance.

Therefore, global justice as an influential concept and relevant theory enjoys the required legitimacy and justification to be applied globally but political boundaries are an existing reality which cannot be ignored in this process. In other words, the principles of justice enjoy the legitimacy and necessary justification to be applied internationally and globally but the question is, with the existing concept of states and political boundaries how can the justice theory find its way into the international domain. To answer these questions and meet these requirements, the concept of "Global Governance" has been developed to provide, in the absence of global government, the justificatory basis for the principles of justice and has been presented as the optimal pattern of the justice framework.

[11] Saladin Melcked-Garcia, "International Justice, Human Rights and Neutrality," *Kluwer Academic Publishers* 10(2004). p.170

1.3. WTO and International Trade

When conducting a review of the current structure of international relations and global governance, it becomes apparent that the World Trade Organization (WTO) is suitably and appropriately placed to take the global governance role. The WTO is one of the most powerful and successful international institutions in international relations and international law and in the short period since its establishment a considerable record in removing trade barriers and contributing to the world's welfare can be attributed to the WTO. The elimination of tariff and non-tariff barriers to trade brought about the integration of national economies leading to the dependency of national economies on each other. This dependency influenced international relations significantly and contributed to the stabilization of international peace, and this fact highlights the WTO as an organization which has commitments to peace and justice.[12] In addition, the organization has introduced a new model of decision-making and set an efficient dispute settlement regime which is widely recognized as a successful initiative. While the WTO is not an ideal organization, and cannot be described as the end point in the justice approach, it however provides a new framework in which the economic relations of the WTO Members can be studied from the justice perspective.

On the other hand, international trade plays an important role in the problem of inequality. International trade plays a significant role in exacerbating or decreasing the problem of inequality by tackling the issue through the areas of comparative advantage and competitiveness. Therefore, the impact of the trade forum on other global problems has forced researchers and scholars to seek a solution within the international trade and WTO framework; a solution which not only preserves the great success of reduced trade barriers and enhanced welfare but also addresses the issue of inequality. Therefore, as a first step the theory of justice and the two principles of justice will be developed on an international scale and for the second step the developed theory will be applied to the WTO as the leader of global governance in structure and international trade as the strategy for addressing the problem of inequality.

[12] Cedro, "John Rawls Justice as Fairness and the Wto." p.122

I. Liberal Theory of Distributive Justice and International Economic Order

1. Justice on National and International Scales

The requirement for justice and equality developed once mankind found himself living in a shared common environment with others. Despite the ideas which look at the individual's life as the scope of application for the concept of justice, the social side of justice which has been reflected in various theories and schools of thought came into discussion as a result of the shared life that mankind has. Therefore, the developed ideas, principles and rules all addressed the establishment of justice in the society in which people lived and interacted with each other; this society being limited to the group of people in the same territory and the rules of justice which addressed the distribution of burdens and advantages created in that society. Following the industrial revolution, the enhancement of telecommunication technologies, the globalization process and the creation of nation-states, the theories, principles and provisions developed in the limited domestic society were presented in a larger scheme. The establishment of international law in its conventional sense provided primary and basic principles and rules which contained both advantages and disadvantages and raised the question regarding whether or not the justice-oriented outlook was relevant and applicable to international relations and mankind on a global scale. The presentation of justice theory on an ultra-national scale found supporters and opponents and a new division occurred among the justice theorists on a national scale. Reviewing justice as the adopted approach of this research requires studying the concept on two different levels; the national level and the international level.

1.1 National Concept of Justice

The most developed and coherent justice approach refers to the theory of justice on a national scale which is applicable to the structures and arrangements within a nation-state. Any study of the concept of justice on a global and international scale requires the study of justice school on a national level due to the fact that the principles set for the national distribution of wealth have been developed in a new sense on an international level. However, the national concept of justice has been studied in two different categories; a traditional concept of justice which refers generally to the schools of thought and approaches before the establishment of international law and specifically to the Aristotelian definition of justice, and the modern concept of justice which has been developed in recent decades and has been shaped and tailored as a result of the interaction of national and international approaches to justice.

1.1.1. Traditional Concept: Aristotelian Approach

Following the presentation of the two concepts of Corrective Justice and Distributive Justice by Aristotle, the main legal theories were shaped around the role and position of these two sorts of justice in different branches of law. The history of these two concepts goes back more than two thousand years and since that time many scholars and academics adopted these concepts as the point of reference for the development of their own legal theories. Prior to Aristotle, the concept of justice had been one of the main subjects of discussion and study among the well-known philosophers of that era. Socrates defined justice as the organization of both the individual and society whereas the Platonic concept of justice accepted only the organization of social life and the relationship of the parts to the whole.[13] Aristotle developed the Platonic notion of justice and developed the approach by extracting two different and distinct concepts of justice. While the history of legal philosophy presents four separate descriptive approaches to justice; i.e. reciprocal justice, retributive justice (Punishment of criminal wrongdoers), distributive justice and corrective justice,[14] Aristotle's

[13] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.46.
[14] Fen Deng, "Corrective Justice in the Confucian Legal Tradition: A Nonexistent Concept!," *available at:*

traditional theory has been shaped on the challenge and interaction of two concepts of justice; i.e. distributive justice and corrective justice, each with its own special definition and distinct view toward individuals, entitlements and equality.[15]

1.1.1.1. Corrective and Distributive Justice

According to Aristotle's theory, corrective justice includes a special concept of justice which is the equality in behavior and compensation of a victim of wrongdoing. Corrective justice means engaging with the different parties of a transaction irrespective of the differences between them with the aim of rectifying and eliminating any wrongful acts.[16] Accordingly the criterion for judgment is whether or not a party has violated another party's rights and the other party has the right to compensation or not. Distributive justice is the rival notion of corrective justice developed first by Aristotle. Unlike corrective justice which assesses the belongings of an individual before and after a transaction, distributive justice considers the belongings of at least two different individuals and members of a society.

Transactions in general and corrective justice as the theoretical background support a kind of equality which Aristotle names Arithmetic Proportion[17] and aims at rectifying the violation which occurred in the transaction by several means

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http://www.lawschool.cornell.edu/international/clarke_program/conferences/upload/DengFeng.pdf. p.3

[15] In the theoretical domain, three distinct approaches toward distributive and corrective justice have been presented; the Aristotelian and Thomas Aquinas' concept of justice, the Hobbes and Grotius concept and finally the Kantian and Hegel's notion of justice. Among these different approaches to justice, the Aristotelian view of justice has been the dominant approach as well as the oldest and the most influential.

[16] Deng, "Corrective Justice in the Confucian Legal Tradition: A Nonexistent Concept!." p.8

[17] The reason for which he names such a comparison an arithmetic proportion is that based on this category of justice a simple comparison would take place between the individual's belongings before the transaction and his belongings after the transaction. In a case which the two amounts of belongings are equal together, it would be judged that the individual has arithmetical equality.

such as compensation without considering the special characteristics of the parties to the transaction in wealth, sex, race etc.[18] The realization of justice in corrective justice is subject to equality between the belongings of a given individual before and after the transaction whereas in distributive justice it should be equality among belongings of the compared individuals which would be at least two persons. Aristotle's theory of justice is the result of interaction between the corrective and the distributive definitions of justice in different branches and fields of law. Each of these definitions has its distinct principles and approaches to entitlement and individuals and the just approach in this school of thought looks for applications of each of these concepts with their respective principles on different scopes of law.

1.1.1.1.1. Principles of Corrective and Distributive Justice

The principles of traditional concepts of corrective and distributive justice differ generally in their respective view toward individuals and society. The core aim of corrective justice addresses the issue of functionality by looking at rectifying the violations of the individual's rights which could happen in the transactions. However, the distributive justice primary rules look at the individuals as the members of the political society. In other words, while the concept of corrective justice depends on individuals' transactions and its scope of application is limited to the individuals involved in the transactions, distributive justice is independent of the individuals' transactions and includes all members of society as the members of the society and all assets and belongings exist in the society.[19]

In addition, the notion of corrective justice has been viewed as an independent and distinct concept from the rights which it supports. In fact, corrective justice has been developed in order to guarantee that the rights and entitlements of individuals would not be violated in the intentional and unintentional transactions they carry out with each other whereas in distributive justice the rights and individual's entitlements are determined by the distributional considerations of

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[18] Peter Benson, "The Basis of Corrective Justice and Its Relation to Distributive Justice," *Iowa Law Review* 77(1992). p.538

[19] Deng, "Corrective Justice in the Confucian Legal Tradition: A Nonexistent Concept!." p.12

distributive justice which look for distribution of society's wealth according to the ranking of each individual in distributional classification of the society. However, in distributive justice, the Distributors and Distributees are not limited to specific parties of society.[20] The Distributors, indeed are the members and the elite of society and the Distributees are the members and citizens of that society. Moreover, the Distribuenda is not limited to the belongings of the involved parties and includes utility, wealth, well-Being, happiness, satisfaction and also the losses and pains within the society.[21] Finally the criteria of corrective justice for having just outcome is the absolute moral equality of the individuals and the equality of all human beings with each other and the transaction not to be odds with the moral equality of the parties whereas in distributive justice there are many discussions and disagreements on "How ought the advantages and disadvantages of the society be distributed?" and "How can distribute society's wealth?". The answers to these questions are known as the "Distribution Formula" which with the Distribution Mechanism is on the subjects on which disagreements exist among the researchers.

Corrective justice aims at curing the violation of equality among parties to a transaction and the claims which go beyond the parties involved in the transaction are presented in the distributive justice framework. This is due to the fact that corrective and distributive justice claims include different scopes of implementation; while corrective justice claims encompass the losses and profits originating from a transaction, the distributive justice overview generally includes all deficiencies in the damaged party's share in the wealth distribution. The claims which originate from violation of corrective justice take place in a bilateral situation in which counterclaims and cross claims rise from a transactional-based relation. Accordingly, any derogation from the equality of the parties whether in terms of non-imposition of liability on a party which should bear the liability or in

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[20] Distributive justice has five major pillars: First those who distribute the benefits and losses among the members of the society (Distributors); second those among whom the losses and benefits of the society are distributed (Distributees); third the objects and things which should be distributed among the members of the society (Distribuenda); forth the formula of the distribution (Distribution Formulae) and finally the system and structure in which the advantages and disadvantages are distributed (Distribution Mechanism).

[21] Robert Hockett, "Minding the Gaps: Fairness, Welfare and the Constitutive Structure of Distributive Assessment," *Cornell Law School Working Paper Series* Paper:21(2006). p.8

terms of imposing liability on an individual who has not any liability in the transactional scheme would be viewed as a violation of corrective justice. In fact, the corrective justice notion presents a negative concept for entitlement in which the transacting parties, rather than having a positive obligation to respect others' rights, are obliged to abstain from depriving other individuals from what they have gained till now.[22]

Therefore, in corrective justice-based claims, there are always two sides; first the party whose belongings have been negatively affected as a result of another party's behavior which violates absolute moral equality; and second the party who has caused the negative effect.[23] In contrast, in distributive justice-based claims the claims are multilateral and in the absence of a special case, none of the low-income members could unilaterally claim against any wealthier members of that society. In the distributive justice scheme, no poor member has any better rights than any other poor members and consequently no rich member has any obligations which are more than other rich members. Consequently, accepting unilateral claims would result in the preference of one poor person over other poor people and discrimination between one rich person and other rich people and this preference and discrimination have been refused and rejected in distributive justice.[24] Generally, poor members of the society are entitled to claim against those who are wealthy members of the society but this rule would not legitimize the unilateral claim of a specific poor person against a specific rich member and the general wealth of the society and relative classification of people in comparison with other members of the society would determine their level of entitlement in the distributive justice perspective.

[22] Benson, "The Basis of Corrective Justice and Its Relation to Distributive Justice." p.539
[23] Ernest J. Weinrib, "The Gains and Losses of Corrective Justice," *Duke Law Journal* 44, no. 2 (Nov. 1994). p.277
[24] Richard W Wright, "Substantive Corrective Justice," *Iowa Law Review* 77(1992). p.706

1.1.1.2. The Relation of Corrective Justice and Distributive Justice

Along with the traditional concept of justice, the relationship of these two important concepts of justice reflects the theory of justice on a national level in its traditional sense. The dependency or independence of these concepts and the possibility of their coexistence or not constitutes the general approach of the theory of distributive justice and the scope of application of these concepts and principles. The dominant approach to justice theory looks at corrective justice as a part and complementary notion to the distributive justice theory. The argument presents the role of corrective justice to keep and preserve the wealth which has been distributed justly and to correct and modify the deviations occurred from the just allocation and distribution of the societies' wealth. Therefore, the two aspects of justice interact together and corrective justice would be dependent on distributive justice conceptually and normatively.

However, the view supported by formalists considers the two concepts of justice as totally separate and distinct conceptual principles which are applied in different normative domains.[25] Accordingly, distributive justice relates to social justice aiming at general distribution of assets and wealth in society whereas corrective justice applies to the personal transactions and personal justice looking to establish formalistic justice and to protect individuals from any damage to their assets and wealth irrespective of distributive justice considerations or any injustice which has occurred between the transactional parties before the transaction or generally among all members of the society.[26] The Aristotelian view of justice found the principles of distributive and corrective justice as complementary principles which justify each other and the possibility of their coexistence whereas the formalists view these concepts as alternative and interchangeable concepts and advocate the total separation of corrective justice and distributive justice. Therefore, the school of formalism looks at the impossibility of co-existence of corrective justice and distributive justice within a

[25] Hanoch Dagan, "The Distributive Foundation of Corrective Justice," *Michigan Law Review* 9(October 1999). p.138

[26] Ernest J. Weinrib, "The Idea of Private Law," *Harvard University Press* (1995).

single legal structure coherently and the impossibility of application of two sorts of justice on one special domain simultaneously.[27]

Consequently, the Aristotelian and formalism schools arrive at the same practical conclusion in which the distributional-oriented principles are more relevant to political theory and corrective justice to personal transactions. While the enforcement of corrective justice has been accepted and shifted to the judicial power's role and is the dominant rule in certain fields of private law such as contract law, the application of distributive justice principles has not been considered as function of the courts due to their lack of information on society's wealth and the classification of its members, and therefore the legislative power is the relevant and capable agent of enforcement. The fields and branches of law known as public law should be ruled and shaped mainly by the legislature according to distributive justice principles even though the courts and judicial establishments play important roles in these fields.[28]

1.1.2. Most Influential Theories of Justice

The traditional theory of justice presented by Aristotle who considered the absolute ethical equality of human beings and freedom and equality as the final goal of the law has been further examined by the modern theories of justice. The process of socialization and urbanization which made social relations more complicated than before required the theory of justice to clarify the formula of distribution in a more detailed and practical manner. Many researchers were shifted toward the left-wing and non-liberal theories of justice which viewed private ownership and consequently capitalism as obstacles towards a more just society.[29] However, in the liberal paradigm, while some academics believe that the benefits and losses of society should be distributed equally without considering personal distinction and qualifications, others criticize such a formula and develop alternative routes; these are alternatives which target wealth

[27] Wright, "Substantive Corrective Justice." p.707
[28] Ibid. p.710
[29] Heikki Patomaki, "Global Justice: A Democratic Perspective," *Globalizations* 3, no. 2 (June 2006). p.116

maximization or the free market system with a minimal state interventionist system. These liberal theories which all put specific objectives as the target of legislation are generally presented in three major schools: Utilitarianism, Libertarianism and Egalitarianism.

1.1.2.1. Utilitarianism

In Utilitarianism, the concept of **Utility** includes the psychiatric state of pleasure as well as providing benefits and satisfying the desires which set the core stone principle which is to establish the distribution criterion based on aggregate utility and profitableness. Accordingly, instead of maximization of welfare, the wealth and assets of society should be distributed in a manner which maximizes the share of each member.[30] Apart from distinct subsidiary approaches within Utilitarianism,[31] the general history of utilitarianism presents the development of a traditional concept of utilitarianism as well as the modern utilitarian school of thought.

The utilitarianism has been developed mainly by Jeremy Bentham.[32] In Bentham's theory, not only the selfishness of individuals has been included, but also the utilitarian formula which includes the interests of other members of the society. According to the traditional point of view, anything which improves and increases pleasure and enjoyment would be a moral good and whatever decreases this

[30] John Stuart Mill and Jeremy Bentham, "Utilitarianism and Other Essays," *Penguin Books, Alan Ryan (Ed.)* (1987).

[31] Within the utilitarian school, three distinct approaches exist: Egalitarian Utilitarianism, Average Utilitarianism and Classical Utilitarianism. In egalitarian utilitarianism, the criterion is the maximum aggregate utility for each person in a manner which is compatible with the similar level of other people's utility. In contrast, the average utilitarianism adopts the aggregate of maximum utility for the majority and finally the classical utilitarianism generally considers the maximum level of utility irrespective of the manner of distribution.

[32] Bentam has been considered as one of the most successful social reformists after Carl Marx. Bentam's social movement resulted in fundamental reforms in lots of regulations and laws, prisons, trade unions, free education and this movement contributed a lot in the expansion of free trade and freedom of expression. Jacob Viner, *Bentham and J.S. Mill: The Utilitarian Background- Economic Jusice*, ed. Edmund S. Phelps (Penguin Education, England, 1973). p.197.

pleasure would be labeled a moral bad.[33] Therefore, in traditional utilitarianism which was the dominant theory till John Rawls, the theory's value is based on happiness and utility and the morality of each act is valued based on its consequence on aggregate individual utility.[34] [35]

However, the modern utilitarian approach, known as the neo-utilitarianism, has been embedded in Law and Economics school of thought.[36] The school of law economics believes that a reasonable man is one who seeks maximization of his wealth and benefits and that legislation in terms of changing laws imposes prices on all activities including even the non-market activities.[37] Law and economics believes if the social actors act efficiently by themselves, there would be no need for the intervention of regulation and that legislation in this situation would cause additional expenses for the society.[38] The law and economics approach, during its short period of existence has been presented in distinct schools.[39] However the most famous neo-utilitarian school is known as the Chicago School or put another way, Positive Law and Economics has been presented more by the well-known scholar Richard Posner in 1970s.[40] Accordingly, the common law regime is the

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[33] William C Powers, "Structural Aspects of the Impact of Law on Moral Duty within Utilitarianism and Social Contract Theory," *UCLA Law Review* 26(1979). p.1270

[34] For the aggregate individual utility, two models have been discussed; first the act-utilitarianism and second the rule-utilitarianism.

[35] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.57

[36] One of the reasons why the law and economics school succeeded in expanding itself in law was the investment of several countries on this issue and the motivation the scholars and academics had to view different branches of law from this perspective. Norman Girvan, "Some Lessons of the Cariforum-Eu Epa," *Trade Negotiations Insights* 8(8)(October 2009). p.3

[37] Richard A. Posner, "The Law and Economics Movement," *The American Economic Review* 77, no. 2 (1987). p.8

[38] Richard McAdams and Eric B. Rasmussen, "Norms in Law and Economics," *Handbook of Law and Economics. A. Mitchell Polinsky and Steven Shavell, editors* 1-2(2007). p.2

[39] The approach of law and economics, during its short period of existence has produced three distinct approaches related to three schools: Chicago School, Yale School and Virginia School. The Yale school of law and economics considers law and regulation as the means of providing efficiency for the system and dealing with market failures and the Virginia school which is the most recent approach in law and economics has included components of both Yale and Chicago schools. Francesco Parisi, "Positive, Normative and Functional Schools in Law and Economics," *European Journal of Law and Economics* 18(2004). p.11

[40] Ibid. p.8

most efficient mechanism of law which not only follows the Pareto-efficiency but also the Kaldor-Hicks pattern in allocating society's resources.[41]

1.1.2.2. Libertarianism

Historically the libertarian approach was developed in response to the Egalitarian theory of Rawls, putting the focus more on the liberty in liberalism and developing the primacy of liberty as an alternative approach to Rawlsian justice theory. Developed mainly by Robert Nozick, they hold as fundamental the primary issue of an individual's right to property and consequently refused the distributional nature of justice in a positive way.[42] Known as radical libertarians,[43] they believe in the freedom of individuals in their transactional relations and the idea that the members of the society have a moral right for concluding any contract and doing any transaction for transferring their titles of ownership unless they violate a third parties' rights. Accordingly, any obligatory transfer of wealth irrespective of its title or name and the application of any pattern of justice would be considered as intervention in the private life of individuals and therefore a form of theft.

The libertarians reject any legislature's intervention whether this is done in the name of a paternalistic and welfare-centered motivation or is done as a result of the distributional motives which look at changing the share of individuals based

[41] The kaldor-Hicks notion of efficiency has provided the concept of *efficient breach* in contract law in which the obligations of the parties should be respected as far as they are efficient for both parties and as soon as the agreement turns inefficient, the damaged party could breach the agreement and compensate the other party.

[42] Jonathan Wolff, *Robert Nozick: Property, Justice, and the Minimal State* (Stanford University Press, 1991). p.3.

[43] Within libertarian school there are two different views: Radical Libertarianism and Moderate Libertarianism. The radical libertarians are essentially and basically opposed to the concept of distributive justice. This school of which Robert Nozick is its most famous leader believes that the only requirement of justice is to protect people's rights to ownership and freedom against violation by other people and that the distribution of wealth is acceptable if it aims at the rectification of a violation which occurred in past.

on the wealth of the society.[44] On the contrary, they adopt a sort of distributive justice concept in negative terms and recommend a minimal state which if extended, would violate the individual's rights.[45] Therefore, justice in a libertarian sense means justice in original acquisition of holdings and justice in transfer of holdings and any consideration of further requirements would lead to the violation of this basic concept and primary principle of libertarianism; i.e. individual liberty.

1.1.2.3. Egalitarianism and Rawlsian School

Rawls theory of justice was originally developed in a liberal context and was in response to the Utilitarian school which defines the principles of equality as the underlying principles of his theory; Justice as Fairness.[46] His theory is based on the egalitarian nature of justice which developed a concept of justice based on the notion of fairness, and he was the first one who incorporated the concept of distributive justice to a broad framework of legal theory. Rawls theory is made up of two principles, known as the first and second principles of justice. According to the Egalitarian Theory, due to the uneven distribution of benefits and burdens which left certain members of society in a disadvantaged position, the members of society agreed to accept the implementation of principles of justice. However, in Rawlsian framework, the implementation of principles of justice required the existence of a structural arrangement known as a basic structure.

1.1.2.3.1. Rawlsian Principles of Justice

The first principle of justice requires that each member of society has an equal right to equal and adequate basic liberties and consequently the rules defining the

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[44] Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power," *Maryland Law Review* 41(1982). p.571

[45] Charles Jones, "Institutions with Global Scope: Moral Cosmopolitanism and Political Practice," *Global Institutions Edited by Daniel Weinstock, The Canadian Journal of Philosophy* Supplementary Volume 31(2005). p.3

[46] Joseph Heat, "Rawls on Global Distributive Justice: A Defence," ibid. p.212

basic liberties apply to everyone equally. The basic liberty cannot be restrained only if it conjuncts with basic liberties of another member of the society and hence rejects any argument of limiting the equality of having basic liberties because of greater general economic benefits (utilitarianism) or in favor of preferential moral values.[47] However, in the second principle of justice, Rawls rules for justification of differences in treatment and distribution. The second principle named as the **Difference Principle** provides that the unequal distribution of society's primary goods is legitimate to the extent that they benefit the least advantaged members. Accordingly, uneven distribution of benefits and burdens, leave some members of society in a disadvantaged position and due to this fact, members of society have agreed to accept the principles of justice.

1.1.2.3.2. Original Position and Basic Structure

Arguing in favor of his theory of justice, Rawls developed a new concept called **Original Position**. He believes that members in original position are behind a "veil of ignorance" which precludes them from knowing which social class they represent and what would be the effect of their decisions on their life. Therefore, behind this veil of ignorance which prevents them from knowing their position in future, they would adopt the two principles of justice.[48] The principles of justice would be applied in the future without distinction whether in a poverty situation or not and would not favor anyone because of social or economic situation or even as a result of luck. The Rawlsian Original Position is an argument which has never happened and would not happen, which looks at what the parties should or would agree in a primary fair situation and not what has really been agreed in the past. Hence it provides a rational basis against the self-interest decision-making process and an ideal justification of defining the need for justice and the principles to be adopted by all members of the society; i.e. the principles of justice.[49] Following the adoption of principles of justice, the people choose the structural principles of justice and the legislature tries to materialize the different

[47] Cedro, "John Rawls Justice as Fairness and the Wto." p.124
[48] John Rawls, "Theory of Justice," *Oxford University Press, T. M. Scanlon (Ed.)* (2005). p.15.
[49] Cedro, "John Rawls Justice as Fairness and the Wto." p.123

aspects of justice in laws and regulations which at the final stage should be implemented by the members of society.[50]

In Rawlsian theory, the invisible hand and the general direction of market acts against the direction of justice requirements and for application of principles of justice in such condition, existence of a political society is a necessary condition. Hence, to establish the justice framework in society, there should be institutions which constitute the background conditions of justice, named the Basic Structure.[51] The Basic Structure generally governs the political society as a **Scheme of Corporation** which is organized for the mutual benefit of its citizens who participate in the scheme as free and equal persons.[52] In Rawls perspective, basic structure is normally constituted from the main political and social institutions in a society which form the mechanism of social cooperation and the way of distribution of rights and basic duties.[53] The two principles of justice apply to the basic structure as well as to primary goods; these goods being those which individuals generally ask for irrespective of their final end and are normally referred to the wealth, rights, income, liberties, self-respect and opportunities.[54]

The need for the existence of political and social institutions has caused the Rawls theory to be limited to the liberal societies. Rawls believe that as the basic structure forms the subject of the justice theory, the absence of such subject in non-liberal and non-democratic societies results in considering justice as the function of basic structure in democratic societies.[55] Moreover, the Rawls theory only addresses the just distribution of benefits and burdens among the citizens of the society and does not involve itself with the issue of scarcity of resources and maximization of wealth. Therefore, the egalitarian school of justice would be

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[50] Volker H. Schmidt, "Procedural Aspects of Distributive Justice," *Darmouth, England* (1997). p.161

[51] Kevin Kordana and David Tabachnick, "Rawls and Contract Law," *University of Virginia Law School* 15(2005). p.7

[52] John Rawls, "Justice as Fairness," *The Philosophical Review* 67, no. 2 (Apr 1958). p.4

[53] "Theory of Justice." p.61

[54] Ibid. p.332

[55] Brodi Kemp, "International Distributive Justice: Evaluating Cosmopolitan Challenges to the Law of Peoples," *Harvard University, Gov 2030: Political Concept* (2005). p.7

viewed as a theory in which the basic structure and primary goods are the subject of its framework and justice would be viewed as principles that citizens and individuals who are the source of values of the theory must agree upon.

1.1.2.3.3. Inequalities and Just Outcomes

The Rawlsian perspective provides different individual starting points within the basic structure of society influenced by natural, social and economic situations or even by luck, creating significant fundamental inequalities in the individuals' life. However, the inequality in this sense would not be intrinsically unjust. Accordingly, the way which the basic structure, i.e. the institutions, address the existing inequality constitutes the notion of just and unjust and the concept of justice in this sense refers to the fact of whether or not the basic structure respect the two principles of justice in distributing burdens and benefits.[56] Rawls justice theory looks at quasi-pure procedural justice[57] in assessing outcomes as just outcomes. In quasi-pure procedural justice, and likewise the pure procedural justice, the just outcome is deemed the result of the application of procedures and rules. However, while in pure procedural justice no external criterion is being considered for judging on the procedural justice, in quasi-pure procedural justice, apart from the application of rules and principles, the result should also be just to a certain level.[58] Therefore, the quasi-pure procedural justice looks for defining the limits of freedom and the framework in which the results would be considered as just results. Consequently, once a regulation or law has been passed and approved, it would be deemed as a just regulation unless it is proved that the result, according to quasi-pure procedural justice, is not a just outcome.[59]

While utilitarianism looks for the satisfaction of the maximum preferences and libertarianism looks for the protection of individual rights as the just outcome, the

[56] Benson, "The Basis of Corrective Justice and Its Relation to Distributive Justice." p.605

[57] Procedural justice could be applied in four ways; Perfect Procedural Justice which applies the justice in a manner which guarantees the just outcome and Imperfect Procedural Justice which the possibility of unjust outcome exists.

[58] Axel Tschenter, *The Function of Procedural Justice in Theories of Justice- Procedural Justice*, ed. Edit by Klaus F. Rohl and Stefan Machura (Darmouth, England, 1997). p.105

[59] Rawls, "Theory of Justice." p.201

egalitarian version of just outcome has been materialized in the second principle of justice which seeks a difference in distributing resources in favor of the weaker and poorer members of the society. In the utilitarian approach, the issue of standing and those whose utility counts does not provide a comprehensive response to the problem of inequality. Therefore in addressing the problem of inequality, the definition of just outcome in each different school of the modern concept of justice presents significant reasoning in adopting the egalitarian version of the concept of justice.

1.1.2.4. Why Egalitarian School?

The egalitarian school has been classified as a deontological ethical theory which instead of focusing on the theory of good or act consequences adopts the right-based approach.[60] In the right-based deontological school of thought, the individuals are treated as ends in themselves and not as instruments to fulfill other goods. The egalitarian school is a deontological ethical theory, putting its point of departure on the most important social values; i.e. equality.[61] However, the utilitarian school cannot be viewed as a comprehensive ethical school. Utilitarianism which looks at happiness and utility as the final end falls short of being a comprehensive framework for addressing the problem of inequality. Recent utilitarian experts have gradually approached wealth maximization and utility as goods which by themselves are not final-ends unless they expedite and facilitate other social goods. Consequently, the new utilitarian theorists have tended to justify utility and wealth maximization not as the final-ends, but as means of moving toward the ideal just principles.[62]

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[60] Ethical theories generally are studied in two categories: first the schools which are based on theory of good and second the schools which have adopted their point of departure on theory of right. These sort of ethical theories focus on the act rather than the good and end. The main branch of the right-based theories is the deontological approaches which form their argument on the nature of the act.

[61] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.76

[62] Guido Calabresi, "About Law and Economics: A Letter to Ronald Dworkin," *Hofstra Law Review* 8(1979). p.559

In addition, the liberal approach of justice looks at the obligatory mechanism for redistribution of wealth and society's resources among the members of the society whereas the libertarians refuse any intervention into the market's function in the name of justice and view these deviations as theft. While the liberal approach is distinct from the libertarian approach by introducing wealth maximization via market mechanism as well as wealth redistribution by different instruments such as equality-oriented tax regimes, the egalitarian school within the liberal context favors the priority of equality over liberty.[63] The egalitarian school believes in the greater commitment of liberalism to equality than liberty. Therefore, equality would find priority over liberty and the problem of inequality becomes the most significant agenda of the liberal school.[64] The egalitarian school criticizes the liberty-centered arguments on the basis that in an unequal standing of the parties to a transaction in which inequality exist in their bargaining power and also the cumulative effect of prior distributions of natural asset, sticking to the libertarian self-ownership principle would only be regarded as a purely formal equality which would weaken the possibility of substantive justice.[65]

The egalitarian approach has been also criticized in several different ways. In Rawls theory, the fact that there is no distinction between those who become poor unintentionally and by chance of life and those who chose to be poor by their own decision, has been the subject of criticism.[66] Moreover, Dworkin's criticism highlights the lack of ambition in the justice theory of Rawls and calls for consideration of the role of ambition and ambition-sensitive theory.[67] However, the egalitarian school despite all the criticism has been viewed as the most competent theory in addressing the problem of inequality in a comprehensive and coherent manner.

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[63] Hugh Collins, "Distributive Justice through Contracts," *Oxford University Press, ed. Current Legal Problems Vol. 45, Part 2* (1948). p.507

[64] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.56

[65] Rawls, "Theory of Justice.", p.72

[66] Hockett, "Minding the Gaps: Fairness, Welfare and the Constitutive Structure of Distributive Assessment." p.48

[67] Philippe VanParijs, "International Distributive Justice, in a Companion to Contemporary Political Philosophy: A Companion to Contemporary Political Philosophy," *Blackwell Publishing, Goodin, Robert E., Philip Pettit and Thomas Pogge* (2007). p.640

1.2. International Distributive Justice (IDJ)

The creation of nation-states and the establishment of international law elevated the theory of justice to a new level. Prior to that, the theory of justice and its principles were only discussed on a national scale and within the boundaries of society. Following the introduction of the new arrangements on an international level, international organizations were established and the decisions made in these arrangements started to affect the national decision-makers' decisions and to impact the distribution of burdens and benefits. The call for justice on an international level was not only inspired by the significance of the role of international players in channelizing and impacting wealth creation and wealth distribution but it also found a remarkable position in addressing the problem of inequality due to historical events. The colonial abuses delegitimized justice in acquisition[68] and consequently put in question the current international holdings not only from a distributive perspective of justice, but also from the corrective nature of justice. The call for justice in structuring the relationship of individuals in an international and globalized world requires that the possibility of having an international version of justice be studied and the theory of justice be developed in order to be applicable to the trans-boundary relations.

The necessity of justice on an international level has been realized and studied more seriously in recent years. The process of globalization and international integration of national economies and national politics have further highlighted the fact that the destiny of all nations is becoming more and more dependent on each other than before. The increase in integration and dependence, the evolution in international means of communication and the integration of the global economy which are current and non-stop processes have caused the destiny of human beings who were more or less detached from each other prior to that, to be more associated together in the coming years and decades. The problem of inequality and call for equality from one side and the interdependence of the

[68] The breach of justice in acquisition would lead to the violation of justice even in the libertarian sense.

nations and their affection on the well-being of each other through international relations have motivated the action of calling for principles of justice in structuring international arrangements. Consequently, the call for just international relations and the application of principles of justice on an international level have put forward a new concept of justice suitable for the international arena. The extension of the second principle of justice to international relations has developed the concept of *International Distributive Justice* as the applicable principle in addressing the problem of inequality on an international scale.

1.2.1. Philosophical Foundation of IDJ

One of the first and the most important aspect of justice in international relations is the philosophical account of the concept of international distributive justice. The priority of this account is based on the fact that the theoretical study of current order and the application of the theory of justice to international relations requires a firm and reasonable philosophical justification and argument on the issue of trans-boundary application of justice principles and for addressing this question it should answer whether individuals of different societies have an obligation to one another due to accepting the benefits of membership in global institutions.[69]

Regarding the philosophical routes and targets of international distributive justice, disagreement exists among the justice theorists. The definition of a just situation has been at the center of the controversies and debates of international justice. The end-oriented approach rules that a just situation exists as long as equal outcomes exist whereas the act-oriented outlook to justice does not consider a role of guaranteeing the equal outcomes among the individuals in a world-wide scale and looks towards establishing a just mechanism in which all members of the international community enjoy equality in opportunities. Another fundamental disagreement addresses the scope of the international concept of justice and the

[69] Kemp, "International Distributive Justice: Evaluating Cosmopolitan Challenges to the Law of Peoples." p.21

limits of the application of these principles. This disagreement itself is evident when considering the reduction of inequality as the primary and most important mission of international distributive justice or limiting its role in the international arena by providing the basic minimum.[70] Consequently, the disagreement in the fundamental issues of target and scope cause disagreement in the criterion, rules, structures and strategies which have been elaborated in several philosophical approaches to the international definition of theory of justice and especially the concept of international distributive justice.

1.2.1.1. The Traditional Theory of Justice

The traditional theory of justice in international relations believes in the inapplicability and irrelevancy of the justice principles to international relations. The inapplicability of the principles have been justified and argued by resorting to several reasons in the theoretical schools. The absence of basic structure, the right of self-determination, the neutral approach and minimalist view towards human rights and the absence of agents for taking responsibility for the implementation of justice principles have been put forward, discussed and reasoned in order to develop a limited and neutral role for the justice theory in the international arena. These arguments all address the basis on which the inapplicability of justice on an international scale has been argued. The most important theorist of the modern justice concept on a national scale, John Rawls steps back from his comprehensive distributive scheme in international relations and limits the applicability of justice principles and especially the second principle of justice to the individuals who interact with each other; these interactions which irrespective of their condition and situation raise the duty of justice in a general sense.

1.2.1.1.1. Rawlsian Approach: Neutralism and Self-Determination

The Rawlsian approach to justice in the international domain presents a different overview of the definition of individuals and based on its special definition of

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[70] Jagdish Bhagwati, "Dependence and Interdependence –Essays in Development Economics," *Basil Blackwell Oxford, ed. Gene Grossman* 2(1985). p.2

political boundaries, it considers a new role of distributive justice in international relations. The core stone and fundamental concept of the Rawlsian theory, whether on a national or international scale, is the notion of basic structure. Rawls' theory of justice looks at the existence of basic structure as the prerequisite for the application of the principles of justice and from this point of view there would be no difference in his theory between the national and international scales. The existence of a basic structure justifies the relevancy of justice principles and as far as an equivalent structure in international relations could be found or set up which represents the people of the international society and distributes the burdens and benefits on an international scale, he would apply the same principles of justice in international relations. However, in the absence of the basic structure on the international arena the result would be the inapplicability of justice principles on this stage. Therefore, in Rawls view "there is no global structure mainly because there is no "world-state" and "since there is no world-state, there is no interdependent global property system to apply a principle of distributive justice to, such as the difference principle."[71]

Rawls international theory originates from his special opinion regarding political borders. In accordance with this theory political borders are contingent and morally significant which leads to a limited role for the international version of principles of justice. The Rawls international theory looks at a way in between the mere *modus vivendi*, determined by the balance of powers and the ideal situation of enforced justice principles. His middle way focuses on the states' system and establishes the states as the point of departure in developing his international theory; i.e. The Law of Peoples.[72] Rawls' Law of People generally accepts flexibilities and differences in approaching human rights and looks towards resolving the tension between a western definition of human rights and different liberal and non-liberal political constitutions and societies. Therefore, a neutral

[71] Samuel Freeman, "The Law of Peoples, Social Cooperation, Human Rights and Distributive Justice," *Social Philosophy and Policy* 24(2006). p.61

[72] Imanuel Kant, "Perpetual Peace, Political Writings," *Cambridge University Press, ed. H.S. Reiss* (1991). p.105

approach would be developed which seeks to accommodate the other non-liberal but *decent* societies.[73]

However, the decent society in Rawlsian terms presents a distinction between acceptable and non-acceptable societies with regard to respecting the minimal set of human rights. This minimalist approach to human rights which originates from Rawls' neutralism in international relations contains only the most basic human rights related to *the right to life* (to the means of subsistence and security); *to liberty* (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); *to property* (personal property); and *to formal equality as expressed by the rules of natural justice* (that is, that similar cases be treated similarly).[74] The neutral and minimalist approach to human rights in international affairs results from John Rawls belief that no common, authoritative body; i.e. basic structure, which would be capable of distributing burdens and benefits and imposing rights and duties does exist. Rawls presents the basic notion of human rights as the guide for foreign policy and further develops the idea that this existence of human rights could be a legitimacy threshold for all the states which by respecting them would block any justification for interfering into other states' affairs.[75]

Apart from moral reasons and arguments spelling out the neutralist approach of John Rawls in international relations[76] the political significance of self-determination justifies the Rawls shift from the person in his theory of justice on a national scale to people in the international version of his justice theory. He views the people as moralized political groups which due to being represented by their internal institutions, are presupposed to be off limits where interference in their

[73] Melcked-Garcia, "International Justice, Human Rights and Neutrality." p.156.

[74] John Rawls, "The Law of Peoples," *Harvard University Press* (1999). p.65

[75] Melcked-Garcia, "International Justice, Human Rights and Neutrality." p.172.

[76] Several arguments have been made justifying the international neutral school. Generally these moral considerations have been argued according to moral concepts such as wide moral accessibility and pluralistic approach to cultures which all are based on the traditional conservative notion of nation-states. Allen Buchanan, "Recognitional Legitimacy and the State System," *Philosophy and Public Affairs* 28(1)(1999). p.55

affairs is concerned.[77] Accordingly any interference in their internal affairs in cases other than serious abuses would be a violation of self-determination and the non-interference approach and also against the Rawlsian international theory.[78]

1.2.1.1.2. Other Traditional Approaches

In addition to the Rawlsian international approach to the role of justice, other philosophical and political theories have been presented denying any international role for justice or admitting only a limited definition of the concept of justice. The theoretical school known as *constructivism* looks at the agent which the principles of justice should govern. Constructivism puts its emphasis more on the operation and implementation of the theory and principles rather than focusing on moral obligations and theoretical principles.[79] The Rawlsian theory could be viewed as a constructivist theory in the sense that the basic structure is the responsible agent and mechanism of implementation of justice principles and the absence of the basic structure on an international and global scale results in the rejection of any enforcement of justice principles at any ultra-national level.[80] In addition, other conservative schools such as the *Cosmopolitan Principle of Global Equality of Opportunity*[81] or the *Complex Equality*[82] present a way between sufficientarin

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[77] For being recognized as state institution which represents the political economy, some minimum standards should be respected which these conditions of fitness serve as an account of self-determination which without them it would be difficult to claim that a society or political community in question, freely accepts the political institutions it has. Test of fitness has been presented to investigate and determine the fitness of political community and the state institution. Michael Walzer, "The Moral Standing of States: A Response to Four Critics," ibid.9, no. 3 (Spring, 1980). p.209.

[78] T. Scanlon, "Human Rights as a Neutral Concern, Human Rights and U.S. Foreign Policy: Principles and Applications," *Farnborough: Heath, ed. P. G. Brown and D. Maclean* (1980). p. 87

[79] "What We Owe Each Other," *Cambridge, Mass. and London England, Harvard University Press* (1998). p.228

[80] Rawls, "The Law of Peoples." p.122

[81] The Cosmopolitan Principle of Global Equality of Opportunity which accepts sufficientarian action for basic rights approaches egalitarianism as a political project which should foster the global equality of opportunity. Daniel Butt, "Global Equality of Opportunity as an Institutional Standard of Distributive Justice," *Distributive Justice and International Economic Law, Chi Carmody, Frank Garcia, and John Linarelli (eds.), Cambridge University Press* (2011).

[82] However, the Complex Equality classifies the requests for justice into three classes of actions; while supporting egalitarian action and providing global equality in health and education it proposes sufficientarian action in housing in the sense of providing a minimum level of equality

approach and egalitarianism which are viewed as conservative approaches to the role of justice in international relations.

1.2.1.2. Transformative Accounts: Cosmopolitan and Non-Neutralist Approaches

The second and significant aspect relating to the global version of justice are the transformative accounts which look at justice as a global concept that could and should be defined and applied not only in international relations but also globally without the need to take on board boundaries imposed by political considerations. The transformative accounts of justice known as the post-Rawlsian debate have endorsed a global concept of justice on ideas such as moral cosmopolitanism, universalism, relativism, etc. The transformative approach to international justice rejects the Rawlsian theory of international relations and criticizes the theory based on the traditional concept of states which constitutes the main pillar of Rawls theory. Despite Rawls claim that a global basic structure or a world-state does not exist to make the justice principles applicable to international relations, such sovereign states that were the basis of Rawls' theory in both domestic and international societies do not exist anymore and the theory should consider the changes that have occurred in the definition and concept of states.[83] There has also been criticism of Rawls in the face of the growth of supranational organizations with the associated power of imposing binding rules. Although international organizations fall short of being a real global state, the general trend in international relations within which the discretion of national states has been gradually decreased while the influence of international organizations has increased through the production of rules and regulations which are coercive and binding, means that the role of these organizations cannot be ignored and the stated absence of a global basic structure would not be correct anymore.[84]

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in access to shelter. This approach believes in insignificancy of inequality in other unimportant issues such as luxury goods. Ibid.

[83] Christopher Bertram, "Cosmopolitanism and Inequality," *Res Publica* 12(2006). p.328

[84] Robert O. Keohan, "Global Governance and Democratic Accountability," *http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan034133.pdf* (2002). p.2

Certain transformative theories have attempted to apply the transformative approach toward the international application of justice principles by focusing on the internal principles and rules of society. The theories such as *Take Distribution Seriously*[85] and *Structural Fairness*[86] emphasis the internal structures of social welfare and the rules distributing the advantages and disadvantages between different classes within society, nationally and internationally. However, the general philosophical transformative account of international and global justice has been reflected and detailed in the cosmopolitan and non-neutralist approaches. Several academics and researchers have contributed to the literature and tried to develop a transformative concept of justice on a global scale. To detail and develop the principles of distributive justice in international relations and also on a global scale, different frameworks have been presented. These frameworks, although they share similar major principles, each has separate and distinct rules in applying the theoretical principles to the real world and should be studied in order to develop the ideal and practical IDJ.

1.2.1.2.1. Cosmopolitanism

The cosmopolitan school is the most significant branch of the transformative accounts of justice on international level. Cosmopolitans have criticized Rawls principles and outcomes on global and international levels. Rawls refusal to apply the difference principle internationally, while presenting a minimalist set of human rights as the guide for international relations and the neutralist and tolerance have been rejected by the cosmopolitan experts. They believe that in

[85] Take Distribution Seriously holds the international role of concept of justice as a bridge between the maximization of wealth and the equalization of wealth which should be shaped in a way that establishes a systematic relationship to transform the result of utilitarian concept, i.e. the maximization of wealth, to its fair distribution. See Robert Hockett, "Human Persons, Human Rights, and the Structure of Justice," *Distributive Justice and International Economic Law, Chi Carmody, Frank Garcia, and John Linarelli (eds.), Cambridge University Press* (2011). Also See "Taking Distribution Seriously," *Cornell Law School research paper No. 08-004, available at http://ssrn.com/abstract=1108217*.

[86] In Structural Fairness, the internal principles and rules of how to make the current order more just such as fair play, non-discrimination and competitive fairness all depend on the complex relations that now organize global arena and to apply the justice approach to international relations, it should address the rules as how they distributive advantage. Aaron James, "Global Economic Fairness: Internal Principles," *available at: https://webfiles.uci.edu/ajjames/Internal%20Principles1.doc*.

Rawls political liberalism, the basic units which are of moral concern are individuals and any shift from individuals to any other criterion would have no reasonable justifications.[87] The states do not enjoy a moral value, nor are starting point in developing the principles of cosmopolitanism. The cosmopolitans put their point of departure on individuals on global scale and reject any moral significance of the political boundaries in developing their principles and rules.[88]

In addressing the inequality in international relations, Rawls presents the 8th principle of the Law of Peoples[89] in order to attenuate the unequal nature of his libertarian approach in international relations. However, his solution and argument contradicts with his argument in the domestic case which presented the free bargaining among the members of society causing the moral powerful members to shape the transactions in their own favor enabling them to take more advantage of the international transactions.[90] Therefore, the arbitrary inequalities between the members of society distort equality in access to opportunities and resources of society and results in domination of certain members of society over other members, and cosmopolitanism extends the same argument to international relations and international institutions by looking at the arbitrary inequalities between the members of these international institutions, i.e. the nations, as a significant element which results in domination of powerful and high-income members over the weaker and low-income states.[91]

They reject constructivism by adopting individuals as the proper agents for global justice and criticize Rawls for ignoring individuals on an international level and limiting the application of the justice principles only to domestic rules without

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[87] Katrin Flikschuh, "The Limits of Liberal Cosmopolitanism," *Res Publica* 10(2004). p.177

[88] Monique Canto-Sperber, "The Normative Foundations of Cosmopolitanism," *Proceedings of the Aristotelian Society* 106(2)(2006). p.267

[89] "8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime." (Rawls, "The Law of Peoples.", p.37)

[90] Thomas W. Pogge, "Rawls on International Justice," *The Philosophical Quarterly* 51(2001). p.252

[91] Adil Ahmad Haque, "Justice without Borders," *Available at SSRN: http://ssrn.com/abstract=654941* (2005). p.17

any admissible justification. Addressing the moral injustice of the current worldwide inequalities in personal well-being and freedom and supporting the concept of international moral obligation, the cosmopolitans believe in the irrelevancy of territorial boundaries and the fundamental contradiction between sovereignty and justice by holding states as significant obstacles to global justice.[92] In cosmopolitanism the adopted global scheme as the ideal agent should be deemed legitimate as if they are representatives of their individuals and not the states (peoples). Therefore, they reject the intervention of international organizations as the representatives of peoples and nations. They believe in the significance of individuals on a global level and present the idea of forming a sort of authoritative global power in a so-called global public law to which the same rules of public law on the national level would be applied irrespective of national boundaries.

The cosmopolitan account of justice is of a non-relational and non-interactional nature. They believe that despite the separation of individuals by national boundaries, economic relations have united individuals and have provided the basis for claiming moral equality among individuals. Thomas Pogge proposes a new justification for cosmopolitanism by presenting the notion of *shared responsibility* in aiding the victims and attempting to reform the unjust relations.[93] Accordingly, even if one accepts that the duties of aiding and rejecting the unjust scheme relates to individuals of the relations which affect each other, the concept of *Vertical Dispersal* believes that people's level of membership is not limited to states and includes local and international memberships. He claims the failure to understand the reason for limiting the application of the domestic justice principles to global relations and presents an inconsistency between liberal moral theory and actual liberal practice.[94] Pogge believes in *fair background conditions* on a global level and in international relations. The fair background in Pogge's theory is a fair initial distribution of societies' resources and a set of just principles, rules and procedures which apply to the members' interaction afterward; the principles which implement the difference principle on a global

[92] Canto-Sperber, "The Normative Foundations of Cosmopolitanism." p.275
[93] Thomas W. Pogge, "Cosmopolitanism and Sovereignty," *Ethics* 103(October 1992). p.50
[94] Flikschuh, "The Limits of Liberal Cosmopolitanism." p.190

scale and provide outcomes which are influenced more by the freedom of members in exercising choice than initial arbitrary endowments.[95]

Therefore, the cosmopolitans try to fill the gap of the global basic structure by proposing a multi-layered authority for resolution of disputes either through the prerogative of voluntary state relations, or through some higher authority, meaning global government. They reject inequality and discrimination among individuals and present the enjoyment of certain economic and political rights as the criterion for judging different political regimes.[96] Apart from general theories of cosmopolitanism developed by Thomas Pogge and certain other academics,[97] different sorts of the subsidiary schools of thought have been developed by the cosmopolitans. *Cosmopolitan Democracy*[98] and *Cosmopolitan Republicanism*[99] have presented a need for a multi-layered democratic and enforceable system in a new domain of global public law; the former through accepting the concept of self-determination as the main pillar of democracy and the latter through rejecting such an idea.[100]

1.2.1.2.2. Non-Neutralism and Reasonableness

The second major transformative approach to international justice criticizes widely the neutralism in international human rights which led to the minimalistic approach of international human rights. They view the Rawls approach to

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[95] Christopher Bertram, "Cosmopolitanism and Inequality," ibid.12(2006). p.332

[96] Simon Caney, "Justice Beyond Borders: A Global Political Theory," *Oxford University Press* (2005). p.113

[97] As an example, Simon Caney rejects the Rawlsian idea of holding the principles of distributive justice only between peoples of the same cooperation scheme based on the lack of guidance in the applicable principles in global markets and its silence on international environmental justice. Ibid.

