

# **Addressing the Impediments to the Realisation of the Right to Development at the WTO**

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## LIST OF ABBREVIATIONS

AB – Appellate Body  
ACP - African Caribbean and Pacific  
ACTA - Anti-Counterfeiting Trade Agreement  
ACWL - Advisory Centre on WTO Law  
ADA – Anti-Dumping Agreement  
AMS - Aggregate Measure of Support  
AoA – Agreement on Agriculture  
AS – Agreement on Safeguards  
ATC - Agreement on Textiles and Clothing  
BRICs – Brazil, Russia, India, China  
COP21 – Paris Climate Agreement  
CTD - Committee on Trade and Development  
CVD - Countervailing Duty  
DCR – Domestic Content Requirement  
DDA – Doha Development Agenda  
DDG – Deputy-Director General  
DFQF – Duty Free Quota Free  
DRTD – Declaration on the Right to Development  
DSB - Dispute Settlement Body  
DSM – Dispute Settlement Mechanism  
DSU – Dispute Settlement Understanding  
EBA - Everything But Arms  
EC – European Community  
ECOSOC - Economic and Social Council  
ERP - External Reference Price  
EU – European Union  
EU – European Union  
FAO – Food and Agriculture Organization  
FDI – Foreign Direct Investment  
GATS - The General Agreement on Trade in Services  
GATT – General Agreement on Tariffs and Trade  
GDP – Gross Domestic Product

GNP – Gross National Product  
GSP – Generalised System of Preferences  
ICC – International Criminal Court  
ICESCR - International Covenant on Economic, Social and Cultural Rights  
ICJ – International Court of Justice  
ICTSD – International Centre for Trade and Sustainable Development  
IMF – International Monetary Fund  
IP – Intellectual Property  
IPR – Intellectual Property Rights  
ITO – International Trade Organisation  
ITT – International Technology Transfer  
LCR – Local Content Requirement  
LDC – Least Developed Countries  
MDG – Millennium Development Goals  
MDP - Mandatory Deletion Programme  
MFA - Multi-Fibre Agreement  
MFN – Most Favoured Nation Principle  
MNE – Multinational Enterprise  
NAMA - Non-Agricultural Market Access  
NGO – Non-Governmental Organisation  
NIEO – New International Economic Order  
OECD - Organisation for Economic Co-operation and Development  
R&D – Research and Development  
RoO – Rules of Origin  
RTD – Right to Development  
SC – Security Council  
SCM – Subsidies and Countervailing Measures Agreement  
SDG – Sustainable Development Goals  
SDT – Special and Differential Treatment  
SSM – Special Safeguard Mechanism  
TFA - Trade Facilitation Agreement  
TRIMS – Trade Related Investment Measures Agreement  
TRIPS –Trade-Related Aspects of Intellectual Property Rights Agreement  
TT – Technology Transfer

TT- Technology Transfer

UN – United Nations

UNCTAD – United Nations Conference on Trade and Development

UNDP - United Nations Development Programme

UNFCCC UN Framework Convention on Climate Change

UNIDO - United Nations Industrial Development Organization

VCLT – Vienna Convention on the Law of Treaties

VER - Voluntary Export Restraint

WHO - World Health Organisation

WIPO – World Intellectual Property Organisation

WTO – World Trade Organisation

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## Chapter II

# MEASURING WTO'S LEGITIMACY AGAINST THE RIGHT TO DEVELOPMENT

### Introduction

This chapter looks at why it would be proper to base the evaluation of WTO's legitimacy mainly on its democratic credentials and the impact of its rules, processes and policies on the potential for economic development of its poorer Members.

There are several perceptions about what legitimacy entails. Buchanan finds that the question of legitimacy of global actors exercising public authority is to a large extent, *a moral one*.<sup>1</sup> Weiler describes that the concept of legitimacy as an evaluative criterion for a polity or an institution can be defined both narrowly and broadly; a narrow definition mainly concerns *formal procedures*, such as ratification, while a broad one concerns '*societal acceptability*' of the polity or institution.<sup>2</sup> In the words of Suchman, legitimacy is a 'perception or assumption that the actions of an entity are *desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions*.'<sup>3</sup> Aristotle based legitimacy on *constitutionalism*, on *justness*, the *public interest* and *distributive justice*.<sup>4</sup> In general terms one could thus say that governance is legitimate if it is *fair*, if it serves the '*common good*' of its respective constituency, is based on its *shared norms*, and if it protects it against both the self-interest of governors and the strategies of special societal interests or the potential tyranny of the majority.<sup>5</sup> Studies of transnational governance regimes increasingly focus on its legitimacy in terms of *justice* and *principled reasoning*.<sup>6</sup> Nanz claims that an adequate constitutionalisation of transnational governance must guarantee that several functional, legal and democratic sources of legitimacy merge.<sup>7</sup> Researchers have often been criticized for using the term legitimacy loosely without defining it and it has been called a blind man's

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<sup>1</sup> A. Buchanan, 'The Legitimacy of International Law', in S. Besson and J. Tasioulas, (eds.), *The Philosophy of International Law*, (Oxford University Press, 2010), p. 80.

<sup>2</sup> J. H. H. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal*, (1991), pp. 2468-2469.

<sup>3</sup> M. C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', 20 *Academy of Management Journal*, (1995), p. 574.

<sup>4</sup> M. Zeldritch Jr, J. Jost, B. Major, (eds.), *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice and Intergroup Relations*, (Cambridge University Press, 2001), p. 4.

<sup>5</sup> P. Nanz, 'Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory', in C. Joerges and E.-U. Petersmann, *Constitutionalism, Multilevel Governance and International Economic Law*, (Hart Publishing, 2011), p. 61.

<sup>6</sup> *Ibid.*, p. 62.

<sup>7</sup> *Ibid.*

hammer.<sup>8</sup> Perhaps this is not surprising given the fact that evaluating legitimacy is at its core a subjective undertaking, which gives precedence to the researcher's own value system. It is an abstract concept, given reality by multiple actors in the social environment.<sup>9</sup>

Apart from the more general question of justness, morality and fairness, three main strands appear most relevant to the present study based on the below analysis. Firstly, whether the organisation upholds the values of its most important stakeholders, secondly, whether its rules and policies fit within the norms and purported goals of the general international legal system and thirdly, do its agenda setting and rulemaking processes uphold democratic principles. These are in turn intrinsically linked since a gap in the democratic legitimacy of the organisation inevitably leads to a gap in the legitimacy of its substantive rules and any enforcement thereof. Other strands of legitimacy theory fail to provide a perfect lens for the present analysis yet their underlying concepts nevertheless offer valuable tools for the subsequent analysis of particular aspects of WTO rules and policy as discussed below.

### **1. External/Internal Legitimacy and Legitimacy of Origin/Exercise**

Governmental legitimacy consists of its internal and external aspects. The internal, which depends on the perception of its subjects, is usually related to the achievement of social and distributive justice – a so-called government for the people – which in turn creates stability and obedience.<sup>10</sup> The external aspect, on the other hand, is a matter of how it is perceived by other international authorities.<sup>11</sup> In theory, internal legitimacy influences external legitimacy.<sup>12</sup> In practice, one can observe rather that when geopolitical interests dictate states to forge alliances or create enemies, the myth of internal (il)legitimacy is pushed regardless of the population's actual perception of their governments to achieve external illegitimacy and enable interference into the affairs of sovereign states.

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<sup>8</sup> R. C. Hybels 'On Legitimacy, Legitimation, and Organizations: A Critical Review and Integrative Theoretical Model,' *Academy of Management Journal Special Issue*, (1995), p. 214.

<sup>9</sup> M.V. Tilling, 'Refinements to Legitimacy Theory in Social and Environmental Accounting', 4 *Commerce Research Paper Series* No 04-6, (2004), p. 4.

<sup>10</sup> I. Shapiro, *Democratic Justice*, (Yale University Press, 1999); This is also known as 'output legitimacy' as opposed to 'input legitimacy' (government by the people), see W. Scharpf, 'Legitimacy and the Multi-Actor Polity', in M. Egeberg & P. Lægreid (eds.), *Organizing Political Institutions: Essays for Johan P. Olsen* 268, (Scandinavian University Press, 1999). I. Shapiro, *Democratic Justice*, (Yale University Press, 1999).

<sup>11</sup> S. Talmon, 'Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law', in G. S. Goodwin-Gill & S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, (Oxford University Press, 1999), pp. 509-17.

<sup>12</sup> M. Weber, *Economy and Society*, (Bedminster Press, 1968), p. 31; J. Austin, *The Province of Jurisprudence Determined* (University of London, 1832), pp. 200-201; T. M. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law*, (1992), pp. 46, 48; R. Grafstein, 'The Legitimacy of Political Institutions', 14 *Polity*, (1981) p. 51.

A distinction has further been drawn between a government's legitimacy of origin and its legitimacy of exercise. In the age of democracy, legitimacy of origin has been understood as living up to some democratic standards. While the legitimacy of origin has been the classical measure for evaluating the legitimacy of governments, recent practice has seemingly shifted towards a concern about the legitimacy of exercise.<sup>13</sup> While this seems commendable in theory, in practice it has led to a regime-change frenzy where the ultimate factor rendering states vulnerable to foreign intervention is neither their lack of democratic credentials, nor their lack of internal legitimacy, but rather their refusal to play along with the economic and geopolitical interests of the powerful. On the other hand, states that do play along do not get their legitimacy challenged despite their vast and profound human rights abuses and an absolute lack of democracy and freedom of thought, expression and political activism. Furthermore in no perceivable future can one expect a serious international condemnation of the lack of legitimacy of origin of the US ruling system itself in light of their undemocratic practices, such as the weighed voting system of superdelegates, rigged primaries that seemingly cannot be challenged in court, legalised bribery of mainstream media and politicians<sup>14</sup> all the way to the electoral college system, which has granted victory to the loser of the popular vote several times.

The first connection between this discussion and the WTO is that theoretically, if Member governments are legitimate then the WTO should also be legitimate.<sup>15</sup> However, if they are not, this already creates a legitimacy gap for the organisation. As Pogge claims, Nigeria's accession to the WTO was affected by its military dictator Sani Abacha, Myanmar's accession by the SLORC junta, Indonesia's accession by Suharto, Zimbabwe's accession by Mugabe and the Congo's succession by Mobutu Sese Seko. These rulers' success in subjecting people to their rule does not give them the moral authority to consent on their behalf – nor does such success entitle us to treat the populations of these countries as if they had consented through their rulers' signatures.<sup>16</sup> If governments entering unfavourable WTO deals violated the right to self-determination of their peoples, such deals would legitimately be put up for scrutiny and re-evaluation based on this fact. One could go further and observe that only 19 countries are now considered to be full democracies. As of 2016, the US is no longer considered a full democracy as popular confidence in the functioning of public

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<sup>13</sup> J. d'Aspremont and E. De Brabandere, 'The Complementary Faces of Legitimacy In International Law: The Legitimacy of Origin and the Legitimacy of Exercise,' 34 *Fordham International Law Journal*, (2011), p. 191.

<sup>14</sup> US Supreme Court, *Citizens United v Federal Election Commission*, 558 U.S. (January 21, 2010).

<sup>15</sup> S. Cho, 'A Quest for WTO's Legitimacy', 4 *World Trade Review*, (2005), p. 392.

<sup>16</sup> T.W. Pogge, *Politics as Usual*, (Polity Press, 2010), p. 41.

institutions has declined.<sup>17</sup> With a clearer perception of reality this popular confidence should have faded long ago. It is further clear, that the general public is increasingly aware of the illusion of democracy and the fact that especially in the area of trade, deals are being agreed to mainly at the dictate and for the benefit of large corporations and are neither *by the people* nor *for the people*.

Secondly, the tests for governmental democratic legitimacy should have equivalents applicable to the governance and decision-making of international institutions themselves. Some find that when it comes to legitimacy of governance ‘beyond the national state’ it is hard to determine the relevant constituency (is it the state members or the citizens of these members), the proper location of its legitimacy, the appropriate criteria to determine it and most importantly, the very meaning of the concept – issues which have come to the fore as a master question in international relations.<sup>18</sup> The internal/external distinction of legitimacy is not readily applicable to international organisations, because strictly speaking there is no subject-sovereign relationship between individuals and international organisations. Yet individuals are the final recipients and users of the adopted rules and regulations and should thus be given a sense of ownership in the process.<sup>19</sup>

Contrary to the trend with national governments, in terms of international organisations, the shift has been in the direction from a concern about the legitimacy of exercise towards a concern about the legitimacy of origin.<sup>20</sup> In the absence of direct legitimacy of origin and the absence of a periodical legitimacy or accountability test through direct elections or any other mechanism, the legitimacy of international organisations has been addressed through the way in which the functions are exercised: i.e. the procedures followed and whether the decisions are in line with the legal obligations of the organisation stemming from the application of international law and the organisation’s constitution.<sup>21</sup> Furthermore, in this context not only the question of how power is bestowed upon such institutions, but also participation in both decision-making and dispute settlement processes forms an important part of the debate.<sup>22</sup>

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<sup>17</sup> The Economist Intelligence Unit’s Democracy Index 2016, available at: <https://infographics.economist.com/2017/DemocracyIndex/>, (last accessed: 8.7.2017).

<sup>18</sup> Nanz, *supra* note 5, pp. 61- 62.

<sup>19</sup> D. Bodansky, ‘The Legitimacy of International Governance: A Looming Challenge for International Environmental Law?’, 93 *American Journal of International Law*, (1999), p.617

<sup>20</sup> d’Aspremont, *supra* note 13, p. 220.

<sup>21</sup> *Ibid.*

<sup>22</sup> N. Matz, ‘Financial Institutions between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environment Facility and Prototype Carbon Fund’, 5 *International Environmental Agreements*, (2005), pp. 271-272.

Contemporary international law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms.<sup>23</sup> The Westphalian model according to which law used to be divided strictly between (internal) state law whose legitimacy rested on the institutionalization of democratic procedures and (external) international law that relied on sovereign consent for legitimate law-making, has partially collapsed in the recent history.<sup>24</sup> Such a two-track model can thus not answer today's questions of the legitimacy and authority of increasingly intrusive global law norms.<sup>25</sup> According to Wheatley, the new model can only be legitimate under the condition that the scope and content of international law norms is subject to the democratic will of all states and more importantly not only considered at the moment of adoption.<sup>26</sup> Wheatley develops his theory based on Habermas' model of deliberative democracy, which presumes an absence of *objective truth* that could determine the 'right policy' and therefore only *political truths* can be established; this should happen through rational discourses grounded in reasoned arguments around what is equally good for all, and where positions are accepted as legitimate only when agreed through un-coerced discussions by those affected by the outcomes and not when they are merely the preference of the majority.<sup>27</sup> With the precondition that all participants have an equal opportunity to exercise influence in the process and have an equal chance of prevailing, the first aim is to convince the others with arguments, however if consensus cannot be reached, the relationship shifts from discourse to bargaining, where compromises are acceptable in principle to all participants.<sup>28</sup> Applying this to the system of governance beyond the state, the laws of the international community of states enjoy democratic legitimacy where agreed through a rational process of diplomatic deliberations in which outcomes are agreed to by all states affected by the relevant international law norms. States may interact through the use of bargaining where each tries to maximise its preferences; rhetoric, where each attempts to persuade others that they should change their positions; and arguing with the aim of achieving a reasoned consensus.<sup>29</sup> The preconditions here are that the participants must have the ability to empathize; share a common

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<sup>23</sup> M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis,' 15 *European Journal of International Law*, (2004), p. 911.