[98] The Cosmopolitan Democracy is developed by David Held. For more see David Held, *Cosmopolitanism: Ideas, Realities and Deficits*, in *David Held and Anthony McGrew, eds., Governing Globalization: Power, Authority, and Global Governance, Cambridge: Polity Press, 2002.*

[99] The Cosmopolitan Republicanism is presented by James Bohman. For more see *James Bohman, Republican Cosmopolitanism*, *Journal of Political Philosophy 12, no.3, 2004, pp.336-52.*

[100] William Smith and James Brassett, "Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives," *Ethics and International Affairs* 22:1(2008). p.80.

international relations in defining the decency of non-liberal states and setting a minimal list for human rights as the principal reason for accommodating the wide range of liberal and non-liberal states. In fact, the criticism looks at the reason for Rawls reluctance in applying the principles of justice to international relations and argues for the non-neutralism approach in international relations in order to respect the separation of individuals. They reject the Rawls argument for developing the Law of People and his neutralist view by questioning how the plurality of states and peoples on the international scale results in the neutralism in international relations and foreign policy.[101] Accordingly, instead of developing a neutralist approach to include the non-liberal states, the criteria of reasonableness should be presented to justify the international application of justice principles. Reasonableness as the proposed rule acts as the degree for tolerance in international order. Therefore, the same role of reasonableness in national and domestic application of the justice principles would be developed and extended to the international relations resulting in different but comprehensive moral views.[102]

1.2.2. Possibility, Desirability and Legitimacy of IDJ Implementation

1.2.2.1. Possibility of IDJ Implementation

The possibility of implementing the concept of justice on a global scale results in different arguments and ideas apart from its philosophical foundations. While the transformative accounts have argued in favor of having a global and international notion of justice, certain requirements have been set as the necessary conditions for applying the principles and moving toward the materialization of these rules in international relations. In fact the question of possibility perspective of the international distributive justice looks at the required prerequisites for making the enforcement of global justice possible. The subjects considered as the prerequisite

[101] Rawls, "The Law of Peoples." p.83
[102] Melcked-Garcia, "International Justice, Human Rights and Neutrality." p. 161

for the implementation of IDJ range from the basic structure to having global people and global democracy.

Apart from the notion of the global basic structure which has been studied in the Rawlsian international conservative account, having global people in the sense that they have common culture and identity has been stated as the prerequisite for IDJ. Egalitarian justice believes in the relevancy of this condition and argues that as there are no common identical and cultural features of the states and societies, distributive justice gives it place to the minimum set of human rights and weak duty of assistance on international scale. Moreover, the condition set for the need for self-governing people with equal political rights for all members of society requires that a democracy be in place on a global scale before appealing to justice on a global scale.[103]

However, the growth in the multiculturalism of populations and improvements in telecommunication technologies have brought people around the world closer together and changed the definition and features of the nation-states. In responding to the conservative accounts of global justice which present the diversity in cultures and mechanism of governance as the main elements of restricting the claim for global justice to certain basic international human rights, the cosmopolitans believe in integration of the world both from above by establishment of international institutions and from below in terms of integration of national economies, the integration on global scale and cultural homogenization.[104] The traditional approach of justice could not ignore the process of nation-building and could not suspend the need for equality on a global scale for the establishment of a global people with the same features of people in nation-states. Similarly, the need for equality in global relations is a matter of the moral duties and rights of individuals in reference to one another and not about the pre-existence of a pure democracy on a global scale. Therefore, the mere

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[103] Gavriel Rubin, "Liberalism and Democracy: A Response to Rawls the Law of Peoples," *available at: http://ocw.mit.edu/courses/political-science/17-000j-political-philosophy-global-justice-spring-2003/assignments/rubin_paper.pdf*. p.12

[104] Canto-Sperber, "The Normative Foundations of Cosmopolitanism." p.269

mutual acceptance of individuals living in the same justificatory community would be sufficient in ruling in favor of IDJ and the cosmopolitan and the global governance approaches have shifted the basis of their approaches from peoples with the same culture to individuals on global level.[105]

1.2.2.2. Desirability and Legitimacy of IDJ Implementation

The second important aspect targets the desirability of implementation of international distributive justice. This desirability does not address the philosophical and theoretical accounts and even accept the international approach of distributive justice but puts in question whether or not to address the problem of inequality on an international level and if the international implementation of principles of justice is desirable. To address the problem of inequality in international relations in economy and politics, some solutions and approaches have been developed. These alternative approaches of justice all study the unjust structure of international arrangements from their specific point of view. First and the most important are the human rights approach and the development of a new category of human rights; i.e. right to development. Additionally, other approaches become distinct based on their point of departure; one by legitimacy and the other by democracy.

The primary subject in studying the necessity for having an international framework for the justice principles is the ethical significance or non-significance of boundaries. According to the humanitarian and justice-centered point of view, the right to have equal opportunities should be for all regardless of their nationalities. Based on this approach, the question arises whether or not in order to address inequalities in a manner to provide equal opportunities or just outcomes, it is necessary to develop the international distributive justice concept. Some proposals have been made as some sort of peripheral to the distributive justice concept and for removing the necessity for developing IDJ and putting in question the desirability of having distributive justice on an international level.

[105] VanParijs, "International Distributive Justice, in a Companion to Contemporary Political Philosophy: A Companion to Contemporary Political Philosophy." p. 648

The restorative concept and transgressed legitimate entitlements has presented the possibility of accepting reparation for colonial and other abuse cases without the need to resort to the development of IDJ.[106]

On the trade side of the debate, initiatives such as the necessity for having fair trade to ensure that the poor do not suffer from monopolies or the cooperative concept of trade by proposing equal distribution of the benefits of cooperation have put in question the necessity for international arrangements for justice. Apart from controversial ideas such as worldwide equal rights to natural resources and sharing them or the humanitarian duty to rescue other human beings, the Rawls approach does not endorse the international concept of justice and refers only to meeting basic needs on a global scale while ensuring a duty of assistance to the weak. In addition to Rawls minimum economic security, Miller put forward the minimally adequate life and right to subsistence as the acceptable concept in the international arena addressing the problem of inequality and Sen follows the route of securing everyone's basic capabilities.[107]

Among all these alternative concepts and peripheral routes to the problem of inequality, the question is "what is the lack and shortage which necessitate the development of IDJ"? The reason refers to the fact that all these proposals and ideas fall short of tracking entitlements. They accept the existing and current entitlements as the correct and just entitlements and put their starting point as the status quo. The reparative concept put in question the legitimacy of entitlements, but falls short of going further and has limited scope and only deals with correcting the wrongdoings of the past. Other considerations regarding the right to subsistence are not only vague in the meanings of basic needs and minimum basic rights, but also limited in the sense that they do not go further than basic needs and do not care about inequality in a broader sense other than providing basic needs. The reason which necessitates the development of a justice-centered

[106] Daniel W. Van Ness and Karen Heetderks Strong, "Restoring Justice: An Introduction to Restorative Justice," *Matthew Bende and Company, ed. Ellen S. Boyne* (2010). p.8
[107] VanParijs, "International Distributive Justice, in a Companion to Contemporary Political Philosophy: A Companion to Contemporary Political Philosophy." p.642

concept is that the international notion of justice studies international arrangements and the problem of inequality in a general, comprehensive and coherent manner; general in the sense it does not care only for past unjust actions and entitlements; comprehensive which does not limit its scope of application to providing basic needs and primary human rights and coherent in the sense that it will not prescribe the application of the principles of justice to one issue, e.g. distribution of natural resources, and applying other non-justice rules and principles for other areas.

While addressing the issues from philosophical foundations of IDJ to its possibility and desirability, still the most important issue which exists is the agent of IDJ and whether or not international organizations have the legitimacy to go after the transformative account of justice. The issue of legitimacy does not interfere with the philosophical account of distributive justice or the desirability of its implementation. Rather, it accepts the rightness of its philosophical account and admits the desirability of its implementation but puts into question the proper agent for its implementation and whether or not international organizations are the legitimate agents to go after distributive justice. While some believe that international organizations must only uphold the basic socio-economic rights and should not follow any transformative distributive pattern, other approach accepts the role of the enforcement of distributive justice for international organizations but make a distinction between the basic socio-economic rights and a global equality of opportunities. Accordingly, international institutions should take immediate action to uphold socio-economic rights while for a comprehensive egalitarian approach and for providing global equality of opportunity, they should develop a political project to justify the intervention of international organizations.[108] However the question of legitimacy is addressed in a broader view of the global governance approach. This approach provides reasonable grounds for the international application of justice theory and sets the duties of the international organizations as the part of global governance.

[108] Butt, "Global Equality of Opportunity as an Institutional Standard of Distributive Justice."

1.2.3. Global Governance Approach

Rawls theory of international justice is based on certain facts and conditions which constitute the pillars of the argument in favor of the Law of Peoples and the minimalistic approach to international human rights as a guide for foreign policy. These facts and presupposed conditions generally refer to the notion of states as separate and totally independent entities without the possibility of affecting each other and the absence of the global basic structure which in his literature is synonymous to the global government; an authoritative body which is the exclusive responsible body for distributing the advantages and burdens of the global society on a global scale. In fact, Rawls international theory, which is a non-ideal theory and does not prescribe any significant change in international relations, is a political theory developed according to certain existing types of political and economic relations and any change in these facts and relations would result in the irrelevancy and non-applicability of this theory.

However, the cosmopolitan approach has been criticized by different theories and schools,[109] and it mainly suffers from ignoring the existing facts and limitations. Alternatively, the global governance approach adopts the existing national boundaries and states as the present facts and stresses that ignoring them in developing the global justice is impossible. This view while it rejects the approach of looking at the national boundaries as a significant element in limiting the application of the principles of justice on an international level, looks at the national boundaries as the existing fact which should be taken into account in developing the global interpretation of the concept of justice. In fact, global governance is a broad conception of management which includes multilevel governance ranging from the subnational, local and regional to the national and international levels.[110] This broad concept recognizes the national boundaries as a real fact and accepts a major role for the states as the most complete form of

[109] The constructivists put forward the issue of agent of justice and ask for the appropriate agent to which the principles defining duties of justice apply. Consequentialists view the maximization of utility across national boundaries impractical and the Hobbsian school adopts the self-help rule as the criterion and rejects the cosmopolitan approach. Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.87.

[110] Bruhl and Rittberger, "From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of the Twenty First Century." p.2

authoritative body. However, all forms of governance from local to the national levels enjoy a clear mandate and distinct structure. The global governance approach addresses mainly the supranational level which is the global governance at its international level in order to complete the chain of global governance. Moreover, cosmopolitanism suffers from the problem of agency in its practical sense. Despite the cosmopolitans' view in presenting international moral obligations and the significance of individuals as the agents of global justice, their theory suffers from the lack of any practical roadmap for moving toward materialization of the justice principles. Pogge's theory, which aims at solving the problem of the basic structure on a global scale by presenting a multi-layered authority in international relations, lacks the authoritative body for decision-making and for dispute settlement in order to dominate the traditional concept of state voluntarism.

1.2.3.1. Creation of Burdens and Benefits

As a consequence of these criticisms, the extension of the Rawlsian principles of justice to global interactions was undertaken by Charles Beitz who claimed the absence of reason that why Rawls' two basic principles of justice should be changed in transposing them to a global framework. Beitz asserted that Rawls had to demonstrate why he had changed his position in the international domain and why he had changed from persons in the analysis of domestic society to peoples in the analysis of international society.[111] Beitz maintained that national boundaries had no moral significance so there would be no difference between the principles applicable in domestic societies and the principles applicable in a global arena. Beitz argues that as Rawls had not rendered a plausible reason for this shift, we ought to extend the domestic principles to the international domain and in response to Rawls' theory which considers the existence of cooperation and interaction as a necessary factor, Beitz believes that although existing global interaction is sufficient to ground duties of distributive justice between the states, justice is required to be applied across the borders even in the absence of

[111] Beitz, "Cosmpolitanism and Global Justice." p.21

interaction and cooperation.[112] Furthermore, in selecting the criteria for applying requirements of justice, Beitz looks at the production of burdens and benefits as the primary criterion for applying the principles of distributive justice. Therefore, he argues that if any social activity produces benefits or burdens the problem of justice would arise whether or not the activity takes place on a domestic or international level.[113]

The application of Rawlsian justice principles is dependent on the existence of a coercive legal system. The most significant feature of a coercive mechanism which is a prerequisite for the international and global concept of justice is its capability of introducing and imposing all duties and rights to all respective members and parts of society. The Rawlsian point of view focuses on the members' obligation rather than natural duties and considers society as a social contract within which parties to the contract are obliged by their voluntary acts.[114] Therefore in searching for the agent of global justice to apply the theory of justice to the global basic structure, Rawls presents the Global Government as the authoritative body required to rule in the context of the application of justice.[115]

However, in the current international order, the only body which acts in an authoritative manner is the state and international arrangements are based more or less on state-consent. Consequently in the Rawlsian perspective, justice with all its principles and rules is applicable only to domestic societies which enjoy a self-sufficient scheme of cooperation. On the contrary, Charles Beitz presents a new perspective to global justice and rules for the sufficiency of production of benefits and burdens. He considers the mere existence of the global scheme of cooperation

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[112] Allen Buchanan and David Golove, "Philosophy of International Law, the Oxford Handbook of Jurisprudence and Philosophy of Law," *Oxford University Press, Edited by Jules Coleman, Scott Shapiro and Kenneth Einar Himm* (2004).

[113] Beitz, "Cosmpolitanism and Global Justice." p.24

[114] "Political Theory and International Relations," *Princeton University Press* (1999). p.131

[115] The controversy among the followers of the global government exist on the issue that the criterion in having global government is it on having a democratic system or to have only a coercive legal system irrespective of its democratic nature. VanParijs, "International Distributive Justice, in a Companion to Contemporary Political Philosophy: A Companion to Contemporary Political Philosophy." p.650

and applicability of justice anytime from which benefits and burdens are produced; e.g. the international and global relations.[116] Therefore he rules for the existence of the global basic structure despite the absence of the global government and argues for the relevancy of the justice principles in the situation where the complex system of border-crossing rules has made the fate of people across the world dependent on each other.[117]

1.2.3.2. Global Governance as the Global Basic Structure

While the Cosmopolitan and the Rawlsian approaches both agree that a global basic structure does not exist, the cosmopolitans do not see this as a reason for ignoring requirements of justice. The cosmopolitans view the international moral obligation as triggering global justice for which individuals are considered as the agent. However, the history of justice theories presents the notion of progression from global government to global governance. This progress criticized the definition of state in Rawls theory by advocating the fact that former states no longer exist while there are a growing number of international organizations; these international organizations although falling short of global state definition, produce coercive rules and affect the mechanism of distribution of benefits and duties. As a consequence, the pattern would change from a global state that distributes burdens and benefits to a multidimensional concept of networks and multilateral legal and political processes which do not substitute the existing nation-states but rather broaden the scope of international relations and act in accordance with the principles of justice. Thus, individuals of different societies would be seen as those who have obligations to one another due to accepting benefits of membership in global institutions and consequently international institutions would undertake a prominent role in the global governance structure and would be studied as the starting point.[118]

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[116] Kemp, "International Distributive Justice: Evaluating Cosmopolitan Challenges to the Law of Peoples." p.19

[117] VanParijs, "International Distributive Justice, in a Companion to Contemporary Political Philosophy: A Companion to Contemporary Political Philosophy." p.651

[118] Kemp, "International Distributive Justice: Evaluating Cosmopolitan Challenges to the Law of Peoples." p.21

Much recent works done in the context of global justice and international law have dismissed Rawls' refusal to extend his domestic theory of justice to the international arena. According to these views, the fact that international economic organizations make decisions which involve allocation of social goods makes their structure, activities and decisions subject to justice theory. Therefore, we have international distributive justice which results in the second principle of justice on an international scale, i.e., "*International Difference Principle*". International Difference Principle's task is to furnish the principles that first, would serve as a standard for evaluating the social response to natural inequalities and second, would act as a guide to social institutions for making distributive allocations.[119]

The question of considering real facts presents itself in the issue of political boundaries. While there is no doubt of the existence of political boundaries, the controversy exists on the issue of whether or not it should be considered and be the basis for the ideal theory. Rawls approach considers the practical possibility and the importance of achievability and developing a realistic utopia, while cosmopolitans reject any relevancy of national boundaries in developing their theory and the global governance approach developed mainly by Beitz adopts a way in between. The *Hybrid Institutional Arrangement* proposed by the socio-politic Jürgen Habermas, though classified as a cosmopolitan school, is more a global governance approach that presents a scheme of global justice in which the democratic components of the system are materialized only in international institutions; transnational institutions which regulates the interactions on regional level and the supranational institutions responsible for peace, security and human rights on the global level.[120]

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[119] Frank J. Garcia, "Global Justice and Bretton Woods Institutions," *Journal of International Economic Law* 10(3)(2007). p.466

[120] Smith and Brassett, "Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives." p.81.

While the Rawlsian approach believes in a clear distinction between moral natural duty and distributive justice in the sense that they have different sources, not every moral claim would be a distributive justice claim and equal moral worth would not suffice to explain the duties of distributive justice. However, Beitz seems less interested to link particular claimants with particular persons and put forward a new concept of justice; "Global Governance" which is a result of looking realistically to ideal theories and has resulted from the interaction between the desirability of applying the justice principles and the reality of the absence of the global state.[121] Therefore, even with the undisputable fact of the global state's absence, due to the existence of a kind of global governance, we should move toward a more just situation and this should be the dominant trend in studying international structure.

1.2.3.3. What is the Global Governance?

In modeling the global governance, different models and patterns have been considered and studied. Apart from the idea which looks for hegemonic power and argues for world state or global government as the necessary element for effectiveness and legitimacy of global justice, the controversy exists in the sufficiency of a non-hierarchical governance with horizontal self-coordination as the appropriate model of global governance.[122] The advocates of the social and self-coordinated pattern believe in non-legal forms of international regulations beyond the state-voluntarism territory providing for "private" or "hybrid" regimes in areas such as dispute settlement, e-commerce and international human rights as the constituent elements of global governance.[123] From a broader perspective, for some experts the modern multinational companies (MNCs) have the potential of taking roles in global governance. Accordingly, due to the openness of investment markets and technological progress, these companies have a significant role in Global Public Policy Networks (GPPN) which in relation to these companies is an

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[121] Kemp, "International Distributive Justice: Evaluating Cosmopolitan Challenges to the Law of Peoples." p.32

[122] Bruhl and Rittberger, "From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of the Twenty First Century." p.24

[123] Gralf-Peter Calliess and Moritz Renner, "Between Law and Social Norms: The Evolution of Global Governance," *Ratio Juris* 22(2)(2009). p.261

emerging mechanism which has the potential of being the agent of global justice.[124]

The idea of distinguishing the social and non-state centered initiatives in international and global order and developing a concept of global civil society has been criticized in terms of lacking a sanctioning and enforcement mechanism as the primary element of the concept of governance. The core stone principle of every governance regime has been viewed as the ability to impose norms and rules with an enforcement regime for guaranteeing compliance.[125] Therefore, in defining the "global governance" term, there has been considered a significant distinction between the "*governance in global*" which refers to the consideration of the social relations and interactions on all levels beyond the national boundaries, and the "*governance that is global*" which presents a purposive mechanism of the principles and norms to which the actors bind themselves to respect the established obligations.[126] Moreover, in designing the respective body as the responsible agent for global justice, the primary role of states could not be dismissed or ignored. Despite the important evolutions, in the definition and function of the states as a consequence of the globalization process, the states play a major role in international relations and the national boundaries and national sovereignty of the nation-states remains as a currently existing fact.[127]

Consequently, apart from major market forces (e.g. the MCNs) and civil society actors (e.g. the alternative dispute settlement mechanisms), the role of states and

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[124] The MCNs have been criticized widely in terms of lack of legitimacy and accountability, their specific public sector and problem in their collective action. David Antony Detomasi, "The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks," *Journal of Business Ethics* 71(2007). p.326, 333

[125] James W. Nickel, "Is Today's International Human Rights System a Global Governance Regime?," *The Journal of Ethics* 6(2002). p.371

[126] Klaus Dingwerth and Philipp Pattberg, "How Global and Why Governance? Ambivalences, Blind Spots, and Challenges for a Critical Global Governance Literature," *available at http://turin.sgir.eu/uploads/Pattberg-D_HowGlobal_061015.pdf*. p.3

[127] Jeffrey Hart and Joan Edelman Spero, "Globalization and Global Governance in the 21st Century," *available at http://www.indiana.edu/~globalm/pdf/tkpaul08.pdf, Research Group in International Security*. p.11

the intergovernmental organizations as the symbol of the states' cooperation should be taken into account and put in a salient position of regulating the behavior of states. The major role of states and consequently the international organizations as the expression of the states' initiatives and cooperation for managing the global problems has been so significant that some academics believe that the "global governance" as an analytical approach does not only act as an alternative to the global government but also has been developed in order to highlight the role of international organizations.[128] Therefore, the global governance as the desirable global basic structure shifts more toward the institutions which enjoy a semi-authoritative mechanism in introducing provisions and rules and establishing the necessary arrangements to ensure compliance. These institutions have progressed one step more from the social norms toward legal initiatives supported by the nation-states which have been conferred the authority to set obligatory rules and make binding decisions affecting the distribution of burdens and benefits on the global scale.

[128] Smith and Brassett, "Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives." p.70

2. Distributive Justice in International Economic Order

There is no doubt that without a mechanism for distributing wealth, the process of globalization and integration of national economies would not be sustainable. Without considering the concept of justice and its principles as the prerequisite for sustainable globalization, the enormous pressure and claims from parties suffering from this process would strengthen the alternative and opposing views of nationalism or socialism. However, the question arises regarding how to extend the normative desirability of justice principles to the positive reality of international economic relations. With the existing controversy regarding the desirability, possibility or legitimacy of obtaining distributive justice principles between different political communities, the unjust character of international relations in the real world necessitates an appropriate response with rectification as the aim. This response, while using distributive justice as the ideal theory, should be developed and tailored in a manner which fits the current situation of international law. Any ideal theories which do not have the capability of implementation would be viewed as impractical theories which do not take into consideration real-life scenarios and which therefore would be incapable of bringing about any change to the lives of people affected. Therefore, to develop an ideal theory which is practical and capable of making a person's life better, the process of theory-making should be close to existing facts and the theory should develop with regards to the capability of making positive changes to the lives of people. Hence, in order to shape the ideal theory of distributive justice in international law to ensure applicability to current reality, the history of globalization and problem of inequality should be studied briefly.

2.1. History of International Economic Order

The history of international economic relations presents decades of attempts to put the issue of inequality as an important agenda item in the international arena. The current inequality embedded in today's international relations was mainly established and created as a result of decades of colonialism. Tracing back the roots of existing inequality in international relations, it is apparent that the existence of colonialism for decades created enormous wealth and advantages for certain countries, while keeping back a considerable number of countries and a huge number of people and nations which were deprived of the opportunity to use their own elements of production for the improvement and growth of their own country.[129] This pure and clear process of exploitation by foreigners has changed and expired by the independence of mainly African countries and the entry into force of a new international scheme. However, this unequal standing of international players affects the global economic relations of nation-states by providing more opportunities for developed countries to be better-off while placing poor countries in a stagnant and even negative and deteriorative trend.[130]

2.1.1. Pre-Globalization Period and US Hegemony

Following the post-World War II era and the independence of colonial countries, international economic relations experienced three different phases in which an economic element unified the different nation-states across the world. The first period, known as Bretton Woods, resulted in a politically controlled system established since 1945 in which monetary issues unified the states. The World Bank and the International Monetary Fund were established and a new regime of economic cooperation on an international scale was introduced. The second period of international economic order covers the time period between 1971 to 1989 in which international trade acted as an element through which the nation-states which were politically independent, attempted to get close to each other in

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[129] Peter P. Ekeh, "Colonialism and the Two Publics in Africa: A Theoretical Statement," *Comparative Studies in Society and History* 17, no. 1 (Jan. 1975). p.99

[130] Some believe that although the direct colonial rule had ended, it has been regenerated in a new shape, naming neo-colonialism, to maintain the unequal standings of the rich and poor countries. Ella Shohat, "Notes on the "Post-Colonial"," *Social Text, No. 31/32, Third World and Post-Colonial Issues, Duke University Press* (1992). p.106.

economic terms by motivating the free flow of goods across their boundaries.[131] The failed initiative of establishing the International Trade Organization (ITO) encouraged industrialized countries to form an agreement in which they committed to reduce the tariff and non-tariff barriers to trade in a gradual manner and in different rounds of negotiation in order to fulfill the increase in global trade.

However all the international efforts in terms of economic relations in the post-colonial and post-World War II period resulted in making the United States (US) the most important power in economic relations. The establishment of the new international monetary system resulted in the introduction of the US Dollar as the global reserve currency and the US as the major owner of world gold stock.[132] The US economy became the major player in international trade and formed more than half of total world investment in 1970s. The changes in economic relations in these periods led to the economic and also military dominance of the United States, making it the only superpower of the post-Cold War era.[133] The economic and consequently the military hegemony of the United States coincided with programs such as the Marshall Plan while the termination of the struggle between the East and West Blocs in the Cold War resulted in the dominance of US values and the liberal pro-business and anti-government approach in Europe.[134] This economic, military and cultural hegemony in the pre-globalization period formed the necessary elements of US superiority in international economic and political relations contributing to a situation where the US Government has been reluctant

[131] Hart and Spero, "Globalization and Global Governance in the 21st Century."p.4

[132] Insights, "Questioning the U.S. Dollar's Status as a Reserve Currency," *http://www.jpmorganinstitutional.com/cm/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1321489339163&ssbinary=true* (October 2009).

[133] "The 9/11 Commission Report notes that the U.S. Defense Department budget is greater than Russia's GDP. The United States is the world's largest consumer of energy, and Americans, by some estimates, consume twenty-five percent of the world's oil resources." Leila Nadya Sadat, "An American Vision for Global Justice: Taking the Rule of (International) Law Seriously," *Global Stud. L. Rev.* 4(2005). p.330

[134] John Ravenhill, "Global Political Economy," *Oxford University* (2005). p.95

to sign or ratify certain notable treaties[135] or even refusing to sign or ratify several important treaties which have become more or less a global norm.[136]

2.1.2. Globalization Era

During the post-1989 period, the world witnessed the addition of a new economic element of the unification of national economies. The monetary and free trade establishment provided the basis for capital to move easily across international boundaries and foreign investment played a major role in shaping international economic relations. The share of Foreign Direct Investment (FDI) in total liabilities rose in a tremendous way especially in the emerging markets.[137] The World Trade Organization (WTO), a more powerful and comprehensive substitute for regulating all trade and trade-related issues, provided a good basis for moving capital and delivering the world economy into a new period of global competition based on comparative advantage in the global market. World trade has grown five times in real terms since 1980, and its share of world GDP has risen from 36 percent to 55 percent over this period.[138]

The process of global integration has been accelerated by the independence of the former Eastern bloc countries and the high motivation of these countries together with Asian countries to be more active in international economic relations and show themselves as key players of the WTO. The integration of the world economy through the globalization of trade and finance started mainly in the

[135] For example the Genocide Convention of 1948 and the International Covenant on Civil and Political Rights

[136] Sadat, "An American Vision for Global Justice: Taking the Rule of (International) Law Seriously." For instance the International Covenant on the Convention on the Rights of the Child, the Kyoto Protocol on Global Warming, the International Criminal Court Treaty, Economic, Social and Cultural Rights, the Land Mines Convention, the Convention on the Elimination of All Forms of Discrimination Against Women, and the United Nations Convention on the Law of the Sea.

[137] The share of FDI in total liabilities has risen across all emerging markets from 17 percent of their total liabilities in 1990 to 38 percent in 2004 and far exceeds the share of portfolio equity liabilities, which rose from 2 percent to 11 percent of total liabilities over the same period. International Monetary Fund IMF, "World Economic Oulook," *International Monetary Fund* (2007). p.34

[138] Ibid. p.33

1980s and accelerated in the 1990s to a position today where it has reached unprecedented levels of integrity. The economic elements of investment and finance led by free trade have proven to be a key element in improving the overall worldwide wealth.[139] The per capita income, GDP on a global scale and people enjoying "medium human development" have increased drastically in the past few decades. The improvement in economic prosperity coupled with the political stability that originated from the removal of trade barriers, investment limitations and capital regulations led to the success of the whole globalization process in improving overall global wealth.[140] Financial liberalization has also accelerated considerably in the past two decades. While the developed economies have previously experienced financial security, the developing countries increased their cross-border financial assets and the financial assets have more than doubled in this period.[141]

2.1.2.1. Globalization and Inequality

The new wave of globalization which has significant implications for the economic well-being of individuals in all countries and regions and among all income groups has brought lots of hopes together with concerns. The hopes are related to the claims and advice which presents the globalization process as an open door to new opportunities and advantages which mostly relates to better access to the global economy in terms of financial facilities and expanded markets for developing nations in terms of improving their trade comparative advantages. On the other side, the concerns reflect the danger of entering into a new phase where the speed of events and availability of opportunities together with free competition among unequal competitors can easily cause the widening of the gap between rich and poor thus further exacerbating the problem of inequality.

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[139] Bruhl and Rittberger, "From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of the Twenty First Century." p.15

[140] Hart and Spero, "Globalization and Global Governance in the 21st Century."p.9

[141] International Monetary Fund: Washington, "Reaping the Benefits of Financial Globalization," *available at www.imf.org/external/np/res/docs/2007/0607.htm.* (2007). Total cross-border financial assets have more than doubled, from 58 percent of global GDP in 1990 to 131 percent in 2004. IMF, "World Economic Oulook." p.33

Despite the fact that this process of global liberalization brought certain positive outcomes in some parts of the world especially in some countries of Eastern Asia, the overall outcome has been viewed as a significant element in widening the gap between rich and poor and exacerbating inequality. In contrast to the tremendous results of free trade in increasing global wealth, the gap between the rich and poor on a global scale has been deepening and the increased wealth has not been justly distributed. The reports of international organizations show that the speed of difference between the incomes of the rich and poor has increased from 30 to 1 in 1960 to 74 to 1 in 1997.[142] The statistics indicate that 13 percent of people in the world live in societies with a GDP per capita of more than USD 30,000 while the remaining 87 percent live in poor societies with an average per capita GDP of USD 1200.[143] The income gap between the fifth living in rich and fifth living in poor countries had increased from 30 to 1 in 1960 to 74 to 1 in 1997 which led to the belief that the western countries did not only fail to honor their negative duties of justice but also contributed to the creation of global poverty in an extreme sense.[144]

The distributional impacts of the process of globalization have also been examined from both optimistic and non-optimistic points of view. The optimistic approach while recognizing the deepening of inequalities and the rise of inequalities following the globalization process, asserts that at the final stage the inequality would decline as the countries move forward towards industrialization. This approach which had been developed even before the start of the new era of globalization and which has been followed and supported by a considerable number of researchers and academics, believes that despite the fact that globalization will widen the gap between low-income and high-income countries in the primary stages, finally the low-income groups will come out as winners from globalization in absolute terms and overall the globalization process will

[142] UNDP, "United Nations Development Programme: Human Development Report 1999," *Oxford University Press* (1999). p.3
[143] Pogge, "Rawls on International Justice.", p.251
[144] Flikschuh, "The Limits of Liberal Cosmopolitanism." p.186

automatically act as a reducing-inequality element.[145] However, the opposite approach rebuts the optimistic view arguing that although globalization would increase the overall incomes on a global scale, the advantages and wealth created as a result of this process are not shared equally among the individuals in different countries and the mere globalization of economies, unless balanced by a new element would not result automatically in optimum results.[146]

The globalization process moved the members of the new globalized world into a new stage of competition which could speed up the development of wealthy and high-income countries while lowering the speed of development of low-income countries leading to a greater gap and more unjust outcomes than before. This income disparity and the widening gap between poor and riches not only results in social externalities but also limits the growth capacities of low income countries due to the fact that the opportunities created by globalization may not be fully exploited.[147] The unjust positions of the players of international economy not only reduce the development speed of the disadvantaged countries but also cost them more to the extent that their development becomes impossible. A report by ActionAid has revealed that hunger could be costing poor nations up to USD 450 billion a year which is more than ten times the amount needed to halve hunger by 2015 and meet Millennium Development Goal One.[148]

This cost has hampered the economic performance of low-income countries keeping them at the lowest levels of life standards. The outcome has been the creation of a certain major class of countries named Least Developed Countries. These countries which have been also called low-income countries or the Bottom Billion by some researchers,[149] are the members of the international community

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[145] Simon Kuznets, "Economic Growth and Income Inequality," *American Economic Review* 45(March 1955).
[146] Justin Forsyth, "Growth and Poor, Letters to the Editor," *The Economist* June 10-17(2000). p.6
[147] World Bank, "World Development Report 2006: Equity and Development," *World Bank (Washington)* (2006).
[148] Action Aid, "Who's Really Fighting Hunger."
[149] Paul Collier, "The Bottom Billion (Why the Poorest Countries Are Failing & What Can Be Done About It)," *Oxford University Press* (2007).

which have been isolated from global economic development and international markets. The more the global economy improves, the less they gain and at the same time their growth is impacted negatively. This income gap results in a stronger bargaining position for the rich and powerful members of international society and a superiority which has enabled them to impose their wills and shape the international economic regime in favor of themselves through tailoring their own economic and trade relations in a mercantilist approach.

Even though it has had positive outcomes in certain countries and regions in the world, the globalization process in general is viewed as a factor of influence which has contributed to lowering the speed of growth in low-income countries. Moreover, it resulted in the removal from the development process of more than a billion people of the world population putting them in a situation in which survival has become impossible without foreign aid. Therefore, the globalization process, in order to be sustainable needs to maintain broad support of the people around the world. Rising inequality would prevent globalization from going ahead and it would encourage nationalistic and protectionist approaches. While globalization has deepened the inequality in current international relations, it has also brought several opportunities and possibilities for the weaker members of the international society. Therefore a new element, i.e. the principle of justice, is required to shift the stream of international economic relations toward a more just distribution of wealth and shared advantages of the global economy.

2.1.2.2. Inequality and Distributive Justice

While globalization has deepened certain inequalities within current international relations, it has also resulted in several opportunities and possibilities to facilitate the development of some low-income countries. These opportunities all relate to how globalization can be viewed and how the principles of justice can be applied to this process of denationalization in order to increase the low-income countries portion and share of global economic development. In fact the justice principle acts as a key element in shifting the current path of wealth distribution to a more just and acceptable situation.

The history of economic relations on an international scale presents pre-existing inequalities and also deepened inequalities as result of the colonial period and the globalization process. In other words, the roots of current inequalities in international relations provide the necessary basis for requiring both corrective justice and distributive justice. The removal of inequality which should take place by the redistribution of wealth has also been investigated by the theories of corrective justice. The corrective justice framework puts into question the rightness and justice of acquisition by certain countries during the time when they profit from exploitation of several other countries mainly in Africa. This sort of theories normally look at the misdistribution of wealth among the international players during the period of colonialism and look to the principles of corrective justice as the guide principle and theory to rectify the inequalities established since the colonialism era.[150]

This approach while a useful and practical approach in addressing the problem of inequality embedded in international relations has been perceived as a fact-specific theory which limits its role only to those facts within which the violation of justice in acquisition has occurred. The corrective justice approach solely addresses the issue of reparation of a specific committed wrongdoing and falls short of developing a general duty for the international community irrespective of what has happened, while the distributive justice requirements provide a broader umbrella to address all sorts of inequalities in the current international order. Therefore in order to address inequality in a comprehensive manner while presenting the justice requirements as a general duty for all international actors and members, and at the same time enhance the position of weaker members in the international society and vindicate the goal of wealth redistribution on international level, an international and global concept of distributive justice should be developed.

[150] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.210

The international version of the concept of distributive justice aims at the proper redistribution of wealth on an international scale as a solution to the problem of inequality. Hence, in order to reduce inequality, the redistribution of wealth is proposed and to accommodate and justify the process of wealth redistribution, the international sense and the concept of justice principles is resorted to. While it could be claimed that the international application of justice principles has caused researchers and writers to think about wealth distribution and removing inequality, it seems that the inequality embedded in the substance and procedure of international arrangements shift the scholars to think and study the problem in a descriptive and normative manner and the redistribution of wealth has been developed to implement the theory of justice in addressing the problem of inequality.

2.1.2.3. International Distributive Justice in Structure and Strategy

The global concept of justice or the transformative sense of international justice has two sides of implementation and application which should be considered as a whole. A comprehensive and coherent implementation of justice requires application in substance as well as the form and procedure of the respective relations. Implementation of justice-centred strategies in a structure which has been founded and shaped based on rules and principles other than justice would not end in a just outcome and at the same time having a mere just structure which provides the framework without implementation of any justice-based strategy would not help in improving the problem of inequality. Therefore, a comprehensive justice approach in international law questions and studies the requirements of justice theories not only as the strategy of the international community in addressing the problem of inequality but also as the structure and framework within which the developed and adopted strategies should take place and be implemented. Hence, the international concept of justice and global-scale approach to the problem of inequality and redistribution of wealth should perceive these principles both in the strategies as well as the structure within which the strategies should be implemented.

2.2. International Distributive Justice and Structure

The structure of international relations mainly refers to the framework in which the international players act; the framework which provides the hard-ware of justice based on which the justice-based strategies, as the soft-ware of the concept of justice find their way to be implemented in the international arena. In fact the implementation of international distributive justice requires that the structure and agent which should bear the responsibility of distribution on an international and global level be aligned with the requirements of justice and a global governance approach capable of fostering the justice-based strategies. Therefore the structure and relevant agent should enjoy at least a just procedure capable of handling the distribution-centred policies and compatible with facilitating the process of application of redistribution and justice principles on a global scale.

The international distributive justice debate in this structural context is faced with some difficulties on a philosophical account. These difficulties mainly relate to defining the point of departure in the theoretical framework and the individual-states as the international players in international relations. While the Rawls theory of justice on national level is based principally on the individuals as the members of society, the extension of principles of justice to international relations has been done by other researchers where some have kept the same criterion but in a global and cosmopolitan view, and others by substituting individuals with the nation-states on an international level.[151]

However, the basis on which the justice principles should be built up is still individuals and the structural examination of international distributive justice requires the justification of extension of justice principles to international relations by keeping individuals as the counting unit of international distributive

[151] Cedro, "John Rawls Justice as Fairness and the Wto." p.152

justice and the political boundaries and the nation-states are the existing realities which should be taken into account in the implementation of justice theories within philosophical and theoretical domains. Ignoring the realities of international relations would result in the facing of significant problems of national self-determination and independent nation-states making the theory impractical and impossible to implement. Therefore while the concept of justice should still be the pure global justice which considers all individuals around the world as the principals in the application of justice, the realities of international relations should be considered in implementing global justice and the ideal theory of justice should be tailored based on the current international relations and considering the existing political boundaries in developing the process of wealth distribution.

2.2.1. Different approaches to IDJ Structure

2.2.1.1. Global Government as the Agent of IDJ

The concept of global government has not only been set as the condition for relevancy of justice principles to an ultra-national level but also has been presented as the relevant and exclusive agent of wealth distribution in a structural scheme of international distributive justice. The body responsible for distributing all burdens and advantages on a global scale whether named as a global government, or using similar concepts such as the world government, global state or super state has been one of the most controversial subjects of justice theory. The development of such a concept has been inspired more by the constructivist approach which considers the issue of agency as the most important and core stone of each theory resulting in the development of global government as the relevant agent of global justice.[152] The Rawlsian approach and its strict condition of implementation of justice principles meets constructivism at the crossroads in the sense that it considers the existence of basic structure as the prerequisite of the implementation of justice principles' leading to the necessity for having a global

[152] Andrew Gavin Marshall, "Global Power and Global Government," *Research Associate with the Centre for Research on Globalization (CRG)*. p.64

basic structure, i.e. a global government, to rule the application of justice principles on a global order.

However the desirability of having a global government as the agent of international distributive justice has been questioned. Some writers have disputed the desirability of having such an economic structure in international relations and have ruled on the undesirability of global government in a sense that it would be a coercive institution which mandates all redistributive issues in the international economic order.[153] According to those who advocate the necessity of global government as the IDJ agent, to date no such international body has enjoyed the features of global government and as all the international organizations are based on state-consent and completely horizontal, they could not take the agent role for international justice.[154] Consequently in the absence of global government, the distribution of wealth would become impossible making remedying the low-income countries difficult. The question that arises is that in the absence of international coercive institutions to mandate distributive obligation, what would happen to the principles of justice and what theoretical pattern should be adopted internationally.[155] The question is would the international community and international players be satisfied with the current situation and wait till the formation of a global government or should they do as much as they can to reduce the inequalities and injustice even without the existence of a global government and adopt a more similar existing body to global government as the IDJ agent.[156]

2.2.1.2. States as the Agent of IDJ

An alternative approach to the international distributive justice and global government idea is the Rawlsian approach in international relations which proposes that instead of developing principles which govern all relations on a

[153] Collier, "The Bottom Billion (Why the Poorest Countries Are Failing & What Can Be Done About It)." p.176
[154] Melcked-Garcia, "International Justice, Human Rights and Neutrality."
[155] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.145
[156] Ibid. p.127

global scale, principles should be developed that govern the current international order, i.e. the foreign policy of sovereign states as defined in Rawlsian approach.[157] This approach while denying the international role of sovereign states views the absence of global government as a basis for refusing the implementation of justice principles and proposes certain soft and general principles to rule or govern the existing international relations especially the foreign policy of states. As a result, principles should be developed which govern only the foreign policy of liberal states in a very general sense.[158]

The Rawlsian theory in international relations has been developed based on the traditional theory of justice in international relations, however the second approach to the international justice structure considers the transformative concept of justice by adopting the current states as the agents for the implementation of global justice. This approach is based on the model which looks at the states not only as the agents of their nations but also, based on the necessity for political morality in the states' activities and the states' responsibilities, as the agents of the individuals to uphold moral obligations and the transboundary actions originated and shaped by the moral obligations.[159] This approach generally views liberal societies as the proper and primary agent of global justice and perceives that liberal states should be powerful enough to take trans boundary actions in a way that international peace and security are not violated.[160]

Therefore despite the Rawls theory which as a result of the absence of a global government, considers the existing point of departure as states and not individuals or members of the nation-states, the second approach of international distributive justice adopts states as the agent of global justice and considers it a duty for them

[157] Rawls, "The Law of Peoples." p.83
[158] Ibid. p.48
[159] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.67
[160] The states' trans-boundary actions have been explained and justified based on three different criteria; first the necessity of political morality in state activity, second the states' role as the individuals' agent in carrying moral obligation and the second-order responsibility of states. See *ibid., p.72*.

to engage in international actions to implement cross-state distributive principles. However this approach to the structure and agent of international distributive justice has been criticized widely based on the fundamental feature of self-governance of political societies and their equal standing in international relations.[161] This approach which is based on the possibility and power of liberal states to take international actions is contingent and also unsustainable. It also puts at risk the existing mutual peace and security leading to the denial of international cooperation. Moreover, the issue that liberal states are proper agents for global justice does not take into consideration the fact that in a world which lacks a common set of authoritative institutions, permitting liberal states to implement global justice through restructuring the non-liberal societies, will not only threaten peace and security but also deny the significance of political independence of sovereign states and act against the equal standing of nation-states.[162]

2.2.1.3. Between Status quo and Global Government: Global Governance

The notion of Global Government has been developed from a new academic review of the ideal concept of Global Government and it was first developed in the justice theories and was considered as an ideal perspective. The notion of "Global Government" shows its role through the question of the possibility of its implementation and presents itself as an answer to the question of whether the existence of global government provides a prerequisite for applying the global justice principles.[163] Nonetheless, emerging global problems following the globalization process and the difficulty of having the prerequisites to rule for the application of justice principles have motivated and encouraged academics and scholars to review once again the ideal notion of a global state and the ways in which it needs to be addressed in today's real world.

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[161] Melcked-Garcia, "International Justice, Human Rights and Neutrality." p.168
[162] Ibid. p.170
[163] VanParijs, "International Distributive Justice, in a Companion to Contemporary Political Philosophy: A Companion to Contemporary Political Philosophy."

The liberals generally do not accept the idea of global government as the guide rule for an international structure, nor do they accept the states being the agents of global justice. Rather, they look for a solution in between; i.e. a solution between a global government and states quo.[164] This option in between two extreme positions looks at the existing international institutions and the process of distribution of burdens and benefits which form a sort of global governance, addressing the transformation and progression from the notion of global government to the notion of global governance. This approach which is well-presented in Rawls-Beitz debate regarding international basic structure while rejecting the role of the states as the proper agents for global justice admits the necessity for having a basic structure therefore presenting the existing international arrangements as the necessary international basic structure which triggers the principles of global justice.

2.2.2. The Global Governance Approach

The structural study of justice theory in international relations represents the conflict of a self-help approach and institutionalism in considering the competent agent for carrying out the requirements of principles of justice. While the self-help approach looks at nation-states as the major players of the international community which follow their own interests irrespective of the consequences, the institutionalism approach puts the focus on international institutions as the significant players who follow a collective pattern of optimal outcomes.[165] This conflict in studying the eligible IDJ agent considers two distinctly different approaches to the notion of international justice based on the agent of justice and the coordinating role which has been reflected in a new dilemma of state-action and ultra-state action.

Similar to the self-help approach but one step further, the state-action approach while accepting the implementation of justice principles on international order,

[164] Melcked-Garcia, "International Justice, Human Rights and Neutrality." p.168.
[165] Ravenhill, "Global Political Economy." p.41

puts the burden of implementation on states' actions and admits no ultra-state authority to function as the justice agent. This approach in fact denies any authoritative role for international institutions and ignores any contribution of international institutions to the process of distribution of burdens and advantages. In contrast, the super-state action approach, while accepting the importance of states' actions in the process of implementation of justice principles, extends the responsibility and role of enforcement of justice to the super-state authorities. The realities of international relations and the limitations of the self-help approach advocate the special framework of global justice on the super-state premises. However the same realities of the current international order reject the idea of the necessity for global government as the only prerequisite for ruling in favor of justice principles and accept the current international arrangement as holding the minimum requirements, transiting from a global government approach to global governance within the paradigm of institutionalism.

The idea of global governance mainly addresses the principle that wherever there is creation or distribution of burdens and benefits, the principle of justice becomes relevant to be applied. The existing international institutions are generally involved in establishing international rules and regulations, imposing on sovereign states and affecting the process of distribution. Generally speaking, the ideas which support the justice-based theories in international arrangements are based on the principles which current international institutions have entered in, which could impose legally and politically binding rules and form a kind of global basic structure or global governance to be served as the necessary structure for implementation of justice theories. While the global governance approach has been widely accepted in theory, in practice and within the implementation phase, several patterns have been presented as the proper pattern. Some researchers have fostered an idea for handling the global problem within the paradigm of global governance through a multiple-organization arrangement which would be acceptable and proper whereas others look at the necessity of having at least one organization as the final body responsible for the global management.

2.2.2.1. Multiple-Organization Solutions

Certain writers believe in the international management of global problems by existing international institutions without giving any priority to any international institution to act as the leader. According to this view, due to the absence of an organization which can handle all global issues and problems simultaneously and comprehensively, there is a need to have separate, strong specialized organizations involved which can keep each other in check and balance each other's power.[166] This view insists on the necessity for the involvement of all relevant agencies' as well as a clear definition of what each institution should be responsible and its specialized task; for instance, WTO for trade, ILO for labour, World Health Organization (WHO) for health issues, etc.[167] In fact, those who support an inter-agency cooperation between international economic institutions in the current international economic order are promoting the multiple-organization model.[168] They call for strengthened cooperation between international specialized institutions to prevent conflicts and to improve global governance in order to address global problems and the problem of inequality on a global scale.[169] Other researchers advocating the multiple-organization pattern argue in favor of this pattern by resorting to the current situation and the incapacity of any of the existing international institutions to handle all global problems. They argue that the WTO, for example, cannot incorporate non-trade issues and therefore it should develop a solution by including multiple and separate organizations in the international scheme.[170]

The difference between the multiple-organization pattern and one-organization scheme does not relate to acceptance or denial of the necessity for having inter-organizational cooperation. However it refers to the primacy of such cooperation. Those who advocate this kind of cooperation as the primary and main role in

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[166] James Patrick Kelly, "The Wto and Global Governance: The Case for Contractual Treaty Regimes," *Widener Law Symposium Journal* 7(2001). p. 129

[167] Kofi Addo, "The Correlation between Labour Standards and International Trade: Which Way Forward?," *Journal of World Trade* 36(2)(2002). p.302

[168] Dukgeun AHN, "Linkage between International Financial and Trade Institutions; Imf, World Bank and Wto," ibid.34(4)(2000).

[169] Christian Tietje, "Global Governance and Inter-Agency Co-Operation in International Economic Law," ibid.36(3)(2002)., p.508

[170] Gabrielle Marceau, "Wto Dispute Settlement and Human Rights," *EJIL* 13(2002). p.756f

global governance and the key element of global governance are categorized as proponents of multiple-organizations solutions. For instance, they believe that instead of developing the idea of including a social clause in GATT, Article XX to improve the WTO to be the leader in a one-organization scheme of international structure, it would be better to encourage international cooperation between the WTO and the ILO and allow the implementation of labour standards to be followed within the ILO advocated framework.[171]

The advocators of this pattern criticize the one-organization pattern as well as those who present the WTO as a capable body for global governance, by arguing that putting non-trade problems on the WTO agenda would lead to overloading the WTO which as a result of an overload on both trade and non-trade issues would not be an effective solution.[172] Supporters of the multiple-organization pattern observe this international arrangement and international cooperation as a part of the overall shift from the law of international coordination to the law of international cooperation and this has been adopted by multiple-organization supporters as the central element of global governance.

However, the multiple-organization approach has been criticized as being incapable of solving and managing the global problems. It's critics mainly address the fact that in a multi-agency cooperation scheme within the current international environment, there would be no guarantee that all nation-states would join and become members of these organizations especially due to the fact that some of the organizations such as labour organizations would impose on them more burdens than benefits. Moreover, even if the problem of membership is solved there is no guarantee that these organizations which would have roles and positions in this inter-agency cooperation will possess adequate powers to check others and advance their agenda. In fact comparing the multiple-organization approach to the

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[171] F. Maupain, "Trade and Core Labour Standards," *Wirtschaftspolitische Blatter* 6(1997). p.583
[172] Although the need for a comprehensive organization for environmental issues exists even in one-organization models, the then Director-General of WTO's call at March 1999 for "Global Environmental Organization" was based on the multiple-organization solutions. See Renato Ruggiero, then Director-General of WTO. Jose M. Salazar-Xirinachs, "The Trade-Labor Nexus: Developing Countries Prespectives," *Journal of International Economic Law* 3(2000). p.384

WTO pattern as an example of one-organization model, even if the universal membership of those organizations is formed, the second issue of accountability among these international organizations would weaken their capability thus making them not as powerful as the WTO in addressing global problems.[173] Finally, by obtaining full universal membership and solving the problem of weakness by having really powerful institutions, there would be no guarantee that such an arrangement would lead to a desirable balance. Due to all these ambiguities and problems, the proposed solutions have not enjoyed adequate support to be the adopted pattern for the international distributive justice structure.

2.2.2.2. One Organization Solutions

Certain solutions have been presented based upon the idea of a central organ which could manage global problems in a cohesive manner. These sorts of solutions, named as the One-Organization approach have many similarities with the ideal global government approach which has been presented in legal theory and the theoretical framework. However, it differs in its answer to the question of whether or not other institutions should have a role in this management or not. Despite the ideal global government approach which sets out that only one institution would be responsible for the distribution of burdens and benefits and for managing global problems, in the one-organization model, one international institution would be selected as the leader-organization, however the role and influence of other organizations would not disappear entirely and would still be present in this scheme. In the other words, one organization would be adopted as the one which has the leading role and the roles of the other organizations would be defined in conjunction with the leader organization.

The advocators of a one-organization solution do not rule out the need for having cooperation and coordination at an international level among the international organizations. The increase in the complexity of trade and in financial and economic issues have necessitated the requirement for to cooperate together to

[173] Andrew T. Guzman, "Global Governance and the Wto," *Harvard International Law Journal* 45(2), no. 2 (2004). p.314

avoid any parallel working and waste of energy.[174] Therefore while this approach does not deny the importance of inter-agency cooperation, it places it in the context of one-leading organization. The high cost of withdrawal and exit has made the one-organization solution more effective. Within multiple-organization solutions, states can easily violate their obligations or exit whenever burdens of participation outweigh benefits.[175] However in a one-organization model violating an obligation within the umbrella of the leading organization would provide the possibility of a broad range of countermeasures, making the violation difficult to sustain. The same applies to exiting the organization which includes diverse issues and both burdens and benefits. Therefore the cost and difficulty of violating an obligation or exiting the coordinator organization which covers several topics have made the one-regime pattern effective and practical.

Adopting the one-organization approach, the debate transfers to the optimal way on how to choose the leading organization. The first approach could be to consider the establishment of a new organization as the leading organization and take the responsibility for coordinating and managing global problems especially the problem of inequality. This new organization although falling short of the concept of ideal global government should enjoy all features and have at its disposal the required (human, capital and technical) resources in order to achieve the redistribution of world wealth or at least distribute the burdens and benefits on a just and fair basis on an international scale.

However, establishing a new institution to be the responsible institution for global problems has encountered significant obstacles and difficulties. Despite the fact that establishment of a new organization with all the ideal features for carrying out the role of international distributive justice and acting as the IDJ agent for distributing burdens and benefits could be considered, realistically this would not

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[174] Ibid. p.314. The IMF salvage programs have been claimed that violate WTO Agreements. World Bank funded policies also have been prohibited by WTO SCM Agreement. AHN, "Linkage between International Financial and Trade Institutions; Imf, World Bank and Wto." p.1

[175] US withdraw from Kyoto Protocol is a significant example of reaction of countries when the burdens of a treaty outweigh the advantages. BRUCE YANDLE, "After Kyoto: A Global Scramble for Advantage." p.24"

be an efficient act. The cost of a new establishment with all the risks of having universal membership, having enough power to enforce its worldwide objectives and finally producing a desirable outcome which does not destabilize the current situation, have together resulted in recognizing the efficiency of using an existing body and institution in international structure. Using the existing structure in developing the desired institution not only is not considered as an ideal or unrealistic solution, but also would provide a broader view of the limitations under which the institution should function. Furthermore, adopting an existing body would enable the researchers to select an efficient institution with closer features to the leader organization, study its duties and responsibilities, deal with its limitations and ameliorate its current deficiencies in order to achieve the goal at lesser cost.

Studying existing international institutions highlights a number of international organizations which have the minimum required global stature and enjoy the necessary jurisdiction or scope of action in order to be the subject of studies to address global problems. These organizations which either have nominated themselves as the relevant institutions required to address global problems or which have not claimed to have such a huge objective but have been observed and studied by writers and scholars as being the capable and proper institutions on this subject are as follows: United Nations, G20/7, Bretton Woods institutions, i.e. International Monetary Fund and world Bank, and World Trade Organization.

2.2.2.2.1. United Nations Framework

The most important inter-state and international institution which is an international organization and more than a mere governmental forum is the United Nations (UN). By saying United Nations, it includes the UN itself, General Assembly, Security Council, Economic and Social Council, UN specialized agencies and UN programs forming a significant pillar of existing global governance. The UN was established by looking at security and peace and it serves as a forum in which all nation-states can have a voice and vote. The UN model was proposed in the aftermath of World War II in order to provide a forum for the peaceful settlement of disputes. However it has gradually become a complex political institution which the complexity of the scope of jurisdiction and responsibility of all respective bodies of UN has made it difficult for it to operate effectively and almost impossible for responsibility to be attributed to it. Moreover it lacks the element of abidingness and only the Security Council's resolutions are legally binding while all its other regulations and decisions lack the important element of applicability.[176] The UN whose aim is to secure peaceful relationships among nation-states was founded based on the recognition of the voluntary nature of state relationships, therefore it is a voluntary organization by nature and its international measures and regulations do not impose any positive obligations on non-members.[177] Due to the lack of abidingness, the UN and its subsidiaries fall short of developing a binding process of wealth distribution. Moreover, it has not changed alongside the changes in the in its operating environment and a consensus exists on the necessity of its reform.[178]

2.2.2.2.2. G20

The creation of the G7/8 (group of nations) which has now been extended to the G20 was a kind of effort to fill the gaps and deficiencies of the UN in its role in addressing global problems. Accordingly, in the absence of ideal world government, the major governmental forums could fill the gap and play the role and the only powerful and respectable governmental forum is the G20.[179] Therefore, as it appears in its objectives, the G20 could be a proper institution taking responsibility for addressing global problems. The former G7/8 and today's "G20" forum consists of 85 percent of global gross national product and 80 percent of world trade. In fact the G20 forum has been presented as a capable institution or forum which could take on the role of managing global problems.

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[176] Harris Gleckman, "Global Governance and Policy Coherence: Before and after the G20 Summit, Global Policy Coherence 2009 Project," *http://www.envirosecurity.org/gpc/publications/GovernanceSummary.pdf, Institute for Environmental Security*. p.3

[177] Melcked-Garcia, "International Justice, Human Rights and Neutrality." p.167.

[178] Erskine Childers and Brian Urquhart, "Renewing the United Nations System," *UPPSALA, Sweden*.

[179] Collier, "The Bottom Billion (Why the Poorest Countries Are Failing & What Can Be Done About It)." p.188

The Gs forum, although it has shown a decisive face to address the world's problems and the participation of high level heads of states shows a powerful political view to solve the issues, still suffers from exclusivity and this exclusive nature, precludes it to render itself as a real global forum.[180] It's a kind of club which apart from the criticism of the selection of its members, has ignored a great majority of the world's population and economic power and not reflected the poor countries' voices. The G20 is not a legitimate institution for the leading organization of global governance as it suffers from the agency problem and does not represent all individuals or in other words all citizens of the world. An international institution should have the votes of the members of the global society and represent them on an international scale and therefore the lack of such votes does not provide the necessary legitimacy to take a leading role in global governance.[181]

2.2.2.2.3. World Bank and International Monetary Fund

The third group of organizations which is known as the "New Bretton Woods" regime are the International Monetary Fund (IMF) and the World Bank which are at the center of the third category of specialized organizations constituting third pillars of current global governance. These organizations are leading organizations in their specific fields and perform distinct and specific roles and tasks; the IMF in currency stabilization and the World Bank in financing development projects. These institutions have good records and have proved to be more effective, global and powerful than parallel bodies in the UN such as UNCTAD and UNDP.[182]

Studying the history of the IMF highlights that the IMF was first designed to promote international monetary cooperation and stabilize foreign exchange but

180 "Policy Brief \#131," *The Brookings Institution* (April 2004). p.3
181 Canto-Sperber, "The Normative Foundations of Cosmopolitanism." p.270
182 Gleckman, "Global Governance and Policy Coherence: Before and after the G20 Summit, Global Policy Coherence 2009 Project." p.3

then it shifted to acting more as an international financial institution.[183] The IMF's structure of governance is not consistent with its purposes and it cannot function as a real global forum. The decision-making is not consistent with the minimum requirements of procedural justice and the G7 countries have 45 percent of votes at the IMF whereas 40 African countries enjoy less than 5 percent of the votes. While the ordinary decisions could be taken by a simple majority, special decisions need 85 percent of votes which has resulted in a situation where the United States, which has 17 percent of the votes, is able to unilaterally block certain decisions irrespective of the discipline and rules advocated by the IMF, resulting in the breakdown of the credibility of the Bretton Wood's regime.[184] These are all happening in a situation which United States is not subject to IMF disciplines and rules benefiting from domination of Dollar in huge deficit in balance of payments. Moreover, the record of its policy advice shows that it follows an ideology that is not responsive to all the challenges resulting from globalization and that it does not have the capabilities of being the leader organization for a one-organization model.[185]

The same applies to the World Bank which although has had considerable success in many ways, it suffers from the same problems as the IMF. The function of the World Bank which was lending money to credit-worthy countries in the framework of International Bank for Reconstruction and Development (IBRD) shifted toward more of wealth transfer to low-income countries. Most of the World Bank and IMF tasks are carried out by loans to the developing countries and not grants; an approach which has been criticized by some researchers.[186] However apart from distributive policies and justice strategies adopted by these institutions, the IMF and the World Bank have fallen short of being the leader organization and have been viewed as inappropriate and irrelevant for being the coordinator of global governance in today's circumstances. The division of power

[183] R.M. Lastra, "The International Monetary Fund in Historical Perspective," *Journal of International Economic Law* 3(2000). p.512
[184] Dennis Leech, "Voting Power in the Governance of the International Monetary Fund," *Annals of Operations Research* 109, no. 583 (2002). p.3
[185] Hector Torres, "Reforming the International Monetary Fund-Why Its Legitimacy Is at Stake," *Journal of International Economic Law* 10(3)(2007). p.443
[186] Allan H. Meltzer, "Report of the International Financial Institutions Advisory Commission," *available at http://repository.cmu.edu/cgi/viewcontent.cgi?article=1029&context=tepper* (2000).

in these institutions exists in a manner which procedural justice in decision-makings is not respected and the structure is not conducive to hearing the grievances or opinions of weaker members.[187]

2.2.2.2.4. World Trade Organization

The WTO was established as a result of nine rounds of negotiations which took place under the auspices of the General Agreement on Tariffs and Trade (GATT). GATT the former forum which managed international trade before the WTO, was more of an agreement than an organization which was formed as a result of an initiative by developed countries to circumvent the International Trade Organization (ITO); an organization which was established after the Bretton Woods arrangement and was mainly dominated by developing countries and low-income nations. Signed by small number of countries, General Agreement on Tariff and Trade (GATT) was initiated by the developed countries to move toward the free movement of goods across their boundaries. Its content represented only what should have been just one of the chapters of the ITO and several aspects relating to development and to the needs of underdeveloped countries were kept out.[188] It did not consider the existing economic inequality among the nation-states in the world and hence did not materialize welfare-increase by itself.[189]

Failure of other trade forums in reducing the trade barriers encouraged the developing and least-developed countries to join GATT and push for consideration of their economic situation in decision-making. The negotiation rounds started and the negotiation agenda shifted from some institutional issues in the first four rounds to the codification of legal behavior in the Kennedy Round and the Tokyo Round. Huge success came in the Uruguay Round and after years of negotiations resulted in the establishment of the WTO. The developing countries succeeded in integrating agricultural goods and textiles into the general

[187] John H. Jackson, "The Perils of Globalization and the World Trading System," *Fordham International Law Journal* 24(2000). p.4
[188] Cedro, "John Rawls Justice as Fairness and the Wto." p.127
[189] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.26

regime of international trade and an efficient and powerful mechanism for settling disputes arising from violation of WTO covered agreements was established. On the other side, developed countries succeeded in integrating services as the second pillar of WTO regulations, incorporating Trade Related Aspects of Intellectual Property Rights (TRIPS) as the third pillar of the WTO regime and also in introducing some general practices such as the anti-dumping practices forbidden by WTO regulations. Therefore, the Uruguay Round resulted in full representation of trade concerns in the international system, bringing developing countries into an international trade regime and it was a step toward a rule-based system instead of a power-based arrangement which therefore increased the security of small and middle-sized countries.[190] As a result of the Uruguay Round conclusion, the WTO was established in 1995 and until now has been the responsible agent for international trade.

The WTO has presented a good pattern of cooperation and regulation through justice principles. Instead of having a powerful executive branch and governing body which acts under the influence of powerful actors and developed countries, it is a member-driven organization in which the decisions are taken based on consensus. In addition, it has an effective dispute settlement mechanism which enables all its members regardless of their economic size and power to complain against each other and follow their claims via this process. While international organizations lack effective tools to induce their members to fulfill their obligations and moral pressure and public attention are the only tools which they hold that are voluntary in nature and lack real structural power, the WTO's effective mechanism of implementation has put the organization in a salient position.[191] Although economic power together with legal and political capacities have greatly influenced the process of decision-making and dispute settlement in which for example most of WTO dispute settlement cases have been among major

[190] Ravenhill, "Global Political Economy.", p.105
[191] Hans Michael Wolfgang and Wolfram Feuerhake, "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)(2002). p.895

actors of WTO, this inequality is a matter of substantial justice.[192] As far as structure is concerned, we are engaged with providing relative procedural justice and the WTO's achievement is something that does not have any precedent in the history of international relations.

The “single undertaking” feature of the WTO and integrated economies has made WTO a single package of rules, principles, commitments and concessions, thus making exiting the WTO nearly impossible and it has had real success in incorporating at least one non-trade subject to the trade forum.[193] In a one-organization model of global governance, the WTO enjoys the capabilities and potential to be presented as the leader organization and to be the major body responsible for dealing with global problems. Many believe the WTO, due to its extensive areas of global business operations, the effective and powerful sanctions mechanism, its great role and the high compliance and good record in opening markets, could be viewed as the most appropriate and proper organization to be in effective inter-institutional cooperation with other international institution in order to address global issues and play the leading role.[194] In the current situation, the WTO (including its former structure) is the only international body which has proved that it is generally improving its structure and agenda significantly in accordance with the distributional concerns. However, the WTO needs fundamental and basic reforms both in its structure according to the requirements of procedural justice and in its agenda and strategy to fulfill the requirements of substantial justice. Therefore, the WTO should be strengthened and empowered and a strong and effective WTO would be in interest of not only economic development but also in the interest of social sustainable development.[195]

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[192] Marc L. Busch Eric Reinhardt and Gregory Shaffer, "Does Legal Capacity Matter? Explaining Dispute Intiation and Antidumping Actions in the Wto," *International Center for Trade and Sustainable Development* paper n.4(2008).

[193] Guzman, "Global Governance and the Wto." p.315

[194] Wolfgang and Feuerhake, "Core Labour Standards in World Trade Law: The Necessity for Incorporation of Core Labor Standards in the World Trade Organization." p.901.

[195] Sabrina Shaw and Risa Schwartz, "Trade and Environment in the Wto. State of Play," ibid.36(1). p.154

2.3. International Distributive Justice and Strategy

The demand for application of justice principles and justice in international economic relations first appeared as part of the need for formal equality in the structure of international relations named as procedural justice. Formal equality or procedural justice provides the framework in which a just decision could be made and a just outcome could be the end result. However the problem is that a pure formal equality in procedure is not a sufficient factor for reaching a just outcome and the procedural justice and equality in the decision-making process, dispute settlement mechanism and the whole structure of the WTO, does not address the establishment of substantive equality among international players and nation-states. Therefore, the second stage of the implementation of justice theory on international relations aims at the implementation of substantive justice in a manner which not only puts the decisions taken in a just structure according to justice requirements but also asks for the substance of decisions and the outcomes to be in accordance with justice principles.

These decisions should provide a set of rules and principles to be applied to the global economy that design an ideal theoretical perspective in which the present semi-mercantilism approach in the international economy can be replaced by new rules and standards; rules and standards which break up the existing cartels, make open the global market in the same manner for all individuals, in a manner through which the authoritative body responsible for rectifying the violations will be able to monitor the trade and economic behavior and intervene whenever it finds deviations from rules and principles.[196] These principles, rules and provisions which are the substance of the decisions taken within the adopted structure for international distributive justice constitute the strategy part of the international concept of justice. The international justice approach to the substance of decisions and to the strategy of international institutions aims at a kind of patterned redistribution of wealth among the individuals across the state boundaries.[197] This strategy named as the second principle of justice in Rawls theory develops a framework in which the unequal distribution of wealth takes

[196] Clyde V. Prestowitz, "Testimony," *http://waysandmeans.house.gov/media/pdf/111/10-03-24_prestowitz_testimony.pdf*.
[197] Butt, "Global Equality of Opportunity as an Institutional Standard of Distributive Justice."

place but in favor of less advantaged members of the society. The Rawlsian theory which has been extended to the global governance on international level provides the general principle of international difference principle as the guideline in international strategy.

Following the Second World War and the establishment of the UN, the problem of inequality has become the center of the demands of the developing countries and as the priority on their agenda. Initiatives were proposed in order to address the problem of inequality and reduce the gap between the rich and poor. These initiatives focused on the substantive inequality among the international community and different classes of countries contributing to the development of the international difference principle. In the Post-World War II period and after decades of war, a new era in international relations started based on the nation-states as the central elements and main international actors and players. Following the independence movement mainly in Africa and post-colonialism era, a class of low-income countries was formed and established which were not only in a disadvantaged position due to colonialism and unjust acquisition by some developed countries, but also they were and are still suffering from the unjust nature of international relations. These unjust relations inspired the developing and low-income countries to present several initiatives to change the existing international arrangements and shift it to a more fair and equitable position.

Inspired by Marxist ideology in the 1970s, a group of developing countries presented a new economic order to enhance the standing of developing countries within the established order in international economic relations. This initiative, named *New International Economic Order (NIEO)* aimed at a more equitable relationship among the international actors and nation-states through the increase in the development assistance and decrease in the tariffs of the developed countries thus responding to the requirements of justice.[198] However, the NIEO attempt of the low-income countries failed and this was effectively due to the reason that it lacked the necessary factual basis. Its failure was due to its political roots and the economic impact of its implementation, which would have resulted

[198] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.9

in some unacceptable implications for primary goods and the creation of high barriers for manufactured goods from low-income countries. By the end of the domination of Marxist ideology, the developing and least-developed countries had no other way than finding solutions and initiatives within the liberal concept of justice and equality. Initiatives were proposed in order to address the problem of inequality and reduce the gap between the rich and poor. These initiatives focused on the substantive inequality among the international community and the different classes of countries which contributed to the development of the international difference principle and should be studied and examined in accordance with the principles of justice in addressing the problem of inequality.

2.3.1. Justice-Oriented Strategy in the Current Facts

The process of globalization has accelerated the speed of denationalization by removing economic barriers and facilitating the movement of goods, capital and the work force. The high speed with which globalization took place coincided with the existing inequality among countries and therefore resulted in deepening the gap between the low-income and high-income countries. The exacerbation of the inequality caused by the high speed of the globalization process caused some researchers to favour the idea of stopping or slowing down the expansion of international cooperation, leading to the reduction of the influence of international organizations particularly the World Trade Organization.[199]

However, the current evolution in today's international relations proves that ideas which prefer to eliminate the causes rather than to solve the problems are incompatible with the reality of the international order. Stopping the daily increasing wave of international cooperation in today's globalized world with the integrated economies is as much unrealistic as ideal global government with full discretion of distributing burdens and benefits. Despite the fact that the globalization process has caused global problems, the appropriate solution is not

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[199] Robert Howse and Makau Mutua, "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* (2001). p.81

to step back from globalization. Therefore the study of the policies and strategies which address the problem of inequality based on the principles of justice should only consider the policies which realize the current facts and existing limitations; the policies which are developed based on the understanding that the globalization process is part of today's international relations and the paradigm which favors an increasing level of cooperation. Therefore in order to address the global problems efficiently, international cooperation and global management is a necessary element.[200]

The global governance approach, while it considers the individuals as the focal point of justice principles on global scale, also take into account the real facts and international limitations as the necessary elements of an ideal theory to be practical and implementable. The global governance approach tailors and shapes the ideal cosmopolitan theory by realizing the existing nation-states and political boundaries, as a significant obstacle to global justice by presenting a two-stage process as a new model for the redistribution of wealth. This two-stage process provides that in the first stage the existing players of international society, i.e. sovereign states, should strengthen to be powerful enough to receive a more than proportionate portion of wealth in international relations and arrangements. The existing nation-states in fact put a kind of precondition and restriction on the distribution of wealth in the current international order through which the distribution of wealth should be channelized in a manner in which first the current sovereign states enjoy a more equal and proportionate share of the world wealth; the stage which is known as the stage of development.

However the wealth created on the international level is not the final stage and the wealth created for the low-income countries as a result of the development process should be distributed on a national scale among the citizens and members of each society to improve the current well-being of individuals in less developed countries. While the first stage of the redistribution mechanism is referred and limited only to the less-developed countries with the aim of making this class of countries capable for the following distributional step, the second stage includes

[200] Guzman, "Global Governance and the Wto." p.307

not only the least-developed and less-advanced economies but also the developed and advanced countries which suffer from a gap between the high-income and low-income citizens of their society.

In other words, the second wealth redistribution stage addresses the inequality resulting from either the pre-globalization inequalities or from the unjust character of the international relations, which affects not only the low-income citizens but also the citizens and members of the middle and high-income countries. Therefore, the redistribution process on a global scale based on the current consideration of existing facts should take place in two stages: first the wealth creation in the international order for low-income and least developed countries and second the wealth distribution on a national level in order to ameliorate the individuals and citizens' standard of living in these countries.

2.3.2. DJ and Wealth Distribution in International Order: Wealth Creation

The existing poverty due to current international circumstances and the lack of economic growth and absence of positive forecasts of economic well-being in the least-developed and low-income countries are evidence of the importance and significance of wealth distribution in the international order. In order to move toward global justice within the current existing international mechanism, the first stage of implementation of justice principles on the international policies and strategies require the supporting and strengthening of the low-income countries; the support which is the subject and target of the first stage of wealth distribution in international order, should result in wealth creation for the weaker members of the society. However, the first distributional stage has been developed and approached by researchers using two different classes of policies; the direct system of financial aid and the indirect policies of development.

2.3.2.1. Direct Financial Aid System

The major focus of the international community in reducing poverty and addressing the problem of inequality has been on the provision of financial aid to poor countries which is categorized as direct financial intervention of rich countries into the less-advanced economies. Attempts to implement the foreign aid approach which has been viewed as a short-term and fast solution in addressing the problem of inequality, has been done through initiatives such as "Millennium Development Goals" (MDG). The MDG was developed to increase social equity and enhance life standards by improving economic and social conditions in the weaker members and poorest countries of the world.[201] The MDG still exists on the agenda of the United Nations and its objectives are as targets for international institutions.[202] Other direct financial aid initiatives the G8 countries' promises of foreign aid to the low-income and weak countries.

Two opposite views on the direct financial-aid system each put foreign aid in a special context which results either in positive or negative outcomes. While the left-wing approach led by some researchers[203] considers a significant and important role for foreign aid, the right-wing scholars[204] mock the delusion of the aid lobby and accuse the aid-approach supporters of neglecting other policies.[205] The left-wing approach in this debate which has been vested in the desirability or undesirability of foreign aid as an instrument and solution believes in foreign aid

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[201] Millennium Development Goals Official Forum (MDG), *available at http://www.un.org/millenniumgoals/index.shtml*.

[202202] MDG aims at eradicating extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV/AIDS, malaria and other diseases, ensure environmental sustainability and develop a global partnership for development. See: Official list of MDG indicators, *http://mdgs.un.org/unsd/mdg/Host.aspx?Content=Indicators%2fOfficialList.htm*.

[203] Being the Director of the United Nations Millennium Project's work on the Millennium Development Goals from 2000 to 2006, Jeffrey Sachs believes a key element to accomplishing this is raising aid from USD 65 billion in 2002 to USD 195 billion a year by 2015. See Jeffrey D. Sachs, "Millennium Project," *http://www.unmillenniumproject.org/who/sachs.htm*.

[204] This approach headed by William Easterly, calls for need for a multifaceted, complex and unique approach to economic development. Accordingly increased and responsible foreign aid, though is nearly a necessary element, it is insufficient by itself.

[205] Collier, "The Bottom Billion (Why the Poorest Countries Are Failing & What Can Be Done About It)." p.191

as an important component of international economic order and seeks for an equilibrium point between aid and other strategies.[206]

However, the rival view puts in question the efficiency and desirability of foreign aid considering aid as not part of any potential solution but rather part of the problem which has exacerbated the underdevelopment of low-income countries.[207] The proponents of this approach argue that current foreign aid is not only heavily conditional but also puts several restrictions and limitations on the recipient countries in the utilization of aid and the control mechanisms for achieving the goals. They also argue that it has brought significant consequences and externalities such as corruption among the governors and authorities of the recipient countries and additionally encouraged rival groups leading to the expansion of disharmony and in extreme cases civil wars within the recipient countries.[208]

The existing foreign aid mechanism and direct financial intervention system has been criticized widely. Initiatives such as MDG, while successful in shifting the agenda from inputs to outcomes, have fallen short of putting forward an ideal scheme which defines the development goals for the entire world. The G8 promises have been unfulfilled and the new promises are nothing but the repackaging of old aid promises in to new aid promises.[209] Its efficiency has been put into question and its desirability in being a solution for the development of the less-developed countries is also in doubt. The foreign aid and direct financial intervention approach has been criticized as not being a realistic and exclusive option and solution for the development of the developing world as it sacrifices mid-term and long-term developmental goals for some short-term and fast

[206] Bhagwati, "Dependence and Interdependence –Essays in Development Economics." p.1
[207] Dambisa Moyo, "Dead Aid," *New York, FSG* (2009). p.47
[208] Peter M. Gerhart, "Slow Transformations: The Wto as a Distributive Organization," *AM. U. INT'L L. REV* (2002)., p.1092
[209] Action Aid, "Who's Really Fighting Hunger."

solution.[210] It distorts the development process of recipient countries and removes the motivations of the less developed countries to look for sustainable solutions and mechanisms for developing and fostering their economies.[211]

The justice-approach looks like more than a charity-mechanism for reducing the poverty.[212] In fact, the justice school addresses the issue of obtaining a sustainable and long-standing approach of removing inequality which result in sustainable growth in the least developed and developing countries rather than a temporary and fast solution and instrument of reducing poverty. The justice-centered theories look at a solution which avoids the adverse side-effects of foreign aid and the developing and less-developed countries have shown in several initiatives proposed by them that they want a hand up instead of handouts. They are seeking more opportunities to expedite their growth and development process rather than receiving annual, heavily conditional amounts of aid which fall short of providing any sustainable solution.[213] Therefore the solutions and policies which aim at the removal of inequality by wealth distribution on the international level and wealth creation on the national level should consider other initiatives rather than the direct financial intervention and foreign aid of developed and rich countries.

2.3.2.2. Indirect system: Non-Aid system

The only alternative to the mechanism of direct financial intervention and foreign aid is an indirect, non-aid approach which addresses the unjust nature and discriminatory consequences of some international economic relations. The direct financial aid approach has not been successful in shifting the low-income

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[210] Bernard Hoekman and Çaglar Özden, "Trade Preferences and Differential Treatment of Developing Countries, Introduction," *available on http://www.ycsg.yale.edu/focus/gta/trade_preferences.pdf*. p.620

[211] Deborah Brautigam, "Governance, Economy and Foreign Aid," *Studies in Comparative International Development (SCID)*, no. 3 (1992). p.11

[212] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.145.

[213] Joseph Stiglitz, "Social Justice and Global Trade," *Far Eastern Economic Review* (March 2006). p.20

countries toward a more just situation and does not present a good outcome even in the area of poverty reduction in terms of halving hunger. A report by Action Aid reveals that 20 out of 28 poor nations are off track in the race to half hunger by 2015 and 12 of these are going backwards.[214] The indirect solutions reject the issue of monetary contributions in a direct manner into the targeted economies and present solutions and approaches in which the common points are the increase in the capability of the poorer and low-income countries in accelerating their development process leading to wealth creation for these countries.

The indirect policies include a wide range of solutions from some institutional solutions such as the establishment of certain public funds or the improvement of regional or multilateral development banks to other strategic and policy mechanisms such as policy reforms, introduction of an international tax regime or the development of an efficient foreign direct investment system. These policies and solutions have been criticized in different ways; some have been contested as being inefficient, others are efficient but unworkable and unpractical, certain others are efficient and applicable but with limited and micro impacts and finally other solutions while being desirable and efficient, have been viewed as difficult to implement politically.

Public funds and regional or multilateral development banks which have been proposed for addressing the inequality and poverty, even though viewed as a step forward, have a limited scope of influence and are prepared to deal only with a limited category of problems. The World Bank experience as the most powerful and well-organized institution in this regard shows a limited scope of influence and major difficulties in implementing strategies which these institutions encounter.[215] Other approaches in international taxation, proposed as a desirable approach which could lead to explicit redistribution, have been developed in two ways; first taxation on transactions on an international scale such as currency transactions and second, as a step further, taxation on international revenue and

[214] Action Aid, "Who's Really Fighting Hunger."
[215] Daniel D. Bradlow and Claudio Grossman, "Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the Imf," *Human Rights Quarterly* 17, no. 3 (Aug. 1995).

global resources. The taxation-centred solutions, even though it was envisaged would be more efficient than any other indirect approaches, have encountered many difficulties and problems in implementation. The taxation solutions have been criticized due to neglecting the existing limitations in terms of national boundaries by proposing an ultra-national mechanism of world taxation and hence have been viewed more as an ideal proposition than a real practical approach to implement.[216]

The policy reform solution, proposed mostly by International Monetary Fund's prescriptions refers to market-friendly policies that were generally advised and implemented and economic reforms that were prescribed for developing countries. Known mainly as the Washington Consensus, the IMF policy reforms ask for reduction of government deficits, deregulation of international trade and economic opening regarding international trade and cross-border investment, and pursuing export-led growth and the expansion of market forces in the national economies. The policy reform in a general sense does not refer only to the IMF prescriptions and its general definition includes all policies ranging from the distribution of natural resources to political and monetary policies and is a major pillar of the justice-approach in international strategies. These prescriptions which address the obstacles or the delay factors in the development process of developing countries have been proposed by some researchers to be reflected in principles known as charters for natural resources, democracy, budget transparency, post conflict situation and investment.[217]

However these charters and principles do not go further than being prescriptions for all countries especially the developing countries and the real policy reforms materialized in the IMF package have proved to be ineffective and are currently unpopular due to the negative outcomes in several developing countries as a result of shock-therapies proposed by these prescriptions. The few examples of

[216] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.209
[217] Paul Collier, "Opportunities and Challenges for the Inclusion of the 'Bottom Billion'," *Session 3, Keynote Lectures: "Economic Development for Global Inclusion", Our Common Future, Hannover* (November 3, 2010). p.3

successful implementation of the IMF policies have been criticized as their success can be attributed to other economic elements and there have been claims of discrepancies between what has been claimed in the Washington Consensus policies and what has been actually implemented by the responsible institutions. These prescriptions mainly advocate a unified prescription for each country which has to date resulted in huge losses and the failure of major developing countries has therefore been widely criticized in regard to the need for policy diversity and local specific paths for development.[218]

2.3.2.2.1. Trade-based Policies

The trade-based policies for development have been studied as the most important set of policies for moving toward wealth distribution on an international level and wealth creation for weak economies. This can be traced back to the trade pessimism approach and the argument which stated that in order to develop the industrial and manufacturing capacity of the developing countries as well as to diversify the production of these countries, the import-substitution policy to protect their infant industries had to be prescribed.[219] The failure of such approach retained no other alternatives for the low-income and middle-class countries other than shifting toward the *General Agreement on Tariffs and Trade (GATT)*. GATT which was an agreement developed in liberal paradigm to propose rules and regulations for international trade liberalization was well-known as a club of rich and developed countries. Its regulations and rules were written by the developed countries and the nature of its provisions resulted in the marginalization of the low-income countries, thereby encouraging the developing countries to reduce the influence of the GATT arrangement through the Havana Charter which however enjoyed little success. The failure of Havana Charter initiative and the character of the GATT regulation which was viewed as the rules of competition among equal but powerful members resulted in the decision by developing countries to minimize their involvement in GATT in the 1960s and 1970s. This decision at

[218] World Bank, "Economic Growth in the 1990s: Learning from a Decade of Reform," *Washington, D.C., World Bank* (2005).
[219] Hoekman and Özden, "Trade Preferences and Differential Treatment of Developing Countries, Introduction." p.2

that time resulted in the transfer to the only existing alternative which was the United Nations framework.[220]

The dominant paradigm of the United Nations at that time was a totally different approach, proposing import substitution in regional and international trade as the adopted approach for the development of the less-developed countries instead of the pareto-efficiency school and the comparative advantage approach of GATT which looked at liberalization of international trade and removal of all tariff and non-tariff barriers to trade.[221] The *United Nations Conference on Trade and Development (UNCTAD)* was established within the UN structure as the result of the developing countries inclination to the UN framework. The UNCTAD initiatives brought for the first time the general concept of differential treatment for the least-developed and developing countries as the marginalized actors of international trade and economics providing a new scope of competition with specific rules and regulations presenting new opportunities and chances for development.

The Haberler report in 1958 indicated that the domestic policies of the high-income countries resulted in the reduction of the export capacity of the low-income countries. The fact that the low-income countries were not suppliers of many goods which were the focus of GATT negotiations coupled with their limited leverage in negotiations due to the smallness of their domestic markets led to the increase in the belief among the low-income countries, who are generally the primary goods producers, that the terms of trade in GATT are in favor of the high-income countries. This dissatisfaction led to the call for the development of flexibilities in GATT in order to encourage the developing and low-income countries to remain within the trade forum.[222] The concept of differential treatment was therefore developed in UNCTAD and justified the generalized

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[220] Robert E. Hudec, "Gatt and the Developing Countries," *COLUM. Bus. L. REV.* 1(1992). p.67
[221] 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
[222] Constantine Michalopoulos, "The Role of Special and Differential Treatment for Developing Countries in Gatt and the World Trade Organization." p.4

system of trade preferences (GSP) and resulted in two initiatives for the first time in GATT; GATT Waiver 1971 and Enabling Clause 1979.[223]

Despite bringing certain success in several aspects, the UNCTAD was viewed overall as an ineffective structure thereby encouraging the developing and least-developed countries to return to the GATT arrangement.[224] The failure of the import substitution model of trade, strengthened the multilateral trade system in GATT and encouraged developing countries to reform the existing structure of GATT in a manner which supported their special pattern of development. This approach resulted in several rounds of negotiation until finally the Uruguay Round of negotiation led to the establishment of the World Trade Organization (WTO) which succeeded in integrating textile and agricultural goods to the general regime, introduced intellectual property to the multilateral forum and created a powerful and efficient mechanism for dispute settlement. The WTO succeeded in introducing a new solution for addressing the problem of inequality, i.e. the trade-based policies.

Generally trade liberalization in an adjusted manner for developing countries has been viewed as a solution which has resulted in opposite outcomes than the impact which financial liberalization has on income distribution. While trade liberalization and export growth in a studied manner have been found to be associated with lower income inequality, increased financial openness is associated with higher inequality and deepens the gap between rich and poor.[225] The trade-based policies have proven to be the most efficient policies in helping the low-income countries, rather than having an aid-needed economy which is structured according to the foreign aid amount received from advanced countries, move towards an integrated economy which provides them with a sustainable development-based approach and ensures that they obtain a reasonable and

[223] 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
[224] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.29
[225] IMF, "World Economic Oulook." p.32

acceptable share in international trade.[226] This set of policies in fact establishes a new set of redistributive policies based on trade considerations which could act as an alternative for the aid-based redistributive policies. The trade-based policies have contributed to the world's wealth creation and provide evidence of the power of the removal of tariffs and non-tariffs barriers to trade in enhancing the world economic situation, and therefore these policies have been adopted as the strategy upon which the justice requirements and mainly international difference principle would be applied as the strategy of justice theory addressing the problem of inequality.

2.3.3. DJ and Wealth Distribution in National Order: Wealth Distribution

The second step for the wealth distribution process would be the distribution of wealth on a national level by the nation-states among their citizens. The second step of distribution actually completes the first step of wealth creation on the international level without which the goal of wealth distribution would be fruitless. The target of justice principles is to make all individuals better-off on a global scale and the two-stage distribution process is only due to the existing limitations and restrictions in international relations. Hence, any wealth creation on an international scale which is not completed by the distributional mechanism on a national level would not be viewed as a successful and complete mechanism and the mission will still be unfinished.

The aim of this research is not to study the alternative approaches of distribution on a national level. The national distributional instruments which are normally referred to are more or less developed and established in particular two efficient distributional mechanisms; the first instrument insists on the establishment of an efficient tax regime putting the disadvantaged members of the society in a more advantaged position and the second instrument highlights the strengthening of the social standards of society thereby improving the life standards of the citizens and guaranteeing a minimum level for the weakest members of the society. In fact the

[226] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.209

two-stage wealth distribution at the national level guarantees the minimum level of economic rights for citizens of the nation and in the second stage addresses the inequality among the citizens by establishing a distributional-oriented tax regime. The reinforcement of social standard in societies by trade-based policies, the theory of parallelism originating from the second principle of justice which supports social development in parallel to economic development and the impact of what trade-based strategies could achieve in order to enhance the social standards of the societies will be the subject of study from the justice point of view to the trade-centered policies.

II. The Principles of Justice in WTO and International Trade

1. The First Principle of Justice in WTO and International Trade

The implementation of the theory of justice on the adopted structure and strategy in international relations requires a two-stage test of the principles of justice. The first stage looks for the accomplishment of the first principle of justice in the structure of the leader organization as well as detailed provisions of the strategy which the leader organization will follow in order to address the problem of inequality. The first principle of justice in fact follows the same approach which the corrective feature of justice follows and calls for equal treatment among all individuals and members of the society. The first principle of justice on the international level advocates the same level of rights, duties, opportunities and treatment among all individuals and members of the international community. This equal treatment provides the necessary basis for the WTO structure to move toward an ideal pattern according to the principle of justice. The ideal pattern and target for the structure and platform which provide the hard-ware of justice is implementation of procedural justice in its real sense. The procedural justice which requires fairness and the transparency of the structure and processes within the structure conforms to the notion of equal treatment and therefore the first principle of justice can accommodate the requirements of procedural justice. However the strategy is a matter of substantive justice which after being assessed according to the requirements of the first principle moves toward the second principle of justice.

1.1. WTO's Structure and Global Governance; Question of Procedural Justice

A comprehensive justice-based study of the adopted body and policy requires that in the first step the structure of the World Trade Organization as the most appropriate body of global governance be studied based on the requirements and principles of procedural justice and in the second step, the trade-based policies be addressed as the adopted strategy according to substantive justice. Procedural justice requires that in the decision-making process of the WTO, the decisions are made by the legitimate agents and also in a transparent manner. In addition, the executive power of the WTO, in order to be deemed compatible with principles of procedural justice, should provide for the implementation of the legislative power by the democratically legitimized institution with the possibility for important stakeholders to participate, and finally the judiciary power's decisions should be consistent with the decisions made by the legislative power in providing the opportunities for the involved parties to appeal and seek review of the issued award.[227]

The WTO, and previously GATT, in a structural sense, succeeded in introducing a rule-based structure in which all members, whether powerful or weak, were treated by the same rule and principles. The political considerations were kept out and all WTO Members enjoy the same level of power in decision-making and also access to the dispute settlement mechanism. While the experience of international organizations presented a model in which the outcomes shaped the rules and in which a lack of procedural justice in their decision-making, execution and governance or dispute settlement processes was exhibited, the Uruguay Round and WTO establishment presented a rule-based mechanism in which all members could participate in decision-making on an equal footing, execute and implement the decisions by their own national government and have unconditional access to the judicial power once they felt that their legitimate interests have been lost and a commitment has been violated.

[227] Breyer, "Health Care Rationing and Distributive Justice Author." p.400

However the fact that the WTO has been adopted as being more efficient and being the closest existing international institution to the principles of justice, does not imply that it fits all requirements of justice and is the ideal organization according to the justice principles approach to international structure. The application of ideal justice principles to the activities of the real World Trade Organization which has had an active existence of more than fifteen years reveals several gaps and deficiencies in the function and structure of the WTO. The failure to deal with these problems, fill the gaps and remove the deficiencies would prevent the WTO from fulfilling the requirements of justice. Therefore in order to make the WTO an organization capable of coordinating and leading global governance, the application of international justice principles serves to highlight several problems and deficiencies in the legislative, executive and judicial powers of the WTO.

When comparing the WTO's structure with the structure of national states, three different powers of states could be recognized and extracted from the WTO's structure. In fact structure in a practical sense refers to the procedure in which the decisions are taken, the framework in which the decisions taken are executed and the mechanism which should function in order to settle and resolve the disputes and claims arising as a result of the execution of these decisions. In this sense the concept of structure constitutes of three different powers; legislative power, executive power and judicial power. Therefore, the WTO's rounds of negotiations and the WTO's Ministerial Conferences could be viewed as the legislative power of the WTO, the Dispute Settlement mechanism as the judicial power and finally the WTO's Members as the executive power themselves having the discretion to implement trade regulations.

1.1.1. Bargaining and Decision Making (Legislative) Power and Procedural Justice

The legislative power which is studied as the first power in the WTO’s structure includes the process of bargaining and decision-making among the WTO Members. This process is conducted mainly through the rounds of negotiations, Ministerial Conferences and the WTO's General Council and is therefore a member-driven process. In contrast to other international organizations in which the decision-making process passes through a bureaucratic organ of decision-making, in the WTO decisions are taken by WTO Members themselves and the WTO Secretariat has no role in the decision-making process. The member-driven process is so sensitive and significant that all decisions are and must be taken by the affirmative answer of all WTO Members, i.e. the decision-making rule known as the rule of consensus. The consensus rule in the WTO currently exists as a golden rule in WTO decision-making whereby WTO Members will not deviate from this concept even in decisions where by WTO Agreement, there are lower requirements for making the decision.[228] WTO Members have shown their interest by insisting on following the consensus rule on occasions such as voting for accession in which the WTO Agreement has provided for a minimum amount of two-thirds of votes.[229]

Another feature of the WTO's legislative power is the single-undertaking approach in the WTO rounds of negotiations which when multiplied by the consensus rule of decision-making together make the legislative power of the WTO a unique power and process. The single undertaking suspends all accords and successes in different issues in order to reach an accord on all issues and agendas and requires all participants to accept or reject the outcome of multiple negotiations in a single package, rather than selecting between them. Consequently, in general, nothing will be finalized and implemented and any agreed issues and provisions will not enter into force until the package is totally agreed upon which the whole package becomes binding and the WTO Members will then have to implement the decisions and ensure conformity of all their individual domestic laws to the agreed principles and provisions.

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[228] In exceptional circumstances, the Ministerial Conference and the General Council may waive the particular WTO obligations of any given WTO Member by a three-quarters vote.

[229] Marrakesh Agreement Establishing the World Trade Organization, Article XII: *2.Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.*

The consensus rule if viewed with the single-undertaking feature represents a high standard of democracy for the WTO legislative power through which even a marginalized member of the WTO could block or even veto all the achievements of the negotiation round. The member-driven nature of the WTO and the golden rule of consensus have proved to be workable and by accepting the agency relationship and the fact that the nation-states are acting as agents of their nations, the WTO's legislature power has been viewed as a great achievement and regarded as close to the requirements of procedural justice in the sense that all WTO Members enjoys the same level of power and have the same voice in the WTO's decision-making process.

The legislative process of the WTO has been viewed as one of the most efficient decision-making mechanism when compared to the decision-making processes of other international organizations. This mechanism, though significant in its features, has deferred difficult decision-making in the forum in favor of the status quo. The consensus rule and single-undertaking features ensure continuation of the status quo unless all WTO Members agree on all provisions and regulations of the negotiation round thus making it difficult for any changes in the existing situation in order to move toward a more just situation.

The WTO's decision-making process from a justice point of view reveals several deficiencies, gaps and problems which indicate how far the WTO is from being the ideal coordinator organization in global governance. These problems which are generally categorized as legitimacy and sovereignty problems clarify how far the WTO is from being the ideal organization and how to move toward the one-organization pattern of global governance by highlighting what kind of reforms and modifications should be done thus enabling the WTO to play the leading role in the global governance framework. These reforms and modifications should be viewed as the ideal prescriptions some of which are feasible and could take place in the current international situation while others would be difficult to implement and would be considered as the ideal principle for long-term action for which the legislative power of the WTO should evolve.

1.1.1.1. Direct Democratic Input and Transparency

The first problem of the WTO's decision-making power is encountered when addressing the issue of legitimacy and looking at the well-known problem of agency. The agency issue looks at the direct democratic input of the WTO's legislative power and puts in question the capability of governments as the real agent of the individuals. Additionally, the agency problem becomes more complex when some domestic arrangements for decision-making among WTO Members such as the Fast Track Authority in US are taken into consideration together with the direct and indirect influence of interest groups in the decision-making of the agents.[230] In fact, the issue of agency exists in all international institutions and forums which include national governments as the members of that international forum. While the ideal global justice approach looks at the individuals themselves and asks for direct election of the representatives by the citizens, the real facts and limitations of the current international relations show the difficulty of implementing such an approach. The sociological study of the issue of legitimacy requires that for an institution to be legitimate, it must be widely believed by the people to have the right to rule,[231] however the theoretical aspect views the nation-states as the representative of their nation and that the national decision-makers are accountable for defending the interests of their citizens.

However, the alternative approach in order to deal with the problem of agency and lack of direct democratic input is to increase the transparency of the decision-making process of WTO and improve the openness of WTO. This solution would become more significant in situation which a considerable part of WTO activities specially the trade negotiations are done in secrecy. The secrecy of the negotiations and process of decision-making has acted against the democratic requirements and has exacerbated the problem of agency and legitimacy. The secret negotiations have resulted in certain decision-makings such as introduction of TRIPS which was not only favoring the developing countries in general but also it favors entirely special interest of certain powerful industrial lobbies in

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[230] Guzman, "Global Governance and the Wto." p.338

[231] Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics and International Affairs* 20(4)(2006). p.405

these countries and mainly in US.[232] The improvement of transparency provisions in WTO negotiations by making the agendas, negotiations and outcomes open to the public and by opening the forum to the public has been viewed as means of avoiding decision-making which only protects the interests of certain powerful groups and could contribute to the possibility of the supervision of individuals on the whole process of decision-making and amelioration of the issue of agency.[233]

1.1.1.2. Risk of Regulatory Capture

One of the significant risks of legislation in every legislative body, internationally and nationally, is the risk of regulatory capture in the sense that powerful interest groups and lobbies gain influence over the process of legislation and shift the legislative power in a direction which enacts regulations and takes decisions which protects the interests of those interest groups rather than the interests of the whole society. This risk would affect the decision-making process in a negative manner and would derail the legislative power from distributional-centered laws and regulations to legal enactment of lobby-based rules and provisions. The WTO as an international organization with great impact on the trade and economy of the member states and consequently the private sectors active in different parts of the various economies has been vulnerable to this risk in an indirect manner. In fact the vulnerability of the lobby groups to the WTO decisions has resulted in the vulnerability of the WTO to the risk of capture by this group. The most important example of this risk can be seen in the introduction of Trade Related Aspects of Intellectual Property which was initiated and supported by the highly influential pharmaceutical industry.[234]

The risk of regulatory capture exists more or less in all international organizations including the WTO. However the decision-making mechanism of each international institution should uphold a process through which this risk is minimized. The WTO as an international organization and as compared to other

[232] Stiglitz, "Social Justice and Global Trade." p.21
[233] Guzman, "Global Governance and the Wto." p.339
[234] Stiglitz, "Social Justice and Global Trade." p.21

international organizations has been successful in minimizing this risk due to the consensus rule of decision-making. The consensus rule in the WTO decision-making process has provided a platform in the WTO which by requiring the positive vote of all WTO Members has reduced the risk and limited the scope of interest groups which would deviate the organization from its distribution-centered agenda. Moving towards a justice approach would require WTO to consider distributional concerns in its decision-making and regulatory capture would act against this approach.