<sup>24</sup> S. Wheatley 'A Democratic Rule of International Law', 22 *European Journal of International Law*, (2011), p. 527.

<sup>25</sup> *Ibid*, p. 527.

<sup>26</sup> *Ibid*.

<sup>27</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, (1996), p.104 in *ibid*, p. 535.

<sup>28</sup> *Ibid*.

<sup>29</sup> T. Risse, 'Let's Argue!': Communicative Action in World Politics', 54 *International Organization* (2000), p. 9.

understanding of the world; a common system of norms and rules perceived as legitimate; must recognize each other as equals and have equal access to the discourse which must also be open to other participants and be public in nature.<sup>30</sup> However the reality is that the differences in power between the actors on the international scene make it impossible to apply this model. Truth-seeking or the formation of rules according to communicative reason is affected by restricting access to the deliberations and by limiting what counts as a good argument.<sup>31</sup> Ideas are presented as automatically carrying more weight if brought forward by more powerful actors which furthermore adjust their arguments based on their interests and thus fail to display the necessary argumentative consistency.<sup>32</sup> As chapters IV and V of this thesis show, the WTO is far from a forum which would provide for utopic bargaining conditions. It is clear that Members of the WTO are not equally powerful in the discussions and do not have an equal chance of prevailing. Essentially even the nature of bargaining is not presented for what it is, as the agendas are advanced mostly under the guise of being ‘beneficial for all’ to enhance perceived legitimacy. Even though the WTO is a Member-driven organization, Members themselves often blame the WTO system itself, not merely other Members for various alleged failures and poor performance, concerning either the negotiations or the DSM.<sup>33</sup>

## **2. Expanding the Legitimacy of Origin**

The expanding reach of international law also means that the general public is directly impacted by it, more so than it has ever been which demands an increased participation of the public itself. The strengthened impact of WTO and its DSM on the policy space of states and their far-reaching influence on the daily lives of citizens of these states, their human rights and the right to development, has brought about an increased attention to the legitimacy of this institution and a call for a meaningful participation of the public to complement the legitimacy of origin currently primarily based on the consent of states.<sup>34</sup> This has shifted the question of WTO’s legitimacy to one which corresponds with the acceptability of the organisation by the extended society.<sup>35</sup> In his recent report on the WTO, the UN Independent

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<sup>30</sup> *Ibid.*

<sup>31</sup> Wheatley, *supra note*, 24, p. 538.

<sup>32</sup> *Ibid.*

<sup>33</sup> S. Cho, *supra note* 15, p. 392.

<sup>34</sup> d’Aspremont, *supra note* 13, p. 224.

<sup>35</sup> S. Charnovitz, ‘Triangulating the World Trade Organization’, 96 *American Journal of International Law*, (2002), pp. 28-29; S. Ostry, ‘The WTO and International Governance’, in K. G. Deutsch and B. Speyer (eds), ‘The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century (Routledge, 2001), pp. 285, 290, 293.

Expert on the Promotion of a Democratic and Equitable International Order, Mr Alfred de Zayas, called for national human rights institutions and civil society organisations to assist in conducting human rights, health and environmental impact assessments of all commercial treaties and disseminate this information amongst the public based on which referendums should then be held.<sup>36</sup> Despite this seemingly good idea, one cannot but question its practicality. How many questions would be put forward to the electorate? Could the electorate ever be truly informed enough to decide on intricate deals or would they instead be presented with an oversimplified in/out decision, bringing potentially more harm than good? Yet, the values of the general public *have to* be taken into account for the WTO to enjoy organisational legitimacy, one way or another.

### **3. Strategic Legitimacy Theory and Relevant Stakeholders**

At an organisational level, legitimacy refers to a process by which an organisation seeks approval or avoidance of sanctions from groups in society.<sup>37</sup> Organisational legitimacy is considered to exist when the activities of the organisation correspond to the norms of acceptable behaviour in the larger societal system of which they are a part: when an actual or even just potential disparity exists between the two there will exist a threat to organisational legitimacy.<sup>38</sup> Legitimacy is an operational resource without which there can be dire consequences for an organisation.<sup>39</sup>

Part of legitimacy theory is examining the relevant stakeholders of an organisation and the resources they control. In a domestic framework the stakeholders of an organisation would be the state, the public, the financial community and the media.<sup>40</sup> There is no equivalent to a government or state providing a general legal framework in the international sphere, so in terms of WTO's stakeholders one can only speak of Member states and perhaps the UN, as a parallel. Apart from that, other stakeholders can be categorised as non-governmental organisations (NGOs), the media and the general public. Thus the WTO has to maintain legitimacy in the eyes of all these stakeholders. The UN as a stakeholder continues to issue development goals for the international community, including the WTO. Unsurprisingly the WTO thus presents itself as working in line with said goals and claims its legitimacy in this

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<sup>36</sup> UN, Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, Human Rights Council, Thirty-third session, A/HRC/33/40, 2016, p. 22, para. 102.

<sup>37</sup> S.E. Kaplan and R.G. Ruland 'Positive Theory, Rationality and Accounting Regulation', 2 *Critical Perspectives on Accounting*, (1991), p. 370.

<sup>38</sup> M. R. Matthews, *Socially Responsible Accounting*, (Chapman & Hall, 1993).

<sup>39</sup> Suchman, *supra note* 3 pp. 575-576.

<sup>40</sup> Hybels, *supra note* 8, p. 244.

regard to avoid any perceived conflict.<sup>41</sup> However one can perceive the UN as an external entity only to a limited extent in the first place, since the Member states of both organisations are essentially the same and the same power structures exist in both. In other words, while WTO's claim to legitimacy is seemingly there to satisfy the UN, a more accurate observation would be that the goals set out by the UN are already formulated in a way not to pose a substantive challenge to WTO's claim to legitimacy in the first place. This is analysed further in the next chapter.

The real challenge rather comes from elsewhere, most notably developing Member states, NGOs, the academia and the general public. It is important to note from the organisational legitimacy theory that legitimacy is a dynamic construct and an organisation can lose its legitimacy if it does not adapt to changing community expectations. The legitimacy of General Agreement on Tariffs and Trade (GATT) was based on its initial Membership and on being in line with the needs of that Membership. With the expansion of the Membership and the transformation into the WTO, the needs of the Membership were not as uniform as before and the affected communities had new expectations and concerns. While from the 23 original contracting parties of the GATT, only 10 were developing countries, the ratio has changed through the years to the point where at the moment more than 70% of the Membership consists of developing countries. Development can fairly be described as the most important and legitimate interest of these countries, thus making it the most important issue for the majority of the WTO Membership.

The organisation has tried to keep up the appearance of its legitimacy with symbolic assurances that all is well and in accordance with everybody's needs, while maintaining the same philosophy as before and merely expanding its reach. There have been only cosmetic changes but no serious rethinking of the system in light of the new Membership and the needs of their economies and communities.

There exists an acknowledgement of a legitimacy gap at the WTO.<sup>42</sup> Legitimacy has been seen as one of the main challenges for the WTO since its creation, generating a great deal of debates and reactions among scholars and politicians alike.<sup>43</sup> Different factors have contributed to this. While representatives of developing Member states claim they have been excluded from vital stages in the decision making processes, representatives of civil society

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<sup>41</sup> See WTO, 'DG Azevêdo presents Ban Ki-Moon with WTO Agreement contributing to UN Development Goals', (10 November 2016), available at: [https://www.wto.org/english/news\\_e/news16\\_e/dgra\\_10nov16\\_e.htm](https://www.wto.org/english/news_e/news16_e/dgra_10nov16_e.htm), (last accessed: 8.7.2017).

<sup>42</sup> d'Aspremont, *supra note* 13, p. 225.

<sup>43</sup> Cho, *supra note*, 15, p. 391.



criticise the organization's lack of consideration of non-state and non-corporate interests in decision making and dispute settlement procedures, thus lacking a genuine legitimacy of origin.<sup>44</sup> Esty describes WTO's lack of legitimacy as linked to the difficult societal acceptance of the institution and its policies.<sup>45</sup> In this sense, the WTO lacks not only the above described legitimacy of origin but the legitimacy of exercise as well. In 2005 the WTO issued a Consultative Report (also known as the Sutherland Report) in an attempt to identify the WTO's institutional challenges inextricably linked to the fundamental question of the legitimacy of WTO as a system, not necessarily as a mere gathering of – at the time – 148 Members. Although the report addressed NGO concerns regarding transparency, it did not pay due attention to the general public, i.e. the actual and potential 'users' of the WTO system.<sup>46</sup> Since then however, there has been a notable effort by the organisation to win over the general public with its elaborate website, public forums and other PR.

#### **4. Justice, Common Good and the Core Values of Humanity**

Similarly to Wheatley, Rousseau linked legitimacy to the will of the people, which is based on a democratic conception, and it is merely a question of what the stakeholders have decided together in their sovereign assembly. On the other hand the 'general will' is an incarceration of the citizens' *common interest* that exists in abstraction of what any of them actually want.<sup>47</sup> According to him, under the right conditions and subject to the right procedures, the legislators will then be led to converge on laws that correspond to the common interest. As UN Secretary-General Kofi Annan observed in the context of the WTO, 'instead of global rules, negotiated by all, in the interest of all, and adhered to by all, there is too much closed-door decision-making, too much protection of special interests, and too many broken promises.'<sup>48</sup> Yet to an extent creating the 'right conditions and procedures' is always utopic. Therefore a shift to a focus on the substance of the rules themselves, and whether they are indeed in the common interest, is necessary for an evaluation of their legitimacy. In this vein, Pogge dismisses propositions that free and competent consent of states to common rules is

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<sup>44</sup> M. Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law', 35 *Journal of World Trade*, (2001), p. 267; D. C. Esty, 'Non-Governmental Organizations and the World Trade Organization: Cooperation, Competition, or Exclusion', 1 *Journal of International Economic Law*, (1998), p. 131.

<sup>45</sup> Esty, *ibid*, p. 124.

<sup>46</sup> Cho, *supra note* 15, p. 391; It should be mentioned that NGOs themselves lack transparency many times and their drives and motives should not in principle be assumed to be noble.

<sup>47</sup> J. J. Rousseau, *The Social Contract*, (Marc Michel Rey, 1762), Book 2, ch.3.

<sup>48</sup> UN, 'In Message to WTO Conference, Secretary-General Calls on Trade Ministers to Address Needs of World's Poorest', available at: <http://www.un.org/press/en/2003/sgsm8859.doc.htm>, (last accessed: 8.7.2017).

the ultimate legitimizing factor.<sup>49</sup> Even though circumstances such as weaker states negotiating under duress, lacking the expertise to work out whether it would be better for them to accept the asymmetrical rules, or to stay outside the agreements, or their bargaining power being negatively affected by historical crimes such as colonialism, are mostly also present – these are not the decisive questions, but rather the fairness or unfairness of the rules themselves when it comes to evaluating them.<sup>50</sup> Regardless of the process according to which they were agreed upon the only morally relevant question about the rules is whether they do wrong to any state which has signed up to them.<sup>51</sup> Posing substantial obstacles to development and exacerbating inequality would present such a ‘wrong’. In this sense Joseph calls for an adjustment of the mechanisms for free trade, which in her opinion have sustained if not created a system of astonishing global inequity,<sup>52</sup> while de Zayas would like to see a WTO, which places people before profits and development before the expansion of monopolies.<sup>53</sup> There is widespread concern and considerable anxiety about potential harmful effects of globalisation on several issues from jobs and wages in the developed world to the global and local ecosystems and the impact on world poverty and hunger, the livelihood of hundreds of millions of small farmers and the economic development of developing countries.<sup>54</sup> In the 90s and 2000s many people expressed their dissatisfaction with and the rejection of economic globalisation and international trade through large and often violent street demonstrations in Seattle, Prague, Montreal, Cancun, Washington, Hong Kong, Geneva, Genoa, Zurich and other cities around the world. Even though one cannot see such protests very often anymore, the debate on the benefits and dangers of economic liberalisation and international trade is more relevant than ever in light of reoccurring economic crises and growing inequality.<sup>55</sup> Rodrik claims that it was the anti-globalisation protesters who may have had only limited success in blocking world trade negotiations or disrupting the meetings of the International Monetary Fund (IMF) that have nevertheless irrevocably altered the terms of the debate: ‘Poverty is now *the* defining issue for both sides. The captains of the world economy have conceded that progress in international trade and finance has to be measured against the yardsticks of poverty alleviation and sustainable

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<sup>49</sup> Pogge, *supra* note 42, p. 22.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> S. Joseph, *Blame it on the WTO: A Human Rights Critique*, (Oxford University Press, 2011), p. 169.

<sup>53</sup> UN Report, *supra* note 36, p. 14, para. 62.

<sup>54</sup> P. Van den Bossche, V. Zdouc, 3<sup>rd</sup> edn., *The Law and Policy of the World Trading System*, (Cambridge University Press, 2013), p. 14.

<sup>55</sup> *Ibid.*, p. 14.

development.<sup>56</sup> As Lester et al. describe, it is safe to say that most people would like to see throughout the developing world countries to develop, ‘that is, go from being poor to rich (generally speaking, through industrialisation).’<sup>57</sup> In other words, development throughout the globe and not just in affluent countries can be identified as a common interest and one of the core values of the general public.

## **5. Adherence to a Normative Hierarchy and Community**

Professor Hart has been one of the main critics of the international system and what he saw as its lack of a ‘unifying rule of recognition specifying ‘sources’ of law and providing general criteria for the identification of its rules.’<sup>58</sup> He wished to see something equivalent to a constitution which would be the ultimate set of rules against which the validity of all other rules would be tested. In his book *Politics*, Aristotle gave one of the first descriptions of legitimacy.<sup>59</sup> One of the main elements he elaborated on was constitutionalism, whereby the authority of government derives from and is limited by a body of higher/fundamental law for the protection of interests of citizens, including minorities. What Franck rightly points out, however, is that the UN Charter does present one of the most obvious such ‘rules of recognition’ and that states perceive themselves to be participants in a structured process of continual interaction that is governed by such ‘secondary rules’:

If the international community were merely a playing field of which states engaged in various random, or opportunistic, exchanges or interactions, it would be easy to conclude that this was a truly primitive aggregation, a rabble, lacking the organizing structure of secondary rules of process and, of course, an ultimate secondary rule... The international community, however, is demonstrably not like that.<sup>60</sup>

If the UN Charter is indeed such a rule of recognition comparable to constitutions in the domestic system, then it does not merely determine procedural rules but should also impact them substantively. All international organisations, including the WTO need to conform to the UN Charter which includes setting out an agenda which does not hinder the achievement of human rights and development.<sup>61</sup> The Charter contains the pledge of all UN Members to take joined and separate action in cooperation with the UN to promote ‘higher standards of living, full employment, and conditions of economic and social progress and development’ ‘[w]ith a view to the creation of conditions of stability and well-being which are necessary

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<sup>56</sup> D. Rodrik ‘Globalization for Whom?’, *Harvard Magazine*, (2002), p. 29.

<sup>57</sup> Lester, S. et al., *World Trade Law: Text, Materials and Commentary*, 2<sup>nd</sup> ed., (Hart Publishers, 2012), p. 26.

<sup>58</sup> H. L. A. Hart, *The Concept of Law*, (Clarendon Press, 1961), p. 209.