1.1.1.3. Principal Supplier Approach

The traditional method of the decision-making process during the GATT period was based on a so-called Principal Supplier Approach. The Principal Supplier Approach of decision-making was the old approach of decision-making through which the big and significant players in international trade managed the whole process of decision-making. As a matter of fact the substantive inequality among the GATT Members encroached on the procedural process of decision-making by marginalizing the less-advanced members of GATT. The highlighting of problems, development of the agenda, the defining of solutions, conduct of negotiations and finally the decision-making were all entirely influenced and done mainly by the US, European Countries, Canada and Japan which hammered out the deals.[235]

The justice requirements reject any sort of principal supplier approach which fosters the interest of certain classes of countries especially the developed countries. Justice requires low-income countries to have a voice as well and to take part as active players in all the steps of decision-making at the WTO. The justice principles require the WTO to move from a Principle Supplier Approach to a multilateral approach which recognizes the role of other less-developed members and to facilitate consensus-rule in decision-making by providing the

[235] Saif Al-Islam Alqadhafi, "Reforming the Wto: Toward More Democratic Governance and Decision-Making," *available at* *http://www.wto.org/english/forums_e/ngo_e/posp67_gaddafi_found_e.pdf*. p.7

necessary basis for detaching from a unilateral approach in legislation and to give weight and position to other coalitions of less-developed countries.[236]

1.1.1.4. Trade Ministers and Non-Trade Issues

Other structural problem of the WTO's legislative power is the sole involvement of trade ministers in the negotiations and decision-making. Despite the fact that the WTO has now become a multilateral and global forum for discussing trade and non-trade issues, the negotiations are done solely by the trade ministers of the WTO Members. The position of non-trade issues within the WTO umbrella, as will be discussed later, has been approached through two opposite views; the first approach perceives the WTO as only a specific-trade forum and the opposite view puts the WTO in the position of leader and coordinator organization in global governance. The first approach rejects any place for non-trade issues in the WTO and thus refuses for them to be presented on the WTO agenda. However, while the second view accepts the involvement of non-trade issues in the WTO, it does not agree that decisions should be taken by the trade ministers on non-trade issues.[237] Moreover, the trade ministers are perceived as the administrative authorities who are most influenced by the special interests of lobby groups and multi-national companies and therefore leaving the negotiations and decision-making on non-trade issues to the trade ministers is not only against proper decision-making according to the procedural justice, but also improves the agenda of special interest groups and acts against the distribution-centered policies.[238]

1.1.2. Executive Power and Procedural Justice

The second pillar of the WTO's power which is the executive power addresses the question of who has the power and responsibility to implement the regulations legislated by the legislative power as well as implements the decisions taken by

[236] Faizel Ismail, "An Assessment of the Wto Doha Round, July-December 2008 Collapse," *World Trade Review* 8, no. 4 (2009). p.583
[237] Stiglitz, "Social Justice and Global Trade." p.22
[238] Ibid. p.21

the judicial power and the dispute settlement process. Generally the execution and implementation of the WTO Agreements and dispute settlement decisions are through the national governments of the WTO Members and these member-states are the executive power of the WTO. In fact the WTO Law gives considerable discretion to national governments over the use and implementation of national policy instruments and this approach of the WTO Law to the role and discretion of the WTO Member-states was shaped as a result of the implementation costs in evaluating all instruments and proposals for the execution of the WTO Agreement. Despite the fact that the national states have been considered as the responsible body for the execution of the trade rules and principles and viewed as the executive power of the WTO, the national governments generally impose their national policies in both an implicit and explicit manner even if they are found to be in violation of international trade commitments.[239]

The high cost of negotiating and finalizing a fully efficient agreement and the nature of the WTO provisions in allowing the discretion of national governments, the existence of the "Escape Mechanism", the imposition of maximum tariff bindings and the rule-approach bindings instead of outcome-approach bindings have resulted in claims that the WTO is an incomplete contract by researchers and academics.[240] This incompleteness has induced the researchers to study between two opposite approaches of a No-Agreement option or a nash equilibrium which gives all discretion to the government of member-states and the First Best Agreement which includes all domestic policy instruments and forces the members-states to respect all WTO decisions on the domestic policy instruments.[241] This challenge puts forward the importance of the executive power in WTO resulting in the formula of a combination of states discretion and also a set of trade policies and instruments which controls the scope of the states' discretion as the executive power scheme in the WTO Agreement.

[239] Hart and Spero, "Globalization and Global Governance in the 21st Century." p.51
[240] Henrik Horn, Giovanni Maggi, and Robert W. Staiger, "The Gatt/ Wto as an Incomplete Contract," *http://www.cepr.org/meets/wkcn/2/2363/papers/Horn.pdf* (May 2006).p.1
[241] Ibid. p.2

These policies monitor certain fundamental principles of WTO regulations to be respected and are mainly the Most-Favored Nation principle and the principle of National Treatment. These principles focus on the necessity of having procedural and substantive equality in the implementation of the WTO Agreement and ensure and guarantee procedural justice in the WTO's executive power. These principles as the general rules of executive power are the proper instruments of justice and equality in the execution and implementation of the WTO's decisions, regulations and provisions, however while these principles can provide procedural justice among WTO Members with equal standing in the world's economy, in order to cover the distributional concerns among unequal members of the WTO, a new set of rules and principles should be developed.

The WTO Members' governments are the responsible bodies and players for the implementation of the WTO decisions which represent the executive power of the WTO. In fact the WTO Members' governments are the only existing bodies which are responsible for executing the WTO's decisions and all the provisions. The decisions made by the WTO's legislative power and the provisions of the WTO Agreements all put certain limitations and restrictions on the behavior of governments in order to control the WTO's executive power. However the justice theory looks for certain restrictions and conditions for addressing the problem of inequality for which the justice principles show certain weaknesses in the executive power of the WTO in relation to the execution of decisions made by the WTO's legislative power.

1.1.2.1. Problem of Sovereignty

Some researchers believe that the restrictions and limitations imposed by the international trade regulations on states' behaviors have restricted the states' autonomy. This conservative approach looks at the traditional concept of national government and rejects putting any restrictions on the national-sovereignty of the nation-states.[242] However, the global justice approach and national sovereignty

[242] Guzman, "Global Governance and the Wto." p.347

requires the formation of global governance in which even though the nation-states have a certain level of discretion, they should still act within the established framework and the limitations and restraints of international relations. Considering the individuals as the main pillar of justice framework with the current limitations in international relations, a move from the traditional notion of national sovereignty and the erosion of nation-states' discretions toward a supra-national body responsible for global governance seems necessary. Hence, from a global justice perspective the supra-national institution responsible for global governance would gradually take on the roles and responsibilities of the nation-states and the traditional concept of national sovereignty which was the basis for the primary establishment of international law. Therefore the application of justice principles by the executive power of the WTO not only justifies the restrictions on the state's autonomy and national-sovereignty of nation-states but also views that as part of broader move towards a justice-based structure in international relations.

1.1.2.2. Hypocrisy in Approaching Free Trade

Another important obstacle in the execution of the WTO rules and implementation of WTO Agreements is the hypocrisy of certain WTO Members in applying the principle of free trade and the comparative advantage approach. While the primary concept of the WTO establishment was the major shift from the theory of nationalism and mercantilism to the free trade and efficiency approach based on comparative advantage theory, certain WTO Members are still adopting a half-mercantilism, half-free trade approach towards international trade. The equal treatment arising from the first principle of justice requires all WTO Members to approach the same issue on an equal basis and be treated equally in the distribution of burdens and benefits.

A well-known example of this double-standard approach refers to the trade regime of agricultural goods in the WTO in which the high level of agricultural goods' tariffs and also the issue of agricultural subsidies in certain developed countries represents an example of hypocrisy when considering free trade. In addition the history of incorporation of intellectual property rights and access to medicine in the WTO regime represents a clear example of a position of double-standard taken by countries such as US. This hypocrisy is reflected in the fact that while the US government was working on the process of improving access to low cost medicines for US citizens, it was also working with the pharmaceutical companies in international trade negotiations in order to introduce stricter and higher standards of intellectual property, thereby making it more difficult to access medicine internationally especially for the least-developed and developing countries.[243]

1.1.2.3. Asymmetry of Economic Opportunity

Another important problem in the performance of the executive power is the asymmetry of economic opportunities in WTO framework in favor of high-income and the developed countries which is a legacy from the GATT period.[244] Many believe that the GATT performance during the past decades has led to the marginalization of the low-income and the developing countries. The GATT rules were shaped in a manner which preserved the economic interest of developed countries while helping and supporting them in keeping a protectionist approach in their own domestic markets.[245] Consequently, the trend of international trade was directed and shifted towards a situation which resulted in an asymmetry of economic opportunities favoring developed countries and disadvantaging developing and least-developed countries.[246]

The implementation of international justice principles requires that all individuals enjoy more or less the same level of opportunities in international trade and advocates the removal of any asymmetry of economic opportunities. By the

[243] Stiglitz, "Social Justice and Global Trade." p.20
[244] Ismail, "An Assessment of the Wto Doha Round, July-December 2008 Collapse." p.581
[245] R. Wilkinson, *The Wto: Crisis and Governance of Global Trade* (Routledge, 2006). Also M. Finger, "Implementation and the Imbalance: Dealing with Hangover from the Uruguay Round," *Oxford Review of Economic Policy* 23(3)(2007).
[246] R. Wilkinson, "The Wto in Hong Kong: What It Really Means for the Doha Development Agenda," *New Political Economy* 11(2)(June 2006).

establishment of the WTO and the entry in to force of the rules and regulations agreed in the Uruguay Round, the GATT image of being a club only for the developed countries disappeared and new players and actors emerged as a result of low-tariffs and the removal of the barriers to trade together with enhanced access to the markets of developed countries. The asymmetry in benefiting from international trade opportunities was improved and the developing countries started to gain better standing in the international market. The launch of the Development Round (Doha Round) and the intention to improve the Special and Differential Treatment all show positive signs of reducing the asymmetry in the WTO Members' participation and enjoyment of opportunities. Therefore, in order for the WTO to be viewed as a just organization it is necessary for the WTO Members to enjoy the same level of opportunities in international trade.

1.1.3. Dispute Settlement Mechanism (Judicial Power) and Procedural Justice

The third pillar of WTO which is the WTO's judicial power addresses the dispute settlement mechanism established as a result of the Uruguay Round of negotiation. The core nature of every dispute settlement arrangement and the judicial power in any structure is the corrective justice which any judicial mechanism in order to be seen to be a just and efficient mechanism should follow to achieve the corrective justice requirements.[247] Corrective justice provides equal standing and equal voices for all the WTO Members, and the WTO's dispute settlement as one of the most efficient dispute settlement mechanisms, provides this equal standing. Coinciding with a reliable enforcement mechanism, the establishment of any just and efficient judicial mechanism would always benefit the weak and less powerful members of society more than the powerful ones. In reality the powerful members of society always have other means of defending their positions and imposing their interest and the establishment of any

[247] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.52

platform which produces binding awards and decisions would be mostly in favor of the weaker members of the addressed society.[248]

The Uruguay Round introduced a new mechanism of Dispute Settlement (DS) which obliged WTO Members to use WTO DS in the event of any conflict or dispute. Consequently, the panel and Appellate Body decisions became legally binding by shifting from the positive consensus in GATT to the negative consensus in the WTO and the dispute settlement coverage extended to other areas of international trade. The obligation to use the dispute settlement mechanism and prohibition of resorting to unilateral sanctions coincided with the quasi-automatic nature of the mechanism which reduced the possibility of blockage and abuses, and provided a new efficient regime of dispute settlement which became capable of handling even the most complex and difficult cases and disputes. Despite the fact that the WTO's judicial power is not limited only to dispute settlement through panels and includes other means of dispute settlement such as Good Offices and Conciliation and Mediation,[249] the dispute settlement process of WTO through panels and the Appellate Body has been the instrument most resorted to and which has presented an efficient and reliable arrangement. This set-up within the WTO context and in parallel with principles such as MFN has made the decisions of the panel and appellate body not only applicable to the parties of dispute but also to the non-parties benefiting from the outcome of the disputes especially the small countries.

The WTO's dispute settlement is a successful and efficient international dispute settlement mechanism which could be viewed as a unique and unprecedented in certain aspects and features. Due to the lack of effective and binding dispute settlement arrangements in international law, the WTO's achievement was a significant outcome in that it mostly favors the weaker members of international trade and prohibits unilateral sanctions mainly enforced by developing countries.

[248] WTO Secretariat Publication, "A Handbook on the Wto Dispute Settlement System, Prepared for Publication by the Legal Affairs Division and Appellate Body," *Cambridge University Press* (2004)., p.109

[249] WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 5

Any sort of dispute resolution mechanism in general would be a positive step towards justice as compared to the absence of any kind of dispute resolution regime.

The efficient implementation mechanism and countermeasures of the WTO DS, the negative consensus procedure and the automatic proceedings present an efficient multilateral regime of dispute resolution. However, the application of justice principles to the WTO's judicial power requires improvement of certain features and rules of the mechanism and also requires solving some functional and structural problems of the judicial power of the WTO. These problems all present a certain deficiency of the WTO DS when compared to the ideal principles of justice theories which seek to make the WTO, a qualified and operational institution in coordinating global governance and handling international problems.

1.1.3.1. Principal-Agent Problem

The agency issue and the principal-agent problem which is one of the major issues in the decision-making process of the WTO as well as a general issue in all international institutions in which the nation-states participate, also exists in the WTO's judicial power. The problem of agency could become more important and critical considering the fact that according to Dispute Settlement Understanding (DSU), the only competent entity who could resort to the WTO DS are the national governments while the non-governmental institutions or private sector could not initiate a WTO dispute settlement case, by themselves. The national governments are the only capable and legitimate actors who could initiate a dispute settlement case and no other international actor could resort, independently from their national governments, to the WTO dispute settlement. Hence, any sort of nullification or impairment of benefits of the private sector activists in international trade, in order to become a WTO case, should be vested in a government action of the complainant against the other WTO Member.

Consequently, initiation of a dispute settlement process as a case in the WTO would be subject to certain significant restrictions on governmental decisions and actions and political considerations which affect and exacerbate the principal-agent problem in judicial power of the WTO. Justice requires that the judicial organ of the WTO move gradually toward lesser influence and less effect from the political considerations and national limitations and also toward a gradual openness of WTO dispute settlement on qualified entities who could initiate a legal case in WTO. In addition, increasing the transparency measures of the WTO Dispute Settlement would decrease the gravity of the agency problem in the judicial organ of the WTO by making it possible for non-governmental actors to monitor the dispute settlement process and the national governments positions and actions. Therefore, general public openings of hearings and proceedings to improve the transparency of the process and ensuring that the non-governmental groups and scholars are capable of having access to the information and can control the whole process of dispute settlement can help in dealing with the agency problem.

1.1.3.2. Legal vs. Political Approaches: Mostly Used by Developed Countries

The justice approach and requirements of justice framework requires a pure legal approach toward dispute settlement in which according to the principles of corrective justice, all members should be treated in the same manner irrespective of their development level and political power. In the primary phases of the establishment of the GATT dispute settlement mechanism, the dominant approach was the understanding that international economic relations should be managed, rather than be regulated. This approach which opened the door for diplomats and political considerations in drafting the rules and clarifying the practices of dispute settlement was mainly reflected in the necessity to have positive consensus for all dispute settlement processes from the initiation of a case to adopting and implementing a decision.[250] Despite the fact that the majority of evolutions within

[250] James Smith, "Inequality in International Trade? Developing Countries and Institutional Change in Wto Dispute Settlement," *Review of International Political Economy, Published by: Taylor & Francis, Ltd.* 11, no. 3 (Aug., 2004). p.544

the dispute settlement mechanism occurred outside diplomatic efforts and all the legal processes of dispute settlement from the submission of evidence to the evaluation, hearing and making of decisions were developed by lawyers, the major principles and principal features governing the dispute settlement input and output during the GATT period has made the mechanism more negotiable and manageable.

The decisive approach of GATT Members in the Uruguay Round and the establishment of the WTO convinced the negotiating members that in order to have a successful set of international trade rules and regulations, the whole system should be more regulated and the mechanism should move from managing toward regulating the international economic relations.[251] This move which necessitates the involvement of lawyers in the first attempt, during the GATT resulted in drafting the dispute settlement procedures in 1979 and consequently in establishment of the Legal Affairs Division in GATT in 1982. Finally this evolution terminated in the establishment of a new regime of DS which by introducing the negative consensus rule, putting second-stage the judicial and legal review of the Appellate Body and detailing the implementation stages from the specific implementation of the decision to the retaliatory measures, presented a new legal-centered regime of dispute settlement. The evolution from the political-centered GATT DS to the more legal-oriented WTO DS was a major step in balancing the power among the unequal members and a significant outcome toward a more just situation.

However, the pure corrective nature of WTO DS has caused WTO DS to be used mostly by the developed countries while the developing and least-developed countries have been involved in WTO DS cases at a low level either as a complainant or respondent.[252] While it is evident that the huge volumes of international trade which increase the possibility of violation of WTO provisions justify the costs and energy to be invested for the dispute, certain other factors and

[251] Ibid. p.543

[252] Kara Leitner and Simon Lester, "Wto Dispute Settlement (1995-2007) a Statistical Analysis," *Journal of International Economic Law* 11(1)(2008).p.182

variables play an important role in making the WTO DS more frequently used by developing countries.[253] The cost of litigation, the difficulties of fact findings, the lack of market power to make the complaining party capable of retaliation and the legal capacity of the low-income countries have made the low-income countries less likely to be challenged.[254] Additionally these elements and reasons have the developed and least developed countries incapable of engaging actively in the WTO DS leading to the marginalization of the developing and least-developed countries which rarely challenge others.[255]

The implementation of justice principles requires the WTO DS to be shifted to a proper framework which support the low-income countries' standing in the WTO. Despite the fact that the developing countries have been more active than before in the WTO settlement in recent years, still the level of participation in WTO DS is unbalanced from equality point of view.[256] Having to deal with the unbalanced participation of the WTO Members in the WTO DS has resulted in a call for special and differential treatment in the WTO DS which without interfering in the corrective justice nature of the WTO DS, provides legal assistance and also facilitate the small-scale claims and disputes which cannot feasibly be presented in the current WTO DS but are on a sufficiently important level and are critical to the developing and least-developed countries.

1.1.3.3. Political Considerations

Some of the significant obstacles of the WTO DS in becoming a proper and competent forum for dispute settlement are the political considerations among the

[253] Publication, "A Handbook on the Wto Dispute Settlement System, Prepared for Publication by the Legal Affairs Division and Appellate Body.", p.110

[254] Chad B. Bown and Bernard M. Hoekman, "Developing Countries and Enforcement of Trade Agreement: Why Dispute Settlement Is Not Enough," *Journal of World Trade* 42(1)(2008). Also Kristin Bohl, "Problems of Developing Country Access to Wto Dispute Settlement," *Chicago-Kent Journal of International & Comparative Law* 9(2009). p.144

[255] Reinhardt and Shaffer, "Does Legal Capacity Matter? Explaining Dispute Intiation and Antidumping Actions in the Wto."

[256] Leitner and Lester, "Wto Dispute Settlement (1995-2007) a Statistical Analysis." p.182

WTO Members. The vulnerability and fear of low-income countries from the political reaction of the developed countries has made low-income members reluctant to initiate a dispute settlement case in the WTO. The threats of retaliation in other economic and non-economic areas, withdrawal of the GSP programs and concessions or other cross-linked punishments have made the weak and lesser-developed countries unwilling to go through the official WTO DS. Some of these claims, while they may seem to be unimportant compared with other huge WTO DS cases, are critical and of significance for those low-income countries.[257]

However the weight of political considerations and economic threat in the initiation of WTO DS dispute should not be exaggerated and due to the fact that the WTO cases are generally against a particular sector of the developed countries' economy, in practice the developed countries may even welcome cases being initiated against them. Therefore, the political considerations should be viewed on their real scale, however the influence of political concerns and cross-linked retaliations impact negatively on the regulated WTO DS and act against the requirements of the principles of justice. The involvement of political influence on the decision-making of the low-income countries in the process of WTO DS would not be fully compatible with the justice and equality approach and justice requirements call for removal of all political considerations in this regard.

1.1.3.4. Competition with other international DS Mechanisms: Forum Shopping

While according to the DSU, Article 23.1,[258] the WTO Members should bring any dispute arising under the WTO covered agreements to the WTO dispute

[257] Magda Shahin, "Egypt's Challenges and Future Options for Participating in the Wto Dispute Settlement System," *International Centre for Trade and Sustainable Development* (2-3 November 2006). p.9

[258] DSU article 23.1: "*When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the*

settlement and they are not authorized to take any unilateral retaliatory measure. However a series of reasons has resulted in overlapping jurisdictions over the trade disputes and therefore the possibility of proceedings being carried out in different dispute settlement forums. These reasons which include the overlap of WTO disputes with other disputes on national and regional levels, the rapid increase of WTO disputes due to the expiration of transitional provisions of the WTO, the establishment of world-wide courts overlapping with or interacting within the jurisdiction of the WTO, the interpretation of the WTO rules by domestic courts, the inclination of private sector to follow the forums to which they have direct access and the fact that WTO provisions themselves provide for the access to domestic courts, have resulted in the issue of forum shopping in WTO dispute settlement.[259]

Forum shopping between the WTO dispute settlement mechanism and other forums of dispute settlement has been a point of discussion for scholars and researchers of international law. This competition has been encouraged as a result of elements such as the different applicable laws, the availability of remedies and the timeliness of proceedings.[260] While some believe that the possibility of forum shopping between the WTO DS and other international and regional DS mechanisms are negative due to several party-related and society-related concerns,[261] in contrast, others look at forum shopping as a positive phenomenon which motivates each dispute settlement mechanism to make it better and more

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attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

[259] Ernst-Ulrich Petersmann, "Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade," *University of Pennsylvania Journal of International Law* 27:2. p.287-297

[260] Marc L. Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade," *available at http://www9.georgetown.edu/faculty/mlb66/Forum%20Shopping.pdf*. p.6,7

[261] The party-related concerns includes the cost of multiple proceedings, avoidance of oppressive tactics and need for finality of rules, leaving the dispute unresolved due to inconsistent rulings, avoidance of double compensation and the party equality. The society-related concerns refer to waste of resources, Stability and security of system and inconsistence ruling which could undermine the legitimacy and credibility of the system. Joost Pauwelyn and Luiz Eduardo Salles, "Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions," *Cornell International Law Journal* 42(2009). p.81,82

successful and provide a flexibility which helps the stability of mechanism.[262] However, despite the fact that forum shopping would induce the DS mechanism to be more efficient and till now the dispute settlement process of WTO has proved to be the most efficient and successful mechanism, the global justice approach to the judicial power of global governance where even non-trade issues should be discussed requires a comprehensive and unified approach to the settlement of disputes. This approach requires that all disputes be considered and processed based on codified justice-oriented principles with specific powerful remedies and that implementation measures be provided for all WTO Members on an equal basis.

1.1.3.5.Negotiation-Adjudication Problem

An important difficulty of the WTO dispute settlement process which falls short of justice principles is the possibility of affecting the WTO Members' obligations by the panels and Appellate Body's interpretations. Despite the Dispute Settlement Understanding Article 3.2[263] which forbids any adding or diminishing of WTO Members' obligations, due to the existence of gaps and arising unforeseen cases in practice, the judicial body of WTO could take decisions and give interpretations which probably could create or remove burdens and obligations.

The issue should be studied in conjunction with the difficulties at the negotiation stage and decision-making process of the WTO which requires consensus among all members and therefore the temptation to vaguely draft some regulations and articles in order to reach consensus among all WTO Members which then shifts

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[262] Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade." p.30-31

[263] Article 3.2 DSU: “*The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*”

the problem from the decision-making process to the dispute settlement stage.[264] Hence, the problem could change in nature from a pure dispute settlement problem to a negotiation-adjudication problem. In fact, due to the consensus legislation in the WTO, it would be difficult to change or even interpret the laid rules and it would create pressure and shift the burden of interpretation to the dispute settlement process. The adaptation of decisions by the WTO DS Body, though it establishes a kind of democratic check and control on the DS process, also acts through the negative consensus veto which reduces its role to a formal and not effective procedure. To deal with the negotiation-adjudication problem, it has been proposed that it becomes possible for a special minority of WTO Members to block the panels' decisions.[265] This proposal while it represents a solution also has its side-effects which affect the efficiency of the mechanism and undermine the significant achievement of the Uruguay Round; i.e. the autonomy and efficiency of the arrangement.

In order to avoid the side-effects and find a solution for the problem, the DS mechanism should be improved in a manner which guarantees that the panel and Appellate Body decisions do not create a binding precedent and which makes them faithful to the text of the WTO Agreement. Therefore a stronger relation between the WTO framework and international law which would lead to a better standing of international norms in to WTO DS jurisprudence, will reduce the gravity of the problem and help in solving the issue in a sustainable manner.[266]

1.1.3.6. Gaps and Weakness

The implementation of justice principles on the judiciary power of the WTO reflects certain other deficiencies and gaps in the existing WTO dispute settlement

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[264] Julio Lacarte, "Wto Appellate Body Roundtable, World Order or a New World Disorder? Testing the Limits of International Law: Proceedings of the Ninety-Ninth Annual Meeting of the American Society of International Law," *Laurence R. Helfer & Rae Lindsay (eds), Washington: American Society of International Law* (2005). p.177
[265] Guzman, "Global Governance and the Wto." p.79
[266] Ibid. p.348

mechanism. The dispute settlement mechanism of the WTO, in order to move in line with justice principles and make the WTO judicial power closer to the ideal situation of global governance, needs to solve these problems and fill these gaps. The limited range of remedies, the absence of retrospective remedies, the uncompensated harm during the implementation period, the inefficiency and impracticality of the non-violation complaints, the considerable time of the settlement process, the non-existence of provisional measures or interim relief and the lack of reimbursement provisions for legal expenses, the possibility of having retaliation in other areas of importance such as TRIPS, etc are all issues which a comprehensive justice-oriented approach to the WTO DS, requires addressing in order to make the current WTO DS mechanism, the proper judicial power for the global governance.

1.2. First Principle of Justice and International Trade

The concept of free trade is based on a liberal approach to the economy which believes that by specializing in the production of certain goods and opening the markets to competition by the producers, the cost of production will reduce and will result in an improvement in the general welfare of the world's citizens. The classical international trade theories inspired by the ideas of theorists such as Adam Smith resulted in the abandonment of mercantilist restrictions on international economic relations especially in investment and trade.[267] Adam Smith developed a new definition of the notion of "Wealth of Nations" and believed that the wealth of nations is not represented by stocks of gold but rather by the resources which the citizens of society have for consumption. The classical theory of international trade gradually developed into a modern approach to international trade favoring free trade and adopting the comparative advantage theory. The modern approach, developed mainly by David Ricardo, which called for shaping the principles of political economy based on comparative advantage theory, constituted the paradigm in the aftermath of World War II period, formation of GATT and consequently the establishment of WTO. This approach,

[267] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.21.

which in theory fits with the requirements of the first principle of justice, has resulted in certain major principles of international trade presented as the result of the Uruguay Round of negotiations.

1.2.1. Governing Principles of International Trade: Uruguay Round and Pareto-Efficiency Approach

The international trade model introduced as the international strategy of addressing the problem of inequality is governed by several principles and rules. These principles and rules have played an important role in presenting the trade strategy as a potentially powerful and capable solution for addressing the gap existing between the rich and poor nations and individuals. In fact, free trade by itself, irrespective of any principle and rule which advocates a distributional-oriented way, not only does not help the justice agenda but also acts conversely in exacerbating the inequality, as indicated by past experience. Therefore, any success attributed to international trade in fact is originated from regulated international trade which respects certain principles and rules. These rules and principles which were agreed and established as result of the GATT period and the Uruguay Round of decisions provided a platform of equal treatment based on the free trade approach and comparative advantage theory. These principles and rules include the principle of Equal Treatment, the Removal of Trade Barriers and the Principle of Predictability.

1.2.1.1. Equal Treatment

The primary and central element of international trade governed by the multilateral trade forum is the equal treatment of all WTO Members. This primary principle in international trade transactions and also at a national level has resulted in the introduction of two important and central principles which are the principle of the Most-Favored Nation (MFN) and the principle of National Treatment which constitute the main pillars of the WTO Agreement.

MFN which appears in several WTO Agreements has been viewed as one of the two fundamental nondiscriminatory and equal treatment principles on which the GATT and WTO system have been constructed and unlike other principles, MFN covers almost all WTO Agreements which by requiring WTO Members to extent the grant of the most preferential tariff to all WTO Members has made international trade a forum through which all WTO Members can profit from the opportunities provided by the international trade forum.[268]

The principle of National Treatment (GATT Art.III) aims at regulating the treatment of WTO Members within their market between the imported goods and services and the national ones. National treatment requires that imported goods are not subject to discrimination in terms of national regulations and internal taxations with the domestic like products, once they succeed in satisfying the border tariffs and measures and enter into the domestic market of the WTO Member.[269] In fact the principle of National Treatment acts together with the MFN to ensure that the trade liberalization commitments are not compromised and offset through any discriminatory actions and measures among the WTO Member markets.[270] The principles of MFN and National Treatment while constituting the major pillars of international trade forum form the principle of Equal Treatment which aims at guaranteeing the opportunities of international free trade for all WTO Members and protecting them from any discriminatory actions.

1.2.1.2. Removal of Trade Barriers

This principle generally addresses the removal of tariff and non-tariff barriers to international trade in order to achieve the free cross-border flow of goods and services. According to this principle, the free trade approach and comparative

[268] Henrik Horn and Petros .C. Mavroidis, "Economic and Legal Aspects of the Most-Favored-Nation Clause," *European Journal of Political Economy* 17(2001).p.234
[269] *Japan – Taxes on Alcoholic Beverages, DS 8,10,11*
[270] Bernard Hoekman, "The Wto: Functions and Basic Principles," *available at: http://www.terry.uga.edu/~eornelas/Econ4040/WTO-basics.pdf*. p.42

advantage theory requires that the international system be developed free of tariffs and non-tariff barriers to trade through a gradual process of rounds of negotiation, and act as a guarantor of the liberties for international actors embedded in the international trade system. Therefore for the trade forum to function properly, the organization should engage in a gradual process of removing tariffs, non-tariffs, technical and non-technical barriers to trade in order to achieve the full freedom of the flow of goods and services across borders.

1.2.1.3. Principle of Predictability

Another important element of international trade looks for more clearance in terms of the WTO Members' rights and obligations in both the WTO Agreements and also the Members' schedules of commitments in order to make the WTO Members' actions more and more predictable. The possibility of predictability in the multilateral trade forum would make the WTO a reliable forum and make it a more equal organization in which all WTO Members could rely on the value of economic concessions and level of access to the international markets.[271]

1.2.2. Free Trade Winners and Losers

The first principle of justice in international trade requires the free flow of goods and services in a totally equal and free manner. However in the free trade model based on comparative advantage, certain actors in international trade would be the winners and others the losers as a result of the implementation of free trade. The knowledge of who wins and who loses in free trade is important and crucial due to the fact that the least-developed and the developing countries have claimed that during the GATT period they have always been the losers while the developed countries have been the winners of free trade implementation. Therefore, in order to make the low-income and least-developed countries more of the winners rather than the losers in the current international trade framework and in future rounds of negotiation, it is necessary to know the case within which if the trade barriers are

[271] Cedro, "John Rawls Justice as Fairness and the Wto." p.28

totally removed and the WTO Members are competing freely and equally based on the comparative advantage theory, who would be the winners and who would be the losers.

To examine the impact of free trade on WTO Members, two models of assessment have been developed. The Specific-Factor Model[272] represents the importance of comparative advantage theory. According to this model, the export-competing industries, if they are efficient and enjoy comparative advantage, would remain and eliminate the inefficient import-competing industries in other countries and by contrast, the import-competing industries would be removed from existence if they do not become efficient and competent. The free trade theories believe that, by the removal of all trade barriers, the inequalities in resources of production would provide opportunities for all international trade actors including the low-income countries to specialize in the production of certain goods and the offering of certain services which through this process of specialization in comparative advantage would bring benefits and advantages for all international trade actors thereby contributing to the justice character of the system. [273]

However a more general analysis of the impact of free trade by the Specific-Factor Model illustrates the impact on national economies. In the second model, within a pure free trade competition scenario, those WTO Members who own most of the factors of production would benefit and in contrast, the members with ownership of very few factors of production would be at a disadvantage.[274] Therefore, those countries that benefit from extensive lands such as China and Australia, cheap and professional labour such as India and China and high capital

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[272] The first model known as the Specific Factor Model assesses the economic and business sectors within the WTO Members addressing domestic special interests and lobbies favoring or disfavoring free international trade. Accordingly, in a free trade situation, the individuals, whether employed or investors, who are related to the export-competing industries benefit more than other sectors and industries of the society due to the access to international markets, whereas the import-competing industries hurt the most due to the removal of their monopoly and the necessity for competition in quality and price. Ravenhill, "Global Political Economy." p.50

[273] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.1

[274] Ravenhill, "Global Political Economy.", p.50

like the US, European countries and Japan would be at an advantage while others would find fewer opportunities to compete in free trade situations. In addition, the empirical studies conducted during the GATT and also the WTO's establishment does not prove the claims of free trade theorists. Despite the fact that the specialization of production of certain goods could contribute to world-wide wealth and also improved welfare among equal competitors, free trade competition not only has positive results in welfare increase among the unequal competitors but also has a negative impact on the current standing of international trade actors. This negative impact has exacerbated the gap between the high-income (developed) and the low-income (developing and least-developed) countries and provided a wider range of opportunities for the developed countries. Therefore even though free trade has been viewed as a powerful instrument in current international relations, there is a requirement that it should be reconsidered from the perspective of the justice framework and be studied with justice features of international trade.

1.2.3. WTO Provisions and the First Principle

The application of the first principle of justice to the current regime of international trade in the WTO presents certain deficiencies and problems in fulfilling the requirements of this principle. In other words, while the end-target of the theory of justice in international trade strategy is to achieve substantial justice which calls for implementation of the second principle of justice, the move toward the second principle of justice requires an analysis of the current provisions and rules based on the first principle of justice. The application of the principle to the existing regime of international trade highlights important deficiencies and problems within the WTO covered agreements.

1.2.3.1. High Level of Tariffs

One of the significant problems which does not conform to the free trade approach and violates the first principle of justice is the high level of the trade tariffs between the high-income and developed members of WTO, and the developing and least-developed Members. The structured tariffs have made it difficult for the low-income countries to improve and increase their exports and have removed the motivation for them to move from exporting only the raw materials to the exportation of a value added chain of goods.[275] Currently the level of tariffs of developed countries against developing countries are four times higher than their tariffs against developed and industrial countries and this disparity makes it difficult to access the markets of developed countries and therefore hinders the development of the developing and least-developed countries. This problem, by weakening the ability of the low-income countries to compete with their international rivals, results in a gradual loss of their comparative advantages and a non-diversified basket of exporting products.

1.2.3.2. Difference between Fairness in Regulations and Commitments

Another significant element when considering the obstacles to moving the Organization toward a just institution from the perspective of the first principle of justice is the commitment established by each WTO Member in their individual schedule of commitments. Studying the legal provisions set in the Agreement indicates a relative fairness and alignment with justice principles. However, looking solely at the Agreement and the rules in the WTO framework would not result in obtaining a true perspective of the Organization. A comprehensive overview of the Agreement with the individual schedules of commitment of each WTO Member shows that the acceptable framework of the Agreement has been disregarded and forgotten almost in its entirety and the first principle of justice which calls for equal treatment has been violated. The problem is illustrated in several cases in the WTO Agreement especially the WTO Agreement on Agriculture in which the rules established present a good overview of a relatively fair arrangement and a good move from a non-desirable situation to a better condition. However reading these provisions in conjunction with the scheme of

[275] Stiglitz, "Social Justice and Global Trade.", p.18

commitments of individual members highlights a different outcome and results in an entire unjust and unfair mechanism.[276]

1.2.3.2.1. Rules of Origin

The rules of origin are a set of rules and provisions which determine the country of origin of particular goods and put forward the formulae which determine whether or not these goods would be considered as manufactured in a certain territory. These rules which are critical in international trade provisions especially in trade policy instruments such as safeguard measures, like anti-dumping and countervailing duties, play a major role in international trade and the free flow of goods between the low-income and high-income countries.[277] The fact that there is no binding regime of rules of origin in WTO has provided the possibility for the powerful members to design carefully and on each good specifically the complicated rules of origin in order to tailor the impact of free trade on the domestic industry of the powerful members.[278] The problem of rules of origin shows itself more in the Special and Differential Treatment and different GSP programs which will be studied later.

1.2.3.2.2. Agricultural and Cotton Subsidies

Originating from the difference between the Agreements' Regulations and scheme of commitments of individual members, the level of subsidies paid to the agricultural and cotton sector of the developed countries and powerful members of the WTO is a major problem in the move toward free international trade. Agricultural policies and subsidies were always one of the controversial issues during the trade negotiation rounds during the GATT as agriculture and cotton

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[276] Cedro, "John Rawls Justice as Fairness and the Wto." p.132

[277] Antoni Estevadeordal and Kati Suominen, "Rules of Origin: A World Map and Trade Effects Integration, Trade and Hemispheric Issues Division, Integration and Regional Programs Department Inter-American Development Bank," *Paper prepared for the The Seventh Annual Conference on Global Economic Analysis: Trade, Poverty, and the Environment, available at https://www.gtap.agecon.purdue.edu/resources/download/1866.pdf* (May 2004). p.2

[278] William E. James, "Rules of Origin in Emerging Asia-Pacific Preferential Trade Agreements: Will Ptas Promote Trade and Development?," *Asia-Pacific Research and Training Network on Trade Working Paper Series* 19(August 2006). p.33

was one of the primary sectors in which the developing and least-developed countries had found their comparative advantage. In fact, one of the most influential elements in the failure of negotiations to establish the International Trade Organization (ITO) was the fact that the developed countries especially the United States refused to align their agricultural policies with the general rules of competition in international trade law.[279]

The Agreement on Agriculture was negotiated and designed as an outcome of the Uruguay Round aimed at promoting the reduction of exports subsidies, improving the market access opportunities and reducing and eliminating the subsidies for domestic production. However, the subsidies which the farmers in US receive now have been calculated as three times more than the entire US AID budget for Africa's 500 million people. The subsidies paid by the developed countries in agricultural goods and cotton made all the concessions made by these countries to the developing countries useless and in vain. The Agreement on Agriculture and the cotton agreement were on the single undertaking package of the Uruguay Round and formed a part of the trade-off between the developed and developing countries. The general regime of international trade was introduced for agricultural goods and cotton and in return other concessions such as the introduction of Trade-Related Aspects of Intellectual Property (TRIPS) were made in favor of the developed countries. However, the level of subsidies permitted under the scheme of commitments made the concessions on the agricultural sector worth zero and consequently the cotton subsidies which twenty five thousand American farmers receive still puts at a disadvantage to a very large and significant extent ten million poor cotton farmers in Sub-Saharan Africa.[280]

The history of the negotiation rounds and the implementation of the Agreements present a clear example of the hypocrisy of the powerful members of the WTO in approaching free trade. The international principles of justice require that the inequality be examined on a global scale and not be limited to the national

[279] R.E. Hudec, "The Gatt Legal System and World Trade Diplomacy," *New York: Praeger* (1975). p.64
[280] Stiglitz, "Social Justice and Global Trade." p.21

boundaries. Statistics reflect that the US subsidies paid to its farmers is more than the entire GDP of an African country such as Burkina Faso, whose economy is affected by more than two million people of its population being dependent on cotton production with over half of them living below the poverty line.[281] The principle of justice requires that the situation of US farmers, among whom the level of poverty is literally zero and the farmers in Africa who mainly live below the poverty line be assessed and compared to each other. This has resulted in the understanding that the WTO concession-exchange mechanism has been designed and functions on unjustified privilege for certain sectors in certain countries and the WTO has provided the possibility for the advanced economies to implement the solutions that were tailored to their specific needs and have them vested in legal and binding principles and rules.[282]

1.2.3.3. Gaps in Agreements and Legal Provisions

Other important problems which exacerbate the disparity and inequality among the WTO Members are the existing gaps in the legal provisions and WTO Covered Agreements. One of the reasons for the WTO's successful record in opening international markets and increasing the overall wealth on a global scale is largely due to the detailed regulations agreed by the WTO Members during the rounds of negotiations. On the contrary, this significant element will result in a negative impact at the same level of importance if the Agreements keep silent on an issue or if the Agreements are not developed and updated to address new issues being raised.

The existing gaps in the applicable rules and provisions of the WTO generally cause a series of "race to bottom" behaviors among the WTO Members putting at stake the efficacy of the WTO as a unique organization in its own efficiency and its relationship with other international arrangements and international organizations. In other words the non-regulation of the relationship of the WTO

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[281] Oxfam, "Cultivating Poverty: The Impact of Us Cotton Subsidies in Africa," *http://www.oxfamamerica.org/files/cultivating-poverty.pdf* Oxfam Briefing Paper 30(2002).
[282] Cedro, "John Rawls Justice as Fairness and the Wto." p.127

and other international organizations as well as the relationship of the international trade agenda with other non-trade issues could negatively affect international competition in the multilateral trade forum. The existing gap in international labour standards and the ambiguity of the WTO's legal position on issues such as human rights in general, labour standards specifically, currency manipulation and the anti-dumping investigations have provided the possibility of opportunistic behavior among the WTO Members. This possibility has caused a "race to bottom" approach among certain WTO Members in which they gradually ignore or circumvent the world-wide accepted rules and protect their domestic economic sectors in order to justify their protectionist approach and to keep their comparative advantages and competitiveness in international trade.

However, the WTO's precedent shows that the WTO would not feel uncomfortable if it interferes in areas which do not directly relate to international trade but could affect and distort directly or indirectly the equal competition in the multilateral trade forum. These non-trade issues which do affect equal competition and the free flow of goods and services are known as trade linkage issues which are the subject of study when studying international trade based on the second principle of justice. However as a general approach and conclusion the current gaps provide a justified basis for the protectionist behavior of the WTO Members and these gaps should be regulated in a manner which does not affect negatively and in any discriminatory manner the international flow of goods and services.

2. The Second Principle of Justice and International Trade: Question of Substantial Justice

The free trade approach outcome which was established as the result of the success in the Uruguay Round of negotiations was due to the fact that the powerful players of international trade became able to accommodate the interests of each other and to establish a common position in the negotiation round against the rest of the world.[283] The establishment of the General Agreement on Tariffs and Trade presented the situation in which some players win and some lose, however those who win, win more and could compensate the others. Therefore, the free trade school is based on the assumption that only efficiency values, whether in a win-win situation or a situation which the gains of winner exceed the loss of losers, should be considered in the process of economic policy making due to the understanding that the policies that enhance global efficiency will also lead to a better distribution of wealth.[284]

The utilitarianism approach was looking at the consequence of the introduction of free trade across the world and due to the increased quality and decreased prices in GATT and consequently in WTO, they favored the efficiency-based free trade approach. They believe that free trade should be free from tariffs and non-tariff

[283] J. Croome, "Reshaping the World Trading System: A History of the Uruguay Round," *The Hague, London, and Boston: Kluwer Law International* (1999).

[284] Dan Ben-David and L. Alan Winters, "Trade, Income Disparity and Poverty," *WTO Special Study No. 5, http://www.wto.org/english/news_e/pres00_e/pr181_e.htm*.

barriers and the primary principles of free trade such as MFN and National Treatment have been established to guarantee equal liberty in order to contribute to welfare growth which would finally end in a win-win outcome and a more just distribution of wealth. In addition, the free trade theory found support from the influential school of libertarianism. Removing the tariff and non-tariff barriers to trade brings the free movement of goods and services across boundaries and contributes to the consumers' ability to choose. In fact this decrease in price and increase in quality bring more individual liberty and supports the main concept of libertarianism which looks for a free non-regulated paradigm for individual transactions. The free trade approach has been supported by libertarians based on the issue that it brings more individual liberty.

Therefore, the utilitarianism and libertarianism approaches have been considered to be more close to free trade and the traditional theory of international trade.[285] However, the liberal egalitarianism approach has also been viewed as compatible with the free trade approach according to its first principle which looks for equal liberty. The first principle of justice looks for equal treatment among all members of the society. In fact a situation would be judged as just situation, according to the first principle, in which all members of the international society enjoy the same level of treatment and opportunities and the free trade approach provides such a framework for players of international trade. However the theory of justice is constituted from two pillars and the second principle of justice goes beyond the equal treatment for all and calls for new features beyond free trade. While the free trade school does not admit any incorporation or even consideration of non-trade concerns within its approach, the second principle of justice known as the difference principle, calls for the unequal members to be treated unequally in a manner which favors the weakest and the lowest-income members. The second principle of justice which advocates the unequal treatment in favor of the weaker members goes beyond mere procedural justice and considers the establishment of substantial justice in international relations.

[285] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.86

The implementation of the first principle of justice in the WTO's structure and international trade strategy and making them compatible with the requirements of procedural justice is less than half way done. The structure which acts as the hardware of global and international justice should be designed, shaped and transformed into a framework within which the software of justice can act and operate. In fact, suitable hardware acts as a prerequisite and necessary condition for the application of principles of justice and it provides the proper platform for the justice-based strategy to function. In other words, without the proper hardware, the software would malfunction and without the right software, the preparation of the hardware would be useless and result in nothing. Hence, dealing with the structural issues of the problem of inequality and resolving the problem of procedural equality among the WTO Members would not make any change as long as substantive inequality exists.

The adopted strategy for global governance in order to move international relations towards the justice principles and address the problem of inequality is the trade-based set of solutions. This set of solutions was selected due to the great power and influence of international trade which has expanded significantly over the past decades. This expansion which had reached more than 60 per cent of world GDP, compared with less than 30 percent in the mid-1980s,[286] has shown a powerful instrument capable of bringing about a solution compatible with sustainable development. Therefore the trade-based solutions have been taken as the adopted strategy and software for the application of principles of justice in order to have a strategy closer to the justice outcomes and distributional concerns. With the existing asymmetry in the executive power of the WTO, the existence of procedural and structural equality would be ineffective and in vain.

In order to address the problem of inequality comprehensively, effectively and in a coherent manner the question of substantive justice in the adopted structure and

[286] A Joint Study of International Labour Office and the Secretariat of World Trade Organization, "Globalization and Informal Jobs in Developing Countries," (2009). p.9

strategy raises itself.[287] The assessment of the WTO structure and its different powers based on the first principle of justice presented a great deficiency and problem which consequently failed the WTO's structure due to its inability to fulfill the requirements of the principle of justice. The problem in executive power relates to the asymmetry of the WTO Members in enjoying the same level of opportunities which the multilateral trade forum provides for WTO Members. This problem, though it shows itself as a procedural problem in the WTO structure, in nature is a matter of substantial justice and strategy. Hence the existing asymmetry in executive power of the WTO is not only a procedural and structural deficiency but also a substantive problem which relates to the strategy and software of global justice. With the current gap and existing inequality among the WTO Members, trade strategy would not only not be a part of the solution to the problem of inequality, but would also be accused of acting as an exacerbating element for inequality. Therefore for the WTO, in order to be considered as the leader organization in the global government scheme, there is no alternative other than making sure that the software as well as hardware of the organization is in line with requirements of justice.

2.1. International Trade Strategy and Inequality

The second principle of justice will be called on and resorted to once inequality exists. The history of international economic relations and the current situation presents an established situation in which some members benefit more from the economic opportunities while certain other members are in an entirely disadvantaged position. The fact that currently about 82 per cent of world's wealth belongs to about 23 per cent of world's population and the remaining wealth (18 per cent) to the remainder (77 per cent) is evidence of the importance and significance of the problem of inequality in current international relations.[288] Inequality and the gap between the poor and rich not only has not remained stable but has also widened. The Report of the Asian Development Bank illustrates the

[287] Americo Beviglia Zampetti, "Democratic Legitimacy in the World Trade Organization: The Justice Dimension," *Journal of World Trade* 37(1)(2003).
[288] Thomas M. Franck, "Fairness in International Law and Institutions," *Oxford University Press* (1998). p.413

fact that "If inequality had remained stable in the Asian economies where it increased, the same growth in 1990-2010 would have taken about 240 million more people out of poverty."[289] Therefore the free trade approach of the WTO has accelerated the widening of the gap between the low-income and high-income countries and the deepened inequality has triggered the need for substantial justice and the implementation of the second principle of justice.

The impact of free trade on economic inequality and the implementation of the second principle of justice in two different layers are studied under a broader subject of the trade linkages in the WTO. In other words, for introducing international trade as the strategy for addressing the problem of inequality, two questions on the possibility and desirability of using the international trade strategy as the distribution-oriented instrument should be answered; the question of whether or not the nature of the WTO trade agreements are capable of encompassing and including the requirements of justice and distribution, and secondly whether it is desirable for international trade in the WTO structure to be viewed as an instrument for addressing the problem of inequality or not. Therefore, in order to craft the required justificatory basis for the implementation of the second principle of justice in the international trade strategy, two basic subjects should be studied: first the nature of the WTO Agreement and secondly the issue of trade linkage in general which reflects in most cases the problem of inequality among the WTO Members.

2.1.1. WTO as a Whole Treaty or Combination of Bilateral Treaties

The application of justice principles and distributional concerns to the WTO and international trade requires that in the first step the relevancy of these principles and concerns to the WTO and its agreements which regulate the flow of goods and services across national boundaries be studied. The relevancy of the principles of justice to the WTO Agreements and commitments raises the question of the nature of the WTO Agreement. The nature of the WTO is an issue

[289] http://www.adb.org/sites/default/files/pub/2012/ado2012.pdf

which has been the subject of debates and still is a point of controversy among researchers and scholars. Some believe in the WTO Agreement as a unique and distinct international treaty which includes all issues and provisions mentioned in the WTO covered agreements. This approach looks at the WTO as a whole and a multilateral treaty which deals with several conflicting interests and encompasses all issues in the same forum and in a multilateral, general and unified approach. On the other side, the alternative approach views the WTO as a combination of several bilateral treaties and contracts instead of a unique agreement.[290] According to this approach, the WTO is made up of several bilateral treaties between WTO Members and these bilateral treaties should not be put in a multilateral scheme to form a unique treaty.[291] Therefore, the second approach believes in the contractarian nature of the WTO which looks at the WTO as a treaty formed by several contracts between the WTO Members.

The general and primary principle in contract law which forms the basics of the concept of contract is the freedom of contracts. Freedom of contracts requires freedom of the parties of the contracts from any intervention by the state or from any imposition by any other party in setting the provisions and rules of contract. The notion of freedom of contract presents the concept of corrective justice in contract law, according to which the standard of justice and equality in contracts is adopted by the contract itself and hence the parties to the contract are bound to the conditions set in the contract which reflects their intention at the time of forming the contract.[292] Therefore, deviation from the provisions and violation of the contract would take place, according to the contract law, only on two basis; firstly when the rights of one of the parties set in the contract have been breached by the other party and secondly when it appears that one of the parties of the transaction has been forced to enter into the transaction.[293]

[290] Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are Wto Obligations Bilateral or Collective in Nature?," *EJIL* 14, no. 5 (2003)., p.928
[291] Guzman, "Global Governance and the Wto." p.346
[292] Kordana and Tabachnick, "Rawls and Contract Law." p.2
[293] Anthony T. Kronman, "Contract Law and Distributive Justice," *Yale Law Journal* 89(1980). p.476

The dominant approach of contract law looks at minimal intervention of legislature and the neutral role of the state in the transactions freely concluded between the members of the society. This impartial, neutral and minimalistic approach admits only the tax regime for fostering distributional concerns and any other interventionist instrument backed by any legitimate concerns would be unacceptable.[294] Therefore, adopting the contractarian approach as the nature of the WTO would block the intervention of distributive justice and ensure the failure of any attempt and effort to apply distributive justice principles in the WTO. Although it could be claimed that the primary and principal vision and expectation of the low-income countries when joining the multilateral forum was to improve their economic welfare and accelerate their development process through international trade, the contractarian approach of private law and consequently the first approach due to the nature of WTO sticks to the provisions agreed in the covered agreements and leaves only a limited scope of application for distributive justice and consequently limited instruments for distributional concerns.