<sup>59</sup> Zeldritch, *supra note* 4, p. 41.

<sup>60</sup> T. M. Franck, ‘Legitimacy in the International System’, 82 *American Journal of International Law*, (1988) p. 755.

<sup>61</sup> UN Report, *supra note* 36, p. 17, paras. 73-74.

for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.<sup>62</sup>

Economic development further presents one of the main components of the international environmental agenda. The notion of sustainable development started to emerge in the consciousness of the international community after the costs to the environment from industrialisation and over-use of natural resources became ever increasingly apparent. From the very beginning however, the concern for the environment included the concern for the needs of poorer countries.<sup>63</sup> In this sense the landmark document in defining sustainable development, i.e. The Report of the Commission on Environment and Development, entitled *Our Common Future*,<sup>64</sup> calls for policies to take into account the problems related to social and economic development alongside the problems related to environmental degradation in a manner that would enable humanity to meet the needs of the present without compromising the fulfilment of the needs of future generations. It describes the concept of sustainable development in the following way:

The concept of sustainable development [implies] limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But technology and social organization can be both managed and improved to make way for a new era of economic growth... widespread poverty is no longer inevitable. *Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes...*<sup>65</sup>

The need for poverty alleviation is thus not only seen as morally necessary but as an inevitable part of preventing ecological catastrophes. The idea here is that growth and efforts at improving technology should be geared towards a model that does not necessitate the destruction of the environment. More recently, the concern over climate change has stepped into the forefront of international efforts for environmental protection. Several documents, dealing with this issue also recognize the connection between tackling climate change and economic development and call for the responses to the danger of global warming to be conducted in a manner that is economically beneficial to the developing country in question. In this sense, the United Nations Framework Convention on Climate Change (UNFCCC) 'specifically recognizes that the problem of climate change cannot be looked at in isolation and that there are close inter-linkages between social economic development and measures to

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<sup>62</sup> UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Arts. 55-56.

<sup>63</sup> Club of Rome, *The Limits of Growth*, (Potomac Associates Books, 1972); Report of the United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, U.N.Doc.A1CONF.48/14/Rev.1, (pmb.) (1972) (Stockholm Report).

<sup>64</sup> Report of the World Commission on Environment and Development, G.A. Res. 42/187, at 46, UN Doc. A/Res/42/187 (Dec. 11, 1987).

<sup>65</sup> *Ibid*, paras. 27-28, emphasis added.

address climate change'.<sup>66</sup> The document further envisions the responses to climate change to be such that they avoid harming social and economic development and are rather integrated with national development programmes taking into account both the legitimate priority of the needs of developing countries for the achievement of sustained economic growth and the fact that economic development is in turn essential for adopting measures to address climate change.<sup>67</sup> The application of new technologies should furthermore be done in a manner that is economically and socially beneficial to the developing country.<sup>68</sup> Similarly the United Nations General Assembly Resolution adopted in 2012 in connection with the Rio+20 Outcome Document *The Future We Want*, in paragraph 3 calls for the mainstreaming of sustainable development at all levels, integrating economic, environmental and social aspects and recognising their interlinkages, so as to achieve sustainable development in all its dimensions.<sup>69</sup> In paragraph 4 it furthermore states that: 'We recognize poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development. We also reaffirm the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting the integrated and sustainable management of natural resources and ecosystems that supports, inter alia, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.' Therefore the concept of sustainable development and environmental agreements such as the above mentioned, clearly recognise the link between the protection of the environment and poverty eradication.

## **6. Development as the Enabler of a Progressive Realisation of all Human Rights**

The additional importance of the international system, including the WTO to work towards the respect of the opportunity to develop is the nature of development as the enabler of the progressive realisation of all human rights. The relationship between human rights, especially economic and social rights, and development is not hard to grasp. The first cannot sustainably

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<sup>66</sup> United Nations Framework Convention on Climate Change, done at New York, 9 May 1992, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

<sup>67</sup> *Ibid*, 21st-22nd recital of the Preamble.

<sup>68</sup> *Ibid*, Arts. 3-4.

<sup>69</sup> UN General Assembly Resolution A/RES/66/288 (adopted on 27 July 2012) ("Rio+20 Document: The Future We Want").

grow in meaning or sometimes even exist without the latter. Eleanor Roosevelt recognised this and wrote in one of her columns about the talks in the Human Rights Commission preparing the first draft of an international bill of human rights on the inevitable relationship between a progressive conception of a freedom from want and the opportunity for development:

In the various proposed bills which have been sent in to us, we have listed the right to food, to shelter, to medical care, to health, to education, and a number of other similar rights, which all really are covered by the general term "freedom from want." ... The representative from the United Kingdom is very much troubled by the fact that, while you can write a bill of human rights, it will mean nothing to various parts of the world where people are still in a state which will not allow them to enjoy many of these rights. It is quite obvious that the people of Borneo do not have exactly the same conception of rights and freedoms as do the people of New York City or London.

Therefore, we will have to bear in mind that we are writing a bill of rights for the world, and that one of the most important rights is the opportunity for development. As people grasp that opportunity, they can also demand new rights if these are broadly defined.<sup>70</sup>

Most Member states of the WTO are parties to universal and regional human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights. The principle of *pacta sunt servanda* requires these States to fulfil their human rights treaty obligations in good faith and prohibits them from entering into agreements that would delay, circumvent, undermine or make impossible the fulfilment of their human rights treaty obligations, which includes the right to self-determination, to freely determine their political status and freely pursue their economic, social and cultural development. The regional human rights systems, the convention for the Protection of Human Rights and Fundamental Freedoms (Arts. 5, 6, 8 to 11, 13 and 14) the European Social Charter, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights establish binding obligations that require proactive measures of implementation and affirmative action to counteract engrained inequalities and the sequels of colonialism and discrimination. In this vein three UN experts have called for human rights obligations to be reaffirmed in the context of global trade rules to ensure that 'WTO negotiations and rules support development efforts to eliminate the *root causes* of hunger, ill-health, and poverty.'<sup>71</sup> In this sense, to this day, proponents of the right to

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<sup>70</sup> E. Roosevelt, *My Day*, 6 February 1947, available at: <https://www.gwu.edu/~erpapers/myday/displaydoc.cfm?v=1947&f=md000567>, (last accessed 22.8.2016).

<sup>71</sup> UN, Human Rights Office of the High Commissioner, 'UN Experts Urge Negotiators to Deliver on Doha Commitments at the Nairobi Conference', available at: [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=1870&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=1870&LangID=E), (last accessed: 8.7.2017), emphasis added.

development assert not merely its relevance but also its primacy.<sup>72</sup> Fukuda-Parr contends that the RTD remains ‘highly relevant to the real and concrete challenges to human rights in an increasingly integrated and unequal world of the twenty-first century’ and its claim to a socially just economic system is even more important now than ever, as globalization proceeds at a rapid pace.<sup>73</sup> In terms of ensuring a progressive realisation of economic, social and cultural rights, States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) bear the responsibility of providing for it. If they lack national resources for such a progressive realisation they ‘have an obligation to seek international cooperation and assistance.’<sup>74</sup> This was indicated by the Committee on Economic, Social and Cultural Rights in reference to the right to just and favourable conditions of work<sup>75</sup> in addition to the many references to international cooperation and/or assistance incorporated in nearly all of its General Comments.<sup>76</sup> Since development is a prerequisite for such a progressive realisation of rights, this would inevitably imply a duty on the part of developing countries to demand a more pro-developmental international economic order as well as a duty of those developed countries that have signed up to the ICESCR to sincerely cooperate in this regard. In other words, human rights obligations give additional weight to a demand for an international economic system which is constructive to developmental needs of poorer countries.

## **7. Right to Development as Part of the WTO**

Based on the analysis of this thesis, the present author advocates for the incorporation of the right to development into the WTO system as a constitutional norm and as part of the legitimate interests which can be protected using exceptions to general rules to contribute to the legitimacy of the organisation and to further address the current deficiencies surrounding the recognition and enforcement of the RTD in international law.

There is cause and space to revitalize the RTD in international law beyond existing international law instruments. Developed countries have refused to recognise development as

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<sup>72</sup> N. Pillay, foreword in UN, Office of the High Commissioner for Human Rights, *Realizing the Right to Development, essays in commemoration of 25 years of the United Nations Declaration on the Right to Development*, (United Nations, 2013), pp. iii-v.

<sup>73</sup> S. Fukuda-Parr, ‘The Right to Development: Reframing a New Discourse for the Twenty-First Century’, 79 *Social Research*, (2012), p. 840.

<sup>74</sup> UN, Committee on Economic, Social and Cultural Rights, ‘General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Art. 7 of the International Covenant on Economic, Social and Cultural Rights)’, UN Doc. E/C.12/GC/23, 27 April 2016, para. 52.

<sup>75</sup> *Ibid.*

<sup>76</sup> Since 1989, the Committee on Economic, Social and Cultural Rights has adopted 23 General Comments and only four of these lack references to international cooperation or assistance.

a right, mainly to avoid any obligations on their part or changes in the mechanism of global trade and finance that are, in fact, central to the ability of developing states to enforce it.<sup>77</sup> When the Declaration on the Right to Development (DRTD) was voted on, it quite unsurprisingly received a negative vote from the US. This was the only negative vote, however eight other developed countries abstained, namely the UK, Western Germany, Iceland, Israel, Finland, Sweden and Japan. The US, and several other Western countries objected to the notion of a RTD on the grounds that it failed to give due attention to economic liberties and entrepreneurship, that it was related to questionable economic and social rights, and that it was conceptually confusing and conflicted jurisdictionally with trade and other international issues.<sup>78</sup> In other words, while developed countries continuously speak of their commitment to development they were reluctant to formally accept it as a legally binding right since that would shift the power from developed to developing countries in setting the international agenda for development. In December of 2016, the Declaration celebrated 30 years of existence. Since being adopted, it has further been reaffirmed in several international documents and fora, including at the World Conference on Human Rights in 1993, which resulted in the Vienna Declaration and Programme of Action containing more than ten references to the RTD and/or the DRTD.<sup>79</sup> In the same year, the UN General Assembly established the post of High Commissioner for Human Rights, tasked among other things with promoting and protecting ‘the realization of the right to development’, and the Preamble to the Resolution reaffirmed ‘that the right to development is a universal and inalienable right which is a fundamental part of the rights of the human person.’<sup>80</sup> The Office of the High Commissioner has since created and serviced many bodies, such as various Intergovernmental Working Groups on the Right to Development,<sup>81</sup> a UN Independent Expert on the Right to Development<sup>82</sup> and a High-level Task Force on the Implementation of the Right to Development (2004-2010).<sup>83</sup> The Millennium Development Goals (MDGs) adopted at the 2000 UN Millennium Summit further pledged the realization of the RTD in a

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<sup>77</sup> B. Ibhawoh, ‘The Right to Development: The Politics and Polemics of Power and Resistance’, 33 *Human Rights Quarterly* (2011), p. 79.

<sup>78</sup> S. Marks, ‘The Human Right to Development: Between Rhetoric and Reality’, 17 *Harvard Human Rights Journal*, (2004), p. 143.

<sup>79</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993.

<sup>80</sup> UN, High Commissioner for the promotion and protection of all human rights, UN Doc. A/RES/48/141, 20 December 1993.

<sup>81</sup> See UN, Development is a Human Right, available at: <http://www.ohchr.org/EN/Issues/Development/Pages/Documents.aspx>, (last accessed: 8.7.2017).

<sup>82</sup> Appointed by the Commission on Human Rights, held by Arjun K. Sengupta from India between 1999 and 2004. See <http://www.ohchr.org/EN/Issues/Poverty/Pages/ASengupta.aspx> (last accessed: 8.7.2017).

<sup>83</sup> UN, *supra* note 81.



commitment ‘to make the right to development a reality for everyone and to freeing the entire human race from want’.<sup>84</sup> Following this, the Monterrey Consensus, resulting from the International Conference on Finance and Development, emphasised the commitment on the part of the international community to support the development efforts of developing countries through international cooperation.<sup>85</sup> In 2015, at the Addis Ababa Third International Conference on Finance for Development, a ‘strong political commitment’ was confirmed to create an enabling environment for sustainable development at all levels in the spirit of global partnership and solidarity.<sup>86</sup> Most recently the so-called Sustainable Development Goals (SDGs) have been endorsed in a UN General Assembly Resolution, which judging by its predecessor the MDGs have the potential to generate enormous momentum. Despite the evolution and continued relevance of the concept of the RTD its implementation and operationalization has been hindered a great deal by political controversy and considerations, especially in the context of international trade arrangements. This thesis thus finds the necessity of creating additional normative frameworks to improve the operationalization of the RTD, especially in its dimension of ensuring a just international economic system in the sphere of trade.

The next section looks at the historical evolution, nature and substance of the RTD and highlights where the current legal framework is insufficient and why incorporating the RTD into the WTO system would have the potential of drastically improving its enforceability.<sup>87</sup> In chapter III special consideration is given to the Sustainable Development Goals, the fulfilment of which according to Khor, ‘would go a long way to realizing the right to development’ yet acknowledging at the same time that ‘there are limitations to the set of SDGs and to the SDG approach.’<sup>88</sup> The African example of an enforceable RTD is highlighted as a model which needs to spread from its regional basis to the international system. In the context of trade, the WTO is the natural candidate for the RTD to be incorporated in its legal system and thus ensure its enforceability. In fact the Human Rights Council recently appointed a Special Rapporteur on the RTD, mandated with engaging and

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<sup>84</sup> UN General Assembly, ‘United Nations Millennium Declaration’, UN Doc. A/RES/55/2, 18 September 2000.

<sup>85</sup> Report of the Secretary-General, ‘Outcome of the International Conference on Financing for Development’, UN Doc. A/57/344, (23 August 2002).

<sup>86</sup> Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13-16 July 2015), endorsed by the General Assembly in its Resolution 69/313, adopted on 27 July 2015 and published in UN Doc. A/RES/69/313, 17 August 2015, para. 1.

<sup>87</sup> K. Arts and A. Tamo, ‘The Right to Development in International Law: New Momentum Thirty Years Down the Line?’, 63 *Netherlands International Law Review*, (2016).

<sup>88</sup> South Centre, ‘The Right to Development at 30: Looking Back and Forward’, *South News*, no. 107, 17 June 2016, available at: <http://us5.campaign-archive2.com/?u=fa9cf38799136b5660f367ba6&id=3a9a00a980>, (last accessed: 8.7.2017), p. 6.

supporting efforts to mainstream the right to development in trade institutions, among other bodies and agencies.<sup>89</sup>

The WTO does not deny its responsibility in ensuring the RTD. In fact not only in its Preamble, but throughout its publications and press releases, the WTO intensively nurtures the image of pursuing an agenda which is essentially aligned with the development of its poorest Members. In the lead up to the final formulation of the SDGs, the Director General issued a statement expressing his own conviction as well as that of the WTO and the United Nations Conference on Trade and Development (UNCTAD) that trade was one of the key enablers of inclusive and sustainable development and concluded that it therefore had to play a central role in the context of the Post-2015 Development Agenda.<sup>90</sup> The Director General further pledged to the UN Secretary-General, the WTO's 'full engagement and support in this effort'.<sup>91</sup> Similarly in the context of climate change which is intrinsically linked to development,<sup>92</sup> the Deputy Director-General stated that the two weeks of negotiations leading up to the Paris Agreement (COP21) were only the start of a common endeavour in which all stakeholders have to contribute, including the international trade community. He further expressed the need to create a virtuous circle of trade and environmental policies which promote sustainable production and consumption while being pro-growth and development.<sup>93</sup> After the last WTO Ministerial, the Director-General solemnly presented the Agreement reached to the Secretary-General of the UN as 'a collective and historic contribution to delivering on a key target of the Sustainable Development Goals' and further pointed out a number of other important areas of the SDGs where trade can make a difference that Members have already begun discussing.<sup>94</sup> On the link between UN Development Goals and the WTO he stated:

Trade was vital in meeting the Millennium Development Goal to cut extreme poverty by half. I have no doubt that trade will be just as important in delivering the new Sustainable Development Goals.

Thus it is undisputed that the regulation of trade should contribute to and not hinder the potential for sustainable development and poverty alleviation. That being said, there is plenty

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<sup>89</sup> UN, Human Rights Council, 'Resolution on the Right to Development', UN Doc. A/HRC/33/L.29, (Sept. 27, 2016), para. 14 (c).

<sup>90</sup> WTO, 'Trade Must Play a Central Role in post-2015 International Work on Development, Azevêdo tells UNCTAD meeting' (4 April 2014), available at: [https://www.wto.org/english/news\\_e/spra\\_e/spra13\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra13_e.htm), (last accessed: 8.7.2017).

<sup>91</sup> *Ibid.*

<sup>92</sup> This is despite a notable lack of mention of this fact in the UNDRTD.

<sup>93</sup> WTO, 'Deputy Directors-General DDG Brauner urges trade community to build on COP21 momentum and support climate action,' (9 December 2015), available at: [https://www.wto.org/english/news\\_e/news15\\_e/ddgra\\_09dec15\\_e.htm](https://www.wto.org/english/news_e/news15_e/ddgra_09dec15_e.htm), (last accessed: 8.7.2017).

<sup>94</sup> WTO, *supra note* 41.

of dispute regarding the way trade should or should not be regulated in order to provide potential for development as discussed in chapter III. Furthermore the exact nature of the obligations involved and of the modes of implementation of the RTD as envisioned in the DRTD have been the subject of intense debate for at least the last thirty years.<sup>95</sup> This has enabled the discourse to sway away from a large part of the RTDs originally intended meaning and there is need to bring it back to its roots.

## **8. Right to Development as a Tool to Transform International Economic Relations**

The concept of a RTD is unsurprisingly of developing country (particularly African) origin. A look at the conceptual roots of the RTD gives us an insight into what its intended nature was before its meaning became diluted in the international discourse. One of the first instances of its mention was at the Conference of the Group of 77 by the Minister of Foreign Affairs of Senegal:

[t]he old colonial past, of which the present is merely an extension, should be denounced. In favour of a new right. Just as, in the developed nations, the right to education, health, employment has been proclaimed for individuals, we must proclaim, loud and clear, the right to development for the nations of the Third World.<sup>96</sup>

The call here was clear: the only way for real self-determination is to resist colonialism, neo-colonialism and their negative effects, by demanding the right to move away from them in a meaningful manner. Not long after, in 1969, Cardinal Duval, Archbishop of Algiers also declared that:

the right to development should be proclaimed for the Third World... as a right of peoples of a social, subjective kind, entailing the recognition and implementation of objective rules in the domain of public international law<sup>97</sup>

The Cardinal rightly pointed out the gist of the matter: to move away from politics into an objective determination of international law rules which would take into account the needs of development. The inclusion of the RTD into the WTO legal system as proposed in this thesis would seek to bring such objectivity into the currently highly politicised international trade law. In the 1960s and 1970s the discourse among the RTD proponents, perhaps the most significant of whom was Senegalese Jurist Kéba M'Baye, linked the right mainly with

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<sup>95</sup> K. Arts and A. Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?', 63 *Netherlands International Law Review*, (2016), p. 224.

<sup>96</sup> D. Thiam, 'L'Afrique demande un droit international [d'un] nouveau', 1 *Verfassung und Recht in Übersee* (1968), p. 54.

<sup>97</sup> Broadcast New Year wishes; for the full text of this message, see 'Justice and Peace' Commission of Algeria, 'Le droit des peuples sous développés au développement au droit des homes et des communautés à être soi, non seulement par soi, mais aussi par les autres', in R.-J. Dupuy (ed.), *The Right to Development at the International Level*, Workshop, 16-18 October 1979, (Sijthoff and Noordhoff, 1980), pp. 217-219; F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, (Martinus Nijhoff Publishers, 2003), p. 298.

the longstanding demands of the New International Economic Order (NIEO), where the emphasis was on the obligations of the international community rather than those of states.<sup>98</sup> The debate revolved around ‘the lack of democracy at the international level and the resulting concentration of economic and political power of the North; the rigged rules of the system which worked against developing countries; the precarious condition of self-determination in developing countries; the lack of effective sovereignty over natural resources due to the aggressive interventionist policies of powerful countries; and the prevalence of structural conditions that prevented the state in the developing world from performing a more robust function in economic policy formulation, coordination, and implementation.’<sup>99</sup> In this sense the RTD presents a right of peoples/states against the international order and it envisions a rebalancing of the latter into a more democratic and development friendly system addressing structural injustices and correcting what is wrong in the global economic order and the effects of the asymmetrical relationship between the developed and developing countries.<sup>100</sup> In the same vein, the Charter of Algiers, adopted by the first ministerial meeting of the Group of 77 ‘developing’ countries in 1967 thus stated that the international community has an obligation to rectify unfavourable trends in the economic relationship between developed and developing countries and create conditions under which all nations can enjoy economic and social well-being and have the means to develop their respective resources to enable their peoples to lead a life free from want and fear.<sup>101</sup> They further expressed the fact that the development of developing countries will benefit the developed countries as well,<sup>102</sup> something which gets too often forgotten in the short term profit maximisation considerations, running most of the world economy. When Kéba M’Baye formulated the RTD in terms of a human right as a ‘right of all’<sup>103</sup> and wrote that its subjects were ‘at once individuals, peoples and States’ and when Michel Virally stated that the right to development was an individual right and a right of the peoples, the ambiguity that persists until this day, began.<sup>104</sup> General Assembly Resolutions have even

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<sup>98</sup> Ibhawoh, *supra note* 77, pp. 76-104.

<sup>99</sup> B. Rajagopal, ‘Right to Development and Global Governance: Old and New Challenges Twenty Five Years On’, 35 *Human Rights Quarterly*, (2013), p. 899.

<sup>100</sup> various works by N. G. Villaroman; K. M’Baye, M. Bulajić, S. R. Chowdhury, T. Karimova, G. Abi-Saab, P. Alston, M. Bedjaoui, S. Fukuda-Parr, S. Marks, N. Schrijver, A. Sengupta and many others.

<sup>101</sup> Charter of Algiers, 10-25 October 1967, Part One, Section 3.

<sup>102</sup> *Ibid.*

<sup>103</sup> K. M’Baye ‘Le droit au développement comme un droit de l’homme’, 2-3 *Revue des Droits de l’Homme*, (1972), pp. 514-515, 529, 532.

<sup>104</sup> Ouguergouz, *supra note* 97, p. 299; see also Fukuda-Parr, *supra note* 73, p. 845; Ibhawoh, *supra note* 77, pp. 76-104.

favoured the individual aspect.<sup>105</sup> For example the Declaration on the Right to Development declares:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

The Declaration places the individual as the central subject of development and beneficiary of the RTD. In its Preamble the Declaration further states: development is a comprehensive, economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.<sup>106</sup> The benefits of this approach have been rightly put into question and it has been claimed that proclaiming the RTD as an individual right does not actually add anything to the concept of human rights.<sup>107</sup> The individual dimension here seems to turn the RTD into nothing more than a synthesis of all human rights as already laid down in their respective declarations and instruments, potentially ‘revitalizing’ or ‘enhancing’ them.<sup>108</sup> Indeed, a

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<sup>105</sup> Resolution 34/46, ‘Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms’, adopted on 23 November 1979, para. 8; para. 5 of the Preamble; General Assembly Resolution 35/174 of 15 December 1980, para. 9, in *Study by the Secretary-General, The regional and national dimensions of the right to development as a human right*, United Nations, Doc. E/CN.4/1488, 31 December 1981, p. 10, para. 14; Resolution 6 (XXXVI) of the Commission on Human Rights, para. 2 in *Study by the Secretary-General, The regional and national dimensions of the right to development as a human right*, United Nations, Doc. E/CN.4/1421, 13 November 1980, p. 7, para. 15 in Ouguergouz, *supra note 97*, p. 301.

<sup>106</sup> UN General Assembly, Declaration on the Right to Development (A/RES/41/128) 1986, Preamble.

<sup>107</sup> On the limits of this concept, see the analysis by G. Abi-Saab, ‘The Legal Formulation of a Right to Development (Subjects and Content)’, in Dupuy, *supra note 97*, pp. 162-164.

<sup>108</sup> Ouguergouz, *supra note 97*, pp. 303-304; see also K. Vasak, ‘Pour une troisième génération des droits de l’homme’ in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in honour of Jean Pictet*, (Martinus Nijhoff Publishers, 1984) p. 841; R.-J. Dupuy, ‘Thème et variations sur le droit au développement’ in *Le droit des peuples à disposer d’eux-mêmes – Méthodes d’analyse du droit international – Mélanges offerts à Charles Chaumont*, (Pedone, 1984), pp. 275, 276; see also P. Alston, who more explicitly states, in connection with Article 11 of the first United Nations Covenant, ‘If considered in isolation it may be possible to enjoy these rights [right to food and right to be free from hunger] by virtue of avoiding starvation or chronic malnutrition. However, if considered in the light of the right to development, the amount and type of food required must be adequate not only for that purpose but also to facilitate the endeavors of the individual to realize his potential’, ‘The Right to Development at the International Level’, in Dupuy, *supra note 97*, p. 108.

question can be posed whether the RTD is at all a ‘human’ right in the classical meaning of the term. As Bedjaoui stresses: ‘the right to development *can not* be a human, that is an individual right, unless it is *first* a collective right, whether of the people or the State’.<sup>109</sup> This is not to diminish the ultimate goal of development, which is to enhance the welfare of individuals, but to recognize that as an individual right it cannot create the necessary mechanism for enforcement against the international community.

On the other hand, it is understandable why the potential collapse of the meaning of ‘community’ into the state and the state into the (current) regime has been seen as problematic.<sup>110</sup> Although it is easy to point to individual human rights abuses and undemocratic practices especially when it comes to the treatment of opposition groups or minorities to argue for a more individualistic approach to the RTD, it is equally important to note that a less than perfect human rights record does not automatically imply bad economic policy or a long-term plan against the common good of the population. China is nowadays subject to a lot of criticism for its one party rule, however that party has been implementing an economic plan for the benefit of its population over decades to great success. As Moyn rightly notes:

successes in the socioeconomic domain have hardly been due to the application of a normative framework of human rights, the birth of a formal regime of human rights law, or the mobilizational activism of any human rights movement. In fact, the lion’s share of poverty reduction in the last few decades (indeed, given the population numbers involved, in world history by far) is due to a single factor: the policies of the Chinese state.<sup>111</sup>

Still the focus on the individual in the context of the RTD has received most attention. In this sense Arthur Lewis described development as the enlargement of peoples’ choices. Similarly Amartya Sen and the United Nations Development Programme (UNDP) Human Development Reports built on the theory of capabilities and look at development as a ‘human centred’ process; a comprehensive process, including economic, social, cultural, civil and political dimensions; a process involving participation of people; and a process involving equal opportunities and social justice.<sup>112</sup> These definitions are perhaps helpful in reminding us that the final objective of development is to provide all human beings with the opportunity

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<sup>109</sup> M. Bedjaoui, Reply to M. Torelli, ‘L’apport du nouvel d’ordre économique international au droit international économique’, (Colloque de la S.F.D.I., Nice 1985), *Les Nations Unies et le droit international, International Law on the Eve of the Twenty-first Century. Views from the International Law Commission*, (United Nations Publications, Geneva, 1997, p. 420.

<sup>110</sup> Ibhawoh, *supra* note 38, p. 94.

<sup>111</sup> S. Moyn, ‘A Powerless Companion: Human Rights in the Age of Neoliberalism’, *77 Law and Contemporary Problems*, (2015), p. 162.

<sup>112</sup> S. Fukuda-Parr, *supra* note 73 p. 842.

for a full life and intended to prevent us from getting lost in the intricacies of the means of achieving this objective.<sup>113</sup> However it is exactly through this approach that three essential aspects of the RTD are being neglected, i.e. who should have the power to exercise the RTD in the international economic systems; what are the needs of states to be able to pursue effective economic development; and what economic development even means. Professor Chang points out the danger of the current definitions in diminishing the importance of the traditional view of development as economic transformation, which was the mainstream view on development until about 30 years ago. He describes the notions of development in today's discourse as 'Hamlet without the Prince of Denmark' in other words leaving out 'development' itself. He stresses that historically speaking development in Britain, the US, Germany, Sweden, Japan, Korea, Thailand, Finland etc. meant upgrading the country's productive capabilities and moving into more difficult industries by using protection, export subsidies and many other means of government intervention, much of which is constrained today. The key here was the possession and application of superior knowledge, embodied in technologies and institutions rather than a command over resources or a 'comparative advantage' in low-technology activities.<sup>114</sup> It is therefore important to adopt this understanding of what is economic development when arguing for the inclusion of the RTD in the WTO. Unsurprisingly, most Western countries have been arguing for a basic needs approach (i.e. the prioritization of the achievement of certain economic and social rights) based on the propaganda that capitalism moderated by the distribution of income within the state is central to facilitating development in the South.<sup>115</sup> In other words, human development has served as a 'solution' for the fact that capital and trade flows favour industrially developed countries and do not bring actual development to poorer countries.<sup>116</sup> Furthermore, although the DRTD speaks clearly of a responsibility of states for the creation of international conditions favourable to the realization of the RTD,<sup>117</sup> here again the focus in practice has shifted mainly on states and providing internal national conditions for the realisation of this right. Thus, the rights-based approach has been putting focus almost entirely on state accountability in terms of issues related to corruption and good governance

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<sup>113</sup> P. Streeten, J. S. Burki *et al*, *First Things First: Meeting Basic Human Needs in Developing Countries*, (Oxford University Press, 1981), p. 165.

<sup>114</sup> H.-J. Chang, 'Hamlet without the Prince of Denmark: How Development Has Disappeared from Today's Development Discourse', talk (London School of Economics, 25. 2. 2010) available at: <http://www.youtube.com/watch?v=INpCcb671KI>, (last accessed, 22.8.2016).

<sup>115</sup> Ibhawoh, *supra note* 38, p. 88.

<sup>116</sup> G. Dunkley, *The Free Trade Adventure: the WTO, the Uruguay Round and Globalism - a Critique*, (Zed Books, 2000), p. 118.