However, the first approach to the WTO which sees the WTO as a unique multilateral treaty believes that the WTO should be viewed as a whole package and a unique body of regulations and dispute settlement mechanisms without dividing it into several bilateral treaties.[295] According to this approach, defining the WTO as a package of several bilateral treaties and studying the nature of the WTO based on the contractarian approach would fall short of defining certain aspects and elements of the WTO. Therefore, the researchers mainly believe in the multilateral nature of the WTO which views the WTO as a whole and multilateral treaty. This view provides the justification for the intervention of legislature in favor of any legitimate target and opens the way for changing any

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[294] Florian Bader and Joachim Behnke, "How Do Values Shape Preferences Concerning Distribution Policies? ," *available at http://www.ecprnet.eu/MyECPR/proposals/reykjavik/uploads/papers/3224.pdf*. p.3
[295] Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are Wto Obligations Bilateral or Collective in Nature?.", p.937

rule or cancelling its application whenever the legislature finds that modification and intervention necessary in fulfilling a public goal.[296]

2.1.2. Problem of Priorities and Different Approaches to Trade Linkages

The WTO in spite of being viewed as a specific organization and a trade forum includes the rules and principles that encompass diverse aspects that go beyond mere trade issues. The broadened and intensified scope and influence of the WTO has resulted in the situation whereby nowadays international trade has intervened and overreached into other territories which are of major importance for the international community. The impact of international trade on other non-trade issues was one of novel outputs of the WTO's creation which with its effective dispute settlement mechanism, forced other subjects such as human rights, environmental topics and labour standards to link themselves to trade.

The binding nature of WTO rules and the implementation of these rules by WTO Members has led to the fact that trade law has encroached increasingly on the other non-trade areas. The lack of applicability of international law was so rigorous that the production of a series of agreements in which the commitment of Members were not just words but real and objective obligations which as a consequence of their interpretations could result in hundreds of millions of dollars of claims and retaliation, forced other areas of international law to follow the WTO as the leading organization. The trade forum has succeeded in dictating what should be done and what should not be done in the public policies which have a direct impact on international trade and on the capacity of WTO Members in speeding up their process of development.[297] This encroachment of trade on the other areas which has been named "trade linkage",[298] "trade and" problems[299] or

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[296] Kronman, "Contract Law and Distributive Justice."
[297] Cedro, "John Rawls Justice as Fairness and the Wto." p.126
[298] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.3
[299] Jeffrey L. Dunoff, "The Death of the Trade Regime," *European Journal of International Law* 10(1999).

"fair trade" issues,[300] has made trade the subject and the trade forum the focal point of other international fields and caused lots of problems and controversies.

The increasing impact of international trade resulted in encroachment of trade law on other social areas forcing them to define themselves with trade law.[301] While the trade linkage in general also includes the issues which have a direct relation to trade and which have been addressed explicitly in WTO rules, the linkage also specifically refers to issues which have not been addressed precisely in WTO agreements and WTO provisions which however have been impacted by international trade.[302] "Linkage Problems" have presently become one of the most important agenda in international trade law and the trade policy domain. The legal and social areas that feel they have been limited and ignored are doing their best to define a decent position in the heart of international trade law and within the trade forum. These linkages in a broad sense include the linkages between trade and environmental standards, labour rights, development and inequality, human rights, cultural diversity and competition policy.

During the GATT, the trade linkage challenges have been manifested on many occasions and during rounds of negotiations. However, the creation of the WTO in 1995 which made the rules, procedures and dispute settlement mechanism more effective and operative, ushered the problem into a new phase in which the claims and solutions were considered much more seriously than before. The implementation of the legal provisions of the WTO intensified the process of overreaching into other institutions' territory thus making it difficult to characterize the trade and non-trade elements of the WTO.[303] The importance of trade linkage problems in the WTO was highlighted in the 1999 Seattle Ministerial Conference that the resulting mass protestation led to the failure of the Conference.

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[300] Jagdish N. Bhagwati and Robert E. Hudec, "Fair Trade and Harmonization: Economic Analysis," *Massachusetts Institute of Technology* 17(1996).
[301] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.5
[302] Guzman, "Global Governance and the Wto." p.303
[303] AHN, "Linkage between International Financial and Trade Institutions; Imf, World Bank and Wto." p.2

The failure of the Seattle Conference resulted in the fact that the impact of trade on other non-trade areas became increasingly important. This failure was mainly due to the difference of opinion on labour rights which was manifested in the position of the administration of the then President of the United States and labour unions which favored the imposition of sanctions on those countries which did not respect CLS (Core Labour Standards) on the one hand and the position of developing countries which were against this idea on the other hand.[304] Subsequently, in the Doha Round, many non-trade issues such as the environment, competition policy and investment have been considered and inserted as part of the agenda of the negotiation round and found their way to a higher level of incorporation in the WTO system.

Different approaches have been presented and studied and several proposals have been made to explain and direct the position of the multilateral forum and on how to deal with linkage issues in the WTO. These proposals are generally classified into two different approaches. Firstly, the idea which believes handling the two kinds of issues (i.e. trade and non-trade) are impossible and therefore deny any involvement of non-trade issues in to the trade forum by calling for an entire pure trade forum. However the second approach has a positive view regarding the possibility of managing the improvement of both trade and non-trade issues in the same forum. This approach which considers a pro-active role for the WTO when faced with non-trade problems has been continued in two different ways. The first approach which looks for an explicit linkage between trade and non-trade subjects in the WTO and the second which favors the moderate option of looking for an implicit link within the trade forum between trade and non-trade issues.

[304] Kofi Addo, "The Correlation between Labour Standards and International Trade: Which Way Forward?," ibid.36(2)(2002). p.295

2.1.2.1. No Linkage: Current Approach

The first category of solutions is based on favoring no linkage between trade and non-trade issues. According to this view, the WTO is a powerful institution with a great legacy of reducing trade barriers among nations and therefore in order to continue this role and maintain its position, it should stick to its limited but important role which is focused on the trade agenda and continue the same process as it has done until now. They believe that any engagement of WTO in regulatory bargaining will lead to protecting special interests at the public expense.[305] Therefore, the WTO must focus on promoting private contracts and reducing tariffs and non-tariff barriers to mitigate wealth transfer and should keep its administrative structure light in order to continue its monitoring duty. Therefore, those favoring a non-linkage between trade and non-trade issues believe the WTO should limit itself to the trade agenda and allow nations to set their policies in their own jurisdictions. The no-linkage approach rejects the idea of making the WTO a vehicle for wealth transfers and believes that any intervention of the WTO into issues other than trade would put the efficiency of the multilateral trade forum at risk.[306]

2.1.2.2. Explicit Linkage

The second approach has presented a clear linkage between trade issues and non-trade issues. Bridging trade and non-trade issues through an explicit link asks for the trade forum to establish an explicit link and incorporate the non-trade issues in to the trade forum. The expansionary approach which advocates for the explicit linkage provides that any violation in a non-trade area would be deemed to be a violation of a trade obligation. Therefore, though a real global government structure should include all issues whether trade or non-trade issues together, obviously this approach cannot operate and be applied within the current WTO structure and any obligation to implement non-trade issues explicitly requires the evolution of the current WTO structure in a way that could handle all non-trade

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[305] John O. McGinnis and Mark L. Movsesian, "The World Trade Constitution," *Harvard Law Review* 114. p.545

[306] "Against Global Governance in the Wto," *Harvard International Law Journal* 45(2)(2004). p.354

issues under the same umbrella. This evolutionary and expansionary approach provides substantial implications for the multilateral trade forum and forces it to share the decision-making process with others. As a consequence, the WTO would be expanded in two ways: the structure and the dispute settlement mechanism.

Accordingly, the WTO, in order to expand its agenda to include non-trade issues, should make tremendous changes in its institution and its structure should be transformed to one which could accommodate the non-trade issues. The first proposal on the expansionist basis calls for a broader structure and believes in leveraging the WTO success by turning it into a "World Economic Organization".[307] However the second proposal views a distinct department for each non-trade issue within the WTO and these departments would have periodic negotiation rounds beside the main negotiation round, called "Mega Round" negotiations. The issues which do not implicate other departments would be decided in departmental negotiations and the issues which implicate others or need concessions from other departments would be referred to the Mega Rounds. In departmental negotiations, the WTO Members would reach agreement at a lower cost and by agreement on a departmental scale, the Mega Round task would be eased and reaching agreement would be more achievable.[308]

On dispute settlement two solutions have been proposed based on the expansionist approach. The first solution which looks for a separate dispute settlement procedure has not found adequate support due to the argument that it will not bring the same success which the WTO DS brought and could even put the existing achievements of WTO at risk. However, the second solution calls for opening the doors of the WTO Dispute Settlement to a wider set of commitments and making the WTO DS available beyond the trade area. The expansionist approach in dispute settlement which calls for availability of the Dispute settlement mechanism for non-trade problems and for maintaining the efficacy of

[307] Marco C. E. J. Bronckers, "More Power to the Wto?," *Journal of International Economic Law* 4(2001). p.46
[308] Guzman, "Global Governance and the Wto.", p.312

the system, proposes having panelists with diverse backgrounds while enabling WTO Members to suspend concessions and to be permitted to retaliate in cases of violation of non-trade obligations.[309]

2.1.2.3. Implicit Linkage: Current System Improvement

The third approach calls for the establishment of the linkage between trade and non-trade issues in an implicit manner. This approach looks for soft reforms within the WTO system with little steps forward that facilitate the subsequent steps. It does not accept that the trade forum should not care about non-trade issues, nor does it look for bridging between these issues in an explicit way. Instead, it focuses on the available tools within the WTO system and by proposing solutions to make these tools more efficient and operative, it tries to avoid both legitimacy problems which are caused as a result of the non-linkage approach and efficacy problems caused by the explicit linkage.

2.1.2.3.1. Negotiation Stage

The explicit linkage studies the existing potential within the current in force WTO Agreement and proposes several instruments in the negotiation and the dispute settlement stages for each of the linkage issues to establish an implicit linkage and further proposes the incorporation of non-trade problems in the trade forum. The implicit linkage advocators propose the possibility of changing the standards, (non-trade issues) and renegotiate its tariffs and concessions with its trading partners.[310] For WTO Members in the current mechanism of the WTO this tool

[309] Ibid. p.335

[310] General Agreement on Tariffs and Trade, Article XXVIII: "…. a contracting party may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest a contracting party … may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest … and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession, modify or withdraw a concession included in the appropriate schedule annexed to this Agreement. … and subject to

permits the WTO Members to raise their standards with the possibility of compensating for potential economic losses within the current WTO arrangement.

However, this possibility requires the agreement and approval of all other trade partners for any change in the schedules and in order to obtain approval, the WTO uses a certification procedure through which the Secretariat of the WTO circulates a member's proposed changes to all WTO members, who may notify objections. The fact that the concerned members must negotiate to reach a satisfactory point for overcoming any objections before the Director-General of the WTO can certify the proposed changes to a schedule as final and binding has resulted in the fact that this potential can rarely be achieved and therefore makes it difficult to be presented as an efficient solution.[311]

Following this approach, some academics have proposed an economic view to the schedules of commitment of WTO Members within which those WTO Members who decide to raise or lower their national standards would be allowed to raise or lower their committed trade tariffs to the extent of market access value.[312] They highlight the importance of market access commitments as the cornerstone of the WTO Agreement upon which the WTO Members are allowed to change their national standards and tariffs freely while respecting the economic value of their commitments. According to this economic approach to the WTO commitments, the externalities resulting from the disrespecting of international standards which do not have an economic value and relate to humanitarian concerns and human rights values, are not entitled to be addressed in the WTO. Therefore the WTO is only concerned with pecuniary externalities which include both the race-to-the-bottom and regulatory chill and the proposal provides the justificatory basis for WTO Members to change their tariffs whenever they decide to change their

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consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession, modify or withdraw a concession included in the appropriate schedule annexed to this Agreement."

311 A WTO Secretariat Publication, "A Handbook on Reading Wto Goods and Services Schedules," *Cambridge University Press* (2009)., p.17

312 Kyle Bagwell, Petros C. Mavroidis, and Rober W. Staiger, "It’s a Question of Market Access," *American Journal of International Law* 96(2002).p.69

standards in order to maintain the economic value of their market access commitments and the WTO Agreement does not concern itself with non-pecuniary externalities.[313]

2.1.2.3.2. Judicial Process

Since the establishment of the WTO, one of the real driving forces behind the WTO's approach toward the trade-linkage issue has been the dispute settlement (DS) system. The interpretations of the WTO covered agreements rendered by Panels and the Appellate Body have played a significant role in completing the WTO agreement. While these interpretations, which are unavoidable elements of the dispute settlement mechanism, became necessary due to gaps and political ambiguities within the WTO contract, such tools could even bridge the trade and non-trade issues on the judicial stage. However these interpretations caused from the existing gaps which have been named by some commentators as "Creative Ambiguities", provide the WTO DS with a legitimacy problem within the WTO judiciary power.[314]

The legitimacy problem in fact reflects the existing debate on the nature of the WTO DS. While the political and diplomatic approach to the WTO DS could open the way to look more flexible at trade linkages and non-trade issues, the legalistic approach requires that the DS organs act on principles that confer them power. As a result of a long debate on the nature of the GATT DS mechanism concerning the issue of whether there should be a rule-based system with a legalistic approach or a flexible diplomatic mechanism with a political approach, the Dispute Settlement Understanding (DSU) tends to lean more to the rule-based legalistic nature for WTO DS.[315]

[313] Ibid. p. 75
[314] Sylvia Ostry, "Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium," *J.F. Kennedy School of Government, Harvard* (June 2000). p.6
[315] Dunoff, "The Death of the Trade Regime." p.754

The trade-linkage issue shows itself in the legalistic approach, in the relation of the WTO Agreement with other international agreements and norms. In other words, the issue of incorporating the non-trade issues and international standards which have been left outside of the WTO forum has been studied in a broader scheme of WTO law and international law. In describing the relationship between WTO and international law several opposite views have been presented and discussed. At one extreme side of this debate, some researchers have looked at the WTO as a special forum totally distinct from international law which should be governed and ruled by its own rules and regulations (Lex Specialis).[316] They refer to the WTO DSU Article 3[317] which asks the panels to only consider WTO law and believe in the relevancy of only customary rules of interpretation in international law to the WTO and refuse any substantive link between international law and WTO law.[318] According to this view, the panels must act on principles that confer on them power and if they rule on domains which are currently contested, it would be transformed from a legal to a political domain, hence undermining their institutional position. Therefore, any "delegalization" of WTO DS proceedings would delegitimize the system and the more the system becomes politicized, the greater would be the possibility of non-compliance and the non-resolution of disputes.[319]

On the other positive extreme side, others look at the WTO Agreement as a product of international relations that should take into account the international norms and standards.[320] They hold the trade forum accountable to human rights by permitting trade sanctions against violation of preemptory norms and as the WTO is an organization formed within the ambits of international law, the UN

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[316] Marceau, "Wto Dispute Settlement and Human Rights." p.756

[317] Article III: "*2.The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*"

[318] Joel P. Trachtman, "The Domain of Wto Dispute Resolution," *Harvard International Law Journal* 40(1999).,p.343.

[319] Dunoff, "The Death of the Trade Regime." p.755

[320] Joost Pauwelyn, "Conflict of Norms in Public International Law: How Wto Law Relates to Other Rules of International Law," *Cambridge University Press* (2003).

Charter takes precedence over conflicting obligations and hence, human rights must be protected.[321]

However other moderate views and solutions in between the two positive and negative approaches have been presented and these look to establish a bridge between the WTO and international law in a softer manner. Some academics have called for a so called "Passive Virtues" solution in which the WTO DS should play a constrained role in contested issues of trade linkages. The advocators of this approach believe that when a trade measure, based on an international treaty is challenged in the WTO, panels could defer from going forward unless and until the dispute resolution procedures under that international treaty have been exhausted.[322]

2.1.3. Dilemma of Legitimacy and Efficacy: WTO as Complimentary Solution

The discussion of trade linkage is significant in a global justice framework from different aspects. The issue of permitting non-trade issues to find a voice in the WTO and to find a decent position in international trade agenda facilitates the process of introducing trade strategy as the adopted software for the implementation of global justice and for reducing the current inequality among individuals across the globe. In fact, the mere caring by the multilateral trade forum about global problems other than trade issues makes the international trade strategy and the WTO the competent strategy and body for global governance in which the powerful trade strategy facilitates the process of dealing with global problems. The concepts of trade and inequality are in themselves evidence of a linkage problem when their interrelationship is viewed, hence any positive address of the problem associated with linkage would also be considered to be positively addressing the problem of inequality which seeks the solution to these issues from the multilateral trade forum.

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[321] Robert Howse, "The World Trade Organization and the Protection of Workers' Rights," *Journal of Small and Emerging Business Law* 3(1999). p.134

[322] Dunoff, "The Death of the Trade Regime." p.760

Therefore to approach the WTO as the leader of global governance and trade strategy as the adopted strategy for global justice there is no way other than accepting non-trade issues in the multilateral trade forum and letting them have a voice in the WTO negotiations, decision-making and dispute settlement. The no-linkage approach which denies any involvement of the WTO and international trade into non-trade issues, while putting into question the leadership of the WTO in global governance, serves the conservative approach which rules out the relevancy of the principles of justice in international relations, and would therefore not fit with the adopted framework of justice. On the other side, global justice calls for global consideration of all non-trade issues within the WTO as the leader of global governance and advocates the expansionist approach to the trade linkage agenda. This consideration even though it seems necessary and significant for moving towards the global justice principles, needs to respect the requirements of existing facts and current limitations within the WTO and international law.

The explicit linkage approach has been criticized on several issues such as the implementation stage and the level of permissible retaliation putting at risk the efficacy of the system. It may cause excessive sanctions, the overreaction of the targeted countries and may generate disagreement on the nature and outcomes of the alleged violations resulting in the destabilization of the whole WTO system.[323] The kind of enlarged WTO jurisdiction proposed by the expansionist approach would put the WTO's efficacy at risk if real-world consequences are not taken into account, and the proposed dispute settlement is so ideal that even the advocators of this approach have proposed the possibility of permitting the dispute settlement mechanism to be a default rule.[324] Therefore, the current limitations on the WTO and international relations do not provide the required circumstances to follow the target of global justice to have a global government which include all non-trade issues and global problems in an explicit manner.

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[323] Guzman, "Global Governance and the Wto." p.317
[324] Ibid. p.324

2.1.3.1. Implicit Linkage: The Way Between

The way between the ideal global justice pattern and the current limitations and facts is to include the non-trade issues into the WTO in an implicit manner. However, the implicit linkage, being approached either through the negotiation stage or through the dispute settlement mechanisms have both certain considerations and limitations which should be viewed in adopting the approach of the trade forum toward the issue of trade linkage.

The establishment of implicit linkage through the negotiation process, looks sound from an academic point of view and in theory will be the best solution, however this seems difficult to be implemented. The negotiation process requires passing the consensus barrier and any consensus on such issues with such diversity as the WTO Members is nearly impossible.[325] On the other side, any circumvention of consensus rules in a sense that the process be contemplated to operate without interfering in the negotiation process and making the WTO Members free to change their commitments while respecting the same economic value of the commitments, encounters significant problems regarding the calculation of the economic value which, due to the high probability of excessive calculations, would generate bad-faith claims. Therefore, the establishment of any implicit linkage between trade and non-trade issues through the change of standards, even if it passes through the consensus process will be difficult to achieve, and if it goes through circumventing the consensus rule would not only encounter the difficulties, but would also be limited to the pecuniary externalities of the non-trade issues.[326]

However the judicial power of the WTO has shown a positive sign to the non-trade issues in certain cases. Reviewing the interpretations of the dispute settlement organs of the WTO shows the creation of some sort of relation between trade and environmental issues even though WTO members have not explicitly framed environmental standards within the trade forum, and by giving a broader

[325] Shaw and Schwartz, "Trade and Environment in the Wto. State of Play.", p.153
[326] Bagwell, Mavroidis, and Staiger, "It's a Question of Market Access." p.74

interpretation to GATT Article XX exceptions[327] it has accepted measures imposed unilaterally in favor of certain non-trade issues.[328] In fact certain legal instruments within the WTO Agreements have been carved out in order to make an implicit link between trade issues and some important non-trade subjects. These legal instruments such as the "Like Products", "Public Morals" or "Effects Doctrine" are all possibilities which have been the subject of detailed legal assessments. The judicial interpretation of the WTO panels and Appellate Body have moved the multilateral trade forum forward in incorporating non-trade issues and helped in introducing international trade as the strategy for addressing the problem of inequality.

However in resorting to any of the existing instruments, apart from the reasonableness and relevancy of the argument in the theoretical framework which should be considered, the consequences and outcomes of its application are of importance to keep the mechanism as efficient as it is. In other words, while the justice framework and international trade as the adopted strategy for addressing the subject of inequality requires that international trade should not be limited to trade issues and should incorporate other non-trade problems, the judicial interpretations also in themselves have several ramifications which should be considered.[329]

Apart from the suspicions of developing countries regarding the pro-western bias of the WTO in general and specifically the WTO DS principles, all WTO Members are generally reluctant to grant a wider scope of justification and discretion to the judicial organs of the WTO; i.e. panels and Appellate Body.[330] The general understanding of WTO Agreements considers the Covered Agreements as the only texts which should be respected in the first instance by the judicial organs of the WTO and any deviation from the general rule which tends to include international standards and norms other than those included in the

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[327] See *US-Shrimp, GATT 1994: Art. I, XI, XIII, XX, 8 Oct. 1996*
[328] Shaw and Schwartz, "Trade and Environment in the Wto. State of Play." p.152
[329] Bagwell, Mavroidis, and Staiger, "It’s a Question of Market Access.", p.75
[330]McGinnis and Movsesian, "Against Global Governance in the Wto.", p.361

WTO Agreement would raise the problem of legitimacy in the judicial power of the WTO. Moreover, the enforcement of the pure-trade obligations in the current WTO DS mechanism depends on the ability of the WTO Members to identify the violations of the WTO Agreements and their willingness to bring complaints against other WTO Members which undermines the efficiency of this sort of solution.

These challenges and the legitimacy problem of judicial process represent the limits of the judicial interpretation in establishing the linkage between the trade and non-trade issues. Any solution put forward within the judicial process and WTO Dispute Settlement should take into account these limitations and should be developed in a manner which avoids the problems to the maximum extent possible in order to enjoy a high-level of support to be presented as a legitimate solution. The discord among academics regarding the possibility of considering the non-trade issues and international standards which are global problems is so high that considering the incorporation of any non-trade issue within the WTO DS immediately, without respecting the applicable WTO rules and regulations, would put the role and efficiency of the WTO at risk unless a relevant and proper legal instrument could be found which, based on the specific non-trade agenda, enhances and improves its position in the multilateral trade forum.

2.1.3.2. International Trade Strategy as the Complimentary Solution to Inequality

The "Global Government" approach which looked at a unified body responsible for distribution of all advantages and burdens requires the WTO and a trade-based solution to be the substitute of all other solutions and instruments within other international bodies. However the "Global Governance" framework adopted as the applicable theory requires the WTO's solutions to be considered as complementary to the current arrangements on the specific non-trade issues and other specific-agenda institutions and organizations. Therefore for the WTO to act as the coordinator of the existing mechanisms and international trade to act as the strategy for the implementation of the international difference principle, there is no solution other than to admit the concept of trade linkage in the theoretical domain. The linkage issue provides the justificatory basis for international trade to address the non-trade issues and enables it to channelize its power in to looking for solutions to the global problems. Despite the fact that the WTO has been placed at the cross-roads, many issues have still been left outside of the WTO negotiation agendas, no agreement has been reached on certain linkage matters which have been inserted in the Doha agenda, and it has been decided that certain linkage issues would be excluded from the agenda of the multilateral trade forum.

However, the specific study of explicit linkage between trade issues and each of the non-trade issues on a case-by-case basis would result in different judgments from the justice point of view. Incorporating non-trade issues in to the trade forum has been viewed in some cases as beneficial, in some cases as harmful and in other cases as having no benefit to the problem of inequality depending on the specific non-trade issue and the circumstances.[331] Despite the fact that the developing countries in some instances have favored the non-trade side of this debate such as competition policies,[332] in most instances, the developed countries are those who have claimed for a higher level of implementation of the standards and have put pressure on trade areas to incorporate and recognize the non-trade issues, which has necessitated a detailed study and consideration of existing views for the incorporation of any non-trade issues within the WTO forum. This confrontation between two sets of countries, in which one belongs to the club of rich and high-income countries and the other to the low-income ones, represents the significance of the problem of inequality and puts the linkage between trade and inequality in a salient position.

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[331] Bagwell, Mavroidis, and Staiger, "It's a Question of Market Access.", p.73

[332] Spencer Weber Waller, "National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law," *Cardozo Law Review* 18(1996). p.1111. The domestic competition laws which facilitate anti-competitive behaviors in domestic markets would enable firms to engage in strategic pricing in foreign markets. While the developed countries do not favor strong international antitrust protections, the developing countries benefit from stronger standards which result in an increased competition. Guzman, "Global Governance and the Wto.", p.318

However, the trade and inequality linkage could be viewed from general and also a specific point of view. In the general sense, the inequality could be studied as the major cause of other problems in the sense that the linkage problems have originated from the existing inequality among the WTO Members. In fact the inequality has impacted and influenced other linkage areas such as intellectual property and labour rights in a manner in which the linkage problem could be considered as a consequence of inequality. Resorting to the argument that developed countries have polluted the environment during their development process or referring to labour standards developed during the industrial revolution in Europe or the vital role of slavery and violation of labour standards in America's early development, all indicate the priority of the problem of inequality.[333]

While the general approach to the inequality linkage studies the entire ramifications of the problem of inequality and its impact on other global problems, the specific view to inequality deals with the impact of free trade in reducing inequality among the WTO Members. This specific point of view refers to the power of the WTO and international trade in addressing the problem of inequality and affecting the process of wealth distribution on international and national levels. The process of wealth distribution on an international level has been studied under the title of development, constituting a subsidiary linkage between trade and development.

2.2. Trade and Development Linkage

The first model of development was presented based on the efficiency approach which advocated free trade as a significant instrument in fostering development in the less-developed members of the trade forum in certain countries. This view has been reflected in the WTO Agreement particularly in the Marrakesh Agreement Establishing the World Trade Organization and its Preamble which seeks the realization of the development process via trade liberalization. According to this

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[333] Steven E. Landsburg, "The Big Question," *http://www.thebigquestions.com/2010/02/10/worked-up*.

approach, the competition generated as a result of trade liberalization will lower the value added to the final goods and services and result in a decrease in inequality while facilitating the process of development.[334] Free trade could bring opportunities and provide certain instruments for the players in international trade to strengthen their economy and expedite their development process. These opportunities generally refer to the high level of accessibility to the markets of other countries especially the more developed and wealthiest countries which could improve the export of the developing countries especially the least-developed ones. In fact, due to the small scale of the domestic markets of the low-income countries, the export of their products in which they have comparative advantage would have a great impact on their development and provide these countries with a sustainable solution.

The positive relationship between development and free trade constitutes the major paradigm of the multilateral trade forum since the establishment of GATT until the present time. The free trade approach attempted to change the dominant school of development which advocates import substitution as the development path for the developing and least-developed countries. Export promotion and export diversification were proposed as the alternative way and were adopted by the members of global trade as a better prescription. The implementation of free trade in international trade, even though it had significant achievements, also created several economic and social problems due to the existence of asymmetry among the WTO Members. The huge volume of criticism led to the belief that free trade, notwithstanding the significant records of improvement in several East Asian countries, has not contributed to the prosperity of low-income countries. In fact the criticism is mainly directed at the details of the trade agreements which are viewed as being structured in a way that does not confer any advantages to the developing countries.[335]

[334] Ronald D. Fischer, "The Evolution of Inequality after Trade Liberalization," *Journal of Development Economics* 66(2)(December 2001). p.556
[335] Stiglitz, "Social Justice and Global Trade.", p.18.

Despite the major records of the positive impact of free trade on the development of certain developing countries especially in East Asia, free trade has fallen short of generating a powerful stream and sustainable process of economic activity in the least-developed countries. The international experience proves that the smaller economies are more vulnerable to the international approach of liberalized trade and they do not only benefit from the opportunities provided within WTO, but also may be unable to keep their previous standing in the international economy and international trade. The weaker members of the WTO due to the smallness of their economy are affected negatively and in some instances heavily by opening their borders to the free movement of goods and therefore this does not only improve their economy but also in several cases it has exacerbated the issue of inequality in these countries.[336] This vulnerability impedes the development process of the weaker members of the WTO thus making free trade not only a development facilitator but also an obstacle to development of the developing and least-developed countries. The relative openness of the economy of the low-income countries and their asymmetry with powerful actors of international trade mainly in production resources and economic stability have made trade in an entire free and liberalized manner riskier for them resulting in the belief that free trade is considered as the best and therefore more just option in international trade, however only among the competitors who enjoy a relative level of development.

Any approach toward free trade should consider the priority of every subject over other issues. Apart from the practical results, free trade is in conflict with the development approaches of the less-developed countries generally on two major issues: the infant industry and also the strategic trade theory.[337] Free trade requires the WTO Members to open their borders and enter into pure free competition while any introduction of a new industry in countries which have not reached a certain level of development requires a period of protection in order for them to become competitive with their international competitors. Moreover, the strategic trade theory, though is illegal under the WTO Agreement, motivates the WTO Members to adopt certain actions such as export subsidies in order to maximize

[336] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.109.
[337] Sonali Deraniyagala and Ben Fine, "New Trade Theory Versus Old Trade Policy: A Continuing Enigma," *Camb. J. Econ.* 25(6)(2001). p.817

their own benefit and minimize their trade partners' shares in international trade.[338] Therefore free trade, in order to stop exacerbating the economic standing of low-income countries and integrate them in international trade transactions, should be balanced with a powerful element of development which will then result in a positive linkage between trade and development. In fact, the target of development justifies the links with trade which calls for the reduction of the impact of complete free trade and for balancing the decision-making in favor of the developing and least-developed countries in order to craft a central role for development in the trade forum.

2.2.1. Move toward Development-Based Policies: Doha Round

The public goal which arises from the requirements of the second principle of justice addresses the issue of wealth distribution on a global scale in favor of the disadvantaged members of the international community. The concept of development has been studied as the primary concept which, for the implementation of the second principle of justice in trade strategy, acts as the necessary element. In fact the concept of international global justice in conjunction with the current facts and existing limitations of international relations have resulted in the implementation of the second principle of justice in two different stages. While the public goal of distribution on an individual scale should be implemented in two levels, the first stage of the implementation of principles of justice addresses how the competition of international players to achieve a greater share in global trade reflects the concept known as development. Development has been considered as the first pillar and prerequisite for the process of wealth-distribution which has been set as the goal of national economies in order to become successful participants in international trade and to benefit to the maximum extent possible from the opportunities which have been provided as a result of competition in international trade.

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[338] Kyle Bagwell and Robert W. Staiger, "Strategic Trade, Competitive Industries and Agricultural Trade Disputes," *Economics and Politics* 13(2)(July 2001). p.113

In fact the prerequisite for distributing any wealth among the marginalized members of society is that those members have a better share of the creation of wealth on an international level and that this process of wealth creation takes place under the concept of development. While the implementation of global justice within the current limitations in international law requires the creation of wealth for the member states in the first instance, the development in its efficiency-based model eventually seeks the integration of the developing countries into the world economy and the elimination of poverty at the national level.[339] Therefore the understanding that the free trade approach which dominated in the Uruguay Round has left them worse-off and the benefits they gained as a result of the free trade were not the benefits they had anticipated, resulted in the initiation of the developmental approach to international trade which called for the WTO to shift from a pure free trade forum to an organization shaped and prepared to expedite the process of development in developing countries.[340]

The inequality created and exacerbated as a result of the implementation of certain provisions and measures of the Uruguay Round left the weaker members of the WTO worse-off and made the developing and least-developed countries skeptical of entering into any new trade deal under the WTO umbrella. This unwillingness was weakened by the assurances which the developing countries received that their problem would be addressed in the Doha Round before the main agenda and it would be supported by developed countries be discussed and negotiated. In fact the Doha Round created a fast track mechanism which by giving some leverage to the developing countries sought the assurance of the developing and least-developed countries in terms of resolving their issues before the completion of the whole negotiation package.[341]

The trade forum in the Doha Round launched a new approach toward the development-based targets by distancing itself from a pure free trade policy and

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[339] Bhagwati, "Dependence and Interdependence –Essays in Development Economics." p.3
[340]Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1051.
[341] Ibid., p.1073.

establishing a new solution under the category of trade-based policies.[342] In the Doha Round, certain demands were put on a fast track agenda and were considered as obtaining some leverage and concessions from the developed countries in order to ensure the satisfaction and participation of developing countries in the Negotiation Round. These concessions, although granted in order to make the low-income Members of the WTO comfortable that the results of this Round of Negotiation would finally modify certain decisions and regulations adopted in the past, present a major shift from the traditional international trade theory based on the complete freedom of movement of goods and services and pure comparative advantage theory to a new development-centered approach. These concessions are not only limited to the new interpretations of past obligations and binding regulations but also include certain new decisions and provisions vested either in the title of interpretation or a new substantive decision the implementation of which will result in the roll-back of prior commitments and legal provisions established in the GATT Rounds of Negotiations especially the Uruguay Round.[343]

These concessions declared in the Doha Declaration include certain provisions in the current applicable international trade regime which the developing countries viewed as preconditions of entering into any new phase of trade liberalization. The anti-dumping proceedings were addressed and certain micro clarifications have been made to discipline the use of anti-dumping measures. While the anti-dumping measures were resorted to as a protectionist instrument for the developed countries, the developing countries called for the setting of a more objective framework in which the anti-dumping measures could take place and the Doha Round provided certain concessions on this basis.[344] In addition, in relation to export subsidies of the developing countries, the possibility of having extensions on the transitional period changed to a sort of right allowing the developing countries to have the opportunity to seek extension and the Doha

[342] Ibid., p.1081.
[343] Ibid., p.1073.
[344] IMPLEMENTATION DECISIONS, supra note 2, art. 7.1: "Where an investigation of the same product from the same Member resulted in a negative finding within 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed."

Declaration made the criteria upon which the extension should be granted more objective.[345] However a significant part of the concessions made by developed and high-income countries in favor of the developing countries in the Doha Round relate to intellectual property rights and the Trade-Related Aspects of the Intellectual Property Agreement (TRIPS).

2.2.2. TRIPS Refinement

TRIPS resulted from a long and complex negotiation and interaction of different interests and conflicting ideas in the Uruguay Round.[346] Following the conclusion of the Uruguay Round and establishment of the WTO, TRIPS became an integral part and third pillar of the multilateral trading system and it called upon all WTO Members to provide protection for product and process patents, including pharmaceuticals and vaccines.[347] The inclusion of IP standards in the WTO treaty was heavily pushed by the developed members of WTO,[348] and particularly the United States which pressured for higher standards of IPR protection with the understanding that intellectual property protection protects not only products but also technologies and services which are major exporting items of the developed countries. In fact, while the developed countries are a major exporter of IP rights themselves, the implementation of TRIPS would protect the export of the IP

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[345] Under the Uruguay Round Agreements, some developing countries could keep their export subsidies for only an eight-year transitional period, subject to an extension if the Committee on Safeguards determined a justification for the extension. Under the new procedures set in Doha, interested countries have an opportunity to seek extensions, and they have them as a matter of right and the Committee *shall grant extension to calendar year 2003* when certain requirements are met. Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1080.

[346] Neville W and Anton Wasson Faunce TA, "A. Non Violation Nullification of Benefit Claims: Opportunities and Dilemmas in a Rule-Based Wto Dispute Settlement System," *Ten Years of WTO Dispute Settlement: Australian Perspectives, Office of Trade Negotiations of the Department of Foreign Affairs and Trade. Commonwealth of Australia, ed. Bray M.* p.5

[347] *Pharmaceutical Patents and the Trips Agreement*, available at: http://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm. p.1

[348] The introduction of IP standards in WTO was mainly supported by United States, Japan, the European Countries (EC) and Switzerland.

rights of patented processes, techniques and designs, copyrights, trademarks and franchises which take place in the structure of a license.[349]

The implementation of TRIPS was a considerable victory for the developed countries because even though it was against real free trade and movement of goods in its traditional sense, it was justified based on market failure which therefore required the intervention of the regulator.[350] The introduction of IP protection during the negotiation of the Uruguay Round was criticized by the developing countries but they finally dropped their resistance in 1986 in the Punta del Este Declaration[351] in which they accepted to "*develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.*"[352]

Finally, TRIPS found its way through the trade forum by constituting a major item of the "single undertaking" of the Uruguay Round in the tradeoff for developed countries' promise to liberalize sectors such as textiles and agriculture which was of particular interest to developing countries.[353] In other words, while the TRIPS Agreement was considered as a loss for developing countries, the whole Uruguay Round package was perceived as a net gain deal and developing countries accepted the whole WTO package of agreements based on the understanding that the benefits of the other Uruguay Round Agreements would outweigh the negative economic and social externalities of the TRIPS provisions. In fact, the improved access to the market of the developed countries and the reduction of the risk of unilateral sanctions adopted by the developed countries

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[349] Joost Pauwelyn, "International Trade Law Course Pack, Chapter 19. Trade-Related Intellectual Property Rights," *Graduate Institute of International and Development Studies* (2008-2009). p.190

[350] Carolyn Deere, "The Implementation Game, the Trips Agreement and the Global Politics of Intellectual Property Reform in Developing Countries," *Oxford University Press Inc., New York* (2009). p.1

[351] General Agreement on Tariffs and Trade (GATT) Punta Del Este Declaration, Ministerial Declaration of 20 September 1986.

[352] Pauwelyn, "International Trade Law Course Pack, Chapter 19. Trade-Related Intellectual Property Rights.", p.91

[353] Ibid. p.187

motivated the developing countries to give the green light to TRIPS to form the third pillar of the trade forum following the GATT and GATS.[354]

2.2.2.1. TRIPS and Development

The TRIPS Agreement, while it did not fit with the traditional free trade theory, enjoys a justificatory basis in the neo-classical approach and modern free trade theory. The concept of introduction of intellectual property in the liberal school of economy has been justified through two different approaches; the consequentialist approach and the rights-based approach. They are both theoretical approaches to international property rights, whether consequentialist or right-based, even though each looks at the IPs from a different perspective, and supports the concept of putting in place certain protective measures in order to motivate the innovation and creation of innovative processes, technologies, artistic works etc. However, the TRIPS standards in practice and in the stage of implementation encounters conflicts with the development process of the countries which are either in the process of development or are trying to start and speed up their entry into this process. In other words, the TRIPS standards, although desirable in theory, conflict with development-centered policies to the extent that the implementation of the IP standards made impossible or delayed the process of wealth creation in low-income countries.

Moreover, from a human rights point of view, the introduction of IP rights in the international and multilateral trade forum resulted in a conflict between intellectual property rights and in a particular sense, human rights through the claim by developing countries of their right to development.[355] They believed that the recognition of intellectual property in the manner as prescribed by TRIPS has caused several problems for the development process of developing and least-developed countries which not only has impeded their development but also has conflicted with other significant widely-recognized human rights such as the right

[354] Ibid. p.191

[355] Margaret Chon, "Intellectual Property and the Development Divide," *Cardozo Law Review* 27(6). p.2895

to health. However, the dominant development feature of the Doha Round highlighted the importance of the impediments facing the development of developing and least-developed countries.

The right to development though widely recognized and supported by the developing and least-developed countries as a complex example of a human right, did not enjoy sufficient support in the club of the high-income and developed countries.[356] They rejected the concept of development as a right for the low-income and developing countries in a manner which imposed duties and obligations for the high-income and developed countries and viewed the right to development more along ethical lines rather than a full human right which brought with it the respective legal obligations. Consequently any legal approach to the concept of development did not find success in being introduced as a legal obligation, however a lesser duty of assistance in an ethical sense found its way into the Doha Round of negotiation calling for the WTO Members to address the issue of access to medicine and also the transfer of technology from the developed countries, who were the major owner of technologies, to the developing and least-developed countries as this issue was exacerbated mainly after the entry into force of the TRIPS Agreement. The development-centered consideration of TRIPS generated a huge demand for refinement of the TRIPS Agreement, clarification of certain TRIPS provisions which have created significant impediments in the development of the less-developed countries and the introduction of flexibilities within TRIPS which are more aligned with development policies and strategies.

2.2.2.2. Clarification, Reinterpretation and Roll-Back in TRIPS

The TRIPS Agreement was drafted in a wide manner and had broad coverage[357] which by providing the minimum standards, made the WTO Members free to

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[356] Ibid. p.2862

[357] The TRIPS Agreement covers both literary and artistic property (copyright and related rights) and industrial property (trade marks, geographical indications, patents, designs and models, knowhow).

implement more extensive protection and to determine the most appropriate method of giving effect to TRIPS provisions.[358] However, in order to facilitate the implementation of these standards, the TRIPS Agreement includes several areas of flexibility to enable the developing and least-developed countries to adapt their national laws and standards to the minimum requirements of TRIPS. Despite considering these flexibilities in implementing its provisions, certain conditions have been set which prevent developing and least-developed countries from using and benefiting from these flexibilities.[359] Therefore, the developing nations sought to reduce the negative impacts of TRIPS implementation and succeeded in introducing certain clarifications of TRIPS provisions and agreeing on certain roll-backs from previous commitments with the developed countries to reduce the negative impacts on their development process.[360]

2.2.2.2.1. TRIPS and Access to Medicine: Balance between Incentive and Access

While TRIPS had a minor impact in countries which had already provided more or less the same level of patent protection for pharmaceuticals, it had the most significant impact on those countries that were forced by their obligations under the TRIPS Agreement to introduce intellectual property protection.[361] Patent protection generally and pharmaceutical protection specifically are introduced to ensure the incentive for the investment in the Research and Development (R&D) of such products remains. Due to the fact that the pharmaceutical companies invest heavily in R&D and have considerable regulatory approval costs, they rely on patents and other types of intellectual property rights (IPRs) to recoup their investment costs.[362] While the R&D and regulatory approval costs are incurred mainly by the company which develops a medicine for the first time and subsequent producers of the same medicine face much lower costs, without a

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[358] The TRIPs Agreement, Article: 1(1).

[359] World Trade Organization (WTO), "Trips and Pharmaceutical Patents," (September 2006). p.1

[360] Ibid.

[361] Kaitlin Mara, "Trips Council Discusses Efficacy of Acta, Public Health Amendment," *Intellectual Property Watch, available at: http://www.ip-watch.org/weblog/2010/10/29/trips-council-discusses-efficacy-of-acta-public-health-amendment* (29 October 2010). p.90

[362] Kamal Saggi, "Trade-Related Policy Coherence and Access to Essential Medicines," *Journal of World Trade* 42(4)(2008). p.620-621

certain period of restricted competition, the developers of new medicines will be unable to recoup their costs, and no more incentive would remain to develop new medicine.

The WTO Members' obligations to respect IP rights led to a general increase in the price of medicines in developing and the least-developed countries, making the problem of access to medicines complex especially for pandemics such as HIV/AIDS, tuberculosis and malaria. However, the incidence of disease in the developing countries and the fact that a high percentage of the individuals infected with HIV and diseases such as malaria and tuberculosis are located in developing countries which require patented medicines for combating these diseases, made the developing and least-developed countries vulnerable to the TRIPS provisions.[363] The implementation of the TRIPS Agreement prohibited the supply of generic copies of new medicines and the supply of generic medicines become limited to older medicines for which patents had expired.[364]

The purpose of patents is to provide a temporary monopoly to rights holders as a stimulus to inventions and their commercialization which gives the patent owner the right to prevent the competition from using the information to produce the same products and the possibility to set prices higher than they could otherwise. Therefore, the price of patented medicines is often much higher than the price that would prevail if generic competition were allowed and such differences lie behind the concerns of TRIPS which has resulted in substantial increases in the price of medicine since the entry into force of TRIPS.[365] There is therefore a direct link between the patentability of drugs on one hand and the availability of medicines and the realization of the right to health on the other.[366]

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[363] Ibid. p.622

[364] Pauwelyn, "International Trade Law Course Pack, Chapter 19. Trade-Related Intellectual Property Rights.", p.203-204

[365] *Wto Agreements and Public Health: A Joint Study by the Wto and Who Secretariat*, (World Trade Organizaton Secretariate, 2002). p.94

[366] Philippe Cullet, "Patents and Medicines: The Relationship between Trips and the Human Right to Health," *International Affairs* 79, no. I (2003)., p.151

The high price of medicines led to the deprivation of the majority of the people in developing countries from necessary medicines to which the people of developed countries had access,[367] and this had a negative impact on the implementation of domestic public health policies in many developing countries by adversely affecting their access to medicines.[368] Consequently the developing nations where patents were in place sought to reduce pharmaceutical prices through measures that the pharmaceutical manufacturers believed would infringe their intellectual property rights, however they were challenged and became the target of litigation by the developed countries especially the US.[369] Therefore, at the request of the African Members of the WTO, the TRIPS Council held a special discussion on intellectual property and for the first time access to medicines was put on the agenda of a WTO body and in the Council's regular meeting in June 2001.[370] Issues such as the definition of "national emergency" and its occurrence, the clarification required for certain provisions such as parallel imports and the implementation period for LDCs and developing countries were topics of concern for the lesser developed members of the WTO. The work that subsequently took place in the TRIPS Council fed into the preparatory work for the WTO Ministerial Conference held in Doha, Qatar in November 2001 and into the

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[367] Lisa Anderson, "The Conflict between Intellectual Property Rights of Pharmaceutical Companies and the Right to Health of Aids Victims in South Africa," *available at: http://www.globalpolitics.net/essays/Lisa_Anderson.pdf* (2002). p.10

[368] Frederick M. Abbott, "The Trips Agreement, Access to Medicines, and the Wto Doha Ministerial Conference," *The Journal of World Intellectual Property* (2000).

Despite the fact that the right to health as a human right has been included in a number of international instruments, it remains, like other economic and social rights, subject to frequent criticism for being vague in content and intersecting with too many other rights. Cullet, "Patents and Medicines: The Relationship between Trips and the Human Right to Health." p.148

However the right to health is now considered as a customary international norm, and every State has ratified at least one international human rights treaty recognizing the right to health and therefore there should be no doubt as to the relevancy of the right to health for all States. Office of the United Nations High Commissioner for Human Rights and WTO (UNHCR&WTO), "The Right to Health, Fact Sheet No.31," *http://www.ohchr.org/Documents/Publications/Factsheet31.pdf*. p.38

[369] South Africa was the target of litigation initiated by a number of pharmaceutical manufacturers over South Africa's legal regime in medicines. The United States government also initiated action against Brazil within the WTO over the compulsory licensing provisions in Brazil's Intellectual Property Law. Susan K Sell, "Trips and the Access to Medicines Campaign," *Wisconsin International Law Journal* 481, no. 20 (2001-2002).

[370] Torres, "Reforming the International Monetary Fund-Why Its Legitimacy Is at Stake." p.135

Declaration on the TRIPS Agreement and Public Health adopted by consensus by the WTO Ministers at that Conference.[371]

While Article 31 of the TRIPS Agreement and Public Health provided the flexibilities and cases in which the Member States were allowed to use the patents without the authorization of the rights-holders, the Doha Declaration on the TRIPS Agreement and Public Health emphasizes that "*the TRIPS Agreement does not and should not prevent members from taking measures to protect public health*" and reaffirms "*the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose*".[372] The Declaration makes it clear that the TRIPS Agreement should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.[373] It contains a number of important clarifications of some of the flexibilities contained in the TRIPS Agreement, while maintaining Members' commitments in the TRIPS Agreement.[374] These interpretations were mainly on the compulsory license processes, the importation regime of the WTO Members and the extension of the implementation deadlines for developing and least developed countries which all aimed at improving and enhancing the access of the low-income countries to medicines and pharmaceuticals and to provide the minimum conditions necessary for the development of developing and least-developed countries.[375]

[371] Deere, "The Implementation Game, the Trips Agreement and the Global Politics of Intellectual Property Reform in Developing Countries." p.126
[372] Doha Declaration on the TRIPS Agreement and Public Health, para.4
[373] The Declaration "*affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all*"
[374] Torres, "Reforming the International Monetary Fund-Why Its Legitimacy Is at Stake." p.136
[375] Abbott, "The Trips Agreement, Access to Medicines, and the Wto Doha Ministerial Conference." p.6-7

2.2.2.2.2. Compulsory License and Freedom of Using

Compulsory licensing[376] is one of the instruments by which the developing countries could soften the harshness of key provisions of TRIPS and intellectual property and to remedy the problem associated with pricing or availability.[377] Despite the fact that TRIPS allows compulsory licensing in an explicit manner, developing countries have not used this instrument as expected. This limited and restricted approach of developing countries to the application of compulsory licensing originated from two different factors; the first refers to the national circumstances of the developing countries and the second to the degree of international pressure.[378] While the licensee must have the know-how to reverse engineer and manufacture the medicine without the cooperation of the patent owner, the developing countries and especially the least developed ones do not have the ability and the administrative and legal infrastructure to manufacture high quality medicines locally. Additionally, they should also plan for a sufficiently large market to justify the costs of investment and manufacture and adequate remuneration to the patentee, yet this group of countries lack such a market.[379]

On the other side, the fear of the possible sanctions which could target the developing countries bilaterally or multilaterally have contributed to the unwillingness of developing countries to use compulsory licenses.[380] As there are

[376] Compulsory license is issued when a government allows a third party to produce a patented product or use a patented process without the consent of the patent owner. (World Trade Organization (WTO), "Compulsory Licensing of Pharmaceuticals and Trips," *http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm*.) This instrument has been established and considered as an essential insurance policy by which the WTO Members could prevent the abuses of the IP system and foster their own national policies. (Pauwelyn, "International Trade Law Course Pack, Chapter 19. Trade-Related Intellectual Property Rights.", p.204)

[377] Frederick M. Abbott, "The Wto Medicines Decision: World Pharmaceutical Trade and the Protection," *The American Journal of International Law* 99(2005). p.319

[378] Deere, "The Implementation Game, the Trips Agreement and the Global Politics of Intellectual Property Reform in Developing Countries." p.203

[379] Ben Sihanya, *Patents, Parallel Importation and Compulsory Licensing of Hiv/Aids Drugs: The Experience of Kenya. Managing the Challenges of Wto Participation: Case Study 19*.