<sup>117</sup> Art. 3.

rather than any international obligations, while international processes and agencies play crucial roles in weakening state capacity, undermining democracy and diminishing state authority.<sup>118</sup> Ouguergouz explains succinctly the question of the nature of the RTD in the following words:

Like the right of peoples to self-determination, the right to development inevitably has an individual dimension; yet this stems rather from the purpose of the right than from the way it is exercised.<sup>119</sup>

It is thus imperative when speaking of the integration of the RTD into the WTO, to stress its ‘other’ side, i.e. the responsibility of states for the creation of international conditions favourable to the realization of the RTD as clearly articulated in the DRTD, as well as the Declaration’s recognition that this right does not pertain only to individuals but also communities, nations and regions. The individual can benefit more from this right in the area of legal policy if it is regarded as a collective right.<sup>120</sup> Indeed, to make the right to development a true human right which may be claimed by every individual would be both misleading and illusory.<sup>121</sup> As Manzo has noted, the rights based approach does little to empower either the people or the state.<sup>122</sup>

It is further important not to equate mere GDP growth with genuine economic development. Many African countries have strong GDP growth, however this is unevenly distributed and increases income inequality.<sup>123</sup> This is hardly surprising, since the growth is based mainly on the export of raw materials and not on industrialisation or the transformation of the productive structure. It is thus important to understand that between a mere focus on GDP or a mere focus on human rights lies true economic development, i.e. the transformation of the productive structure into higher technology production with the potential of engaging and lifting larger parts of society out of poverty.<sup>124</sup> One could argue that economic development is the growth of GNP accompanied by the growth of technical and institutional resources with equity and the progressive realisation of human rights as the ultimate goals. At the end of the day it has to be acknowledged that ‘any improvement in those resources improves the

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<sup>118</sup> Ibhawoh, *supra note 77*, p. 98, K. Manzo, ‘Africa in the Rise of Rights-Based Development’, 34 *GeoForum*, (2003), p. 437.

<sup>119</sup> Ouguergouz, *supra note 97*, p. 306.

<sup>120</sup> Abi-Saab, *supra note 107*, pp. 163-164.

<sup>121</sup> R. Pelloux, ‘Vrais et faux droits de l’homme – Problèmes de définition et de classification’, 1 *Revue du Droit Public et de la Science Politique en France et à l’Etranger*, (1981), p. 62.

<sup>122</sup> Manzo, *supra note*, 118, p. 437.

<sup>123</sup> J.E. Stiglitz, M. Doyle, ‘Eliminating Extreme Inequality: A Sustainable Development Goal, 2015-2030’ *Ethics and International Affairs*, (2014), p. 3.

<sup>124</sup> Chang, *supra note 114*.



prospects of realising all the rights and increases the value of their indicators.’<sup>125</sup> Thus the confusion is merely between what is the *necessary* and what is the *sufficient* condition in the relationship. It would be sensible to expect the WTO to work towards enabling its Members to achieve the so-called necessary condition by providing for the enforcement of a right to *economic* development. It would then be a matter of international human rights mechanisms to push for the sufficient condition when necessary.

## 9. Lessons from the African Charter

Contrary to the controversy at the international level, RTD is fully recognized as a legally binding right in the African Charter on Human and Peoples' Rights (African Charter), which states in Art. 22 that

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Importantly, the RTD as postulated in the African Charter might just as well be read as a simple clarification of the right of peoples to self-determination,<sup>126</sup> which is a core principle of international law, arising from *customary* international law. As Bedjaoui has stated ‘[t]he ‘right to development’ flows from [the] right to self-determination and has the *same nature*.’<sup>127</sup> Thus its legitimacy should be of the same nature as well. What is more, the charter clearly envisages that the holders of the right are people, not individuals. Needless to say, however, the power of a right recognized only in a regional human rights instrument is limited to the states parties to that covenant. This is why the recognition of the RTD by the African Charter nevertheless has obvious constraints in that it can have no direct influence on the international economic order, i.e. the essence of the general claim to an RTD. A look at the jurisprudence of the African Commission on the RTD shows this focus, limited to local responsibilities between parties to the Charter and claims made by individual groups against their own state. For example in *Gumne*<sup>128</sup> a group of individuals brought a communication against Cameroon on behalf of the people of Southern Cameroon, claiming that their RTD

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<sup>125</sup> A. Sengupta, A. Negi and M. Basu, (eds.), *Reflections on the Right to Development*, (Sage Publications Pvt. Ltd, 2006), p. 100.

<sup>126</sup> Ouguergouz, *supra note* 97, p. 306.

<sup>127</sup> M. Bedjaoui, ‘The Right to Development’, in M. Bedjaoui (ed.) *International Law: Achievements and Prospects* (UNESCO, Martinus Nijhoff, 1991) p. 1177, 1184.

<sup>128</sup> Comm 266/2003: 26<sup>th</sup> Annual Activity Report of the African Commission, annex IV.

had been violated due to their economic marginalisation through a denial of basic infrastructure.<sup>129</sup>

The Respondent state contested the allegation of economic marginalisation with documents and statistics in support of its provision of basic infrastructure in Southern Cameroon, which showed that for the period 1998 up to 2003/4, the North West and South West provinces, (Southern Cameroon,) were allocated substantially higher budgetary resources, than the Francophone provinces, for the construction, and maintenance of roads, and running of education training institutions. The documents showed that the situation in the Anglophone regions was not that different from other parts of the country and the problem concerning inadequate infrastructural development was not peculiar to Southern Cameroon.<sup>130</sup> The Commission found this convincing and further recognized

the fact that the realisation of the right to development is a big challenge to the Respondent State, as it is for State Parties to the Charter, which are developing countries with scarce resources... The Respondent State is under obligation to invest its resources in the best way possible to attain the progressive realization of the right to development, and other economic, social and cultural rights. This may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances. This alone cannot be a basis for the finding of a violation. The Commission does not find a violation of Article 22.<sup>131</sup>

The above mentioned limitations of an RTD provided for only in a regional human rights instrument can be clearly seen from this case as the state itself is limited in its abilities to provide for its citizens. It is thus the proposition of this thesis that this regional right should be adopted in the international system by being incorporated into the WTO in order to bring enforceability to its external dimension.

## **10. Certainty, Symbolic Validation, Coherence and Compliance Pull**

Before concluding, it is worth revisiting several aspects of Franck's legitimacy theory which are also important for our analysis. Apart from it fitting into the normative hierarchy of the international community, Franck based the legitimacy of an international rule in its clear and determinant meaning, its symbolic validation or authority that it carries; its coherence within a wider pattern of rules by treating like cases alike; and adherence of states to it.<sup>132</sup>

In order to be legitimate a rule has to possess certainty. In that sense, a rule that prohibits the doing of 'bad things' lacks legitimacy because it fails to communicate what exactly is

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<sup>129</sup> *Ibid*, paras. 100, 205.

<sup>130</sup> *Ibid*, para. 158.

<sup>131</sup> *Ibid*, para. 206.

<sup>132</sup> T. M. Franck, *Fairness in International Law and Institutions*, (Clarendon Press, 1995), pp. 30-42.

expected.<sup>133</sup> Franck observes that '[i]f a norm is full of loopholes, there is little incentive to impose on oneself obligations that others can evade easily' and furthermore that 'some rules are [intentionally] written with low determinacy so that noncompliance will be easy.'<sup>134</sup> This claim to a lack of legitimacy can be easily applied to the bulk of special and differential treatment (SDT) provisions included within the WTO agreements which are full of hortatory language and uncertain obligations, rendering them inoperative in large part. This is important to recognise, when witnessing the lack of effectiveness of SDT provisions (see analysis in chapter IV).

Another aspect of importance in Franck's analysis of legitimacy generally is symbolic validation, which does not relate so much to content but to the authority of a rule or the originator of a rule.<sup>135</sup> These are questions of ritual and pedigree (i.e. flags, anthems, supernatural or successive legitimacy, etc.)<sup>136</sup> In Franck's opinion the international society is underendowed with such symbolic validation, however he sees as an example the creation of supranational agencies such as the United Nations Development Programme (UNDP), the World Bank, the World Health Organisation (WHO), the Food and Agriculture Organisation (FAO) and the UN International Children's Emergency Fund which are purportedly created to distribute benefits to the deserving and needy, either in tandem or in competition with the unilateral donations still given by one country to another.<sup>137</sup> He sees these agencies as symbolically multilateralized as they could function with only the 12 to 16 chief industrial nations as members since they contribute almost all of the working capital.<sup>138</sup> This symbolic multilateralization is there to 'direct gratitude to the agency, instead of bitterness' as it is a symbolic representation of confluence between sovereignty and interdependence that holds together the 'community' of states.<sup>139</sup> A critical look at this 'symbolic multilateralization' could however reveal that it can serve to mask the fact that these organisations are run by the powerful to fit the agenda of the powerful and thus again only provide a 'perceived legitimacy'. Especially in the case of the World Bank, its intentions have been proven time and again as less than noble when it comes to conditionalities put on the receiving countries. The standards of symbolic validation and pedigreeing have to be applied coherently, thus the symbolic equality of states is expressed through the same amount of ritual acts when

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<sup>133</sup> Franck, *supra note* 60, p. 716.

<sup>134</sup> *Ibid.*, pp. 717-718.

<sup>135</sup> *Ibid.*, p. 725.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*, p. 730.

<sup>138</sup> *Ibid.*, p. 729.

<sup>139</sup> *Ibid.*, p. 730.

validating a government or state. This purports to restrict what powerful states legitimately may do with their advantage over the weak. Franck explains this as ‘[a] cue that prompts the Soviets, however reluctantly, to do a lot of explaining when they invade Afghanistan’. One could add that it also prompts the US to routinely fabricate evidence against adversary governments before invading their countries either directly or through its mercenaries and forcing regime change. Still the superficial nature or indeed the mere symbolic nature of the equality of states requires little more than basic propaganda to convince the domestic public and proceed to rule as the hegemon pleases. This author strongly disagrees with Franck’s observation that ‘[s]ymbolic equality... both affirms and reinforces real equality.’<sup>140</sup> It does no such thing but merely creates an illusion to distract the public from the reality. While observing substantial amounts of symbolic legitimacy in the WTO – mainly through the illusion that all Members contribute equally to rulemaking or have an equal chance at the dispute settlement as well as the purported strive for the development of poorer Members – this author does not accept that this in itself can bring legitimacy. Furthermore once the real power structure and its effects on the processes and rules are exposed to the general public, the symbolic legitimacy evaporates and a call for substantive legitimacy replaces it.

Coherence as an essential part of Franck’s legitimacy test does not simply mean the same rules for everyone but ‘mandates a connectedness between various component parts of a rule or code; between several applications of a rule in various instances; and between the general principles underlying a rule’s application and those implicated in other rules.’<sup>141</sup> To illustrate his point, he gives the example of a SDT within the world trading regime. He notes that the most favored nation (MFN) provision is the most basic provision of the GATT (now WTO) and it would therefore seem that applying it consistently in practice would constitute coherence and therefore legitimacy. Yet as he explains it has become evident that the MFN provision, if applied consistently to all nations, would undermine rather than advance GATT’s *underlying purpose*’ by diminishing the trade prospects of the less-developed Member countries.<sup>142</sup> Thus the introduction of the Generalized System of Preferences (GSP) which allows developed states temporarily to permit preferential access to products of only some states, particularly the least developed, does not present a loss of coherence nor legitimacy.<sup>143</sup>

On the contrary, while GSP is inconsistent with MFN, it coheres with the underlying purpose of GATT, which is to increase trade for all nations. It thus advances *the real* objectives of GATT. Also, it establishes a standard for distinction between the members to whom MFN is applicable and those temporarily benefited by GSP. That standard connects coherently with boundaries commonly used in other sets of regulations to demarcate coverage. Redistributive principles such as those which underline GSP are commonplace in the international rule system and justify distinctions that, although creating superficial inconsistencies within rules and the application checkerboarding, in other words, is redeemed

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<sup>140</sup> *Ibid*, p. 736.

<sup>141</sup> *Ibid*, p. 750.

<sup>142</sup> *Ibid*, p. 750, emphasis added.

<sup>143</sup> *Ibid*.

by being seen as based on a principle that both is consistent with the real intent of the specific rule and connects with that skein of principles integrating various other rules of the international system.<sup>144</sup>

In this sense Franck's theory is superior to that of Rousseau who advocated for the rules based on the 'general will' to be applied without discrimination and thus failed to take into account the diversity of stakeholders and the fact that the impact of the laws will be different for everyone based on a diversity of lifestyles and the degree of economic inequality between them.<sup>145</sup> Coherence, and thus legitimacy must be understood in part as defined by factors derived from a notion of community. They preclude caprice when they are applied consistently or, if inconsistently applied, *when they make distinctions based on underlying general principles that connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system.*<sup>146</sup>

This part of Franck's analysis is very important for the present thesis as it not only invites an examination of whether the GSP and other SDT treatment provisions are really bringing more trade to the less developed countries and generally taking into account their specific needs, but also an examination of other rules within the system to the extent that they go against the *underlying purposes* of the GATT/WTO, which are not only the increase of trade for all nations, but also sustainable development and the raising of living standards around the world. If the provisions do not work towards said underlying purposes, a readjustment of the system based on these principles is merited to give it more legitimacy. This is what the thesis ultimately proposes.

## **Conclusion**

Several aspects of legitimacy theory have been examined to form the basis of the subsequent analysis of WTO's legitimacy. Apart from the more general question of justness, morality and fairness, most relevant aspects to consider are whether the organisation upholds the values of its most important stakeholders, whether its rules and policies fit within the norms and purported goals of the general international order and whether its agenda setting and rulemaking processes uphold democratic principles. The subsequent analysis conducted in this study thus looks at historical and current processes which are essential in the rule and policy making of the institution to expose its democracy gap. This in turn leads to an analysis of the rules themselves evaluated against what has been identified in this analysis as the main

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<sup>144</sup> *Ibid.*

<sup>145</sup> J. J. Rousseau, *supra note 47*.

<sup>146</sup> *Ibid.*

benchmark for legitimacy of the WTO, i.e. the impact on economic development of its poorer Members. Apart from development being a core value of humanity and the main demand by the general public in terms of the WTO, it is also a purported core value of the international system, being spelled out as a goal for the international community in the UN Charter and several international documents since. Furthermore, the legitimacy of pursuing economic development is based on the same moral premises as the pursuit of human rights protection, self-determination and the right to resist economic oppression. Yet the right to development as it currently stands in national and international law suffers from enforceability issues, especially in its external aspects. Despite it emerging mainly from a call for a more equitable international economic system it is at present powerless at the relevant institutions, including the WTO. This study thus seeks to incorporate said right into the WTO to address its legitimacy gap. The analysis furthermore exposeses what can be rightly called WTO's merely perceived legitimacy created through propaganda and designed to distract from the real legitimacy gap.

# Chapter I

## GENERAL INTRODUCTION

Trade is the oldest and most important economic nexus among nations and alongside war has been central to the evolution of international relations.<sup>1</sup> It has also been the reason for countless wars. In the words of Woodrow Wilson for example, World War I was ‘a commercial and industrial war. It was not a political war’.<sup>2</sup> And it was a war in which ‘Britain had destroyed a trade rival’.<sup>3</sup> It is also true that ‘[b]attles can be won with bayonets, but the result of war is decided by economics’.<sup>4</sup> One should never underestimate the power of economic interests and how they shape the world which we live in. Although the language changes, the essence of the underlying policies aimed to serve these interests has remained the same for hundreds of years.