[380] Deere, "The Implementation Game, the Trips Agreement and the Global Politics of Intellectual Property Reform in Developing Countries." p.229-231

relatively few developing countries which are in a position to overcome these domestic and external problems, compulsory licensing, which seems an efficient and feasible instrument to attract the low-income countries, has not been used frequently by developing countries. One of the so-called concessions made during the Doha Round, addressed the ability and legitimacy of the developing countries to resort to compulsory licensing as a legal instrument to deal with public health problems.[381] The Doha Declaration made it clear that these countries are free to resort to compulsory licensing and the WTO Members have the right to determine the grounds on which they decide to grant them.[382]

2.2.2.2.3. New Interpretation: "National Emergency" in Compulsory License

Though in the TRIPS Agreement, the right of the WTO Members to use compulsory licensing in national emergencies was recognized, the developing and least-developed countries were reluctant to use this instrument. The reason was both internal and external variables which made the compulsory license solution vague and also costly in their cost and benefit calculations and the criteria set by the TRIPS Agreement to permit the use of compulsory licensing for medicines have made it almost impossible for some countries to utilize the provisions.[383]

In the Doha Round and Doha Declaration, the right of countries to determine what constitutes a national emergency has been clarified in order to make compulsory licensing more accessible for developing countries. The Doha Declaration made it clear that "*each Member has the right to determine what constitutes a national emergency or other circumstance of extreme urgency*" and that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other

[381] Abbott, "The Trips Agreement, Access to Medicines, and the Wto Doha Ministerial Conference." p.2
[382] (WTO), "Compulsory Licensing of Pharmaceuticals and Trips.", p.4
[383] Sisule F.Musungu and Cecilia Oh, "The Use of Flexibilities in Trips by Developing Countries: Can They Promote Access to Medicines?," *South Center, World Health Organization. Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH). CIPIH Study* paper 4C.(August 2005). p.15

epidemics, can represent such circumstances.[384] In addition, while it reaffirmed the fact that the license-issuing Member is required to compensate the rights holder, it requires that the amount of compensation would be fixed in the process of negotiation which provides a significant leverage for the compulsory license issuer in these negotiations.

2.2.2.2.4. Roll Back: TRIPS Amendment

The major change approved in the WTO and post-Uruguay Round is a roll-back of a significant commitment in the TRIPS Agreement in using compulsory licensing in medicines. The traditional regime of a compulsory license in which the licensee of the compulsory license was not allowed to export goods manufactured to other WTO Members and countries, made the use of a compulsory license in improving the problem of access to medicine and addressing the issue of right to health useless due to the fact that the least-developed countries did not and could not have the manufacturing capacity and the necessary market to make generic versions of patented medicines feasible.

Consequently, the Doha Declaration directed the TRIPS Council to find a way to allow countries with insufficient manufacturing capacity for pharmaceuticals to take advantage of compulsory licensing provisions to improve their level of access to the necessary medicines leading to the amendment of the TRIPS Agreement. This Amendment makes it easier for low-income countries to obtain cheaper generics of patented medicines by allowing pharmaceuticals made under compulsory license to be exported to countries lacking the production capacity and infrastructure and also deals with avoiding double remuneration to patent-owners, regional trade agreements involving LDCs, non-violation and retaining all existing flexibilities under TRIPS. It also covers, in a new annex, provisions containing definitions, notifications, avoiding sending goods to wrong markets,

[384] Haochen Sun, "The Road to Doha and Beyond. Some Reflections on Trips Agreement and Public Health," *European Journal of International law* 15(2004). p.137-138

developing regional systems to allow economies of scale and annual reviews in the TRIPS Council.[385]

However, the decision is still considered a temporary waiver, [386] and will only become a permanent amendment to the TRIPS agreement once it becomes approved by two-thirds of WTO Members.[387] Moreover, the donation of medicines to poor countries will still encounter important obstacles. On the one hand there are some diseases which are exclusive and particular to some regions in which marginalized populations and poor people in low-income countries exist, and on the other hand, health intervention and research and development are inadequate and underfunded to produce drugs for these diseases in such poor countries.[388] Consequently, in certain rural area settings where poverty is widespread and where some diseases are exclusive to those areas, pharmaceutical firms usually refrain from investing and therefore, essential medicines against these diseases will often be unavailable or inadequate.[389]

2.2.2.2.5. New Interpretation: Right of Determining Import Regime

The other new interpretation favoring developing countries is to do with parallel import regimes. In the TRIPS Agreement, the issue of parallel imports was left

[385] Edward Kwakwa, "The Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips)," (Spring 2010). p.89-90

[386] Currently the deadline is 31 December 2013, which it could be extended by the consent of the WTO Members. World Trade Organization (WTO), "Pharmaceutical Patents and the Trips Agreement," *available at: http://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm*. The first deadline had been set at 1 December 2007, and this was extended to 31 December 2009 by the WTO General Council, then to 31 December 2011 and now to 31 December 2013. The Amendment will come into effect once two thirds of the WTO Members formally approve it and it will replace the 2003 Waiver. For each of the remaining Members, the Waiver will continue to apply until they accept the amendment and it takes effect. Ibid.

[387] DG Pascal Lamy, "The Wto in the Archipelago of Global Governance," *Institute of International Studies. Geneva. available on: http://www.wto.org/english/news_e/sppl_e/sppl20_e.htm* (2006).

[388] Anne-Laure Ropars Mary Moran(Director), Dr Javier Guzman,Dr Jose Diaz and Christopher Garrison, *London School of Economics and Political Science, The Wellcome Trust* (September 2005). p.74-75

[389] (UNHCR&WTO), "The Right to Health, Fact Sheet No.31."

open and the WTO's decision on WTO Members' discretion to determine their own import regime could be challenged and be subject to dispute in the WTO dispute settlement body. The Doha Declaration recognized the right of WTO Members to determine their own parallel import regimes in medicines.[390] Therefore, the Declaration allows "parallel imports" of medications from nations where prices are lower to the countries which the prices of medicines are higher due to financial and non-financial reasons.[391]

2.2.2.2.6. Roll Back: Extension of Transition Period

While the developed countries were required to implement TRIPS obligations a year after the TRIPS Agreement took effect; i.e. January 1996, developing countries were permitted for a certain period to defer the obligation to extend product patent protection to the areas of technology which could not be easily protected under their national laws on the general date of application of the Agreement.[392] The TRIPS Agreement recognizes the technological and economic limitations of the least-developed countries, and therefore provides the eleven-year transition period and the possibility for further extension of the transitional period. Based on this possibility a least-developed country Member could obtain an extension only "*upon duly motivated request*" which made extensions available on a case-by-case basis, but gave no guarantee that any extensions would be given and gave no hint concerning the grounds for denying the extension.[393]

These deadlines and case-by-case mechanisms established under the Uruguay Round made it difficult for the least-developed countries to maintain even their

[390] "*the effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge*"

[391] Sun, "The Road to Doha and Beyond. Some Reflections on Trips Agreement and Public Health.", p.138

[392] The TRIPS Agreement, Article: 65(4).

[393] Most new Members who joined after the establishment of WTO in 1995 have agreed to apply the provision of TRIPS Agreement once they become a WTO Member which has been set in each new Member's terms of accession. Pauwelyn, "International Trade Law Course Pack, Chapter 19. Trade-Related Intellectual Property Rights." p.207

low level access to certain necessary medicines bringing fears that it could cause a humanitarian crisis. The Doha Declaration on the TRIPS Agreement and Public Health, following pressure from the low-income countries and the NGOs, extends the transition period for pharmaceutical products for all least-developed countries for an additional ten years, until 2016, for the minimum requirements relating to patents[394] and frees least-developed countries from the obligation to implement the TRIPS Agreement until January 2016[395] regarding the protection of patents of pharmaceutical products, without prejudice to their right to seek other extensions of the transition periods provided in the TRIPS Agreement.[396]

2.2.2.2.7. TRIPS and Technology Transfer: Balance between Development and Minimum Standards

By the entering into force of the Uruguay Round, the anti-development features of the legal provisions became the subject of discussions and resulted in the criticism of the developing countries. One of the major criticisms addressed the problem of the transfer of technology from the developed and high-income WTO Members to the developing and least-developed countries. While in the pre-TRIPS period, the developing countries were not forced to respect the legal provisions and procedures set out in the TRIPS for using the technologies and inventions registered and protected under the intellectual property standards in developed countries, by taking into account the effect of TRIPS, they were required to enter into negotiations with the IP holder and seek their consent and pay the respective fees.[397] The developed countries were arguing that by protection of IP rights, the enterprises which were owners of IP rights would increase the export of their high-tech goods to the developing countries and would more easily disclose the

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[394] Deere, "The Implementation Game, the Trips Agreement and the Global Politics of Intellectual Property Reform in Developing Countries." p.126-127

[395] *"the least-developed country members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement."*

[396] F.Musungu and Oh, "The Use of Flexibilities in Trips by Developing Countries: Can They Promote Access to Medicines?." p.7-8

[397] Birgit Verbeure, Gert Matthijs Geertrui Van Overwalle, and Esther van Zimmeren, "Models for Facilitating Access to Patents on Genetic Inventions," *Nature Reviews Genetics* 7(February 2006).

information regarding the protected rights, hence facilitating the transfer of technology to developing countries. The debate in fact was in the same context in which the access to medicine took place in which on one side, the goal of creating incentives for innovation stands and on the other side, the problem of access and the limitation which the TRIPS Agreement has caused by setting minimum standards for IP protection.[398]

The Doha Declaration states that "*Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members.*" This provision which goes far beyond an ethical duty or advice, however falls short of being a concrete and clear obligation. While the Doha Declaration clearly states a mandatory provision for the WTO Members to facilitate technology transfer to the least-developed countries, in practice this only requires the developed countries to prove that they are meeting their obligation in encouraging the technology transfer to the least-developed countries.

2.2.3. Doha Round and Development

While the long-standing dilemma of access and motivation for innovation and finding an equilibrium point have always been subject to debate and discussion, the introduction of the TRIPS Agreement and its implementation following the conclusion of the Uruguay Round have changed the existing balance in favor of innovation as a major concession to the developed countries. The legal provisions obliging WTO Members to set certain strict minimum standards and to increase their current regime of intellectual property protection, significantly affected the level of their access to patented goods and services such as technologies and medicines and consequently the development process of the least-developed and developing countries was put in danger; the process which relied heavily on the easy access to the protected goods and services. The launch of a new round of negotiation required the involvement of all WTO Members in the Negotiation Round and the developing countries looked at this possibility as an opportunity to

[398] Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1075.

address the unbalanced situation more in favor of the developing and least-developed countries. Developed countries agreed to present certain reinterpretations and roll-backs of previous commitments made in the Uruguay Round as a concession to the developing and least-developed countries to provide them with incentives to participate in the negotiation round.

The Doha Round was structured in a manner which ensured addressing and discussing a considerable part of the demands of developing countries and least-developed WTO Members in order to bring them to the negotiating table. In fact, the Doha Round was launched with the target of speeding the development in lesser developed countries and looked at stopping the asymmetry of economic opportunities in favor of certain powerful and developed Members of the WTO. Naming the 2001 Doha Round of negotiations as the Development Round, it presented the development approach to international trade and the belief that "*international trade can play a major role in the promotion of economic development and the alleviation of poverty"*.[399] However to motivate the marginalized Members of the WTO to take part and follow a new round of negotiations, it presented several economic concessions with a view of giving some guarantees that the asymmetry created by the GATT Rounds of Negotiations especially the Uruguay Round would be stopped and removed; these concessions not only included new interpretations of the existing commitments and legal provisions but also in some cases a roll back of certain previous commitments mainly in the TRIPS Agreement.

However, the concessions made in favor of the developing countries in Doha appeared to be more of a type of good gesture to decrease the external pressure on the developing and least-developed countries rather than a real contribution to their problems. Certain concessions in access to medicines provided only a temporary solution for access to necessary medicines in epidemics and others such as capacity building and technical assistance provided a mere framework to make the developing and least-developed countries capable of implementing WTO obligations which actually provided more support to the free trade approach

[399] Doha Ministerial Declaration, supra note 1, para 2.

rather than the development-oriented policies. Other vague concessions mainly in technology transfer, even though they seem fine in theory, still contain significant obstacles in achieving the goals and have been made only to entice the low-income countries to participate in the negotiation round. However, these concessions, even though they were made to make the WTO's bicycle move forward, reflect a major shift from the traditional theory of free trade which was the dominant approach in pre-Doha WTO and GATT to a new approach in which free trade should also care about the development of the low-income and lesser developed Members of the WTO.[400]

The dominant approach in the multilateral trade forum since its inception in GATT and the WTO was the traditional pareto-efficiency based free trade approach. However, the Doha Round's decisions opened the door for non-trade concerns and presented the concept of wealth creation for all WTO Members and the notion of development in the sense that in a totally free competition model, the process of wealth would be shaped in a totally advantageous manner in favor of developed and powerful members of the trade forum. The Doha Round's importance was because for the first time the developed countries accepted the theoretical concept of deviating from certain traditional free trade principles in order to integrate other economies of the low-income countries in to the global economy and to use international trade as an instrument for fostering development in the lesser-developed countries and alleviating poverty.

In fact the Doha Declaration by recognizing the major role of international trade in the development process of the WTO Members, and providing the possibility of rolling back from established commitments under the free trade umbrella, prepared the necessary theoretical legitimacy for the non-trade and developmental concerns to shape the process of decision-making in the WTO. However, a comprehensive view toward development as a primary step toward just distribution policies requires that the legal provisions and the structure of the WTO Agreement be designed in a manner which fosters and facilitates the process of development for the lesser-developed countries rather than some

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[400] Wilkinson, "The Wto in Hong Kong: What It Really Means for the Doha Development Agenda."

nominal concessions which only have a minor impact on the development of these countries.

3. Move toward the Distribution-Based Trade Strategy

Adopting international trade as a suitable and available strategy in moving the current international arrangements toward a more just system of wealth distribution raises the question of the approach which could make international trade more capable in addressing the problem of inequality. Several approaches toward international trade have been put forward and discussed as the right pattern for the WTO in fostering a trade agenda by which each approach tackles a specific/special goal in the trade agenda and a framework is then designed through which an international trade strategy could contribute to the prosperity of people around the world.

The free trade approach reflected in the Uruguay Round and introduced in the WTO and previously in GATT established a mechanism based on rules which look for mutual advantage in international trade relations. These rules called only for the implementation of the legal rules of the WTO in international trade relations irrespective of the outcome which would be generated from the application of these rules and legal provisions. Consequently, the establishment of the WTO and the appearance of the outcome of provisions and decisions emanating from the Uruguay Round did not satisfy the developing and low-income countries and led to the conclusion that the outcome was not the outcome which they were bargaining for. The low-income countries expected better participation in global trade through engaging in the Uruguay Round and WTO however what actually materialized was not what they had expected and the eventual outcome was far more than what they had initially considered.

The asymmetry in trade and economic opportunities was intended to be stopped by the launch of the Doha Round of negotiations.[401] Development was intended to be the main feature of the Doha Declaration and the decision was made for certain modifications to take place as concessions to the least-developed countries. The Doha Declaration resulted in certain development-oriented modifications which, in practice, were of less value for the development process of developing and least-developed countries. The concessions made within the umbrella of the Doha Round are not of substantially important value for the real development process of the developing and least-developed countries and serve to address certain primary and basic human rights, mainly the right to health, which was affected negatively by the entry into force of the Uruguay Round decisions. These concessions which were only made to provide the necessary motivation for these countries to participate in the negotiations however indicates a major shift from the previous free-trade dogma to a distributional-oriented organization and a slow transformation of a pure-efficiency organization to a semi-efficiency semi-distributional institution.[402]

While development is a main prerequisite and first step in wealth creation for low-income countries on international level, the Doha Declaration provides the necessary justificatory basis for the introduction of the development-based concepts of trade policy into the trade forum. However, the final goal of distributive justice theory is to ensure wealth distribution through a just manner among the individuals across the world which therefore goes beyond a mere development framework. The WTO mechanism should not only be repaired from the developmental point of view, but should also be shifted toward a mechanism which justly and fairly distributes the wealth created in the development process, hence the main problem of the Doha Declaration from a distributional point of view is the lack of a distributional framework.

[401] Finger, "Implementation and the Imbalance: Dealing with Hangover from the Uruguay Round."

[402] Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1073.

The just structure would not be deemed to be functioning properly unless a justice-oriented strategy is adopted as the principle guide for decision-making, decision-implementing and the settling of disputes in the justice-based structure. Procedural justice by itself would not result in more just results and the just procedure though viewed as a prerequisite, could not and would not be viewed as the sufficient cause and element required. On the other hand, the free-trade based approach when applied as the strategy for situations with differences in factor endowments, varying access to technology etc., should result in positive outcomes according to the factor-price equalization theorem for integrated economies, it still would not bring about a more just result and would also widen the income gap between high-income and less-income countries. This substance in international strategy should be shaped and inspired by justice requirements and thus necessitates having a comprehensive solution for dealing with the problem of inequality irrespective of unjust or just holdings. This comprehensive solution with its justice-based features will lead to the implementation of distributive justice, namely the second principle of justice in international relations.

The justice-based approach to international trade looks from a distributional point of view to free trade rather than a pure free trade or a development-based approach. The distributional concerns generally go further than the developmental forms and pass the limitations existing in the principal-agent theory in international law calling for the outcome of free trade to be the just distribution of wealth among the individuals and members of society on a global basis. The 2009 Ministerial Conference presented a significant transformation from an entire-efficiency approach toward a more distributive ends and goals approach in the attitude of the WTO Members. They called for a shift from a purely rule-based approach of the WTO to an approach within which the outcomes are taken into consideration and become important at least in decision-making and dispute settlement. The post-Doha decisions initiated a new phase of moving from a more efficient and free trade-based approach toward a distributional-oriented outlook and for the first time they acknowledged the significance of outcomes in the

World Trade Organization by calling for "*an ambitious, balanced and development-oriented outcome.*"[403]

3.1. International Difference Principle and Trade on International Level

As discussed in the second chapter, the implementation of the principles of justice on a global level has seemed to be impossible in a unified way. The existence of national boundaries has prevented the justice principles from implementing the distributional requirements on individuals across the world. The current principal-agent approach in which the nation-states are the members of the WTO and the states are deemed as the representatives of the individuals living in that society has made the process of direct wealth distribution among individuals impossible. In fact the concepts of nation-states and sovereignty have forced the principles of justice to consider the implementation of the distribution of wealth on two different levels: the international level and the national level.

The existing limitations have added a layer between the global governance coordinators and the individuals which requires that the process of wealth distribution be conducted in a first layer among the nation-states transacting in international trade and in a second layer among the individuals on a national level. Consequently as a first step, the principles of justice should shape the rules governing the distribution of resources among WTO Members which should result in the creation of wealth for the developing and least-developed countries. None of the levels will independently satisfy the justice agenda in the complete sense and therefore international trade, as the adopted strategy for addressing the problem of inequality, should improve the process of wealth distribution on both international and national levels. Therefore, the policies adopted through the decision-making power of the WTO, should look toward the redistribution of

[403] Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, Doha, Qatar, 29 November- 2 December 2008

wealth and resources from the wealthy Members of the WTO to the poorer countries and in this sense the development-centered trade strategy should be adopted to make the low-income countries powerful enough to compete in international trade on an equal basis.

However wealth distribution on an international level could also be interpreted in the context of a wealth creation process for the developing and least-developed countries as it creates wealth in favor of lesser-developed countries to make them capable of engaging in wealth distribution on a national level. In addressing substantive inequality on an international level, two different approaches have illustrated two distinct distributional patterns for the international trade strategy within the WTO; the first approach which looks for a tremendous change in the WTO approach from a rule-based mechanism to an outcome-oriented arrangement and the second approach which while it preserves the rule-based features of the WTO, looks for certain significant changes within the existing WTO arrangement to cover the international difference principle.

3.1.1. WTO as an Outcome-Based Organization: Two-Stage Mechanism

Despite the fact that the free trade dogma has not permitted the distributional values to find an independent force in WTO law-making and dispute settling, in general policy the WTO Members have shown a soft shift toward incorporating these values in the trade forum. The International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, held at Doha in 2008, introduced a new concept of "*balanced and development-oriented outcome*" and the approach which if followed accordingly would see the WTO transform from an organization which only cares about the removal of the trade barriers and wealth creation to an organization which also facilitate the distribution of wealth.[404]

[404] Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1047.

Therefore, the WTO would become an organization in which apart from the fact that the principles and rules would be applicable to all WTO Members, the outcomes should also be balanced. This transformation from a rule-based mechanism to an outcome-centered arrangement, has been interpreted and presented as a major shift from the free trade approach to a distributional-oriented approach; a shift from "*reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations*"[405] to "*an ambitious, balanced and development-oriented outcome*" which "*should support the expansion in the exports of developing countries, reinforce the potential for trade to play its due role as the engine of growth and development, and provide increased opportunities for developing countries to use trade to support development.*"[406] However, to define international trade and the WTO's position in approaching the international difference principle within the outcome-based framework, the rule-based and outcome-based approaches within the WTO should be studied.

[405] Marrakesh Agreement Establishing the World Trade Organization.

[406] Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, Doha, Qatar, 29 November- 2 December 2008: "*32. We are very concerned that, despite significant efforts, the Doha Development Agenda round of multilateral trade negotiations has not yet been concluded. A successful result should support the expansion in the exports of developing countries, reinforce the potential for trade to play its due role as the engine of growth and development, and provide increased opportunities for developing countries to use trade to support development. It is important to make progress in key areas of the Doha Development Agenda of special interest to developing countries, such as those outlined in paragraph 28 of the Monterrey Consensus, reaffirming the importance of special and differential treatment referred to therein. To this end, flexibility and political will are essential. We welcome recent commitments concerning trade and the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty, especially as this might particularly affect developing countries. On this basis, we will urgently re-engage and strive to reach agreement by the end of the year on modalities that lead to a successful and early conclusion to the World Trade Organization Doha Development Agenda with an ambitious, balanced and development-oriented outcome.*"

3.1.1.1. Dilemma of Rule-Based and Outcome-Based Approaches

The discussion of rule-based and outcome-based approaches to the WTO was resolved in favour of rule-based approach for the regulations approved as result of the Uruguay Round and the establishment of the WTO. However, the rule-based approach toward the WTO regulation which was looked upon as a victory of the legal approach over the diplomatic and political approach, intersected with the issues of inequality and distributional concerns raised by the developing and least-developed countries. The importance of the distributional concerns related to the tendency of a major group of WTO Members to keep their membership in WTO and to keep proceeding with the process of trade liberalization while ignoring these concerns could lead to divergence among WTO Members and put the existence of WTO at stake.

Moreover, the scheme established and enforced by the free trade-efficiency during the decades of the GATT and years of WTO has been viewed as having ambiguities and deficiencies in approaching the distributional values in international trade. The mechanism which was structured as an incomplete contract has led to a dilemma in establishing justice principles in the multilateral trade forum. The lack of specificity and limited knowledge regarding the consequences of implementation of the decisions and provisions have provided the possibility for one party to act opportunistically and to obtain the benefits of the trade bargain with other trade partners and WTO Members but without incurring the costs of the trade bargains.[407]

Following the establishment of the WTO and appearance of the results and consequences of the Uruguay Round, the distributional concerns have become more and more important. The demand for a just institution and more balanced outcomes all resulted in the nomination of the new round of negotiations as the Development Round. As a result, in the Doha Round of negotiations, the WTO Members accepted to modify certain Uruguay Round-based provisions to render

[407] Oliver E. Williamson, *The Economic Institutions of Capitalism: Firms Markets, Relational Contracting* (The Free Press, New York, 1985)., p.64-67.

some new interpretations and to reinterpret certain existing commitments in order to convince these classes of countries to participate in the new round of negotiations. The WTO has been viewed as a bicycle in the sense that if it doesn't go forward it will fall over and if therefore the liberalization process does not move forward, it will, like a bicycle, be pulled down because of the gravity of special interests.[408] The bicycle example represents the exact sense of outcome approach in the WTO which in order firstly for keeping the existing successful arrangements and secondly to motivate the WTO Members to launch new rounds of negotiations and new ranges of trade liberalization, should consider the outcomes. Therefore, if the WTO outcomes are not as expected by a considerable number of WTO Members, which is the case for developing and least developed countries in the Uruguay Round,[409] the WTO will not move forward and it will fall over.

The lack of a comprehensive international mechanism for redistributing wealth and the exacerbation of inequality by the applicable WTO Regulations motivated the developing countries to try to insert the outcome-based approach on distribution of wealth into the negotiation round and the fact that the bicycle of the WTO is required to sometimes move backward in order to go forward through the giving of concessions by industrial countries to provide a more balanced playing field in the Uruguay Round Agreements and the Doha Round prove the recognition and importance of outcomes in WTO.[410]

3.1.1.2. Right vs. Policy: Theoretical Root

The rule-based mechanism of the WTO and the outcome-oriented approach of the trade forum originate from the theoretical roots of the schools which adopt their

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[408] Robert B. Zoellick, "The Wto and New Global Trade Negotiations: What's at Stake, Address before the Council on Foreign Relations," *Available at: http://www.cfr.org/world/wto-new-global-trade-negotiations-s-stake/p4149* (30 Oct. 2001).

[409] J. M. Finger and J. J. Nogus, "The Unbalanced Uruguay Round Outcome: The New Areas in Future Wto Negotiations," *The World Economy* 25, no. 3 (2002). p.321

[410] Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1080.

principal criteria of decision-making and judgment based on the consequentialist or rights-based justifications which were reflected in several points in WTO law. The reflection was in the intellectual property rights and related issues addressed in the Doha Round mainly the critical issue of access to medicine. The consequentialist justification advocates an exclusive right for inventors, authors or artists to prevent others from reproducing and selling their works and to encourage inventors to invent, authors to write and artists to paint. Accordingly, the greater the quantity of inventions and creative works which are eventually released into the public domain, the more the public benefits through economic or cultural enrichment, or enhanced quality of life.

However, the rights-based justification looks at the IPRs as a real property right and an issue of human rights rather than of public policy.[411] The rule-based arrangement originating from rights-based justifications requires that the trade forum only set the rules of the international trade and leave the markets to decide who the winners are and who the losers are. According to the traditional liberal approach, the invisible hand which is guided by the comparative advantage theory would clarify who wins in the free market competition and who loses. However, the WTO Members, especially the developing and least-developed countries, due to their uncertainty and lack of information over the effects of implementation of rules and regulations, were pushing more for the outcomes than the rules and this interest was reflected in the Doha Round. The major criticism of the developing and least-developed countries addressed the issue of double-standards in the multilateral forum and the WTO Covered Agreement. They put in question the real rule-based approach of the WTO by highlighting the two important Agreements of the WTO Agreement, the Agreement on Textiles and Clothing and the Agreement on Agriculture, as the Agreements which were structured based entirely on the outcomes, while the rules of the Agreements were derived from the desirable ends of the interested parties among the high-income members of the WTO.[412]

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[411] Pauwelyn, "International Trade Law Course Pack, Chapter 19. Trade-Related Intellectual Property Rights."

[412] Ambassador Celso L.N. Amorim, "The Wto from the Perspective of a Developing Country," *Fordham International Law Journal* 24(1), no. 6 (2000). p.97

The hypocrisy in approaching free trade therefore supported within the developing countries, the concept of balanced outcome as a new guide principle for the whole international trade mechanism. As a result, while the dominant feature, fundamental principle and primary overview of the WTO forum was based on the emphasis on the significance of the rules and rights-based approach, the increasing demand and ideal of the WTO Members and the developing countries was on the outcomes and consequentialist approach which found semi-legal support in the Doha Round. Consequently, the dilemma continued in incorporating the distributional goals in the trade forum which led to the importance of the issue of the flexibilities within the WTO Rules.

3.1.1.2.1. The Flexibilities: Instruments of Outcome Approach

The justification and establishment of the flexibilities in the WTO framework originate from the outcome-based and rule-based approaches of the multilateral trade forum. Several flexibilities have been designed in current WTO obligations which the WTO Members could resort to as exceptions thus obtaining flexibility within the WTO regulation. These flexibilities have been seen as necessary requirements to establish a balance between the ex-post results of the implementation of WTO provisions and the ex-ante expectations of WTO Members in making decisions and approving regulations.[413] The existence of the concept of the flexibilities has made the WTO mechanism which is a rule-based arrangement not totally detached from the concept of an outcome approach. In fact while the flexibilities have been viewed as a mechanism which seeks to balance the outcome for the Member resorting to it, it has also been perceived as acting against the expected outcome from the point of view of the trading partners of that Member State. In addition, the non-violation provisions (GATT Art. XXIII) have been structured in order to make the WTO capable of dealing with unanticipated circumstances. This legal instrument which approximates the outcome-oriented framework of international trade enables the WTO Members to take actions against the measures which, even though they are not against the applicable rules of the international trade in Covered Agreements, act against the

[413] Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1064.

reasonable expectation of the WTO Members as an anticipated outcome of decision-making.[414]

However, the flexibilities embedded in the WTO mechanism and the legal instrument in general, fall short of materializing the real outcome-based mechanism. The flexibilities within the WTO system are all seen as legal exceptions to established WTO obligations which only provide certain limited justified defences and cannot be considered as a general rule and principal element and cornerstone of an outcome-based mechanism. Moreover, the non-violation complaints, even though they seem to be more of a general rule than an exception in WTO dispute settlement, play a limited role and are not capable of handling the distributional concerns. Therefore, any claim for the WTO to be an outcome-based organization will not be met unless structural and strategically changes are made in the Organization and the implementation of the concept of *development-oriented and balanced outcome* which requires that the outcome-oriented principles be established in the WTO as a general approach and dominant feature of the WTO.

3.1.1.3. WTO as a Transfer Payment Organization; Kaldor-Hicks and Distributive Approaches

While the outcome approach looks for a balanced result at the end of the implementation of international trade rules, the flexibilities have only little success in reducing the pressure of the unexpected results of the rule-based approach. In the interpretation of the concept of balanced outcome and the implementation of the right mechanism to achieve that, it has been proposed that the WTO which functions under the Kaldor-Hicks approach, provide a mechanism in which the losses of the losers be compensated by those whose gains exceed others. WTO is viewed as an efficient mechanism according to the

[414] Henrik Horn, Joseph Francois, and Niklas Kaunitz, "Trading Profiles and Developing Country Participation in the Wto Dispute Settlement System," *International Centre for Trade and Sustainable Development* Issue Paper No. 6(December 2008).

Kaldor-Hicks concept which is the weakest approach towards efficiency and which has been presented as an alternative to the Pareto-efficiency mechanism. However, to fulfil the "*balanced outcome*" perspective, a compensation mechanism should be developed in which once a decision or action is found to be compatible with the efficiency principle, compensation of the losses incurred by the losers is done by offsetting these losses against the gains of those who benefit the most.[415]

In other words, compensation payments would be developed and occupy a significant position following the ruling on the efficiency of a decision or transaction and the party that gains the most from a transaction; a decision or a policy change could compensate the party that gains less from that decision and transform the win-loss game to a win-win game.[416] According to the Kaldor-Hicks concept, the mere fact that the gains of the winners exceed the losses of the losers makes the transaction efficient in a sense that it would increase the worldwide wealth.[417] Although the Kaldor-Hicks approach expands the scope of efficiency from win-win transactions to transactions which are win-loss but in which the gains of winners exceed the losses of losers, the fairness and balanced outcome approach looks for just redistribution of wealth among the members of the global society. Therefore, this approach represents a scheme of redistribution which has the potential to lead to a situation where the party which has gained more will compensate the other party by a direct transfer.

The opponents of the one-stage approach in implementing distributive justice argue about the differences in the nature of the exchange mechanism which constitutes the WTO and the mechanism of wealth redistribution. While the exchange approach is a positive sum game, the distributive perspective is a zero sum game which offsets the gains of each party.[418] Therefore, the implementation of the redistributive approach and arriving at a balanced outcome cannot be

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[415] Michael J. Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, 1993)., p.7.
[416] Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1070.
[417] Ibid., p.1072.
[418] Ibid., p.1094.

achieved through mere bargaining and a new stage is required to complete the first stage's function and to equally distribute gains by making transfer payments from those who benefited the most to the members who benefited the least. Accordingly, as the barter system of the WTO's decision-making is unable to address the inefficiencies and to maximize the welfare, efficiency and also the legitimacy of the mechanism, the WTO should develop a system of direct transfer payments.[419] This direct transfer payment mechanism provides a double-transaction scheme in which the parties should negotiate to reach an efficient decision in a Pareto sense, however they should transfer directly the wealth created to the less advantaged parties and members until the stage where the gains can be viewed as balanced whereby not only the efficiency requirements but also the fairness principles are met and obtained.

3.1.2. WTO as a Rule-Based Organization: One-Stage Mechanism

For the WTO as a multilateral forum, to keep its salient role in global governance there is no way other than moving from its efficiency-biased principles toward the equality-oriented rules and requirements of distributive justice. Inequality and economic weakness are major obstacles to enjoying the opportunities within the WTO umbrella and the asymmetry in benefiting from the opportunities would put at stake the legitimacy of the WTO. Therefore the advanced and developed countries should detach from their mercantilist and opportunistic approaches and introduce considerable evolutions in the attitude and principles of the trade forum to make the WTO function better. However, this approach towards the concept of balanced outcomes could be viewed in a broader sense as an introduction of distributive values and justice concerns within the umbrella of the trade forum.

Moving toward more balanced outcomes requires that in the current competition between the international trade actors, the trend of the multilateral trade forum moves from the efficiency policies and free trade values to a distributional and redistribution approach to the resources and wealth creation which form key

[419] Ibid., p.1089.

components of international trade, from the wealthy members of the WTO to the poor and low-income countries. The balanced outcome requires that the forum considers an important position for the wealth distribution rules and that the WTO Members should sacrifice the Pareto efficiency principle in its absolute sense in favor of distribution. Therefore the parties should negotiate rules and principles which while respecting the efficiency values and rules in a relative sense, consider the just and fair outcome as an essential prerequisite and therefore sets up a mechanism which incorporates the distributional outcomes in setting the rules and principles.

However, the justice-oriented concept does not consider direct wealth transfer as a sustainable and long term approach and requires that the concept of balanced outcome be reflected through the incorporation of distributional principles and fairness outlook into the negotiations and decision-making process which results in rules, principles, regulations and provisions which by their implementation results in a just and fair outcome; i.e. the balanced outcome is obtained. The justice-oriented concept which seems to be the most appropriate vehicle for moving toward the balanced outcome illustrates that instead of having a double-transaction mechanism in which the principal transaction fulfills the efficiency requirements and the second one the distributional conditions, a set of rules and regulations within the territory of the WTO should be made and established the implementation of which will result in balanced outcome.

Due to the fact that the process of wealth creation in international trade is an outcome which should be materialized in the current legal establishment of the WTO and not as a second and parallel arrangement to the existing mechanism, the evolution of the trade forum should take place in a manner which fosters the development features of the WTO and change the direction of international trade transactions in favor of wealth creation for the low-income and weaker members of the trade forum. The Doha and subsequent developments present an important theoretical change to the WTO from a Pareto-efficiency organization to an organization which has decided to also include the distributive goals and principles in its legal regime. The capacity building measures, roll backs and new interpretations of existing commitments and obligations in favor of less-developed countries and the firm declaration of the WTO regarding not only looking to be a rule-based establishment but also for pursuing development-oriented and balanced outcomes highlights new and important signs of a major intention to shift from a pure efficiency forum to an efficiency-distributive mechanism.

3.1.2.1. International Difference Principle: Unequal Treatment for Unequal Members

The generally applicable rules and principles of the trade forum reflect mainly the first principle of justice theory asking for equal treatment among equal members of the international society. The two major pillars of equal treatment, i.e. the Most-Favored Nation and National Treatment, proves that the main skeleton of the global forum, to a large extent, is looking towards moving in line with the requirements of the first principle of justice theory. However, the second principle of justice deviates from the general principle of equal treatment and looks for unequal treatment among the unequal members of the international society and therefore any change and deviation from the primary and general rule of MFN and National Treatment (equal treatment) should fall under the scope of the second principle of justice; i.e. the international difference principle. Therefore achieving *balanced outcomes* and implementing the just principles requires that the standards, rules and provisions of the international regime in general and WTO in particular be shifted and transformed into a mechanism with equal treatment for equals and unequal treatments for unequals which will result in balanced outcomes.

Studying the current regime of international trade in the WTO highlights several obstacles in the WTO rules which prevent moving toward a justice-oriented approach in WTO and which do not facilitate the development process for the least-developed and developing countries. These obstacles not only align the WTO with the efficiency approach and mutual advantage scheme, but also widen the current gap between the high-income and low-income countries and act in a way which exacerbates the existing disparity among the WTO Members. The resulting outcome was the pressure on smaller economies to substitute efficiency-oriented policies with social-welfare oriented strategies affecting the employment rates and wealth disparity in the economy.[420]

Consequently, addressing the problem of inequality in the WTO from a justice perspective requires a comprehensive distributional-oriented review of the whole WTO legal regime instead of a double-transaction mechanism which changes the general direction of the Organization from a pure efficiency forum towards the distribution principle. However, the prerequisite and necessary condition for this transformation is dealing with the current unjust provisions and the removal of exacerbating elements. The second principle of justice necessitates the deviation from the first principle of justice in favor of distribution to the disadvantaged members of the society. Therefore, while the deviation from the first principle of justice is only allowed in favor of the low-income members, in the WTO regulation on several occasions this deviation has occurred not only for the benefit of the low-incomes but also for the developed members of the international community. The unjust deviation not only does not bring about the concept of equal treatment for all, but also has established the understanding of unequal treatment for unequal members, with the benefit however accruing to the wealthiest members.

The international difference principle, on the contrary, encourages different treatment between members with different economic standings and puts forward the concept of unequal treatment for unequal members, however with the benefit accruing to less advantaged members. The development approach to trade goes back to the early stage of the establishment of GATT during which the dominant approach of the trade forum was the free trade approach and the attempts of the developing countries led to the introduction of certain initiatives which originated from development insights to serve as solutions in addressing the inequality among the WTO players. These initiatives and solutions which aim at making the low-income countries capable of taking a larger share of the global trade includes

[420] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.25

the Regional and Preferential Trade Agreements (RTAs and PTAs) among different classes of countries and the Special and Differential Treatment (S&D) in favor of the developing and least-developed countries.

3.1.2.2. Regional and Preferential Trade Integration

Following the high records of GATT in the removal of trade barriers and the establishment of the WTO, developing and least-developed countries have found that trade liberalization in the multilateral trade forum has been structured in a manner which excludes certain important areas in which they have significant comparative advantage from competition. The disappointment in opening the markets of the developed countries for the goods in which they had comparative advantage led them to move toward establishing different models of preferential and regional trade arrangements.[421]

The history of regionalism presents two different waves of the move toward the regional and preferential solutions as a means of having better development and a greater share in international trade. The successful establishment of the European Economic Community (EEC) in 1957 motivated the lesser developed countries to establish Regional Trade Agreements (RTAs) among themselves in order to encourage the flow of goods between countries with relatively the same level of economic standing.[422] These South-South arrangements such as Central American Common Market (CACM)[423] and the Caribbean Community (CARICOM)[424] were formed based on the understanding that by restricting the imports from outside the region, the partners would find a less-competitive platform and therefore improve their comparative advantage. However, the initiative of

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[421] These models include RTAs, PTAs, free trade area, customs union, common market and economic union.

[422] Yongzheng Yang and Sanjeev Gupta, "Regional Trade Arrangements in Africa: Past Performance and the Way Forward," *IMF Working Paper* WP/05/36(Februray 2005)., p.28.

[423] The CACM was signed in 1960 by Nicaragua, Costa Rica, Honduras, Guatemala and El Salvador

[424] The CARICOM was signed in 1958 by Dominica, Antigua and Barbuda, Bahamas, St. Kitts and Nevis, Belize, Granada, Guyana, Haiti, Barbados, Jamaica, St. Lucia, St. Vincent, Suriname, Trinidad and Tobago

regionalism in the 1960s was not successful due to the fact that the regional members of these arrangements were mainly exporters of primary commodities and lacked the necessary infrastructure for the production of industrial goods.[425] Moreover, the inequality among the regional partners was exacerbated due to the creation of growth poles in these arrangements which finally resulted in a decrease in the revenue of the governments as a result of a decrease in imports and the removal of tariffs.

The end of the cold war and the breakup of the Council for Mutual Economic Assistance (COMECON) in 1991, which opened the way for Eastern Europe countries to join the European Union, coincided with China joining the Asia-Pacific Economic Cooperation (APEC) and brought up the second wave of the rush to regionalism in the 1990s. The distinct feature of the second wave of regionalism was the establishment of RTAs and Preferential Trade Agreements (PTAs) between the industrial and less developed countries which resulted in the establishment of north-south arrangements and agreements; agreements between the European Union and countries in Eastern Europe and the Mediterranean region and between United States with the Caribbean Basin Region (Caribbean Basin Initiative), Sub-Saharan Africa (African Growth and Opportunity Act), South America (Andean Trade Promotion and Drug Eradication Act) and Middle Eastern countries (Qualified Industrial Zones).[426]

3.1.2.2.1. Regionalism as a Means of Wealth Distribution

Regionalism is usually fuelled by political motivation and the understanding that these agreements could enhance the negotiating power of the trade partners and provide the possibility of having more leverage in getting concessions and aid budgets. However, despite the political motivation of establishing a regional trade agreement, in which the negotiating power of the members would be enhanced, the major motivation for moving toward regional and preferential agreements is

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[425] Anthony J. Venables, "Winners and Losers from Regional Integration Agreements," *available at http://www.cepr.org/meets/wkcn/2/2306/papers/venables.pdf*.
[426] James, "Rules of Origin in Emerging Asia-Pacific Preferential Trade Agreements: Will Ptas Promote Trade and Development?." p.27

economic advantage and the issue of how these arrangements could improve the process of development in these countries. Entering into the regional trade agreements could provide the chance for the low-income countries to introduce a certain degree of preferential access for their domestic industries which they believe in their competitiveness in order to make them ready to compete on a worldwide scale.

These regional trade arrangements aim at integrating the countries of a region or of a same level of development and provide them with the possibility of preventing the economic trading sectors from being faced with a huge flow of trading competitors.[427] Some have perceived south-south commodity trades as an engine of growth which, by increasing Asian demand for energy and industrial raw materials, facilitates the shift in the composition of food demand and the establishment of regional trade in food staples which could be an important instrument in reducing inequality and poverty.[428] In fact, the regional and preferential-based solutions have been viewed as a trade-based instrument for development which by providing opportunities for developing countries to improve and build up their comparative advantage, providing protection in certain economic sectors and also providing a larger home market, could increase the competitiveness of their products beyond their boundaries on a smaller scale than global markets and therefore improve their attractiveness for investment, thus improving their development standing and ultimately making them more efficient in the global marketplace.[429]

However, the regional trade agreements have been criticized not only from a Pareto-efficiency perspective but also from development-oriented approaches. The Pareto-efficiency approach criticizes the PTAs and RTAs for causing trade

[427] Gorgon H. Hanson, "Regional Adjustment to Trade Liberalization," *National Bureau of Economic Research* Working Paper No. 4713.
[428] UNCTAD, "World Commodity Trends and Prospects, Note by the Secretary-General," *Report prepared by the secretariat of the United Nations Conference on Trade and Development* (28 July 2006). p.9
[429] Leon E. Trakman, "The Proliferation of Free Trade Agreements: Bane or Beauty?," *Journal of World Trade, Kluwer Law International* 42(2)(2008). p.382

diversions in the sense that the imports of semi-efficient partners will substitute the efficient extra-regional imports and will remove the incentives for fostering a general free trade agenda and for removing trade barriers on an international scale to facilitate more trade liberalization.[430] Therefore, as a consequence not only will the resources be wasted and the efficient allocation of resources distorted, but also the trading members of these arrangements would lose their previous tariff revenues.[431]

The development-oriented approach believes that the RTAs and PTAs fall short of being a comprehensive solution to the problem of inequality. The general approach of the preferential and regional trade agreements, whether from a south-south perspective or through a north-south framework is inconsistent with the theoretical model of global justice. While the global justice school requires that the features of global government be implemented as much as possible in the structure of the proposed solution, the PTAs and RTAs are normally viewed as diverting the structural leadership away from the global governance body; i.e. the World Trade Organization, and this makes it difficult to adopt comprehensive distributional policies on a global scale. On the other hand, the two different waves of regionalism all become unsuccessful in facilitating development-centred and distributional policies and reducing the inequality among the developing countries and the rest of the world.

The south-south arrangements were faced with the lack of powerful and significant trade partners in the agreements and the fact that countries such as African countries were only exporting primary goods and the customers of their goods were in the developed countries made regional integration useless and unable to fulfill their real function.[432] Moreover in some cases, the establishment

[430] John McMillan, "Does Regional Integration Foster Open Trade? Economic Theory and Gatt's Article Xxiv," *In Regional Integration and the Global Trading System, K. Anderson and R. Blackhurst, eds., London, Harvester Wheatsheaf* (1993). p.3
[431] Robinson and Karen Thierfelder, "Trade Liberalization and Regional Integration: The Search for Large Numbers," *Trade and Macroeconomics Division International Food Policy Research Institute* TMD Discussion Paper NO. 34(January 1999).
[432] Venables, "Winners and Losers from Regional Integration Agreements.", p.16.

of these arrangements exacerbated the inequalities within the members of the same agreement in a region by causing the business offices and industries to be shifted to certain economic poles of the region which has led to the increase in inequality within the low-income members of the same agreement.

Similarly, the north-south arrangements, approached in the second phase of regionalism have not shown any considerable meaningful outcome in reducing inequality and helping the southern countries to take their place as important trade participants on a global scale. While the north-south arrangements have been justified based on the higher accessibility of the less-developed countries to the markets of developed countries in order to encourage them to enter in to these arrangements, the difficulty of taking decisions and arriving at a common ground on the agenda of the regional trade agreements has caused the powerful members of the PTAs and RTAs to impose their position through establishing certain legal provisions and instruments; e.g. the rules of origin, and they have used these bilateral treaties as a means of exerting pressuring for introducing ultra-WTO obligations such as 'TRIPS-plus' intellectual property protection in developing countries.[433]

3.1.2.3. Special and Differential Treatment

While the GATT's primary principle addressed the first principle of justice through expanding and developing the free trade agenda and providing a platform based on the equal treatment of the Members, the smallness of the national economies and domestic markets of the low-income countries were not impacted positively from the free flow of goods and services. Therefore, the free trade approach and pure equal treatment principle made the low-income and weaker economies dependent on international trade in a manner in which any change in the market prices of the goods in which they had a comparative advantage or any decrease in the level of their market access, significantly affected their economy in a negative sense. Therefore, parallel to the dominant economic school which

[433] Alqadhafi, "Reforming the Wto: Toward More Democratic Governance and Decision-Making." p.22

considered liberalized free trade as a positive element for the economic growth of both the world economy and the low-income ones, a new theoretical perspective was developed rejecting the idea of complete free trade as a solution for addressing the problem of inequality and looking for other developmental instruments to complement free trade.[434] The instruments proposed were at odds with the general principle of the trade forum and GATT primary rules.[435]

One of the most important instruments and the set-up which helps the WTO to shift from a pure-trade forum to a more equal and just institution is the special and distinct treatment for the marginalized and weaker members of international trade. The rationality of the solution lies in the belief that the MFN approach to trade liberalization does not necessarily facilitate the process of development and growth and therefore industries in developing countries need to be protected from foreign competition for a certain period of time in order to become competitive with international rivals.[436] While many elements within the current regime of international trade exist that deviate from the first principle of justice and rather than being in favour of the weaker members of the forum are actually more in favour of the powerful and advanced members, the implementation of the International Difference Principle on a worldwide scale requires not only the removal of the negative deviations from the first principle of justice, but also requires the adoption of rules and provisions which facilitate and develop the notion of positive deviations in favour of the low-income members of the trade forum.

The International Difference Principle calls for establishing specific treatments and a distinct set of rights and obligations and also a particular level of

[434] Chantal Thomas, "Democratic Governance, Distributive Justice and Development," *Chi Carmody, Frank Garcia, and John Linarelli (eds.), Distributive Justice and International Economic Law, Cambridge University Press* (2011).,

[435] Joseph M. Senona, "Negotiating Special and Differential Treatment from Doha to Post-Hong Kong: Can Poor People Still Benefit?," *Journal of World Trade* 42(6)(2008).

[436] Bown and Hoekman, Patrick Low, and Alexander Keck, "Special and Differential Treatment in Wto: Why, When and How?," *World Trade Organization, Economic Research and Statistics Division* Staff Working Paper ERSD(2004-03). p.1

commitments for the weaker members of international trade in order to facilitate the process of development and wealth distribution in these countries, and justifies the deviation from the equal treatment of all members as long as the unequal treatment favours the less-advantaged members of the international society with the aim of correcting and modifying the inequalities embedded in the international trade relations. The developing countries and their supportive theoretical school try to obtain deviations from the equal treatment and non-discrimination principles of the GATT and exemptions applied to the developing and least-developed countries from the reciprocity approach of WTO with the aim of enjoying extra new preferences.[437] The proposed exemptions took place within a larger picture of crafting a proactive role for inequality in the multilateral trade forum. This larger and comprehensive picture, called "Special and Differential Treatment" was designed and established in order to be the applicable regime in international trade relations between the developed and the developing countries.[438]

3.1.2.3.1. Market Protection and Market Access Provisions

The S&Ds in the WTO have been presented generally as providing two types of concessions to developing countries: market protection and market access measures. Market protection, unlike market access, is in principle against the free trade approach of the multilateral trade forum; however the importance of capacity building in exporting sectors has justified the need for providing market protection for the economic sectors in lesser developed countries. The market protection provisions of the WTO have been set out generally in the market protection for infant industries as well as the market protection policy in using subsidies for development measures. The infant industry works on the assumption that the least-developed and developing countries have not had the chance to improve the production of goods in which they have comparative advantage or could have comparative advantage, due to the small size of their markets, and therefore to help these countries to build up their comparative advantage and

[437] Chin Leng Lim, "The Conventional Morality of Trade," *Chi Carmody, Frank Garcia, and John Linarelli (eds.), Distributive Justice and International Economic Law, Cambridge University Press* (2011).