The neoliberal agenda of free trade today, has been advanced under the guise of promoting peace and benefits for all, however from the very beginning the old mercantilist desire to open foreign markets to exports of surpluses and assure cheap imports of raw materials from them, has never been far from the surface.<sup>5</sup> Furthermore the World Trade Organisation (WTO) and its predecessor the General Agreement on Tariffs and Trade (GATT) have served to provide perceived legitimacy to what is essentially a selfish and systematic pursuit of rich countries’ interests, largely with disregard, or at the expense of poorer countries and their ability to develop. Rules created in this setting are shaped by power and wrapped in deceitful propaganda. They are then enforced through ‘voluntary’ observance or through the dispute settlement mechanism, sometimes to the benefit of developing countries, but many times against them and against their efforts at achieving economic development. This study will show why the organisation, being merely a forum for bargaining and the enforcement of the results of such bargaining, in essence lacks a mechanism for providing equal protection of its Members’ interests, especially the right to development. Furthermore to borrow Gramsci’s expression ‘cultural hegemony’ or Nye’s description of so-called ‘soft power’, the agenda of

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<sup>1</sup> R. Gilpin, *The Political Economy of International Relations*, (Princeton University Press, 1987), p. 171.

<sup>2</sup> Quote attributed to Woodrow Wilson in 1919, in B. Alexander, *How America Got it Right: The US March to Military and Political Supremacy*, (Three Rivers Press, 2005), p. 80.

<sup>3</sup> *Ibid*, p. 80.

<sup>4</sup> Quote attributed to Frederick the Great, in A. Christelton, ‘Economic Background of the Anglo-Spanish War of 1762’, 18 *Journal of Modern History*, (1946), p. 22.

<sup>5</sup> A. Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order*, (Oxford University Press, 2011), p. 25.

the powerful is not pursued merely through political and economic coercion, but also ideologically.<sup>6</sup> Economic theories, such as that of free trade and comparative advantage or the theories purporting developmental benefits of strong intellectual property protection are used for this purpose. Through such propaganda certain norms which may well work against development, are eventually accepted as the ‘common values’ of all, *ab initio* limiting the discourse at the negotiations and the frontiers of possible reform. Despite development being a purported goal of the system, there is at the moment no mechanism which can provide meaningful protection of developmental interests of Member states beyond what developing countries can manage to secure in this highly unequal game of bargaining and ideological persuasion. Nevertheless, the WTO claims that ‘development is a core aim – and a main accomplishment – of much of what the WTO does.’<sup>7</sup> This thesis aims to reveal the fallacy of this statement through an analysis of several aspects of this organisation. Considering the right to economic development as an essential right and a prerequisite for the long term attainment of all other human rights, this author further links the lack of its protection at the WTO with a claim of the illegitimacy of the organisation, especially in light of the latter’s purported pursuit of sustainable development.

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Generally speaking, norms of international law are legitimised through the procedural requirements of the consent of states laid down in treaties or customary law. There are 162 Members of the WTO and it represents more than 97% of world trade. This provides the advocates of the current system with the argument, that all Member states joined the system voluntarily, which is proof that they agree with its aims and goals, rendering the latter legitimate. However, as Stiglitz points out, there is a difference between individual and group actions:

Given that other developing countries had agreed to sign, it might pay any country that is holding out to sign on; but it is still quite possible that developing countries as a whole (or a subgroup of these countries) would be better off if they, as a group, had not signed. (The prisoners’ dilemma arises not only in the case of prisoners, but also in the case of poor countries engaged in bargaining with the rich.)<sup>8</sup>

Yet the question of whether developing countries as a whole would have been better off outside the system is not the only or the ultimate question when evaluating the current model. Rather it can be recognised that it is quite possible that in several of its aspects the

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<sup>6</sup> A. Gramsci, *Selections from the Prison Notebooks*, eds. and transl. Q. Hoare and G. Nowell Smith, (ElecBook, 1999), pp. 765-767; J. Nye, *Soft Power: The Means to Success in World Politics*, (Public Affairs, 2004).

<sup>7</sup> World Trade Organization, *The WTO at Twenty: Challenges and Achievements*, (WTO, 2015), p. 9.

<sup>8</sup> J. E. Stiglitz, A. Charlton, *Fair trade for All, How Trade Can Promote Development*, (Oxford University Press, 2007), p. 75.



GATT/WTO system has presented a better option to developing countries than bilateral bargaining and relations when dealing with stronger countries, yet at the same time, the GATT/WTO is not much more than a lesser evil in this respect and is thus just as worthy of severe critique and reform into a more development friendly model, if it is to attain greater legitimacy.

It is further important to recognise the persistent criticisms by developing countries to the way the system and its rules had been set out. Out of the 23 original countries of the GATT, 11 were developing countries, namely Brazil, Burma (Myanmar), China, Ceylon (Sri Lanka), Chile, Cuba, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe), and Syria. It appeared that these signatories believed in the underlying philosophy of the GATT and that all countries could gain from the multilateral trading system if they only identified the sectors in which they had comparative advantage.<sup>9</sup> However already in the 1950s a number of newly independent developing countries who acceded to the GATT challenged the *status quo* and argued that it was not realistic to expect newly independent countries with fragile economies to compete on a level playing field with established industrial countries at that time.<sup>10</sup> Developing countries now make up the vast majority of the WTO Membership and despite raising many objections throughout the several rounds of negotiations and forming alliances between themselves, they nevertheless time and again end up agreeing to more and more rules curtailing available tools necessary for their economic development, while being denied meaningful market access in developed countries. An analysis of processes involved in the rulemaking, however, does not indicate any hope of change in the future. This author suggests that a certain degree of de-politicisation is needed, if the organisation is to meaningfully protect and promote economic development for poorer countries.

First, however, it needs to be acknowledged that what is driving the institution is not a set of economic truths but rather pseudo-science which serves the political ends of the powerful. While political scientists have the occasional fascination with how the law influences relations among states, lawyers seldom give enough attention to the influence of politics on law or even prefer not to acknowledge it at all.<sup>11</sup> It should be obvious that politics sways the

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<sup>9</sup> B. Onguglo, 'Developing Countries and Unilateral Trade Preferences in the New International Trading System,' in M.R. Mendoza., P. Low, and B. Kotschwar (eds.), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Brookings Institution Press, 1999), p. 119.

<sup>10</sup> *Ibid.*

<sup>11</sup> T. Broude, M. L. Busch, and A. Porges (eds.), *The Politics of International Economic Law*, (Cambridge University Press, 2011), preface.

development of international economic law, however this still sounds controversial in a field which has traditionally taken pride in its de-politicization.<sup>12</sup> In the words of one observer:

In contrast to [many]<sup>13</sup> international governmental organizations, the World Trade Organization, as well as its predecessor, the General Agreement on Tariffs and Trade, seems to have managed to keep relatively free from the plague of politicization. It is a business-minded organization fully devoted to its mandate of multilateral trade liberalization and of developing an "integrated, more viable and durable multilateral trading system."<sup>14</sup>

However politicization here refers to a situation where a state or groups of states take actions for purposes which are not related to the goals and functions of that organization, but rather to geopolitical goals and strategies, i.e. 'higher' politics.<sup>15</sup> This does not imply that the GATT and the WTO have been free from politics altogether and the author happily recognizes its role in the GATT and WTO

in the sense of diverging socio-economic policies and ideologies and the use of political tactics in order to further what is perceived as the national interests of the various member states...<sup>16</sup>

When the higher politics were focusing, on matters of international security and the East-West conflict during the Cold War, the trade system was entrusted to a group of 'experts', who tended to see the trade system as grounded in the insights of economics and thus to be above the 'madhouse' of politics and it was they that recast the post World War II global economic system as *economics, and economics became ideology, the ideology of free trade*.<sup>17</sup> One could say that like most other ideologies it began to live a life of its own, however this does not mean that it was born out of some objective truth or even a democratic international process, instead of a pursuit of national economic interests with the most powerful architect imposing their vision on the rest of the world through 'trade politics'. Furthermore the full force of not just trade politics, but plain old 'geo-politics' is still entering the trade arena as has recently clearly been manifested through the sanctions imposed on Russia, despite its accession to the WTO in 2012 and the many commitments it had to undertake in the process.

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<sup>12</sup> T. Broude, M. L. Busch, and A. Porges, 'Some Observations on the Politics of Int'l Economic Law', in *ibid*, p. 4.

<sup>13</sup> Specifically referring to the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization, United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the United Nations Conference on Trade and Development.

<sup>14</sup> A. Reich, 'The Threat of Politicization of the WTO', 26 *University of Pennsylvania Journal of International Economic Law* (2005), p. 780 (abbreviations omitted); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1125, (1994), Preamble.

<sup>15</sup> *Ibid*, p. 784.

<sup>16</sup> *Ibid*, p. 781.

<sup>17</sup> R. Howse, *The WTO System: Law, Politics and Legitimacy*, (Cameron May, 2007), pp. 16-17; see also: J. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement', in R. B. Parter *et al.* (eds.), *Efficiency, Equity, And Legitimacy: The Multilateral Trading System at the Millenium*, (pp. 334, 336-337); D. Driesen 'What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate', 41 *Virginia Journal of International Law* (2001), p. 279.

Proponents of the world trading regime like to emphasise that although majority voting is allowed, decisions in the WTO are normally reached by consensus.<sup>18</sup> Art. IX, paragraph 1 of the WTO Agreement states that

[t]he WTO shall continue the practice of decisionmaking by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote.... Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.

This supposedly makes the decisions more acceptable to all Members and gives them more legitimacy. The WTO claims that consensus legitimizes the outcomes of negotiations, because it ‘prevents the most powerful from dominating the agenda [and] keeps everyone negotiating until compromises are reached.’<sup>19</sup> However it is also recognized that lengthy behind-the-scenes negotiations are sometimes necessary to reach said consensus, and it is hard to imagine how this adds to legitimacy, especially since they many times involve *divide et impera* tactics and the blackmailing of weaker states. Pascal Lamy, the then Director General put it bluntly that ‘[t]here is no way to structure and steer discussions among 146 members in a manner conducive to consensus.’<sup>20</sup> A true consensus then might just be nothing more than an impossible ideal. Furthermore, it is often times too late for a meaningful influence on the outcomes of the negotiations by the time of the voting on a particular draft. It is not unimportant who prepares the draft and when and how it reaches the rest of the Membership. In other words, the consent theory at the WTO is based on the same principles as the rules of contract. However in the words of one observer:

Contract's principles of good faith and bargaining fail when developing nations have no ability to bargain with the First World. Contract legitimizes this kind of oppression by positing that all parties - in this case First and Third World nations - are autonomous, competent, and able to reach agreement that merit enforcement. Autonomy in terms of these countries and their bargaining power is clearly fictional. It is obvious through the use of such legal fictions, however, that law is able to allow domination couched in the appearance of autonomy.<sup>21</sup>

The WTO is plagued by power inequalities and is in that sense not distinct from other international organizations.<sup>22</sup> As shown in chapter IV, the powerful states use their strength inside and outside of the WTO to push for their agenda and furthermore dominate the WTO

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<sup>18</sup> World Trade Organization, *Understanding the WTO: The Organization: Whose WTO is it anyway?* available at: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm) (last accessed 22.8.2016).

<sup>19</sup> World Trade Organization, *supra note 7*, p. 13.

<sup>20</sup> P. Lamy, Press Conference closing the World Trade Organization Fifth Ministerial Conference, Cancun, Mexico, 14 September 2003.

<sup>21</sup> M. H. Davis and E. D. Neacsu, ‘Legitimacy Globally: the Incoherence of Free Trade Practice, Global Economics and their Governing Principles of Political Economy’, 69 *University of Missouri – Kansas City Law Review*, (2001), p. 744/745.

<sup>22</sup> J. Walters, ‘Power in WTO Dispute Settlement’, 28 *Journal of Third World Studies*, (2011), p. 169.

administration, steering the negotiating process according to their wishes. Whose interests and ideas are shaping the rules can also clearly be seen through such examples as the negotiations regarding the 'standard of review' at the Uruguay round.<sup>23</sup> The issue which was only understood by a few people and went 'virtually unnoticed by almost all the public or private policy-makers concerned with the negotiation' was turned into a 'deal breaker' - a problem which could have caused the entire negotiation to fail - by the interests of the US companies.<sup>24</sup> The said standard determines to what degree panels should respect national governments' determinations on whether an action is consistent with WTO law or not and certain economic interests in the US and elsewhere were deeply concerned about restraints on the capacity of the organization to overrule national government determinations, especially on antidumping duties.<sup>25</sup> Unlike others, these countries were 'perceptive and economically endowed enough to carry their views deeply into the negotiating process.'<sup>26</sup> Quite unlike the proposition of it being a non-politicized institution, it is therefore fair to say that the WTO 'has been, and continues to be, shaped in its agreements and institutional foci in significant part by political pressures emanating from its members, particularly those able to wield the most influence.'<sup>27</sup>

It has been argued that positions should be accepted as legitimate only where agreed through un-coerced discussions by those affected by the outcomes and not when they are merely the preference of the majority.<sup>28</sup> This is to happen through rational discourses grounded in reasoned arguments around what is equally good for all to determine the 'right policy' or a *political truth* as it is not possible to determine an *objective truth*.<sup>29</sup> One could easily prove the coercive nature of the discussions at the WTO, however it is harder to determine what are actual 'rational discourses' and a search for 'what is good for all' and what is mere propaganda used to convince all parties into accepting what is actually only good for some.

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<sup>23</sup> Art. 11 of the Dispute Settlement Understanding now stipulates, that a panel has to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the Dispute Settlement body in making the recommendations or in giving the rulings provided for in the covered agreements.'

<sup>24</sup> Based on interviews by Professor J. H. Jackson, in J. H. Jackson, *The Jurisprudence of GATT and the WTO, Insights on Treaty Law and Economic Relations*, (Cambridge University Press, 2000), p. 135.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> M. K. Lewis, *The Politics and Indirect Effects of Asymmetrical Bargaining Power in Free Trade Agreements*, (Cambridge University Press, 2011), p. 19.

<sup>28</sup> J. Habermas, 'Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy', transl. W. Rehg, (MIT Press, 1996), p. 104.

<sup>29</sup> *Ibid.*

In this sense procedural legitimacy should not be overestimated at the expense of substantive legitimacy.<sup>30</sup> It is important to bear in mind how the use of legitimizing theories such as the comparative advantage theory, according to which ‘everyone benefits’ can limit the political imagination and lead to ‘false consciousness’ whereby even the dominated do not understand that they are oppressed.<sup>31</sup> In other words, it is ‘a limit upon consciousness in which all, rulers and ruled share’.<sup>32</sup> In such a situation, a continuing search for an *objective truth*, justice or substantively legitimate rules outside the actual negotiations becomes the only option to improve the system.

This thesis thus proposes the integration of the right to development into the WTO and its dispute settlement mechanism. The ultimate goal would be to correct the current rules, heavily tilted towards the interests of already industrialised countries, and give meaning and a degree of legal power to the right to development which currently lacks it in the international setting.

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Trade liberalization and WTO rules provide better market access to contracting parties, they improve the relative incentive for exports as against sale in the domestic market and they provide a number of privileges to exporters.<sup>33</sup> They further provide them with security in market access as trade is subject to agreed rules and the existing trade barriers will be known to the investors and exporters; if any dispute arises, it can be settled through the dispute settlement mechanism (DSM); furthermore in cases of imports competing with domestic products in an unfair manner, the affected industry can request their government to take necessary measures through safeguard actions and the imposition of antidumping and countervailing duties.<sup>34</sup> However firms that do not have production capabilities competitive at an international level, may not be able to take advantage of the opportunities provided by global trade liberalization and even when they do, they may incur higher marketing cost due to their lack of experience, smaller scale and the lack of marketing and distribution channels.<sup>35</sup> Not only would such firms not be able to take advantage of the opportunities at the moment of liberalization, but they would also be stripped of the chance of ever building

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<sup>30</sup> P. Nanz, ‘Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory’, in C. Joerges and E. U. Petersmann, *Constitutionalism, Multilevel Governance and International Economic Law*, (Hart Publishing, 2011), p. 63.