[438] Hoekman, Low, and Keck, "Special and Differential Treatment in Wto: Why, When and How?."

enable them to compete on an international scale, the protection for these industries should take place.[439] The development measures which authorize using the subsidies form the second pillar of the S&D provisions under the umbrella of market protection. The development measures are the second category of the list of subsidies which starts from the least to the most capable subsidies in terms of distorting the market[440] and relates to a few specific types of policies for which developing countries do not need to assume reduction commitments.[441] They include the support for investment in the agricultural sector, agricultural input subsidies available to low-income or resource-poor producers in developing countries and domestic support to producers in developing countries to stimulate diversification from growing illicit narcotic crops.[442]

The S&Ds also include provisions and concessions for improving the market access of the lesser developed countries which provide market protection for economic sectors and the domestic industries of these countries by having a better access to the markets of developed countries. The market access provisions which constitute the second pillar of S&Ds have been presented and materialized in Enabling Clause and subsequently in GSP programs of the advanced and developed economies. The most named GSP programs are the programs initiated by United States[443] and European Union,[444] providing certain preferences on certain conditions for the least-developed and developing countries.[445] While these programs have strict eligibility criteria and also export ceiling on product eligibility, they mainly do not cover the goods in which the developing countries

[439] Yilmaz Akyuz, "The Wto Negotiations on Industrial Tariffs: What Is at Stake for Developing Countries " *Third World Network, Trade and Development Series* 24(2005). p.39-44
[440] The five categories of subsidies from least to most capable in terms of distorting the market are: the "green box", the "development measures", the "blue box", the "de minimis" level of support and the "amber box".
[441] Cedro, "John Rawls Justice as Fairness and the Wto." p. 129
[442] World Trade Organization, Agreement on Agriculture, Art. 6.2.
[443] The US GSP program is grounded in The 1974 Trade Act which took effect in January 1976.
[444] The European preferential program, called CARIFORUM, or EU EPA.
[445] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.33

have comparative advantage and are with complex rules of origin which make them with less practical importance.[446]

3.1.2.3.2. Capacity Building and Technical Assistance Provisions

Subsequent to the conclusion of the Uruguay Round and entry in to force of the legal provisions, the WTO Members reached the common belief that in an existing unbalanced situation and lack of sufficient human resources and institutional capacity, a fair outcome would not be achieved. Therefore, the third pillar of the S&Ds called for providing technical assistance to the weaker members of the trade forum in order to enable them to easily integrate into international trade. This set of measures can be traced in different provisions which call for the cooperation of Member States on certain occasions such as the issue of access to medicine and making them available at affordable prices.[447] The technical assistance which has been widely used in European integration appears in the form of capacity building by the transfer of expertise and technical knowledge.[448] However international assistance and cooperation is not a substitute for domestic obligations and it comes into play in particular if a State is unable to give effect to economic, social and cultural rights on its own, and requires assistance from other States to do so. In other words, states have the obligation not only to guarantee the access to medicines of their own people but also to provide economic and technical assistance to enable other States to meet their obligations.[449]

The capacity building and technical assistance provisions made the WTO Members commit to generally help the least-developed countries financially and technically in order for them to become capable of implementing WTO measures and requirements. However one of the most important development-oriented

[446] Caaglar Ozden and Eric Reinhardt, "The Perversity of Preferences: Gsp and Developing Country Trade Policies, 1976-2000," *Journal of Development Economics* 78(2005). p.4
[447] Cullet, "Patents and Medicines: The Relationship between Trips and the Human Right to Health." p.149
[448] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.38
[449] Committee on Economic, Social and Cultural Rights, general comment N° 3 (1990) on the nature of States parties' obligations and general comment N° 14, paras.38-42

provisions of the Doha Declaration is the Declaration's emphasis on the principle of capacity building and duty of technical assistance. The Declaration states "*firm commitments on technical cooperation and capacity building*"[450] and recognizes them as "*core elements of the development dimension of the multilateral trading system*".[451] The capacity building which was aimed at making the low-income countries and marginalized WTO Members capable of bargaining and implementing the obligations, led to the establishment of the Doha Trust Fund to implement the promise of financial assistance; this initiative in reality showed that it is a long distance away from enabling the provision of real assistance from high-income countries in contributing to solve the developmental problems of the low-income countries.

3.1.3. Limited Reciprocity as a Rule: Asymmetric Trade Liberalization

The major dilemma in implementing the International Difference Principle within the WTO refers to the dilemma of rule-based and outcome-based mechanisms in the WTO decision-making and dispute settlement processes. The dilemma is showcased due to the questions that arise as to how the WTO Members should benefit from the opportunities created by international trade and how every country should benefit from international trade in terms of the expected outcomes or the actual outcomes of rules and regulations. While the dominant feature of the current mechanism in the WTO has a rule-based approach, any shift from a rule-based mechanism towards an outcome-based arrangement would require that the criteria for decision-making and dispute settlement rules shift from the ex-ante negotiation of actual benefits to the ex-post distribution of benefits and also move from the expectation-based perspective toward the result-centered approach.[452]

However any recommendation of such a shift requires significant changes to the current regime of international trade and requires the establishment of a second-

[450] Doha Declaration, Para. 41.
[451] Doha Declaration, Para. 38.
[452] Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1064.

stage arrangement which materializes the transfer payment for offsetting any unjust outcome. Such an approach, while it may seem difficult to implement within the current arrangements and limitations, will be desirable once all steps and initiatives within the current approach, i.e. the rule-based approach, have been taken in addressing the problem of inequality. In other words, the move toward an outcome-based WTO requires a gradual move and implementation of possible initiatives within the current mechanism and any immature move would be neither possible nor desirable.

The current rule-based approach, examined by the second principle of justice highlights the necessity of the question of reciprocity. The question of reciprocity touches on the question as to how the WTO Members should benefit from the opportunities created by international trade in the sense that the question being asked is whether the weaker members of the WTO should be treated equally when in competition with advanced and developed countries and when all the WTO Members are competing for equal opportunities on an equal footing or whether they should rather not be involved in a full reciprocity situation with powerful and high-income WTO Members and should instead enjoy a more favorable prescribed situation. While the second principle of justice rejects the idea of full-reciprocity in a situation where inequality exist, the limited reciprocity comes out as an approach recommended for dealing with the international trade rules and regulations between the unequal members of the WTO. The limited reciprocity is the core approach of the rule-based mechanism toward the problem of inequality and the result of the implementation of principles of justice on international trade relations. The major outcome of the WTO in the limited reciprocity paradigm has been the initiative of Special and Differential Treatment.

S&Ds have been proposed and designed in order to make the developing and least-developed countries capable of competing with advanced and developed economies and they return to the idea of the necessity for unequal treatment between the unequal members of a society. The idea of establishing a special set of rules and principles for unequal members of the forum arises from the second principle of justice, which advocates providing unequal treatment for unequal members and S&D, in this context is the most significant provision of the WTO in addressing the problem of inequality and it therefore generally enjoys the theoretical support of the global governance school. However from the perspective of global governance and international justice theory, the special and differential treatment suffers from deficiencies and loopholes and in practice, the crafted S&D arrangement in the WTO does not provide a real unequal treatment which facilitates the development process of the less-developed countries.

One of the major deficiencies is the WTO's approach to S&Ds, i.e. the principle of self-determination. The WTO Agreement holds the S&D as an entirely discretionary task for the rich and developed countries thus conferring the power of tailoring their needs and considering their political expediency in granting any special concession. The discretionary nature of the S&D in the WTO has made it vulnerable to political considerations and economic self-interest. The unilateral nature of the S&Ds and the developed countries' discretion in setting the provisions of the GSPs has been the cause of not only the problem of political considerations but also other problems such as the exclusion of competitive goods and the free movement of people and immigration, up to the lack of S&Ds in services and these all relate, in principle, to the self-selection nature of S&Ds as well as in services.[453]

Moreover, the conditionality of GSP programs, which has effectively shaped them as a tool for promoting international standards desirable for the developed countries, has encountered real criticism and it is believed that in certain instances EU GSP programs (EU EPA, CARIFORUM) have acted against other issues and goals and have been drafted in a manner which acts against the south-south trade.[454] The dependency of the S&Ds on political considerations, while it has been seen as offering positive flexibility, has been largely criticized by the lack of legal security it causes for the development policies of the developing and least-

[453] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade.", p.198
[454] Girvan, "Some Lessons of the Cariforum-Eu Epa." Also Cheikh Tidiane Dièye and Victoria Hanson, "Mfn Provisions in Epas: A Threat to South-South Trade?," ibid.7(2)(March 2008).

developed countries.[455] Therefore despite the fact that this flexibility is an advantage of GSP programs and without detracting from the record of GSP programs in improving international standards in certain instances, it suffers from drastic and major deficiencies and disadvantages that have put the GSP programs out of consideration as being a reliable tool and suitable solution.[456]

The second principle of justice requires the establishment of an arrangement which provides unequal treatment for the less-advantaged members of the international society in a comprehensive and binding nature; the arrangement, instead of being a free discretionary exception to the efficiency rule, should serve as a binding rule alongside the efficiency mechanism for regulating the trading relationship among the unequal members of the international society. In the WTO's current trade strategy, not only is the unequal treatment of the unequal members not comprehensive, binding and worth any value, but also the binding and valuable unequal treatment exists in favor of the developed and powerful members of the WTO. The protection of agricultural goods in some rich countries, the tariff escalation structure and high standards in the developed countries, which all coincide with the lack of competition, productivity and producing capacity in developing and less-developed countries, have consequently led to the establishment of special treatment in favor of developed and high-income countries.[457]

Therefore the first step in moving the WTO and international trade toward a distribution-based approach starts from the current rules and provisions of the WTO. While the two-stage approach which looks for a transfer payment mechanism can be desirable in theory, it cannot serve the justice framework as the starting point. The current regime of the WTO Agreement has been established on a rule-based approach and this approach has been viewed as a great achievement of the WTO. Any implementation of the second principle of justice should first

[455] Bagwell, Mavroidis, and Staiger, "It’s a Question of Market Access." p.72
[456] Trakman, "The Proliferation of Free Trade Agreements: Bane or Beauty?." p.383.
[457] Collier, "The Bottom Billion (Why the Poorest Countries Are Failing & What Can Be Done About It)." p.160

consider the existing regime of the WTO as this will make it more possible and feasible. The current rule-based approach of the WTO with regulations and provisions provides an existing instrument for the problem of inequality; the S&Ds. S&Ds which, in theory, seems proper and fits in with the international difference principle, suffers from several problems in their ability to offer a suitable strategy for wealth distribution on an international level.

A comprehensive approach for wealth creation for less-developed countries, based on the second principle of justice, requires that the Special and Differential Treatment becomes a legal and rule-based framework and be empty of political considerations and be able to move from a unilateral and discretionary program to a legally binding framework, which in order to remove any possibility of opportunistic behavior and the problem of conditionality of GSP programs, provides commitments for the developed countries. Therefore the S&Ds should transform into a mechanism which not only includes all goods necessary for the competitiveness of the developing and least-developed countries but also adopts substantive binding criteria for treating unequally the unequal members of the WTO which fits in with the requirements of the second principle of justice.[458]

3.2. International Difference Principle and Trade on National Level

While the distribution of wealth which originates from the implementation of the principles of global justice, reaches a level of wealth distribution among individuals on a global scale and across boundaries, the current facts and existing limitations require that in order to make the global justice theory practical and feasible, the theory be tailored and reshaped based on the current limitations of international trade and international law. Distribution of wealth among the individuals cannot be achieved unless the wealth created on the international level

[458] In measuring the inequality, certain criteria have been put forward such as the GDP per capita, land, population, etc. See the Korean Case.

through the pro-development policies and environment is distributed in the second and complementary step among the individuals on the national level.

Despite the fact that the ideal global justice theory considers individuals as the citizens of the global society in which the wealth distribution among individuals should take place in a direct one-stage manner, the current limitations and present structure of international relations impedes such a scheme from being implemented. The current international arrangements have been established based on the significance of the nation-states as the major pillars of the current international order and in order to implement the ideal principles and theoretical school of thought, these limitations should be accommodated. While the first step looks for the pro-development policies to shift the wealth creation process in international economic relations in the direction of favoring the least-advantaged members of the multilateral forum, a second stage is required to fulfill the ideal end of the global justice approach by guaranteeing that the wealth created contributes to the well-being of the individuals and citizens of the nation-states.

Therefore, the wealth created for the developing and least-developed countries, in order to fulfill the requirements of global justice, should be distributed among the individuals on a national level. The distribution of wealth among individuals on a national level is the function and agenda of the Rawlsian theory of justice which perceive the basic structure as the agent of wealth distribution. However the encroachment of international trade to other areas including the national and governmental policies of member-states has provided a new agenda for the trade forum which addresses the impact of the WTO Agreement on the distribution of wealth on a national level. Therefore, the WTO should also take into consideration the wealth distribution process on a national level and strengthen the policies which help the national governments to achieve the distributional goals on national level among the individuals that are the point of departure in the global justice theory.[459]

The implementation of free trade-based regulations and the rules of WTO have resulted in a process of ignoring and also the reduction of certain important and critical human rights in favor of free trade. Rights such as international labour rights, the right to health and right to development are well-known examples of human rights which, when adopting free trade as the substantive strategy for international and global justice, should be considered. However the intervention of the international trade policy on the wealth distribution on a national level has been reflected in the international labour standards.

3.2.1. Free Trade and International Labour Rights

The international labour standards and namely the Core Labour Standards (CLS) have been considered as one of the major pillars of international human rights which although are not aimed at removing inequality in a comprehensive approach, provide a minimum level for the low-income members of the society. The CLS are fundamentally based on humanitarian concerns and the high number of members of the International Labour Organization (ILO) which have ratified them presents a quasi-consensus in favor of them on an international level.[460] Core labour issues enjoy a high degree of support and even consensus in support of them. In addition, trade linkage with labour standards is, unlike human rights linkage, issues which are not based solely on pro-Western values and as a result the correctness of the implementation of these standards is unlikely to be

[459] Gerhart, "Slow Transformations: The Wto as a Distributive Organization.", p.1049.

[460] In 1998, the 86th International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work and identified eight conventions as fundamental principles and rights at work which all members have obligation to implement them even if they have not ratified them. The standards embodied in these conventions have been called "Core Labour Standards" (CLS). These eight conventions deal with freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. Addo, "The Correlation between Labour Standards and International Trade: Which Way Forward?."

challenged.[461] However the international standards, due to their impact on the comparative advantage of the WTO Members, have been the target of the encroachment of free trade, resulting in the linkage of free trade and labour standards.

3.2.1.1. Matter of Comparative Advantage and State's Autonomy

The issue of linkage between trade and labour standards in particular becomes significant when one consider the fact that on one hand the improvement in the standard of human life is one of the duties of international law in general and the WTO in particular[462] and on the other hand the proponents of the establishment of the linkage between labour standards and WTO regulation are not only human rights groups and non-governmental organizations (NGOs) but also the politically powerful lobbying groups seeking protectionist goals through enforcing standards.[463] In fact despite the fact that that the human rights movement and enhanced communication networks have in recent years made the subject of the trade and labour linkage important from a humanitarian point of view, the competitive impact is still the key element.

Free trade has a significantly negative impact on labour standards by linking the issue with the competition in goods and the matter of comparative advantage. The strict observation of core labour standards in international trade would involve serious economic disadvantages and negatively affect the ability to compete of the

[461] Jagdish Bhagwati, "Afterward: The Question of Linkage," *American Journal of International Law* 96(2002). p.128

[462] Agreement Establishing the World Trade Organization

[463] Wolfgang and Feuerhake, "Core Labour Standards in World Trade Law: The Necessity for Incorporation of Core Labor Standards in the World Trade Organization.", p.851.

involved members.[464] This reality arises from the fact that the more you respect international standards and the higher you set your standards' level, the lower would be your ability to compete and there would be a greater probability of losing your comparative advantages.[465]

The importance of competitiveness and comparative advantage in the current international trade order, which is the key element of prosperity in the efficiency model of trade regime, has constrained the autonomy of states in the sense that any change in standards would put the affected industry in a non-competitive position. On the other hand, the investment policies have acted in a way such that any change in policies which disfavor the international investors, from expansive policies in fiscal domain with higher rates of employment to policies to enforce the implementation of higher labour standards which lead to higher cost of production, would result in the threat of capital exit and put pressure on the national states involved.[466] These constraints highlight the importance of multilateral responses to these problems due to the fact that leaving the states to pursue their individual policies on a voluntary basis would not result in a desirable outcome. Therefore, the WTO can no longer ignore non-trade issues especially labour rights and a broader view is required for dealing with problems in a way in which the total aspects of the problems can be addressed; a view which integrates these distinct interests without undermining the strength and effectiveness of the trading system.

3.2.1.2. WTO and Labour Rights

Labour standards are a part of a larger scheme of social development which even though taken into account in the Agreement Establishing the World Trade

[464] Some writers, have named the fact of producing products at a lower price by exploiting workers "social dumping".Friedl Weiss, Erik Denters, and P. J. I. M. de Waart, "International Economic Law with a Human Face," *Kluwer Law International* (1998). p.86

[465] Eddy Lee, "Globalization and Labour Standards: A Review of Issue," *International Labour Review* 136(1997). p.177

[466] Dunoff, "The Death of the Trade Regime." p.753

Organization, have not been reflected in the WTO's Covered Agreements. While the international standards do not enjoy same value in the multilateral trade forum, the labour standards have been valued as the third group of international standards which cannot be used as a basis for claims, nor can they be used for defenses.[467] Giving no legal value to labour standards, either on a claim or defense basis, has caused problems inside and outside the multilateral forum.[468]

The WTO however has not been silent on the issue of labour standards and in the Singapore Ministerial Declaration has stated that the competent organization for labour standards is the ILO.[469] This inattention from the trade forum did not discourage the labour forum from following the linkage between trade and labour standards and in 2008, the International Labour Organization declared that "*the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes*".[470] This declaration, although seemingly useful in ILO context, reflects the increasing demand for solving the

[467] At first level, there are standards such as intellectual property rights which could be the basis for both claims and defenses. While the second group is the standards which cannot be basis for claims but could be resorted to for defenses such as in health and environmental standards.

[468] The Belgium-Family Allowances (Allocations Familiales) GATT dispute was the first case in GATT-WTO dispute settlement that a social program of a Member was invoked and showed the inapplicability of social concerns and goals to be presented as basis for defenses. However the core labor standards could be viewed as a basis for defense in the context of the GATT Article III and National Treatment. *Steve Charnovitz, "Belgium Family Allowances and the Challenge of Origin-Based Discrimination," World Trade Review 4(1)(2005).*

[469] "*...4. We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration……*". Singapore WTO Ministerial 18 December1996, WT/MIN(96)/DEC.

[470] ILO Declaration on Social Justice for a Fair Globalization, 13 August 2008, Director- General's announcement, IGDS Number 36 (version 1), available at *http://www.ilo.org/public/english/bureau/dgo/download/dg-announce-en.pdf*

problem of trade linkage with labour standards and the lack of response in the WTO context.

One of the significant supporters and international actors who have pushed for introducing the non-trade issues in the trade forum are the NGOs. They favor the explicit establishment of non-trade issues in the WTO and generally ignore the consequences of this establishment on the development processes of the less-developed countries. Many believe that the NGOs are not fully aware of the implications of protectionism and the economic facts and that by insisting on the mandatory implementation of labour standards in its complete sense, many jobs will be lost in the developing and least-developed countries and consequently will harm the workers rather than helping them.[471] Moreover, even if there are solid doubts regarding the NGOs concerns on human rights, values and respect for labour standards in developing countries, there are no doubts that the protectionist groups in developed countries have attempted to abuse the slogans and obligations in order to protect their own economic interests.[472]

The issue has led to the general belief among the developing countries that the motivation for including labour standards in the trade agenda are not really humanitarian at all but rather a hidden protectionist interest and the most important reason to which can be attributed the major cause in provoking this linkage debate is the matter of competition.[473] Therefore, in order to find a balancing point between the call for the respect of human rights in developing countries and the threat of serving the targets of the protectionist groups, a new criterion is needed to call for a "social development" in parallel to the "economic development".

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[471] Gray J. Wells, "Trade Agreements: A Pro/Con Analysis of Including Core Labor Standards," *US Department of State, Foreign Press Centers, CRS Reports for Congress*.
[472] Wolfgang and Feuerhake, "Core Labour Standards in World Trade Law: The Necessity for Incorporation of Core Labor Standards in the World Trade Organization.", p.886.
[473] Salazar-Xirinachs, "The Trade-Labor Nexus: Developing Countries Prespectives."

3.2.2. Parallelism of Social Development and Economic Development

One of the most important outcomes of the implementation of justice principles in wealth distribution is the necessity to consider the weakness and power of the national economies in order to set the proper social standards. General standards for all nations regardless of their economic circumstances would not be optimum standards and a similar set of social standards for all would not result in a just outcome in terms of wealth distribution and for addressing the problem of inequality. The second principle of justice requires that the unequal members of the international society should not be treated equally and that the regulations and provisions be structured in a manner which considers the different levels of the economies of the nation-states. The unilateral implementation of similar international social standards by the developed countries on trade-related and non-trade related issues has caused many problems in the least-developed and developing countries and did not only make a contribution to addressing social standards but has also resulted in exacerbating the problem of inequality in targeted countries.[474] Therefore, in setting necessary social standards for implementing wealth distribution, the existing inequalities among the nations should be taken into account.

Justice requires that social development be parallel to economic development and this parallelism between social and economic aspects of development, which is the contribution of the principles of justice to the problem of standards, has been manifested effectively in the WTO Agreement. GATT, Article XXXVI mentions raising the standards of living and the progressive development of the economies of all contracting parties as the basic objective of the WTO Agreement and recognizes international trade as a means of achieving both economic and social development.[475] In fact the main question at the second stage of wealth

[474] As an example of the unilateral implementation of a similar set of social standards, a survey done regarding the US threat to impose a ban on imports from Bangladesh's goods industries in which child labour exists showed that many of the children would meet a fate worse than working in factories. A. Panagariya, "Trade-Labor Link: A Post-Seattle Analysis," *University of Maryland-College Park* (June 2000). p.14

[475] General Agreement on Tariffs and Trade, Article XXXVI (a)(e)

distribution which addresses wealth distribution on a national level illustrates the role of international trade in fostering the just distribution on a national level and among individuals which is reflected in the issue of labour standards. While the improvement of labour standards has been viewed as a significant element in distributing wealth among individuals, the pressure for higher social standards which are ahead of rather than in parallel to the economic development of the targeted country will not only not improve the distribution of wealth among individuals, but will also impede their development and wealth creation processes in the first stage. Therefore any adopted approach and solution for addressing labour standards in the WTO, in order to respect the requirements of the justice principles, should also respect the requirements of parallelism between the economic development and social development of the member states. In other words, this approach should provide the basis for the goods which have been manufactured in the developing countries under social conditions which are parallel to the economic development of the country, to be imported into the markets of the developed countries.

3.2.2.1. Different Approaches to Social Standards and WTO: Dilemma of Legitimacy and Efficacy

Following the encroachment of international trade into labour standards and the necessity for respecting the parallelism, the debates focus on how the WTO system can be improved in a way that contributes to wealth creation on a national scale and prevents free trade from being a means of deepening inequality among the individuals in society. This debate has taken place in the context of amplified criticism over the WTO in recent years and the seeking of more attention from the trade forum on non-trade issues. The huge demand from different participants in international law over the issue of labour standards has resulted in the fact that in the event that the WTO does not give voice to non-trade issues it would encounter an amplified and huge mass of criticism as well as an increase in the unilateral adoption of measures by members that would weaken the multilateralism.[476] For this reason, if WTO closes its doors to non-trade issues it would encounter a

[476] Jose E. Alvarez, "How Not to Link: Institutional Conundrums of an Expanded Trade Regime," *Widener Law Symposium Journal* 7(2001). p.6

situation in which its ability to manage international cooperation would be compromised and the legitimacy of the Organization in the sociological sense would be at stake.[477]

On the other hand, one of the most successful features of the WTO is the obligatory nature of its commitments which have been attained as a result of its effective mechanism for the implementation of decisions. The phenomenon of overreaching into other areas has been engendered as a consequence of its effectiveness and adding non-trade participants would undermine the cohesiveness of this process.[478] Due to this consequence, other commentators believe that if the WTO becomes a forum for non-trade issues, it would overburden the regulatory system of the WTO and undermine the effectiveness of all WTO conventions.[479] Therefore any solution put forward on the issue of the contribution of trade policy to the process of wealth creation on a national level in terms of strengthening the labour standards should neither encounter the problem of legitimacy, nor put at stake the efficacy of the Organization. Just as in following the three different approaches presented in the general linkage problems, the same approaches have been studied in analyzing the problem of linkage between international trade and social standards, especially the labour standards.

3.2.2.1.1. Current System Continuation Approach: No Linkage

The first approach supports the conservative idea of continuing the current system without establishing any linkage between international trade and international labour standards. While this approach does not deny the importance of social standards as a desirable goal, it is based upon the fact that the expansion of trade would lead to economic growth which would make more resources available for

[477] Legitimacy has two senses: in a normative sense it indicates "who has the right to rule?" but in a sociological sense it refers to "widely be believed to have the right to rule". By problem of legitimacy we mainly look at the sociological sense. Buchanan and Keohane, "The Legitimacy of Global Governance Institutions." p.405

[478] Guzman, "Global Governance and the Wto." p.333

[479] Jagdish Bhagwati, "Third World Intellectuals and Ngo's, Statement against Linkage," *available at: https://www2.bc.edu/~anderson/twin-sal12.pdf*. p.3

states to address their social problems.[480] The classic international trade theory rejects the consideration of social standards in the trade forum and the first GATT case dealing with discrimination based on social standards was Belgium-Family Allowances (Allocations Familiales) in which the GATT panel ruled out the establishment of any linkage between international trade and social standards.[481]

However despite the fact that the WTO's current legal regime does not support any involvement of non-trade issues in the trade forum, it provides two means of promoting international standards; firstly the possibility of negotiating standards in return for preferential tariffs below the bound rates and secondly the grant of preferential tariffs to the goods manufactured in developing countries through the Generalized System of Preferences (GSP). The proponents of the "no-linkage" approach consider the GSP programs as one of the few WTO capabilities in improving international standards and support the idea of granting trade concessions based on the improvement in social standards of the recipient countries.

3.2.2.1.2. Expansion Approach: Explicit Linkage

The expansionist approach toward labour standards presents certain propositions both in the legislative as well as judiciary processes of the WTO. These propositions which are based on the establishment of an explicit linkage between trade and labour standards range from incorporating a separate chapter such as TRIPS for social standards and inserting a social clause in GATT, Article XX, to broadening the definition of concepts such as "Like Products" in GATT, Article III. While developing a separate chapter or adding a particular clause to general exceptions in GATT, Article XX, are all possibilities which WTO Members can establish by consensus, broadening the definition of available propositions offers

[480] McGinnis and Movsesian, "Against Global Governance in the Wto.", p.356

[481] Belgium- Family Allowances (Allocations Familiales), adopted on 7 November 1952, was a complaint submitted by Norwegian and Danish delegations regarding the application of Belgian law on the levy of a charge on foreign goods purchased by public bodies when these goods originated in a country whose system of family allowance did not meet specific requirements. Belgium lost the case although it did not invoke GATT, Article XX. See GATT Panel Report, Belgian Family Allowances, G/32, adopted 7 November 1952, BISD 1S/59.

the possibility of establishing explicit links between international trade and international labour standards in the dispute settlement process. However, in studying the feasibility of inserting the production methods in the definition of “alike” or the feasibility of resorting to GATT, Article XX(a), for legitimizing trade sanctions in cases of violation of labour standards, the limitations of interpretation of the WTO Agreement should be considered.[482] Certain ideas have been proposed on the “*like products*” basis that an argument can be made that goods manufactured under conditions in which the international standards such as international labour standards have not been respected will not be qualified to be seen in the same context as goods which are physically similar but which have been manufactured under different conditions of production. The *like products* argument aims at opening the doors for legitimizing the discrimination between the same products which have been produced under different production circumstances, hence providing room for international standards to play a role in the WTO's legal regime.

However on public morals, GATT, Article XX, states that nothing in the WTO Agreement shall be construed as preventing the adoption or enforcement of measures necessary to protect public morals and the WTO dispute settlement has admitted "public morals" as a concept which can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values and the members have the right to determine the level of protection that they consider appropriate.[483] Therefore, unlike the "like products" argument, the argument in "public morals" enjoys more support and is a better basis at least for the international labour standards and the proponents of the "public morals" proposition believe that the 1998 ILO Declaration on "Fundamental Principles and Rights at Work" which considers an obligation for ILO members to implement four fundamental principles and rights at work even

[482] Some arguments could be made based on the similarities between the product of prison labour mentioned in GATT, Article XX(e), and the violation of core labour standards which is far from a real legal argument as it cannot broaden the definition of words which explicitly implicate other meanings.

[483] Panel Report, United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, 5797, paras. 6.559-461.

in the case of non-ratification, presents a real model of "public morals". In addition, the General Agreement on Trade in Services (GATS), Article XIV provides a wider notion of “Public Order” as a general exception.

However, establishing explicit linkage by advocating an argument on "public morals", is in itself an argument based on "General Exceptions" which serves only as a basis for a defense and is faced with certain significant limitations.[484] Moreover, the establishment of an explicit link by interpreting public morals in this fashion, apart from causing disputes between public morals, does not completely conform to the principles of justice. The International Difference Principle requires different treatment with different conditions however the application of all labour standards fully without considering the circumstances of each member would result in excessive sanctions and generate bad-faith claims that do not highlight a successful perspective for this approach.

3.2.2.1.3. Current System Improving approach: Implicit Linkage

The current WTO legal regime supports no linkage between the international trade measures and the international standards, mainly the international labour standards and therefore in the WTO legal system, any violation of labour standards, even if they are the core international labour standards per se, is not considered as violation of WTO commitments.[485] However, developing an implicit linkage provides the possibility of building up a legal status for the international labour standards in the multilateral trade forum.

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[484] The precondition to resort to General Exceptions is the satisfaction of the Article XX chapeau and in this case for the public morals argument to be capable of being presented as an acceptable defense, it should respect the chapeau of Article XX. Moreover, the General Exceptions could be utilized only as a defense and not a claim which should fulfill the requirements of the "effects Doctrine" which has been developed in Tuna/Dolphin cases and requires the effects on trade be substantial, foreseeable and direct. Bagwell, Mavroidis, and Staiger, "It’s a Question of Market Access." p.75

[485] Ibid. p.73

In fact the implicit linkage approach in international labour standards shifts the point of debate onto the WTO dispute settlement body and calls on the judicial body of the multilateral forum to take into account the international norms of international law as acceptable norms in the WTO dispute settlement. The non-violation complaints as a judicial tool within the WTO mechanism has provided the capability of establishing implicit linkage between labour standards and the trade forum. While the ideal pattern of the WTO in a global justice approach looks for the establishment of explicit linkage, the current facts and applicable limitations do not provide the necessary conditions for the ideal pattern and thus any move toward the ideal position should be taken in gradual steps. The non-violation complaint provides the first possible step in the current WTO regime which tailored by the justice-oriented approach provides a significant step toward the enforcement of labour standards within the Member States and contributes positively to the wealth creation process on the national scale.

3.2.2.2. Non-Violation Complaint

As the WTO Agreement is not a complete set of rules without gaps, it is possible for WTO Members to take measures that comply with the letter of the Agreement but frustrate one of its objectives or undermine trade commitments contained in the Agreement. For this reason, the non-violation complaint has been considered as a remedy for such measures.[486] By recourse to this category of complaints, the member states could claim the nullification and impairment of benefits as a result of adopting a measure which is not by itself a violation of the WTO Agreement. The GATT, Article XXIII states that the application of a measure, whether or not it violates the provisions of the WTO Agreement, could be a basis for a claim "if any benefit accruing to the member directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded".[487]

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[486] A WTO Secretariat Publication, "Handbook on the Wto Dispute Settlement System," *Cambridge University Press* (2004)., p.32

[487] General Agreement on Tariffs and Trade, Article XXIII: Nullification or Impairment: "*If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement*

In fact the pecuniary externalities in trade relations which constitute the dominant paradigm of the WTO Dispute Settlement advocates nullification or impairment as necessary requirements of the WTO complaints mechanism which while presumed in the violation complaint, is not presumed in non-violation complaints and needs to be proved. However the key point is that this nullification or impairment of benefits which is required to be proved in non-violation complaints, must be contrary to the legitimate or reasonable expectations of the complainant at the time of the negotiations.[488] In fact in the current regime of WTO law, the WTO Agreement requires that the adopted measure must be against the reasonable expectations of the complainant and therefore, in a legal sense, adopting a measure which lowers a social standard of a Member State could be a basis for a non-violation complaint and in contrast, continuing to apply an adopted measure would not fit the category of being reasonably unexpected, in a legal sense, and therefore it could at least be a basis for a "situation complaint".[489] While it could be claimed that the international standards mentioned in the international conventions which has been ratified by each WTO Member constituted the reasonable expected standards from that country, it would not be a suitable criteria as it is evident that a big portion of states which have signed agreements, containing standards with obligations in them, do not really implement the standards once they ratify them.

The situation is complex in labour standards as on one hand the comparative advantages of developing countries are in labour-intensive goods and tough labour laws in a country with high rate of unemployment do not function well as they would easily be circumvented. On the other hand, economic growth in many developing countries has not lead to improvement in life standards and working conditions for many workers. In developing countries, job creation has largely

is being impeded as the result of (a)the failure of another contracting party to carry out its obligations under this Agreement, or (b)the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c)the existence of any other situation."

[488] Faunce TA, "A. Non Violation Nullification of Benefit Claims: Opportunities and Dilemmas in a Rule-Based Wto Dispute Settlement System."

[489] General Agreement on Tariffs and Trade, Article XXIII(c).

taken place in the informal economy where around 60 per cent of workers are employed and most of them have low incomes, almost no job security and no social protection.[490] Therefore, since reasonable expectation indicates that members' engagement in globalization process would improve their social norms parallel to their economic growth, adopting the same standards applied at the time of establishing the WTO as the expected standards will not be the right approach. The approach, presented in Preamble of Agreement Establishing World Trade Organization and GATT, Article XXXVI, declares the WTO's commitment to improve the quality of life and to promote progressive development.[491]

As a result of the implementation of the principles of justice, the solutions put forward based on promoting progressive development and improving the quality of life should adhere to the requirements of the principles of justice. The International Difference Principle requires that countries with different conditions and in different situations are not treated in a similar manner and on the contrary, similar group of countries can be treated in a similar manner and be expected to have a similar level of standards. However, if those countries enjoy different levels of economic and social development, it would be unjust to expect from them the same level of standards. Therefore, the result is that while a high standard should not be expected from a low-income country, neither should a low standard be expected from a high-income country.

As an adopted tool in improving standards, the concept of "reasonable expectations" at the time of negotiations should be scrutinized to determine the real reasonable expectations of WTO members in respecting international standards and for this reason the principles of justice insert a new element in assessing the concept of reasonable expectation. The concept of parallelism, developed under the umbrella of global justice, has been presented as a major element of a just scheme of applying social standards. Any proposal for promoting social standards as a means of wealth distribution on a national level

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[490] "Globalization and Informal Jobs in Developing Countries," *A Joint Study of International Labour Office and the Secretariat of World Trade Organization (ILO&WTO)* (2009).
[491] Available at http://www.wto.org/english/docs-e/legal-e/04-wto-e.htm

should accommodate the concept of parallelism and fulfill the requirements of parallel social and economic developments. Avoiding the unjust imposition of international standards, including labour standards, which favors the interests of certain powerful lobbies and industries in wealthier and advanced economies, requires that the adopted instrument for promoting the international standards and mainly the labour standards, be capable of establishing a procedure to implement the demand for parallel social development with economic development of the concerned member-states.

In the "*Japan – Measures Affecting Consumer Photographic Film and Paper*", the Panel found that in non-violation complaints, the complaining party must demonstrate, under Art. XXIII:1(b), that a measure has been applied by a WTO Member which as a result of the application of the measure, nullification or impairment of the benefit accruing under the relevant agreement. However the concept of parallelism inserts a new element according to which, not only will the application of an unexpected measure provide a basis for non-violation complaint, but also the non-improvement of a social standard in parallel to the economic development could constitute the concept of implementing an unexpected measure. In other words, the continued implementation of a measure which at the time of its initial application was in accordance with the requirements of the involved country, subsequent to which it has not been improved and enhanced in parallel to the economic development of the said country, could be construed as "*the application by another contracting party of any measure*" thus falling under the scope of GATT Art. XXIII:1(b).

The non-violation complaint with its distinct feature of reasonable expectation provides the necessary basis for strengthening the social standards and wealth distribution in WTO Members within the current limitations. According to reasonable expectation, the implementation of a measure which had been adopted in accordance with the principles of justice at the time of its adoption could be viewed as unjust if that measure has not developed in parallel with the economic development of society. In fact reasonable expectation requires that the WTO Member States do not just stick to their social standards which were applicable at the time of their accession to WTO but rather calls on them to improve their social standards parallel to their economic prosperity and advancement in wealth creation on an international scale. In other words, not only is adopting a measure which lowers the social standards of the concerned member from the level of the time of their accession to WTO, in general against reasonable expectations, but also the non-improvement of the social standards parallel to their economic development acts against the legitimate expectation of its trading partners. Therefore, in a case of the violation of labour standards interfering with competitiveness power, if it can be proved that the measure has not developed in parallel to economic development, it provides the necessary basis for the non-violation complaints.

The non-violation complaint is a weak instrument in the sense that even if the complaining party wins the case, there would be no obligation for the responding party to withdraw the measure and therefore both parties would need to look for a satisfactory solution.[492] However, the reports of the panels or the Appellate Body on this ground recognize the disputed measure as an unjust and illegitimate measure which is a step forward in engaging the WTO on the issue of labour standards and would force the responding party to seek for a satisfactory adjustment in favor of the complaining party. In fact, while an amendment to the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU) for improving the implementation process of non-violation complaints seems necessary and useful, the principles of justice contribute to the social development of WTO Members by starting from an existing potentiality within the current mechanism of WTO, which by mere declaration of a measure as an unjust and illegitimate measure, facilitates the path for further developments.

3.2.2.2.1. Interpretive Guideline

Consequently the question would be how to litigate a case brought in WTO DS based on a non-violation complaint dealing with violating a labour standard with pecuniary impacts and how should the panel and Appellate Body determine that

[492] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 26(b)

the violation of the specific standard was against reasonable expectation? Despite the few cases initiated based on non-violation complaints which have been litigated in WTO DS organs, there is no criteria through which the judicial organs could distinguish between a standard that is reasonably expected and a standard which is not reasonably expected at the time of negotiation. This gap, which could weaken the predictability of the dispute settlement process, should be filled by referring to and considering the textual interpretation of the WTO Agreement as well as the principles of justice. The proposed solution for filling this gap is an "Interpretive Guideline" which by scrutinizing the legitimate and reasonable expectations, categorizes the international standards especially the international labour standards, based on different classes of members. This Guideline could be formulated by a group of economic and social experts while considering legal and political limitations and the WTO members should be classified into certain categories and classes and this classification should be based upon diverse economic indicators pertinent to the development process.

The "Interpretive Guideline" could help judicial organs of the WTO to recognize what kind of standards should be expected from the respondent members and would force states to improve their social standards parallel to the speed of their economic growth. Although WTO members are typically concerned about panels and the Appellate Body's reference to any other agreements and documents outside the WTO agreements, this "Interpretive Guideline" would not be binding for the WTO's judicial organs, nor would it be necessary for it to be mentioned explicitly in their reports in the current regime of WTO and instead, it would operate as an indicative notion of reasonable expectations to enrich the case-by-case analysis of DS organs.[493] Even in child labour cases, a stage by stage and step by step approach could be implemented as experience shows that an absolute ban on goods produced by children without considering the social environment of the affected country would constitute improper action.

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[493] According to Japan-Film panel report, reasonable anticipation must be assessed on a case-by-case basis. Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998, DSR 1998: IV, 1179, Paras. 10.90-349*.

Using this method would be in the benefit of both developing and developed countries. While it frees the developing countries from excessive demand of higher standards, it provides a legal tool for developed countries to sanction those who have not improved their social norms and standards parallel to their economic growth. Furthermore, non-violation complaint supplemented with an Interpretive Guideline would not only address the direct effects of the matter but also address the indirect effects. In comparison with other WTO tools and solutions such as banning importation of goods based on public morals, the members could address both the direct effects (e.g. child labour only in export industry) and the indirect effects (e.g. child labour in whole industry) of the violation of labour standards on competitiveness in a more comprehensive and just manner.

The proposed solution is based on a real interpretation and this Guideline does not need to be adopted by WTO Members' decision. It does not diminish or add to any commitment undertaken as part of the obligation of the members and by well-scrutinizing a potential tool within the WTO arrangement, it avoids the problem of legitimacy. On the other side, by clarifying the real position of WTO members and the real expected standards, it prevents potential abuse of the system, whether advancing protectionist goals by hiding behind the claims for higher standards or violating real human rights by asserting the claims for maintenance of comparative advantage. While in a non-violation complaint, the burden of proof rests upon the complaining party,[494] adopting the Interpretive Guideline by a decision of the WTO Members establishes a presumption in favor of complaining party to establish the Prima Facie case. While the Appellate Body has agreed with the WTO panel approach in approaching the remedy in Article XIII:1 (b) with caution as an exception remedy,[495] the "Interpretive Guideline" initiative transfers the remedy in non-violation complaints from an exception to a rule and in a situation which WTO resist against establishing linkage with non-trade issues and specially the labour standards, the Interpretive Guideline initiative provides a

[494] See Panel Report, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001: VIII, 3305. Paras. 8.285-303.

[495] Appellate Body Report, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001: VII, 3243. Paras. 186-190

reform within the system by which any WTO Member could claim against the labour standards of other WTO Members which nullify or impair its legitimate benefits.

Conclusion

The theory of justice, among the schools of legal theory, has been a major source of influence on decisions, regulations and laws. In fact the distributive justice approach is a normative value which does not override other normative values such as efficiency and liberty, but rather coexists with them while acting as a guide and primary principle.[496] The cosmopolitan perception of justice, as reflected in the global government perspective has been viewed by some commentators as the only acceptable moral principle. However the justice approach, as expanded upon in this research, still considers individual states as the main actors in international relations.[497] For a theoretical approach to be applicable, the practical realities of the existing situation should be considered as a result of which the focus on individual states as the initiators of international organizations and international decisions and commitments has resulted in the "global governance" approach; a path between the global government and the individual states as the only participants of international relations.

3.3. Theory of Justice and the WTO's Structure

In structure, the global governance approach rejects the white and black concept of justice and advocates for the relevancy and applicability of the principles of justice by considering a new layer between the individual states and the global government. The theory of distributive justice and its extension in international relations as the adopted framework of this research perceives the World Trade Organization (WTO) as an opportunity for fostering the justice targets and principles. The WTO has proved itself to be one of the most powerful and successful organizations in international relations. The binding rules and

[496] Breyer, "Health Care Rationing and Distributive Justice Author." p.398
[497] Canto-Sperber, "The Normative Foundations of Cosmopolitanism." p.279

enforcement mechanisms of the WTO have made it one of the most influential international institutions and its wide membership scope together with the possibility of attaining membership for the non-members have introduced it as a real global forum which is qualified for discussing global problems.

The desirability for the economic integration of national economies and the political feasibility of establishing peace by bridging the fate of countries together and making nation-states more dependent on each other resulted in the establishment of an organization which by advocating the removal of the tariff and non-tariff barriers to trade, facilitated the process of international integration based on free trade and the comparative advantage approach. The establishment of the WTO following the GATT served as a remarkable step for the integration process and filled many existing gaps in the international structure by addressing trade-related issues and concerns.

The WTO as a multilateral forum with a remarkable record in decision-making and dispute settlement represents an important model of cooperation at an international level which has provided many opportunities and chances. Even though the WTO was established to address international trade issues, the lack of a supranational authority having the power to implement decisions and to settle disputes arising from the implementation of legal provisions has resulted in non-trade international issues and problems being brought before the WTO. Even though this may be perceived negatively from a pure-trade perspective and seen as superfluous to the original intention of the states at the time of establishment of GATT or the WTO, it has resulted in the provision of different opportunities while at the same time enabling the WTO to showcase its capabilities across a much wider scope. In fact the WTO has been placed at the center of discussions regarding many non-trade problems such as environmental issues, labour standards, equality etc. and this central role has provided the possibility of a semi-leadership role in global governance.

From the global governance perspective, the WTO has the potential for taking on a prominent role in international coordination and cooperation thereby becoming an integral and significant part of global governance. The global justice approach looks at the WTO as a complex set of rules and principles which has significantly affected the distribution of wealth across the globe and hence it could and it should be utilized to contribute to international cooperation in addressing global problems. In other words, the WTO, despite its reluctance, has been placed at the crossroads of global governance and this in itself while securing significant potential for the WTO through the myriad of open avenues also confers certain responsibilities on the WTO. However, in order to profit from the potential openings available to the WTO through the effective harnessing of its capabilities, a certain element of redesigning and restructuring is required in order to better equip the WTO and make it more capable of efficiently and comprehensively addressing the problem of inequality.

The theory of justice seeks pure corrective justice to be reflected in the structure of the WTO and requires the removal of political considerations. The first principle of justice seeks improvement in the transparency of the WTO's decision-making process to reduce the problem of agency and the absence of direct democratic input. It calls for the involvement of non-trade ministers in the decision-making process to reduce the risk of regulatory capture and limit the scope of power of interests groups which act against distribution-centred policies. It requires the multi-lateralization of the negotiation process and a move from the current principal supplier approach to a more diversified approach in which the coalitions of the less-developed countries have a louder voice.

In the execution of the WTO rules, procedural justice rejects the half-mercantilism, half-free trade approach of the member states toward international trade and equal treatment, as a result of originating from the first principle of justice it calls upon all WTO Members to approach identical issues on an equal basis and also for WTO members to be treated equally in the distribution of burdens and benefits. The application of the first principle of justice to the execution process of the WTO promotes the idea of removing the asymmetry of economic options and bringing about the enjoyment of the same level of opportunities.

While the WTO dispute settlement process seems more compatible with the requirements of the first principle of justice than the decision-making and execution process of the WTO, certain features and rules of the WTO DS process should be improved to deal with the deficiencies of the judicial organ of the WTO. The transparency of the mechanism should be increased to reduce the shortcomings associated with reduce the shortcomings associated with the agency problem. The non-governmental participants should be able to monitor the dispute settlement process and also be able to have access to the proceedings, information and the national governments' positions during the dispute settlement process. Political considerations should be minimized and the possibility of having access to different forums for dispute settlement should be considered through a justice-oriented approach which provides implementation measures and remedies on an equal basis. The adjudication-negotiation issue should be dealt with and certain checks and controls should be established to monitor the interpretation of the WTO rules and to ensure that the panel and Appellate Body's interpretations are faithful to the text of the WTO Agreement.

However on the other side of a purely corrective nature of the WTO DS process is the weakness of the developing and least-developed countries in fact-finding, meeting cost payments and investigating and utilizing the possibility of retaliation which has contributed to the fact that the dispute settlement process is mostly used by the developed countries. The unequal standings of the WTO Members in the WTO DS process is not a question of corrective justice, rather it looks for substantial inequality among the WTO Members and call for second principle of justice.

The study of the WTO's strategy; i.e. on international trade, from the perspective of the first principle of justice, provides certain deviations from this principle which has resulted in the developing and least-developed countries suffering the most. The high level of tariffs on certain goods in which the developing countries enjoy a comparative advantage, the existing fairness in the WTO regulation and the reality of the WTO Members' schedule of commitments, employing new forms of protections and tailored rules of origin in favor of national economic sectors, the subsidies especially in agricultural goods and cotton in certain rich countries and the existing gaps in provisions provide departures from the equal treatment approach and it is the developed countries who are able to take advantage of this non-conformity. According to the theory of justice, these problems should be resolved and an equal basis for competition for all the WTO Members should be provided.

3.4. Theory of Justice and the International Trade Strategy

The general aim and target of free trade is to alleviate the problem of an individuals' welfare and any attempt to promote and develop free trade on a higher scale and level requires that groups of people and individuals arrive at the understanding and belief that the wealth created as a result of the development process would be distributed fairly. However the issue of distribution is not the objective when making reference to trade theory. While trade liberalization brings growth and increases wealth for the WTO Members, it falls short by not directing wealth distribution in order to contribute to global welfare. Therefore not only is the distribution of wealth on an international level and between the WTO Members not fulfilled, but also the trade forum has relegated policy-making for national distribution to the decision making arena of individual states domestic policies and therefore based on the current situation, the WTO would be unable to play an influential role in the translation of economic growth and wealth creation to human welfare and wealth distribution.

When considering the dilemma between the laissez faire approach which rejects the interference of the trade forum on any social objective basis and the planning approach, the planning approach seeks to bring to the fore the thinking of justice and distribution ofn an international scale.[498] For developing countries, free trade has been viewed as more likely to exacerbate their dependence on the exportation of raw materials rather than enabling them to seek the diversification of their trade opportunities.[499] Therefore the claims of developing countries' go further than simply having procedural justice and an argument exists for having substantial justice with a balanced outcome.[500] In other words, it is not only the equality of opportunity that matters, but additionally the equality of outcome should also be considered.

Many academics, lawyers and practitioners resist against the concept of creating links between the trade forum and non-trade issues and will only attend to or explore the global non-trade problems up to the extent to which they have been provided for or commented upon by the WTO Agreement in an explicit manner. However the theoretical study of legal issues and international problems goes beyond the positive arguments of practitioners and takes into consideration an ethical value for any side of the argument. Therefore the legal theory of international law and the WTO, if it is to be applied to analyse a resultant role for the WTO as a result of being faced with global problems and international non-trade issues, should go a step further than a positive and pragmatist approach to the WTO and study the existing and potential possibilities.

The evolution in the global economy and the highlighting of the outcome of the international trade rounds of negotiations has proved that international trade law can no longer ignore he requirements of justice principles. Consequently certain institutional arrangements are required in order to make international trade work for all members and individuals rather than limited groups and individuals. However, certain significant criticisms have been discussed regarding the interference of justice concerns in international trade law that could result in

[498] Bhagwati, "Dependence and Interdependence –Essays in Development Economics." p.2
[499] Collier, "The Bottom Billion (Why the Poorest Countries Are Failing & What Can Be Done About It)." p.175
[500] Lim, "The Conventional Morality of Trade."

domestic protectionist abuses and therefore, these concerns and criticisms should be considered in designing the justice-based scheme for international trade.[501]

3.4.1. Free Trade and Second Principle of Justice

However the theory of justice looks beyond equal treatment among the WTO Members and calls for change in the way of approaching trade negotiations and asks that member-states, instead of seeking to maximize the interest of their domestic economic sectors, conduct their negotiations in a way which targets the objective of development.[502] The promotion of international trade within the multilateral trade forum requires the development in the belief that international trade can contribute to the fair distribution of wealth across boundaries. However, the view of the neutral theory of free trade based on the efficiency model of international trade is that international trade will not result in just income distribution and it is also an important element why the distributional and justice aims are not achieved. The efficiency and comparative advantage school as followed by the trade forum only cares about trade liberalization and welfare maximization.