<sup>31</sup> Davis, *supra note* 21, p. 739.

<sup>32</sup> Davis, *supra note* 21, p. 740.

<sup>33</sup> M. Shafaeddin, *Competitiveness and Development, Myth and Realities*, (Anthem Press, 2012) p. 38

<sup>34</sup> *Ibid*, p. 38, 39.

<sup>35</sup> *Ibid*, p. 39.

up sufficient capabilities to do so. In other words, if trade barriers from countries which are still developing are torn down too rapidly, they will never have the opportunity to build up domestic industries and to engage in respective learning processes, because their infant industries would be killed off by competition before this could happen.<sup>36</sup> Furthermore many available remedy tools have mostly been used against developing countries while they themselves have been reluctant to utilise them for political or technical reasons, such as their lack of resources.

Implementing the underlying free trade theory in its pure form, would be problematic enough as it would allow for a static comparative advantage situation, where developing countries are forever at a disadvantage locked into the production of primary commodities. However, it is no secret that the WTO furthermore only pursues free trade in areas where the rich countries are strong while it allows for Keynesianism where they are weak. Although this has been put forward as the biggest problem preventing development, developmental economists disagree, and argue that the most important question is that of policy space left under the WTO and other international agreements to the developing countries, to be able to pursue industrialisation as all successful countries have done in the past. Moreover, because the situation in the world has changed and due to the increase in competitiveness and the role of multinational companies in trade and the power they have on the market and production system, the need for more policy space has actually increased, yet at the same time this policy space is constantly shrinking.<sup>37</sup>

Renowned developmental economists such as Rodrik, Stiglitz and Chang have shaken the unconditional belief in free trade, igniting a new interest in industrial policy. Several non-governmental organisations (NGOs) such as Oxfam, War on Want and Action Aid have been persuading developed country governments to protect developing countries' policy space at the WTO and a heterodox perspective on development has even entered the World Bank, with the ideas of its chief economist at that time, Justin Yifu Lin, the first non G9 chief economist, advocating for the use of industrial policy.<sup>38</sup> However as Professor Robert Wade describes it from his own experience doing research at the institution during that time, other World Bank economists, including from the vice presidency were receiving the ideas of Lin

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<sup>36</sup> P. Hilpold, *WTO Law and Human Rights: Bringing Together Two Autopoietic Orders*, (University of Innsbruck, 2010), p. 19

<sup>37</sup> M. Shafaeddin, interview on Challenges Facing LDCs after the Global Economic Crisis, at the Global Development And Environment Institute, (Tufts University, 29.9. 2010) available at: <http://www.youtube.com/watch?v=HVL-wiPS1jM> (last accessed 22.8.2016)

<sup>38</sup> J. Y. Lin, *New Structural Economics: A Framework for Rethinking Development*, World Bank Policy Research, Working Paper No. 5197, (World Bank, 2010)

with great scepticism, summed up by one of them in the following statement which closed down the whole discussion about industrial policy: ‘For every Korea there are a hundred failures, who would you put your money on?’<sup>39</sup> With Lin’s departure from the World Bank in 2012, the ideas sadly left the institution as well.<sup>40</sup>

It is the aim of this thesis to highlight some of the aspects of the GATT/WTO system which have been most detrimental to the development of poorer countries; to expose the politics and propaganda behind the WTO law in this regard; to present and explain alternative thinking to the economic theory adopted by the organization and finally to advocate for resistance against an unfair international economic order through a demand for the recognition and enforcement of the right to development.

## **1. Research Questions**

This study seeks to answer the core research question of whether the WTO suffers from a legitimacy gap due to its rules being overly tilted in favour of developed countries to the extent that they encroach upon the ability of poorer states to pursue true economic development. The study further discusses the sub-questions of how ideological, historical and procedural factors perpetuate this gap and how it is concealed through maintaining perceived legitimacy.

To answer the main question, the analysis tackles several aspects of the GATT/WTO:

Firstly it examines the mandate and the main source of the WTO’s claim to legitimacy, i.e. its underlying economic theory which is behind the idea that the WTO is apolitical in its goals, serving an almost scientific truth for the benefit of all. It asks whether this so-called theory of comparative advantage is in fact as sound as portrayed and whether it can be universally applied with positive results, regardless of specific circumstances of particular countries and their developmental level, or can it in fact retard development. It also examines how this theory serves to limit any demands by developing countries for special and differential treatment by making them appear unreasonable.

Secondly, the thesis looks at GATT/WTO procedural legitimacy. It examines the forum nature of the system and what that relates to in practice in terms of providing all Members with equal opportunity in bringing forward proposals and to determine outcomes and the

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<sup>39</sup> R. Wade, D. Quah and H.-J. Chang, ‘Does Market-led Development have a Future?’, discussion (London School of Economics, 15 May 2013), available at: <http://www.youtube.com/watch?v=R84XoLinBL8>, (last accessed, 22.8.2016).

<sup>40</sup> *Ibid.*

(in)ability of poorer countries to defend their policy tools necessary for development while at the same time assuring opportunities in accessing the markets of more affluent countries;

Thirdly it looks at legitimacy in terms of the outcomes of the negotiations, i.e. the rules themselves and whether they present a fair and balanced protection of Members' interests, especially development. It devotes special attention to one of the agreements within the system, i.e. the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and its particular purported and actual impacts on the ability of less technologically advanced countries to upgrade their technologies to superior levels, which is essential for development;

Fourthly it considers whether the dispute settlement mechanism at the WTO can bring a rebalance of the system and the unequal protection of Member's interests or are there limitations inherent in the mechanism and the law it applies that prevent it from playing such a role to a satisfactory extent;

Finally, the study looks at the possibility of meaningfully addressing the *status quo* by incorporating the right to development into the system.

## 2. Literature Review

Vast literature exists on the WTO, its particular agreements and their implications for individual economies or sectors of these economies. This is not surprising considering the scope, importance and complexity of the law of this organisation. Most mainstream writings, including those from the organisation itself, present the WTO as a pro-development organisation and furthermore even if some criticism is considered to be valid, the conclusion is that the organisation is based in sound economic theory and therefore follows the right path.<sup>41</sup> If nothing else, the merits of the WTO for development is highlighted through the fact that it is better to be inside a predictable system than outside, if you are a weaker party.<sup>42</sup>

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<sup>41</sup> See for example: P. Van den Bossche, V. Zdouc, 3<sup>rd</sup> edn., *The Law and Policy of the World Trading System*, (Cambridge University Press, 2013); S. Lester et al., *World Trade Law: Text, Materials and Commentary*, 2<sup>nd</sup> ed., (Hart Publishers, 2012); M. Friedman and R. D. Friedman, 'The Case for Free Trade', *Hoover Digest* 4 (1979); J. H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, (Cambridge University Press, 2007); C. A. E. Goodhart, 'Economics and the Law: Too Much One-Way Traffic?' 60 *Modern Law Review*, (1997); P. Samuelson, *Economics*, 10<sup>th</sup> edn., (McGraw – Hill, 1976); B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System, The WTO and Beyond*, 2<sup>nd</sup> edn. (Oxford University Press, 2001); P. Krugman, 'Is Free Trade Passé?', 1 *Journal of Economic Perspectives*, (1987); J. Bhagwati, 'Is Free Trade Passé After All?', 125 *Weltwirtschaftliches Archiv*, (1989); M. Corden, *Trade Policy and Economic Welfare*, (Oxford: Clarendon: 1974)

<sup>42</sup> See for example: D. C. North, 'Institutions', 5 *Journal of Economic Perspectives*, (1991); R. Coase, *The Firm, the Market and the Law*, (University of Chicago Press, 1990).



However, extensive studies and critiques have also been done on the WTO *vis-à-vis* its developing Members in general<sup>43</sup> and on particular questions in this relationship, such as the weakness of developing countries in the lawmaking of the organisation,<sup>44</sup> the particular challenges they are facing in the dispute settlement,<sup>45</sup> the special treatment accorded to them,<sup>46</sup> impacts on particular sectors of their economies,<sup>47</sup> etc. More recently, studies and

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<sup>43</sup> See for example: Y.-S. Lee et al., (eds.), *Law and Development Perspective on International Trade Law* (New York: Cambridge University Press, 2013); Sonia E. Rolland, *Development at the World Trade Organization*, (Oxford University Press: 2012); T. Chantal and J. Trachtman (eds.), *Developing Countries in the WTO Legal System* (Oxford University Press, 2009); R. E. Hudec, *Developing Countries in the GATT Legal System*, (Cambridge University Press, 2010); H. Katrak and R. Strange, (ed.), *The WTO and Developing Countries*, (Palgrave Macmillan, 2004); B. Hoekman and W. Martin (eds.) *Developing Countries and the WTO: A Pro-Active Agenda*, (Blackwell, 2001); S. Laird, *The WTO Agenda and the Developing Countries*, (Centre for Research in Economic Development and International Trade, 2000); G. P. Sampson and W. B. Chambers, (eds.), *Developing Countries and the WTO: Policy Approaches*, (United Nations University Press, 2008); W. Martin and A. Winters, (eds.), *The Uruguay Round and the Developing Countries*, Paper No. 307 (World Bank, 1995).

<sup>44</sup> See for example, F. Jawara and A. Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations: The Lesson of Cancun*, (Zed Books, 2004); B. L. Das, *The Current Negotiations in the WTO: Options, Opportunities, and Risks for Developing Countries*, (Third World Network, 2005); T. Broude, M. L. Busch, and A. Porges (eds.), *The Politics of International Economic Law*, (Cambridge University Press, 2011); B. Guha-Khasnobis, (ed.), *The WTO, Developing Countries, and the Doha Development Agenda: Prospects and Challenges for Trade-Led Growth*, (Palgrave Macmillan, 2004); R. Wilkinson and J. Scott, 'Developing Country Participation in the GATT: A Reassessment', 7 *World Trade Review*, (2008).

<sup>45</sup> See for example, M. L. Busch, and E. Reinhardt, 'Developing Countries and GATT/WTO Dispute Settlement', 37 *Journal of World Trade*, (2003); C. P. Bown and J. Pauwelyn, (eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, (Cambridge University Press, 2010); M. M. Ching, 'Evaluating the Effectiveness of the GATT Dispute Settlement System for Developing Countries' 16 *World Competition* (1992-93); K. Won Lee, 'Suspending TRIPS Obligations as a Viable Option for Developing Countries to Enforce WTO Rulings', 9 *Asian Journal of WTO and International Health Law and Policy*, (2014); A. Subramanian & J. Watal, 'Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO', 3 *Journal of International Economic Law*, (2000); M. Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change', 9 *Law and Society Review*, (1999)

<sup>46</sup> See for example, A. A. Yusuf, 'Differential and More Favourable Treatment': The GATT Enabling Clause', 14 *Journal of World Trade Law* (1980); A. A. Yusuf, *Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law*, (Kluwer Academic Publishers, 1982); D. Coppens, 'How Special is the Special and Differential Treatment under the SCM Agreement? A Legal and Normative Analysis of WTO Subsidy Disciplines on Developing Countries', 12 *World Trade Review*, (2013); A. Ansong, *Special and Differential Treatment of Developing Countries in the GATT/WTO: Past, Present, Future*, (Law Research Associates, 2012); B. Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment', Paper presented at the Third Annual Conference on Preparing the Doha Development Round – WTO Negotiators Meet the Academics. European University Institute, 2-3 July 2004

<sup>47</sup> See for example, T. T. Nguyãên, *Competition Law, Technology Transfer and the TRIPS Agreement: Implications for Developing Countries*, (Edward Elgar, 2010); C. M. Correa, 'Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?', manuscript, Duke University (2003); FAO, 'Experience with the Implementation of the Uruguay Round Agreement on Agriculture: Developing Country Experiences', Symposium on Agriculture, Trade and Food Security, Paper No. 3, (FAO, 1999); DFID, *Industrial Tariffs, Developing Countries and the WTO*, (Department for International Development, 2003); K. Anderson, *Agriculture, Developing Countries and the WTO*, (Centre for Economic Policy Research, 2000);

critiques of the WTO have also been framed as questions of human rights violations.<sup>48</sup> Last but not least, extensive commentaries and critiques have been written by several developmental economists of not just particular rules or agreements, but even of the underlying theory of the organisation itself.<sup>49</sup> These studies have been conducted by academics with backgrounds in political sciences, economics, history, theory and law and some of their studies have explicitly recognised the interdisciplinary nature of the questions at hand.<sup>50</sup>

In recognizing and highlighting the issues faced by developing countries at the WTO, the present study is not unique. In the edited collection, *Law and Development Perspective on International Trade Law*,<sup>51</sup> for example, one can explore a breadth of coverage of developmental topics at the WTO by renowned scholars both from developed as well as developing countries, such as could not have even been attempted by the present author. In parts of its observations, the present study has furthermore reached some of the same conclusions as have already been noted before. For example, Rolland, calls for the reconsideration of the trade and development relationship at the WTO in her book, *Development at the World Trade Organization*.<sup>52</sup> Her finding that the institutional processes for creating and implementing trade rules at the WTO and the actual regulatory outcomes are inseparable and that the consideration of the development dimension at the WTO must examine them both jointly has also been one of the major observations and approaches of the present study. The above mentioned are just some of the many studies which have highlighted the persistent problems in terms of development at the WTO and offered solutions to the *status quo*. Yet the situation remains much the same in terms of a chronic

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<sup>48</sup> See for example, S. Joseph, *Blame it on the WTO: A Human Rights Critique*, (Oxford University Press, 2011), p. 162; O. de Schutter and K. Y. Cordes, eds., *Accounting for Hunger: The Right to Food in the Era of Globalisation*, (Hart Publishing, 2011); C. G. Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries', 27 *Columbia Journal of Environmental Law*, (2002); M. F. Jorge, 'TRIPS-Plus Provisions in Trade Agreement and Their Potential Adverse Effects on Public Health', 1 *Journal of Generic Medicines*, 2004.

<sup>49</sup> See for example, G. Dunkley, *The Free Trade Adventure: the WTO, the Uruguay Round and Globalism - a Critique*, (Zed Books, 2000); J. E. Stiglitz, A. Charlton, *Fair trade for All, How Trade Can Promote Development*, (Oxford University Press, 2005); H.-J. Chang, *Kicking, Away the Ladder: Development Strategy in Historical Perspective*, (Anthem Press, 2002); D. Rodrik, 'The Global Governance of Trade: as if Development Really Mattered', Paper prepared for the UNDP (2001); R. Peet, 'Ten Pages that Changed the World: Deconstructing Ricardo', 2 *Human Geography*, (2009); S. R. Khan 'WTO, IMF and the Closing of Development Policy Space for Low-Income Countries: A Call for Neo-Developmentalism', 28 *Third World Quarterly*, (2007).

<sup>50</sup> S. Joseph, D. Kinley and J. Waincymer (eds.), *The World Trade Organisation and Human Rights: Interdisciplinary Perspectives*, (Edward Elgar, 2009).

<sup>51</sup> Lee, *supra* note 41.

<sup>52</sup> Rolland, *supra* note 41.

inequality in the protection of Members' interests and the obstacles to the pursuit of development. Therefore it warrants an ongoing discussion and a search for new solutions, especially in light of the importance of the issue.