The second principle of justice requires that all standards and principles of international relations be established in a manner which puts the less advantaged members in a more favorable position than the advanced members; this refers to the standards and principles from investment, trade, loans, intellectual properties and international taxation regimes through to environmental standards, use of international resources, international social and labour standards etc. The relevancy of the second principle of justice depends on the nature of the WTO Agreement. While the contractual nature of the WTO refuses the intervention of any non-contractual value and concept, the relevancy of the second principle of justice in its perception, views the WTO as a unique multilateral treaty and a whole package of regulations and dispute settlement process which cannot be divided into bilateral treaties.

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[501] Garcia, "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." p.4

[502] Stiglitz, "Social Justice and Global Trade.", p.21.

The relevancy of justice requirements to the WTO and international trade also depends on the question of trade linkage and the WTO's reaction to this question and the problem of priorities. While as a matter of fact, the broadened scope of the WTO has resulted in the overreaching of international trade into other scopes, the implementation of the theory of justice on the WTO and trade looks for the WTO's position on the question of trade linkage. The theory of distributive justice and its application to trade strategy is a matter of linkage between trade and inequality and for the WTO as a coordinator and leading institute in global governance, there is no way other than accepting the linkage between the trade forum and non-trade issues in a manner which does not put the efficiency of the WTO at stake.

The impossibility of the presumption of reducing international economic cooperation and the fact that effective trade measures have an impact within national borders and on non-trade issues, have ensured that the approach which denies any connectivity between trade and non-trade issues and which believes that the WTO should only be devoted to the trade agenda, is seen as an unrealistic view.[503] The connectivity of trade and non-trade issues have therefore made the view that the WTO should only care about trade issues non-acceptable and initiatives such as the GSP programs, Belgium Standard of Labeling and Eco-Labels which have been taken by WTO members in a unilateral manner illustrates the increasing demand for managing the problem of linkage such that in the event that the WTO does not serve as a pacemaker for managing international problems, it would in itself be weakened even in its role of handling the trade agenda.[504]

In other words, when faced with the dilemma of legitimacy or efficiency with regard to the linkage issues which originate from the interference of special interests and the issue of comparative advantage, the WTO should play a

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[503] Jackson, "The Perils of Globalization and the World Trading System." p.371
[504] Guzman, "Global Governance and the Wto." p.306

complementary role and admit the trade linkage together with other non-trade issues to the extent that it does not put at stake the efficiency of the multilateral trade forum. Answering the question of trade linkage seems necessary for designing the scheme of justice principles applicable to the WTO and trade. The consequence of adopting a trade strategy as the efficient and reliable strategy for establishing a sustainable process of development and reducing the inequality gap is that the trade strategy should be capable of incorporating other global problems which are not necessarily trade issues.

Therefore the question of inequality and justice should be addressed as a linkage issue and the WTO should consider the requirements of justice on both international and national scales and thereby incorporate a positive role for distributive justice in the WTO's rules and regulations in a manner which minimizes the risk of inefficiency for the WTO. Therefore the second principle of justice in international trade strategy looks for the implementation of the requirements of justice for wealth distribution on both the international and national levels.

3.4.2. Wealth Distribution on International Level

The concept of wealth distribution from the rich countries to the low-income countries has been discussed in the linkage between development and trade. The launch of the Doha Round presented a new approach towards the trade-based policies by creating some distancing away from the pure free trade policy and including development as one of the targets of the trade forum. The Doha Round was set up to ensure that a considerable part of the demands of the developing and least-developed countries were put on the agenda and for this reason it provided certain concessions in order to meet the developing countries' claims due to the asymmetry caused as a result of the Uruguay Round. The concessions made were considered to represent a gesture of goodwill rather than being a real contribution; however the Doha Round opened the door for non-trade concerns and for the first time, the deviations from traditional free trade rules were tolerated and approved.

3.4.2.1. Two-Stage Mechanism (outcome-Based) and One-Stage Mechanism (Rule-Based)

However the implementation of the second principle of justice goes further than a development-based approach and calls for the just distribution of wealth among individuals on a global basis. The 2009 Ministerial Conference called for “an ambitious, balanced and development-oriented” outcome, providing a better theoretical framework for arguing in favor of wealth creation for the lower-income countries. While the existence of national boundaries has made wealth distribution among individuals possible at two levels, at the first level the creation of wealth for developing countries has resulted in a debate on the WTO’s role in wealth distribution, specifically whether or not an outcome-oriented or a rule-oriented approach should be adopted.

In the outcome-based approach, to materialize the proposed balanced outcome, it has been suggested that the WTO be transformed into a "payment organization". The outcome-oriented approach shifts from a reciprocal to a “balanced outcome” approach and invents a “payment mechanism” through which the party who gains the most should compensate the party who gains less from a decision or transaction. In other words, through a two-stage approach, a double-transaction scheme is considered which provides a direct transfer payment mechanism to transfer the wealth created to the less advantaged parties until the stage at which the outcome is seen as a balanced outcome.

However the two-stage mechanism would not be a good solution for the current WTO structure and trade strategy and would require significant changes in the WTO which therefore makes it less feasible. The rule-based nature of the WTO is viewed as a key ingredient for the success of the WTO and any solution for implementing the principle of justice should consider the rule-based nature of the WTO as the priority framework for the proposed solution. Therefore the balanced outcome in this structure requires that the multilateral trade forum moves from the Pareto-efficiency policies toward the distributional approach in relation to resources and wealth and implement the concept of the second principle of justice within the current structure of the WTO rules. The ideal theory of global justice looks for a set of rules and regulations which enables the multilateral trade forum to accommodate both efficiency and distributional approaches as the output of the entire system.

The second principle of justice rules for unequal treatment for unequal members not in a double-transaction mechanism, but rather in the whole WTO framework; i.e. the Agreements, legal provisions, decisions, panel and Appellate Body reports etc., in order to enable them to accommodate the aims of the distributional approach alongside the Pareto efficiency policies. Therefore, global justice requires that the current arrangements be changed in order to shift towards a model underpinned by fairness and this will require the inclusion of rules and principles from which the output will be the fair distribution of wealth. The unequal treatment through the current rule-based structure of the WTO considers that the regional trade arrangements and special and differential treatment are the means of applying the second principle of justice.

3.4.2.2. Regionalism and Preferential Trade Agreements

The regional and preferential trade agreements have been studied and been viewed as significant and considerable examples of development instruments put in place in order to facilitate the process of wealth creation. In fact the principal aim of establishing a regional arrangement is to create better trade conditions at a level lower than on a global scale in order to ensure that the industries and economic sectors of the members of the regional agreements are capable of being efficient enough to compete on a global scale. International trade has experienced positive RTAs and PTAs both among the developing and also the developed countries. These Agreements could provide preferential access to the markets of the other parties to the Agreement in order to make the economic sectors of the low-income countries ready to compete on a worldwide scale.

However the overall experience of having the RTAs and PTAs in place proves that regional integration cannot be viewed as a comprehensive solution for the problem of inequality. The structure of a regional establishment in a general sense is not compatible with the generally applicable rules and principles on structure within international justice theory. The international justice theory requires a comprehensive global governance body to be responsible for addressing the issue of inequality in a unified and global manner whereas within the regional arrangements each country has their own structure and strategy and the overlaps in their structure and strategy normally neutralize each other's efficiency. Moreover, in practice due to the small size of the economies of the low-income countries, the regional arrangements among the low-income countries (south-south) have created divergence among this class of countries and instead of improving their economic capabilities, they have exacerbated the inequality between the least-developed and developing countries.

The initiatives for the integration of the low-income countries with the developed countries have not resulted in the expected desirable outcome and the disparities in economic and political power of the members of the RTAs and PTAs which are of a north-south nature have further contributed to the significant influence of the powerful members thus leading to the marginalization of the weaker members. Therefore, the preferential and regional trade agreements, whether in a south-south framework or north-south establishment have fallen short of being a comprehensive solution for the issue of inequality and the implementation of the second principle of justice and will therefore not work as the strategy for the theory of justice.

3.4.2.3. Asymmetric Trade Liberalization and Special and Differential Treatment

As a key aspect of strategy the asymmetry of trade liberalization in favor of the weak and less powerful members of the WTO should be established.[505] The newly adopted theme in the Doha Round views the utilization of asymmetric rules and principles and the resulting balanced outcome as a consequence of the

[505] Stiglitz, "Social Justice and Global Trade." p.20.

implementation of these provisions and rules. The second principle of justice requires an asymmetric mechanism for regulating the advanced and less-developed countries while guaranteeing a minimum level of balanced outcomes. The asymmetric arrangement requires clear, mandatory and comprehensive special and differential treatment in order to facilitate the development process of the least-developed and developing countries.

The fundamental problem is that the starting point, or the basis that is used for determining the commitments of the different members, is completely unequal. However this inequality was not established to benefit the more vulnerable ones who are socially and economically more fragile. On the contrary, this inequality was set up to benefit the stronger countries. Therefore the "power of threats" as utilized during the Uruguay Round has also affected the various rounds of negotiation conducted after the Uruguay Round.[506] The Special and Differential Treatment for the marginalized members of the trade forum is a developmental solution that was proposed to complement free trade; this solution is seen to be an exception to the equal treatment of the WTO Members and seeks to provide asymmetry of trade liberalization.

The international difference principle looks for a particular set of rules and commitments for the less-advantaged members of society and to this end "Special and Differential Treatment" in favor of the least-developed and developing countries has been designed in order to provide a more favorable trade regime for the weaker members of international trade. The S&Ds are generally provided through market protection and market access measures and the capacity building and technical assistance provisions have acted as their complementary pillar. The S&Ds have worked as a major exception to the dominant feature of reciprocity as the rule of the WTO and as a result, a limited reciprocity approach has been crafted which accommodates the S&D measures and rules.

[506] Cedro, "John Rawls Justice as Fairness and the Wto." p.132

In fact the rationale of looking for special rules and principles for the weaker members of international society with the aim of removing the inequality and gaps existing between them and the developed countries conforms to the theoretical model which the theory of justice and the global governance approach seek to embrace. However in practice, certain deficiencies and problems have made the implementation of these measures ineffective. The principle of self-determination and the discretionary nature of S&Ds for the developed countries have made these measures vulnerable to political considerations in granting a concession. The self-determination approach has caused the exclusion of the goods in which the developing countries have comparative advantage, the competitive goods, the free movement of people and also the lack of S&Ds in services. Additionally, the conditionality of GSP programs has made these programs a means of promoting and imposing international standards desirable to the developed countries and these have been drafted in a manner which act against other desirable goals, and therefore the lack of legal security has prevented the developing countries from counting on favorable measures in order to pursue their development policies.

However, the international difference principle looks for a comprehensive and binding solution. It rejects the discretionary and exceptional nature of the S&Ds and looks for a comprehensive and binding rule parallel to the efficiency and equal treatment mechanism of the WTO. Therefore in moving towards a distribution-oriented mechanism, the current rule-based approach of the WTO should be the point of departure and that is what the S&Ds should be focused on. The theory of justice and the implementation of the international difference principle at the first stage of wealth distribution on an international level within the WTO require that the Special and Differential Treatment moves from a discretionary and unilateral program with political considerations to a legal and rule-based framework which results in a firm commitment for developed countries. In other words, the second principle of justice looks for unequal treatment with unequal members for the S&Ds and to fulfill the requirements of this approach it should adopt substantive binding criteria for defining the unequal members and setting out the unequal treatment in order to produce legally-binding commitments for the developed countries and in favor of the least-developed and developing countries.

3.4.3. Wealth Distribution on National Level: Parallel Development

The second stage of the implementation of the international difference principle looks for the distribution of created wealth in the first stage on a national level among the individuals who are the citizens of the global society in the ideal global justice theory. The WTO as the lead organization in the global governance scheme should take into consideration the wealth distribution on a national scale as well and it should also make sure that the benefit of international trade contributes to the well-being of people on an individual level.

A single-forum dealing with global problems has the advantage of handling all issues comprehensively and in a cohesive manner and adopting the WTO as the leading organization in global governance increases the possibility of finding a multilateral solution for the distribution of wealth through strengthening the policies which help the national governments to arrive at the distributional goal on a national level. While the intervention of international trade on the second stage of wealth distribution on a national level is reflected in international labour standards, finding a multilateral response for the non-trade issues and the international labour standards within the trade forum becomes the critical question of the theory of justice. The international labour standards as a major part of social development highlight the importance of the competitiveness and comparative advantage in current international trade and the significant position of non-trade issues.

Despite the fact that NGOs are the international participants who support establishing an explicit link between international trade and international labour standards, the connectivity of international labour standards and the issue of comparative advantage and the fact that the developed countries are the countries who support establishing the link, has led to the belief among the developing countries that the motivation for including the labour standards in the trade forum is more of a hidden protectionist interest. The principle of justice requires that the proper level of social standards be set with regard to the weakness and power of the national economies. The international difference principle provides unequal treatment for unequal members and as a result of the contribution of the theory of justice to the problem of labour standards, social development should be envisaged in parallel to economic.

The WTO cannot on one hand reduce its impact on non-trade issues and on the other hand give international law precedence over its own law and hence any solution rendered which seeks to take a step forward in the improvement of labour standards should consider this dilemma. The dilemma of legitimacy and efficacy is the situation which the WTO is facing in considering the non-trade issues and any solution put forward to deal with the problem of labour standards should neither be faced with the problem of legitimacy, nor put at stake the efficiency of the multilateral trade forum. The WTO's experience highlights the fact that in this structure, big bargains with such diverse interests and member-states can hardly be reached and the WTO's new era is the era of minute but constant steps that will take place in the WTO's judicial process. The judicial process, however, has limitations and deficiencies of its own and it totally depends on the ability of members to identify violations and their willingness to bring complaints against other members. Nevertheless, it's the only available solution to avoid the dilemma. Propositions made based on the judicial interpretation of existing articles and provisions could all be indicative of progress and a step forward.

The international difference principle requires that countries which enjoy different levels of economic development should not be expected to attain the same level of standards and therefore while a high standard should not be expected from a low-income country, neither should a low standard be expected from a high-income country. Therefore, interpreting legal expressions such as "public morals", "like products" and other provisions all indicate the considerable potential of the WTO Agreement to address the problem of labour standards however they lack the required parallelism and fail to observe social development which is parallel to economic development. In contrast, the non-violation complaint in the WTO

Agreement is a tool that would not force states to respect international standards alone.

The concept of parallelism requires that the continued implementation of a measure which at the time of its initial application was in accordance with the requirements of the involved country and subsequent to which it has not been improved and enhanced in parallel to the economic development of the said country be construed as "*the application .... of any measure*" thus falling under the scope of GATT Art. XXIII:1(b). The non-violation complaint is argued based on the reasonable expectation of the WTO Members and this basis provides the justificatory basis for strengthening social standards according to the second principle of justice and the social development which should be parallel to the economic development. The reasonable expectation requires that the WTO Members should not to stick to their social standards which were applicable at the time of their accession to the WTO. The international difference principle call for improvement of social standards parallel to the economic prosperity of the WTO Members and therefore if it can be proved that the social standards in question have not improved parallel to the economic development, it provides the necessary basis for a non-violation complaint.

While the non-violation complaint is a weak instrument in general, the mere recognition of a disputed measure as an unjust and illegitimate measure is a step forward in creating a leading role for the WTO on this issue. However in the WTO dispute settlement, when it comes to panels, a lack of criteria exists based on which the WTO DS organs would be able to distinguish between a measure which was not reasonably expected at the time of negotiation and a measure which is expected. Therefore to fill the gap, an "Interpretive Guideline" has been proposed for development which will categorize the international labour standards based on different economic levels of the WTO Members. This Guideline could help the WTO panels and Appellate Body to determine the real reasonable expected measures based on the theory of justice and will provide the legal backing to force the WTO Members to improve their social standards.

By practically defining the features of reasonable expectation in an "Interpretive Guideline", the matter of parallelism would be taken into account and the possibility of compliance would be increased. This Guideline would make each member's position transparent, leading to some kind of external public pressure even in a case of non-dispute and provides a multilateral response to the problem. This document would not be binding on the WTO's judicial body however it would work as an indicative definition for reasonable expectation and as it would not be a new substantive measure or a new burden or commitment, it would not require the consensus-based decision-making process. However a decision adopting the Interpretive Guideline could make it more efficient and establish a strong presumption in favor of the complainant. The "Interpretive Guideline" would provide for the developed countries, the possibility to decide to improve a low but legitimate standard of developing or least-developed member, by offering them equivalent concessions during the negotiation process and would provide the criteria to distinguish between the real and legitimate demands of humanitarian concerns (developed countries) and comparative advantages (developing countries), from illegitimate goals hiding behind specious claims.

Bibliography

(MDG), Millennium Development Goals Official Forum. *available at* *http://www.un.org/millenniumgoals/index.shtml* (

(UNHCR&WTO), Office of the United Nations High Commissioner for Human Rights and WTO. "The Right to Health, Fact Sheet No.31." *http://www.ohchr.org/Documents/Publications/Factsheet31.pdf* (

(WTO), World Trade Organization. "Compulsory Licensing of Pharmaceuticals and Trips." *http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm* (

———. "Pharmaceutical Patents and the Trips Agreement." *available at:* *http://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm* (

———. "Trips and Pharmaceutical Patents." (September 2006).

Abbott, Frederick M. "The Trips Agreement, Access to Medicines, and the Wto Doha Ministerial Conference." *The Journal of World Intellectual Property* (2000).

———. "The Wto Medicines Decision: World Pharmaceutical Trade and the Protection." *The American Journal of International Law* 99 (2005): 317-58.

Action Aid, Report "Who's Really Fighting Hunger." *available at:* *http://www.actionaid.org.uk/doc_lib/scorecard.pdf* (

Addo, Kofi. "The Correlation between Labour Standards and International Trade: Which Way Forward?". *Journal of World Trade* 36(2) (2002).

AHN, Dukgeun. "Linkage between International Financial and Trade Institutions; Imf, World Bank and Wto." *Journal of World Trade* 34(4) (2000): 1-35.

Akyuz, Yilmaz. "The Wto Negotiations on Industrial Tariffs: What Is at Stake for Developing Countries ". *Third World Network, Trade and Development Series* 24 (2005).

Alqadhafi, Saif Al-Islam. "Reforming the Wto: Toward More Democratic Governance and Decision-Making." *available at* *http://www.wto.org/english/forums_e/ngo_e/posp67_gaddafi_found_e.pdf* (

Alvarez, Jose E. "How Not to Link: Institutional Conundrums of an Expanded Trade Regime." *Widener Law Symposium Journal* 7 (2001).

Amorim, Ambassador Celso L.N. "The Wto from the Perspective of a Developing Country." *Fordham International Law Journal* 24(1), no. 6 (2000): 95-106.

Anderson, Lisa. "The Conflict between Intellectual Property Rights of Pharmaceutical Companies and the Right to Health of Aids Victims in South Africa." *available at:* *http://www.globalpolitics.net/essays/Lisa_Anderson.pdf* (2002).

Bader, Florian, and Joachim Behnke. "How Do Values Shape Preferences Concerning Distribution Policies? ." *available at* *http://www.ecprnet.eu/MyECPR/proposals/reykjavik/uploads/papers/3224.pdf* (

Bagwell, Kyle, Petros C. Mavroidis, and Rober W. Staiger. "It's a Question of Market Access." *American Journal of International Law* 96 (2002): 56-76.

Bagwell, Kyle, and Robert W. Staiger. "Strategic Trade, Competitive Industries and Agricultural Trade Disputes." *Economics and Politics* 13(2) (July 2001).

Bank, World. "Economic Growth in the 1990s: Learning from a Decade of Reform." *Washington, D.C., World Bank* (2005).

———. "World Development Report 2006: Equity and Development." *World Bank (Washington)* (2006).

Beitz, Charles R. "Cosmpolitanism and Global Justice." *The Journal of Ethics* 9 (2005): 11-27.

———. "Political Theory and International Relations." *Princeton University Press* (1999).

Ben-David, Dan, and L. Alan Winters. "Trade, Income Disparity and Poverty." *WTO Special Study No. 5, http://www.wto.org/english/news_e/pres00_e/pr181_e.htm* (

Benson, Peter. "The Basis of Corrective Justice and Its Relation to Distributive Justice." *Iowa Law Review* 77 (1992): 515.

Bertram, Christopher. "Cosmopolitanism and Inequality." *Res Publica* 12 (2006): 327-36.

Bhagwati, Jagdish. "Afterward: The Question of Linkage." *American Journal of International Law* 96 (2002).

———. "Dependence and Interdependence –Essays in Development Economics." *Basil Blackwell Oxford, ed. Gene Grossman* 2 (1985).

———. "Third World Intellectuals and Ngo's, Statement against Linkage." *available at: https://www2.bc.edu/~anderson/twin-sal12.pdf* (

Bhagwati, Jagdish N., and Robert E. Hudec. "Fair Trade and Harmonization: Economic Analysis." *Massachusetts Institute of Technology* 17 (1996).

Bohl, Kristin. "Problems of Developing Country Access to Wto Dispute Settlement." *Chicago-Kent Journal of International & Comparative Law* 9 (2009): 131-200.

Bown, Chad B., and Bernard M. Hoekman. "Developing Countries and Enforcement of Trade Agreement: Why Dispute Settlement Is Not Enough." *Journal of World Trade* 42(1) (2008): 177-203.

Bradlow, Daniel D., and Claudio Grossman. "Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the Imf." *Human Rights Quarterly* 17, no. 3 (Aug. 1995): 411-42.

Brautigam, Deborah. "Governance, Economy and Foreign Aid." *Studies in Comparative International Development (SCID)*, no. 3 (1992): 3-25.

Breyer, Friedrich. "Health Care Rationing and Distributive Justice Author." *Rationality, Markets and Morals* 0 (2009): 395-410.

Bronckers, Marco C. E. J. "More Power to the Wto?". *Journal of International Economic Law* 4 (2001).

Bruhl, Tanja, and Volker Rittberger. "From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of the Twenty First Century." *Volker Rittberger, ed., Global Governance and the United Nations System (Tokyo: United Nations University Press)* (2002): 1-47.

Buchanan, Allen. "Recognitional Legitimacy and the State System." *Philosophy and Public Affairs* 28(1) (1999): 46-78.

Buchanan, Allen, and David Golove. "Philosophy of International Law, the Oxford Handbook of Jurisprudence and Philosophy of Law." *Oxford University Press, Edited by Jules Coleman, Scott Shapiro and Kenneth Einar Himm* (2004).

Buchanan, Allen, and Robert O. Keohane. "The Legitimacy of Global Governance Institutions." *Ethics and International Affairs* 20(4) (2006).

Busch, Marc L. "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade." *available at http://www9.georgetown.edu/faculty/mlb66/Forum%20Shopping.pdf* (1-37.

Butt, Daniel. "Global Equality of Opportunity as an Institutional Standard of Distributive Justice." *Distributive Justice and International Economic Law, Chi Carmody, Frank Garcia, and John Linarelli (eds.), Cambridge University Press* (2011).

Calabresi, Guido. "About Law and Economics: A Letter to Ronald Dworkin." *Hofstra Law Review* 8 (1979).

Caney, Simon. "Justice Beyond Borders: A Global Political Theory." *Oxford University Press* (2005).

Canto-Sperber, Monique. "The Normative Foundations of Cosmopolitanism." *Proceedings of the Aristotelian Society* 106(2) (2006): 265-81.

Cedro, Rafael Rosa. "John Rawls Justice as Fairness and the Wto." *The Law and Development Review* (2010).

Charnovitz, Steve. "Belgium Family Allowances and the Challenge of Origin-Based Discrimination." *World Trade Review* 4(1) (2005): 7-26.

Childers, Erskine, and Brian Urquhart. "Renewing the United Nations System." *UPPSALA, Sweden* (

Chon, Margaret. "Intellectual Property and the Development Divide." *Cardozo Law Review* 27(6) (2813-904.

Collier, Paul. "The Bottom Billion (Why the Poorest Countries Are Failing & What Can Be Done About It)." *Oxford University Press* (2007).

———. "Opportunities and Challenges for the Inclusion of the 'Bottom Billion'." *Session 3, Keynote Lectures: "Economic Development for Global Inclusion", Our Common Future, Hannover* (November 3, 2010).

Collins, Hugh. "Distributive Justice through Contracts." *Oxford University Press, ed. Current Legal Problems Vol. 45, Part 2* (1948).

Croome, J. "Reshaping the World Trading System: A History of the Uruguay Round." *The Hague, London, and Boston: Kluwer Law International* (1999).

Cullet, Philippe. "Patents and Medicines: The Relationship between Trips and the Human Right to Health." *International Affairs* 79, no. I (2003): 139-60.

Dagan, Hanoch. "The Distributive Foundation of Corrective Justice." *Michigan Law Review* 9 (October 1999): 138-66.

Deere, Carolyn. "The Implementation Game, the Trips Agreement and the Global Politics of Intellectual Property Reform in Developing Countries." *Oxford University Press Inc., New York* (2009).

Deng, Fen. "Corrective Justice in the Confucian Legal Tradition: A Nonexistent Concept!". *available at:* http://www.lawschool.cornell.edu/international/clarke_program/conferences/upload/DengFeng.pdf (

Deraniyagala, Sonali, and Ben Fine. "New Trade Theory Versus Old Trade Policy: A Continuing Enigma." *Camb. J. Econ.* 25(6) (2001): 809-25.

Detomasi, David Antony. "The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks." *Journal of Business Ethics* 71 (2007): 321-34.

Dièye, Cheikh Tidiane, and Victoria Hanson. "Mfn Provisions in Epas: A Threat to South-South Trade?". *Trade Negotiations Insights* 7(2) (March 2008).

Dingwerth, Klaus, and Philipp Pattberg. "How Global and Why Governance? Ambivalences, Blind Spots, and Challenges for a Critical Global Governance Literature." *available at* http://turin.sgir.eu/uploads/Pattberg-D_HowGlobal_061015.pdf (1-8.

Dunoff, Jeffrey L. "The Death of the Trade Regime." *European Journal of International Law* 10 (1999): 733-62.

Ekeh, Peter P. "Colonialism and the Two Publics in Africa: A Theoretical Statement." *Comparative Studies in Society and History* 17, no. 1 (Jan. 1975): 91-112.

F.Musungu, Sisule, and Cecilia Oh. "The Use of Flexibilities in Trips by Developing Countries: Can They Promote Access to Medicines?". *South Center, World Health Organization. Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH). CIPIH Study* paper 4C. (August 2005).

Faunce TA, Neville W and Anton Wasson. "A. Non Violation Nullification of Benefit Claims: Opportunities and Dilemmas in a Rule-Based Wto Dispute Settlement System." *Ten Years of WTO Dispute Settlement: Australian Perspectives, Office of Trade Negotiations of the Department of Foreign Affairs and Trade. Commonwealth of Australia, ed. Bray M.* (123-40.

Finger, J. M., and J. J. Nogus. "The Unbalanced Uruguay Round Outcome: The New Areas in Future Wto Negotiations." *The World Economy* 25, no. 3 (2002): 321-40.

Finger, M. "Implementation and the Imbalance: Dealing with Hangover from the Uruguay Round." *Oxford Review of Economic Policy* 23(3) (2007): 440–60.

Fischer, Ronald D. "The Evolution of Inequality after Trade Liberalization." *Journal of Development Economics* 66(2) (December 2001): 555-79.

Flikschuh, Katrin. "The Limits of Liberal Cosmopolitanism." *Res Publica* 10 (2004): 175-92.

Forsyth, Justin. "Growth and Poor, Letters to the Editor." *The Economist* June 10-17 (2000).

Franck, Thomas M. "Fairness in International Law and Institutions." *Oxford University Press* (1998).

Freeman, Samuel. "The Law of Peoples, Social Cooperation, Human Rights and Distributive Justice." *Social Philosophy and Policy* 24 (2006).

Garcia, Frank J. "Global Justice and Bretton Woods Institutions." *Journal of International Economic Law* 10(3) (2007): 461-81.

Garcia, Frank J. . "Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade." *Transnational Publishers* (2003).

Gerhart, Peter M. "Slow Transformations: The Wto as a Distributive Organization." *AM. U. INT'L L. REV* (2002): 1045-95.

Girvan, Norman. "Some Lessons of the Cariforum-Eu Epa." *Trade Negotiations Insights* 8(8) (October 2009).

Gleckman, Harris. "Global Governance and Policy Coherence: Before and after the G20 Summit, Global Policy Coherence 2009 Project." *http://www.envirosecurity.org/gpc/publications/GovernanceSummary.pdf, Institute for Environmental Security* (

"Globalization and Informal Jobs in Developing Countries." *A Joint Study of International Labour Office and the Secretariat of World Trade Organization (ILO&WTO)* (2009).

Guzman, Andrew T. "Global Governance and the Wto." *Harvard International Law Journal* 45(2), no. 2 (2004): 303.

Hanson, Gorgon H. "Regional Adjustment to Trade Liberalization." *National Bureau of Economic Research* Working Paper No. 4713 (

Haque, Adil Ahmad. "Justice without Borders." *Available at SSRN: http://ssrn.com/abstract=654941* (2005): 1-20.

Hart, Jeffrey, and Joan Edelman Spero. "Globalization and Global Governance in the 21st Century." *available at http://www.indiana.edu/~globalm/pdf/tkpaul08.pdf, Research Group in International Security* (

Heat, Joseph. "Rawls on Global Distributive Justice: A Defence." *Global Institutions Edited by Daniel Weinstock, The Canadian Journal of Philosophy* Supplementary Volume 31 (2005): 193-226.

Hockett, Robert. "Human Persons, Human Rights, and the Structure of Justice." *Distributive Justice and International Economic Law, Chi Carmody, Frank Garcia, and John Linarelli (eds.), Cambridge University Press* (2011).

———. "Minding the Gaps: Fairness, Welfare and the Constitutive Structure of Distributive Assessment." *Cornell Law School Working Paper Series* Paper:21 (2006).

———. "Taking Distribution Seriously." *Cornell Law School research paper No. 08-004, available at* http://ssrn.com/abstract=1108217 (

Hoekman, Bernard. "The Wto: Functions and Basic Principles." *available at:* http://www.terry.uga.edu/~eornelas/Econ4040/WTO-basics.pdf (

Hoekman, Bernard, and Çaglar Özden. "Trade Preferences and Differential Treatment of Developing Countries, Introduction." *available on* http://www.ycsg.yale.edu/focus/gta/trade_preferences.pdf (

Hoekman, Bown and, Patrick Low, and Alexander Keck. "Special and Differential Treatment in Wto: Why, When and How?". *World Trade Organization, Economic Research and Statistics Division* Staff Working Paper ERSD (2004-03).

Horn, Henrik, Joseph Francois, and Niklas Kaunitz. "Trading Profiles and Developing Country Participation in the Wto Dispute Settlement System." *International Centre for Trade and Sustainable Development* Issue Paper No. 6 (December 2008).

Horn, Henrik, Giovanni Maggi, and Robert W. Staiger. "The Gatt/ Wto as an Incomplete Contract." http://www.cepr.org/meets/wkcn/2/2363/papers/Horn.pdf (May 2006).

Horn, Henrik, and Petros .C. Mavroidis. "Economic and Legal Aspects of the Most-Favored-Nation Clause." *European Journal of Political Economy* 17 (2001): 233–79.

Howse, Robert. "The World Trade Organization and the Protection of Workers' Rights." *Journal of Small and Emerging Business Law* 3 (1999).

Howse, Robert, and Makau Mutua. "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* (2001): 51-82.

Hudec, R.E. "The Gatt Legal System and World Trade Diplomacy." *New York: Praeger* (1975).

Hudec, Robert E. "Gatt and the Developing Countries." *COLUM. Bus. L. REV.* 1 (1992).

IMF, International Monetary Fund. "World Economic Oulook." *International Monetary Fund* (2007).

indicators, Official list of MDG. http://mdgs.un.org/unsd/mdg/Host.aspx?Content=Indicators%2fOfficialList.htm (

Insights. "Questioning the U.S. Dollar's Status as a Reserve Currency." http://www.jpmorganinstitutional.com/cm/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1321489339163&ssbinary=true (October 2009).

Ismail, Faizel. "An Assessment of the Wto Doha Round, July-December 2008 Collapse." *World Trade Review* 8, no. 4 (2009): 579–605.

Jackson, John H. "The Perils of Globalization and the World Trading System." *Fordham International Law Journal* 24 (2000).

James, Aaron. "Global Economic Fairness: Internal Principles." *available at: https://webfiles.uci.edu/ajjames/Internal%20Principles1.doc* (

James, William E. "Rules of Origin in Emerging Asia-Pacific Preferential Trade Agreements: Will Ptas Promote Trade and Development?". *Asia-Pacific Research and Training Network on Trade Working Paper Series* 19 (August 2006).

Jones, Charles. "Institutions with Global Scope: Moral Cosmopolitanism and Political Practice." *Global Institutions Edited by Daniel Weinstock, The Canadian Journal of Philosophy* Supplementary Volume 31 (2005): 1-28.

Kant, Imanuel. "Perpetual Peace, Political Writings." *Cambridge University Press, ed. H.S. Reiss* (1991).

Kelly, James Patrick "The Wto and Global Governance: The Case for Contractual Treaty Regimes." *Widener Law Symposium Journal* 7 (2001).

Kemp, Brodi. "International Distributive Justice: Evaluating Cosmopolitan Challenges to the Law of Peoples." *Harvard University, Gov 2030: Political Concept* (2005).

Kennedy, Duncan. "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power." *Maryland Law Review* 41 (1982).

Keohan, Robert O. . "Global Governance and Democratic Accountability." *http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan034133.pdf* (2002): 1-35.

Kordana, Kevin, and David Tabachnick. "Rawls and Contract Law." *University of Virginia Law School* 15 (2005).

Kronman, Anthony T. "Contract Law and Distributive Justice." *Yale Law Journal* 89 (1980).

Kuznets, Simon. "Economic Growth and Income Inequality." *American Economic Review* 45 (March 1955): 1-28.

Kwakwa, Edward. "The Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips)." (Spring 2010).

Lacarte, Julio. "Wto Appellate Body Roundtable, World Order or a New World Disorder? Testing the Limits of International Law: Proceedings of the Ninety-Ninth Annual Meeting of the American Society of International Law." *Laurence R. Helfer & Rae Lindsay (eds), Washington: American Society of International Law* (2005).

Lamy, DG Pascal. "The Wto in the Archipelago of Global Governance." *Institute of International Studies. Geneva. available on: http://www.wto.org/english/news_e/sppl_e/sppl20_e.htm* (2006).

Landsburg, Steven E. "The Big Question." *http://www.thebigquestions.com/2010/02/10/worked-up* (

Lastra, R.M. "The International Monetary Fund in Historical Perspective." *Journal of International Economic Law* 3 (2000): 507.

Lee, Eddy. "Globalization and Labour Standards: A Review of Issue." *International Labour Review* 136 (1997).

Leech, Dennis. "Voting Power in the Governance of the International Monetary Fund." *Annals of Operations Research* 109, no. 583 (2002).

Leitner, Kara, and Simon Lester. "Wto Dispute Settlement (1995-2007) a Statistical Analysis." *Journal of International Economic Law* 11(1) (2008): 179.

Lim, Chin Leng "The Conventional Morality of Trade." *Chi Carmody, Frank Garcia, and John Linarelli (eds.), Distributive Justice and International Economic Law, Cambridge University Press* (2011).

Maio, Michele Di. "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* (

Mara, Kaitlin. "Trips Council Discusses Efficacy of Acta, Public Health Amendment." *Intellectual Property Watch, available at: http://www.ip-watch.org/weblog/2010/10/29/trips-council-discusses-efficacy-of-acta-public-health-amendment* (29 October 2010).

Marceau, Gabrielle. "Wto Dispute Settlement and Human Rights." *EJIL* 13 (2002): 753-814.

Marshall, Andrew Gavin. "Global Power and Global Government." *Research Associate with the Centre for Research on Globalization (CRG)* (

Mary Moran(Director), Anne-Laure Ropars, Dr Javier Guzman,Dr Jose Diaz and Christopher Garrison. *London School of Economics and Political Science, The Wellcome Trust* (September 2005).

Maupain, F. "Trade and Core Labour Standards." *Wirtschaftspolitische Blatter* 6 (1997).

McAdams, Richard, and Eric B. Rasmussen. "Norms in Law and Economics." *Handbook of Law and Economics. A. Mitchell Polinsky and Steven Shavell, editors* 1-2 (2007).

McGinnis, John O. , and Mark L. Movsesian. "Against Global Governance in the Wto." *Harvard International Law Journal* 45(2) (2004): p.353.

———. "The World Trade Constitution." *Harvard Law Review* 114 (

McMillan, John. "Does Regional Integration Foster Open Trade? Economic Theory and Gatt's Article Xxiv." *In Regional Integration and the Global Trading System, K. Anderson and R. Blackhurst, eds., London, Harvester Wheatsheaf* (1993).

Melcked-Garcia, Saladin. "International Justice, Human Rights and Neutrality." *Kluwer Academic Publishers* 10 (2004): 153–74.

Meltzer, Allan H. "Report of the International Financial Institutions Advisory Commission." *available at* *http://repository.cmu.edu/cgi/viewcontent.cgi?article=1029&context=tepper* (2000).

Michalopoulos, Constantine. "The Role of Special and Differential Treatment for Developing Countries in Gatt and the World Trade Organization." (

Mill, John Stuart, and Jeremy Bentham. "Utilitarianism and Other Essays." *Penguin Books, Alan Ryan (Ed.)* (1987).

Moyo, Dambisa. "Dead Aid." *New York, FSG* (2009): 188.

Ness, Daniel W. Van, and Karen Heetderks Strong. "Restoring Justice: An Introduction to Restorative Justice." *Matthew Bende and Company, ed. Ellen S. Boyne* (2010).

Nickel, James W. "Is Today's International Human Rights System a Global Governance Regime?". *The Journal of Ethics* 6 (2002): 353-71.

Organization, A Joint Study of International Labour Office and the Secretariat of World Trade. "Globalization and Informal Jobs in Developing Countries." (2009).

Ostry, Sylvia. "Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium." *J.F. Kennedy School of Government, Harvard* (June 2000).

Oxfam. "Cultivating Poverty: The Impact of Us Cotton Subsidies in Africa." *http://www.oxfamamerica.org/files/cultivating-poverty.pdf* Oxfam Briefing Paper 30 (2002).

Ozden, Caaglar, and Eric Reinhardt. "The Perversity of Preferences: Gsp and Developing Country Trade Policies, 1976-2000." *Journal of Development Economics* 78 (2005).

Panagariya, A. "Trade-Labor Link: A Post-Seattle Analysis." *University of Maryland-College Park* (June 2000).

Parisi, Francesco. "Positive, Normative and Functional Schools in Law and Economics." *European Journal of Law and Economics* 18 (2004): 259-72.

Patomaki, Heikki. "Global Justice: A Democratic Perspective." *Globalizations* 3, no. 2 (June 2006): 99-120.

Pauwelyn, Joost. "Conflict of Norms in Public International Law: How Wto Law Relates to Other Rules of International Law." *Cambridge University Press* (2003): 456-72.

———. "International Trade Law Course Pack, Chapter 19. Trade-Related Intellectual Property Rights." *Graduate Institute of International and Development Studies* (2008-2009).

———. "A Typology of Multilateral Treaty Obligations: Are Wto Obligations Bilateral or Collective in Nature?". *EJIL* 14, no. 5 (2003): 907-51.

Pauwelyn, Joost, and Luiz Eduardo Salles. "Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions." *Cornell International Law Journal* 42 (2009): 77-118.

Petersmann, Ernst-Ulrich. "Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade." *University of Pennsylvania Journal of International Law* 27:2 (273-366.

"Pharmaceutical Patents and the Trips Agreement." available at: http://www.wto.org/english/tratop_e/trips_e/pharma_ato186_e.htm.

Pogge, Thomas W. "Cosmopolitanism and Sovereignty." *Ethics* 103 (October 1992): 48-75.

———. "Rawls on International Justice." *The Philosophical Quarterly* 51 (2001): 247-53.

"Policy Brief \#131." *The Brookings Institution* (April 2004).

Posner, Richard A. "The Law and Economics Movement." *The American Economic Review* 77, no. 2 (1987): 1-13.

Powers, William C. "Structural Aspects of the Impact of Law on Moral Duty within Utilitarianism and Social Contract Theory." *UCLA Law Review* 26 (1979): 1263-65.

Prestowitz, Clyde V. "Testimony." *http://waysandmeans.house.gov/media/pdf/111/10-03-24_prestowitz_testimony.pdf* (

Publication, A WTO Secretariat. "A Handbook on Reading Wto Goods and Services Schedules." *Cambridge University Press* (2009).

———. "Handbook on the Wto Dispute Settlement System." *Cambridge University Press* (2004).

Publication, WTO Secretariat. "A Handbook on the Wto Dispute Settlement System, Prepared for Publication by the Legal Affairs Division and Appellate Body." *Cambridge University Press* (2004).

Ravenhill, John. "Global Political Economy." *Oxford University* (2005).

Rawls, John. "Justice as Fairness." *The Philosophical Review* 67, no. 2 (Apr 1958): 164-94.

———. "The Law of Peoples." *Harvard University Press* (1999)

———. "Theory of Justice." *Oxford University Press, T. M. Scanlon (Ed.)* (2005).

Reinhardt, Marc L. Busch Eric, and Gregory Shaffer. "Does Legal Capacity Matter? Explaining Dispute Intiation and Antidumping Actions in the Wto." *International Center for Trade and Sustainable Development* paper n.4 (2008).

Renner, Gralf-Peter Calliess and Moritz. "Between Law and Social Norms: The Evolution of Global Governance." *Ratio Juris* 22(2) (2009): 260-80.

Robinson, and Karen Thierfelder. "Trade Liberalization and Regional Integration: The Search for Large Numbers." *Trade and Macroeconomics Division International Food Policy Research Institute* TMD Discussion Paper NO. 34 (January 1999).

Rubin, Gavriel. "Liberalism and Democracy: A Response to Rawls the Law of Peoples." *available at: http://ocw.mit.edu/courses/political-science/17-000j-political-philosophy-global-justice-spring-2003/assignments/rubin_paper.pdf* (

Sachs, Jeffrey D. "Millennium Project." *http://www.unmillenniumproject.org/who/sachs.htm* (

Sadat, Leila Nadya. "An American Vision for Global Justice: Taking the Rule of (International) Law Seriously." *Global Stud. L. Rev.* 4 (2005): 329-45.

Saggi, Kamal. "Trade-Related Policy Coherence and Access to Essential Medicines." *Journal of World Trade* 42(4) (2008): 619-40.

Salazar-Xirinachs, Jose M. "The Trade-Labor Nexus: Developing Countries Prespectives." *Journal of International Economic Law* 3 (2000).

SANTOS, Norma Breda dos, 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): 637-70.

Scanlon, T. "Human Rights as a Neutral Concern, Human Rights and U.S. Foreign Policy: Principles and Applications." *Farnborough: Heath, ed. P. G. Brown and D. Maclean* (1980).

———. "What We Owe Each Other." *Cambridge, Mass. and London England, Harvard University Press* (1998).

Schmidt, Volker H. "Procedural Aspects of Distributive Justice." *Darmouth, England* (1997).

Sell, Susan K. "Trips and the Access to Medicines Campaign." *Wisconsin International Law Journal* 481, no. 20 (2001-2002).

Senona, Joseph M. "Negotiating Special and Differential Treatment from Doha to Post-Hong Kong: Can Poor People Still Benefit?". *Journal of World Trade* 42(6) (2008): 1041-64.

Shahin, Magda. "Egypt's Challenges and Future Options for Participating in the Wto Dispute Settlement System." *International Centre for Trade and Sustainable Development* (2-3 November 2006): 1-19.

Shaw, Sabrina, and Risa Schwartz. "Trade and Environment in the Wto. State of Play." *Journal of World Trade* 36(1) (2002).

Shohat, Ella. "Notes on the "Post-Colonial"." *Social Text, No. 31/32, Third World and Post-Colonial Issues, Duke University Press* (1992): 99-113.

Sihanya, Ben. "Patents, Parallel Importation and Compulsory Licensing of Hiv/Aids Drugs: The Experience of Kenya. Managing the Challenges of Wto Participation: Case Study 19." http://www.wto.org/english/res_e/booksp_e/casestudies_e/case19_e.htm.

Smith, James. "Inequality in International Trade? Developing Countries and Institutional Change in Wto Dispute Settlement." *Review of International Political Economy, Published by: Taylor & Francis, Ltd.* 11, no. 3 (Aug., 2004): 542-73.

Smith, William, and James Brassett. "Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives." *Ethics and International Affairs* 22:1 (2008): 69-92.

Stiglitz, Joseph. "Social Justice and Global Trade." *Far Eastern Economic Review* (March 2006): 18-22.

Sun, Haochen. "The Road to Doha and Beyond. Some Reflections on Trips Agreement and Public Health." *European Journal of International law* 15 (2004): 123-50.

Suominen, Antoni Estevadeordal and Kati. "Rules of Origin: A World Map and Trade Effects Integration, Trade and Hemispheric Issues Division, Integration and Regional Programs Department Inter-American Development Bank." *Paper prepared for the The Seventh Annual Conference on Global Economic Analysis: Trade, Poverty, and the Environment, available at https://www.gtap.agecon.purdue.edu/resources/download/1866.pdf* (May 2004).

Thomas, Chantal. "Democratic Governance, Distributive Justice and Development." *Chi Carmody, Frank Garcia, and John Linarelli (eds.), Distributive Justice and International Economic Law, Cambridge University Press* (2011).

Tietje, Christian. "Global Governance and Inter-Agency Co-Operation in International Economic Law." *Journal of World Trade* 36(3) (2002): 501-15.

Torres, Hector. "Reforming the International Monetary Fund-Why Its Legitimacy Is at Stake." *Journal of International Economic Law* 10(3) (2007): 443.

Trachtman, Joel P. "The Domain of Wto Dispute Resolution." *Harvard International Law Journal* 40 (1999).

Trakman, Leon E. "The Proliferation of Free Trade Agreements: Bane or Beauty?". *Journal of World Trade, Kluwer Law International* 42(2) (2008): 367-88.

Trebilcock, Michael J. *The Limits of Freedom of Contract*. Harvard University Press, 1993.

Tschenter, Axel. *The Function of Procedural Justice in Theories of Justice- Procedural Justice*. edited by Edit by Klaus F. Rohl and Stefan Machura: Darmouth, England, 1997.

UNCTAD. "World Commodity Trends and Prospects, Note by the Secretary-General." *Report prepared by the secretariat of the United Nations Conference on Trade and Development* (28 July 2006).

UNDP. "United Nations Development Programme: Human Development Report 1999." *Oxford University Press* (1999).

VanParijs, Philippe. "International Distributive Justice, in a Companion to Contemporary Political Philosophy: A Companion to Contemporary Political Philosophy." *Blackwell Publishing, Goodin, Robert E., Philip Pettit and Thomas Pogge* (2007): 638-52.

Venables, Anthony J. "Winners and Losers from Regional Integration Agreements." *available at http://www.cepr.org/meets/wkcn/2/2306/papers/venables.pdf* (1-20.

Verbeure, Birgit, Gert Matthijs Geertrui Van Overwalle, and Esther van Zimmeren. "Models for Facilitating Access to Patents on Genetic Inventions." *Nature Reviews Genetics* 7 (February 2006): 143-54.

Viner, Jacob. *Bentham and J.S. Mill: The Utilitarian Background- Economic Jusice*. edited by Edmund S. Phelps: Penguin Education, England, 1973.

Waller, Spencer Weber. "National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law." *Cardozo Law Review* 18 (1996).

Walzer, Michael. "The Moral Standing of States: A Response to Four Critics." *Philosophy and Public Affairs* 9, no. 3 (Spring, 1980): 209-29.

Washington, International Monetary Fund:. "Reaping the Benefits of Financial Globalization." *available at www.imf.org/external/np/res/docs/2007/0607.htm.* (2007).

Weinrib, Ernest J. "The Gains and Losses of Corrective Justice." *Duke Law Journal* 44, no. 2 (Nov. 1994): 277-97.

———. "The Idea of Private Law." *Harvard University Press* (1995).

Weiss, Friedl, Erik Denters, and P. J. I. M. de Waart. "International Economic Law with a Human Face." *Kluwer Law International* (1998).

Wells, Gray J. "Trade Agreements: A Pro/Con Analysis of Including Core Labor Standards." *US Department of State, Foreign Press Centers, CRS Reports for Congress* (

Wilkinson, R. "The Wto in Hong Kong: What It Really Means for the Doha Development Agenda." *New Political Economy* 11(2) (June 2006).

———. *The Wto: Crisis and Governance of Global Trade*. Routledge, 2006.

Williamson, Oliver E. *The Economic Institutions of Capitalism: Firms Markets, Relational Contracting*. The Free Press, New York, 1985.

Wolff, Jonathan. *Robert Nozick: Property, Justice, and the Minimal State*. Stanford University Press, 1991.

Wolfgang, Hans Michael, and Wolfram Feuerhake. "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) (2002): 885.

Wright, Richard W. "Substantive Corrective Justice." *Iowa Law Review* 77 (1992): 625-710.

Wto Agreements and Public Health: A Joint Study by the Wto and Who Secretariat. World Trade Organizaton Secretariate, 2002.

WTO, Public Forum 2009. "Global Problems, Global Solutions: Toward Better Global Governance." *available at: http://www.wto.org/english/forums_e/public_forum09_e/public_forum09_e.htm* (

YANDLE, BRUCE. "After Kyoto: A Global Scramble for Advantage." (

Yang, Yongzheng, and Sanjeev Gupta. "Regional Trade Arrangements in Africa: Past Performance and the Way Forward." *IMF Working Paper* WP/05/36 (Februray 2005).

Zampetti, Americo Beviglia. "Democratic Legitimacy in the World Trade Organization: The Justice Dimension." *Journal of World Trade* 37(1) (2003): 105-26.

Zoellick, Robert B. "The Wto and New Global Trade Negotiations: What's at Stake, Address before the Council on Foreign Relations." *Available at: http://www.cfr.org/world/wto-new-global-trade-negotiations-s-stake/p4149* (30 Oct. 2001).