### **3. Significance of the Present Study**

Gupta once expressed his frustration at observing the progressive development of international law that supported the *status quo*.<sup>53</sup> The author of the present thesis shares his experience of finding legal tools to deal with the discussion of North-South issues to be increasingly limited which leads one to embrace an eclectic set of ideas and tools from different disciplines to make their arguments clear.<sup>54</sup> Thus the kind of scholarship which is needed is one which looks beyond the law and uses methods and tools from politics, policy studies, international relations, development studies, anthropology and other disciplines to create a multidisciplinary academic movement fit to address the challenge of opportunistic incrementalism pushed by scholars from the established journals in the developed world.<sup>55</sup>

This study thus assesses some of the most difficult themes in the practice of WTO policy by looking beyond the legal and political dimensions of the relevant issues. In addition, it incorporates multidisciplinary dimensions including the unpacking of economic theory and the history of international trade policy from the International Trade Organisation to the WTO. It thus presents a comprehensive account of the multifaceted mechanism which operates behind the legitimacy gap of the WTO. The economic, political, historical, philosophical and legal analyses unmask different aspects of the same vicious circle leading to ideologies, rules and practices that are keeping poorer countries from sufficiently being able to pursue policies for economic development. Based on the analysis it calls for a drastic rethinking and reform of the system beyond compromises sought within what the UN or human rights frameworks offer. The contribution of this study in this respect differs substantially from related work which mostly seeks a merger between human rights and the WTO in a simple incorporation of one system into another. It also differs from calls to 'solve' WTO problems by implementing developmental goals set out by the UN.

This study further presents a tool for the general public to thoroughly understand and identify the multifaceted nature of the problem areas thus lifting the smokescreen created by the propaganda of the WTO and other players pushing for the neoliberal agenda through every

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<sup>53</sup> J. Gupta, 'Broadening Third World Legal Scholarship to Include Introspection and Interdisciplinarity', 8 *International Community Law Review*, (2006), p. 65.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, p. 69.

pore of the international system. The general public cannot analyse intricate panel reports or legislature, nor does it necessarily understand the economics of development.<sup>56</sup> It is furthermore easy to manipulate facts in this sphere due to the complicated - and often times hard to be clearly established - links between trade as well as intellectual property rules and the successes and failures of particular economies in their quest for development. Disinformation is key in creating perceived legitimacy and manufacturing consent thereby *de facto* diminishing democracy. The first step in addressing the issue of a legitimacy gap at the WTO is thus addressing the misinformation in a manner which is academic yet understandable to the general public and this study does just that.

#### **4. Methodology**

The analysis of this thesis considers to the question of WTO's legitimacy gap. It thus concerns both the organisations' norms and its institutional basis (i.e. dispute settlement mechanism and decision-making procedure). The main theoretical approaches have been to develop an analysis through legitimacy theory, to conduct a law and development critique and consider the propaganda model in relation to the WTO.

##### **a) Legitimacy theories**

Several theoretical approaches found in various legitimacy theories are used in this thesis to conduct an analysis of the organisation and its law. Three main strands provide the main tools for the analysis: the democratic credentials of the organisation (i.e. legitimacy of origin), whether it upholds the values of its stakeholders (i.e. legitimacy of exercise and organisational legitimacy) and whether it fits within the normative hierarchy of the international system. All three are essentially intertwined and connected to the broader legitimacy theory which rests on the principle of justice and morality. This thesis does not adopt the legitimacy theories which uphold perceived legitimacy as the sufficient benchmark for the evaluation of organisations or rules but seeks a substantive evaluation of their legitimacy. Even theories that do not present a perfect lens for the analysis however, offer underlying principles which provide valuable theoretical approaches for its particular aspects. This is discussed in detail in chapter I.

##### **b) Law and development critique**

Based on the legitimacy theories analysed, the advancement of the economic development of poorer countries is identified as the main criterion for the evaluation of the legitimacy of the WTO. A law and development critique is thus conducted, which forms the primary approach

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<sup>56</sup> S. Cho, 'A Quest for WTO's Legitimacy', 4 *World Trade Review*, (2005), pp. 396-397.

of the study. The thesis outlines the undisputed claims of benefits for development in terms of Membership in the WTO and proceeds to investigate other, more controversial, claims. In order to identify aspects of the organisation which nevertheless hinder the potential of developing countries to catch up with more developed economies, it follows a rigorous methodology based on evidence from original and secondary sources and critically assesses some of the most difficult themes in the practice of WTO policy by looking beyond the legal and political dimensions of the relevant issues. In this sense the research conducted is primarily interdisciplinary in that it is *about* the law and the implications of the law and its ideological surrounding for the subjects it effects rather than a doctrinal study based on research *in* the law. It thus includes the unpacking of economic theory and the history of international trade policy from the International Trade Organisation to the WTO and throughout various negotiating rounds in order to bring an understanding of the way rules are created and which interests they serve. The main economic theories behind the liberalisation mandate of the WTO are critically examined through historical evidence and the theories of Hamilton, List, Keynes and several modern developmental economists in chapter III to provide a clear account of how the developmental rhetoric fails to be reflected in the underlying approach set out to achieve it. Similarly economic claims as to the benefits of the WTO's international intellectual property protection are analysed through an account of the most successful models used historically for the technological advancement of countries and through an account of the various critiques of (inter)national intellectual property protection from a developmental perspective in chapter V.

The economic and historical analysis is then directly referenced in the legal analysis of primary and secondary GATT/WTO sources to try and identify which current and former rules of the system have been most obstructive to economic development and whether the special and differential treatment provided to developing countries makes any substantial difference in this regard. This method required a textual analysis of the relevant legal texts as well as an analysis of dispute settlement body and Appellate Body reports. The methodology of selecting the relevant case law rested mainly on identifying situations in which developing countries sought to carve out policy space for economic development based on their developing condition and the purported developmental goals of the agreements in order to achieve broader interpretations of special and differential treatment provisions and general exceptions. This served to identify a gap in the law in terms of economic development not being recognised as a legitimate goal that could be protected with exceptions to general rules.

The study also drew on the examples of certain developing as well as developed countries, when these were conducive as illustrations of the main arguments. The countries were not chosen based on the level of their development, but rather on the basis of their experiences either with certain aspects of GATT/WTO law or based on their previous or current experiences implementing WTO-consistent as well as inconsistent policies and the impact of said law and policies on their economic development. A legal and theoretical analysis was further conducted of primary and secondary sources on the right to development as well as the potential human rights theory in solving questions of development, poverty and inequality to identify deficiencies and gaps in said doctrine. The methodology then consisted of political analysis of the way interests have been pursued at the GATT/WTO and why developing countries have been relatively unsuccessful in defending development friendly outcomes. This required an analysis of previous and current negotiating rounds and a look at reports from 'behind-the-scenes' for a better understanding of the politics at play. It also required an analysis of practical and financial considerations when it comes to the question of equal participation in the law-making as well as access to the dispute settlement by developing countries.

c) Propaganda model

Parallel to all above methods and as a result of the used methodologies runs the consistent and thorough unveiling of the actual agenda hidden behind extensive propaganda conducted through the glorification of certain economic theories, the purported goals of the organisation, its purported lack of bias and the illusion created that the negotiations continuously bring improvement on developmental and environmental needs of the Member States and its peoples. Such disinformation is key in creating perceived legitimacy of the organisation and manufacturing consent thereby *de facto* diminishing democracy.

d) Ideological approach

The work on this study was inspired by the concern about the lack of enforceability of economic human rights in developing countries. The recognition was soon made of the fact that the capability of states to provide for the enjoyment of these rights is conditioned upon the 'enabling' right, i.e. the right to development and its external dimension of ensuring a just international economic order conducive to economic development. Identifying a gap both within the international economic institutions as well as the international human rights system in terms of the protection of the later right this analysis serves to provide the basis for a fundamental rethinking of world trade law and the inclusion of the right to development into the system to give its external aspect meaningful enforcement. In other words my ideology

reflects a concern for a sustainable progressive realisation of human rights, of solidarity and the betterment of the human condition as well as the condition of the ecosystem. This ideology best fits the global South approach yet it can be said to form the basis of the values of the whole of humanity when removing the smokescreen of propaganda and political manipulation which is placed in front of us.

#### e) Challenges

Conducting interdisciplinary research is an intrinsically challenging endeavour when the expertise of the author is limited to only one discipline. For someone with a purely legal background it was thus unsurprisingly a daunting task to take on economic theory, especially theories which are promoted as dogma and science. Yet a thorough understanding is absolutely necessary for studies such as this one. In a way, the lack of previous knowledge on economics proved to be a blessing in disguise as my mind was not already primed to follow the orthodoxy and furthermore it made me understand better the format to be followed in presenting the analysis to others who may also lack training in economics. As noted, tackling the propaganda manufacturing consent is essential for addressing the democratic deficit and it is only through academic work which can be read and understood by the general public that we can be successful at this endeavour.

My methodologies could have taken into considerations other areas, agreements and case law as well as examples from other negotiations. This being said, the GATT/WTO is an immensely vast subject and the examples chosen in this thesis suffice for sustaining the main arguments. The more one analyses GATT/WTO themes and policies, the more one observes a repetition of the same pattern and the deficiencies and imbalances highlighted in this thesis apply *mutatis mutandis* to all other areas. They even apply to international law in general, and in this sense an analysis was also briefly included on the philosophies and practices of the international legal system and its politics to place the WTO in its broader framework and for a better understanding of power and agenda in this context.

There is a danger of overgeneralising when tackling issues concerning large groups with different interests and characteristics such as ‘developing countries’. The discrepancies in their interests are obvious and they clearly play a detrimental role, when these countries fail to stand together at negotiations to block bad deals. This being said, the analysis and conclusions of this thesis concerns themes relevant to all of them as well as a broader evaluation of the justness of the system which is not a partisan issue. As Chimni rightly points out, in the struggle for a more just international economic order struggle it is important to keep a focus on structures and processes of global capitalism that continue to bind and

unite developing countries, despite the differences in the patterns of their particular economies. It is the former structures and processes that produced colonialism and have now spawned neo-colonialism: 'In other words, once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category 'third world' assumes life.'<sup>57</sup> International law prescribes rules that deliberately ignore the phenomena of uneven development in favour of prescribing uniform global standards, casting to flames the principal of special and differential treatment in everything but rhetoric.<sup>58</sup> To speak of developing countries as a particular category is crucial to organising and offering collective resistance to hegemonic policies. The alternative of merely multiplying sub-categories may be nothing but a tactic of *divide et impera* to prevent a global coalition of third world peoples and subvert collective modes of reflection on common problems and solutions.<sup>59</sup> With this exact sentiment in mind, the methodology of the present research has been to focus on systemic problems of the WTO in their impacts on developing countries, regardless of their specific levels of development or structures of their economies. In this sense the critique is not limited to particular cases, but looks for general problems and solutions in the relationship of domination between developed and developing countries at the WTO. It furthermore suggests reform that is flexible enough to offer a useful tool to any developing country, regardless of their particular needs and structures of their economies.

## 5. Outline of Chapters

This thesis analyses several aspects of the GATT/WTO underlying theories, genesis and evolution, procedures and laws in order to answer the three main research questions, i.e. whether the organisation suffers from a legitimacy gap, which mechanisms are perpetuating this gap and how the organisation should be reformed in order to address it.

### a) Chapter II – Measuring WTO's Legitimacy against the Right to Development

Chapter II thus analyses legitimacy theory from several different perspectives to devise a framework for the evaluation of the GATT/WTO system. It looks at classical standards for legitimacy of government and considers their application at the international level. It then takes into account the evolution in perspective on legitimacy of international law and WTO law in particular in light of its ever increasing scope and reach and identifies the general

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<sup>57</sup> B.S. Chimni, 'Third World Approaches to International Law: a Manifesto', 8 *International Community Law Review*, (2006), pp.4-6.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*



public as its main stakeholder in the modern times. It also reflects on the fact that the WTO is part of the wider international legal framework and on what that entails for measuring its legitimacy. Three main themes are identified from the study of the theories as the relevant benchmarks for evaluating the organisation's legitimacy. Firstly, its procedural/democratic credentials, which imply that its lawmaking and dispute settlement procedures need to uphold certain necessary standards; secondly, its adherence to the values of the general public as its main stakeholder; and thirdly, its adherence to the values of the broader international system and the UN Charter as a rule of recognition comparable to a constitution in the national system. Both latter criteria imply that the pursuit of the economic development of poorer countries should be the organisation's priority. The different layers of legitimacy are furthermore intrinsically linked as a lack in democratic legitimacy leads to rules which do not reflect the values of humanity and their application at the dispute settlement in turn renders the latter equally unjust on top of any legitimacy gaps it may have on its own due to unequal participation and enforcement. This chapter further identifies the constraints imposed on enforcing the right to development in the current international legal framework, including in the trade context, despite its essential relevance for ensuring a progressive realisation of all human rights and considers the African Charter of Human and Peoples' Rights as an inspiration for the international model in this regard.

#### b) Chapter III – Development through Liberalisation

Chapter III then looks at the mandate of the WTO to consider whether it sufficiently reflects developmental concerns and how its underlying theory contributes to soft power exerted at the negotiations and beyond. It firstly considers aspects of Membership in the organisation which are undoubtedly beneficial for economic development and proceeds to look at the more contentious aspects of its mandate, namely the achievement of welfare enhancement and sustainable development through mutual liberalisation. The chapter looks into the historical background of how the mandate for the institution was set and why it failed to reflect other ideas apart from neo-liberalism. It then examines how comparative advantage theory, which underlines this mandate, has become the dogma it is today and why this is harmful for policy space needed for development. It examines some of the main original problems of the theory with regards to development, especially the myth of a static comparative advantage, and it examines on the other hand how some of its main preconditions have been later disregarded. It then looks at the historic evidence that speaks against premature liberalisation and furthermore examines the voices of developmental economists which offer a radically different view from the orthodoxy. Finally it unveils the

rhetoric and propaganda which has secured the prominent position of the neoliberal theory today at the expense of any other view.

The main argument is that the free trade theory is inadequate as a recipe for development, therefore less orthodox theories need to be given a chance to influence the international trade system to begin addressing its legitimacy gap.

c) Chapter IV – The Unequal Protection of Members’ Interests at the WTO and its Impact on Policy Space and Market Openings for Development

This chapter discusses to what extent the majority of the WTO Membership, which are developing countries, are able to influence the rulemaking sufficiently to protect their developmental needs, namely market openings for products of interest to them and sufficient policy space for the protection and development of their industry and technological capabilities. It looks at their status in the organisation in terms of an equal voice and equal opportunity to impact rule making and rule changing and how this impacts the rules themselves thereby clearly demonstrating the link between a democratic legitimacy gap and the legitimacy gap of the norms thus created. It illustrates the problems of negotiations and accession protocols and how the biased rules that result therefrom are violating the right to development by denying market access to goods of most importance to developing countries, by permitting extensive protectionism to still exist in developed countries while prohibiting essential policy space for developing countries. In this context it also examines several rules and the ineptitude of the so-called special and differential treatment granted to developing countries. It finally argues that a rebalancing of the rules is necessary, if the organisation wants to achieve true legitimacy, however recognising that this is impossible to a truly meaningful extent under the current framework.

The main argument is that the past and present international trading system is heavily tilted against developmental needs of the majority of its Membership and the bargaining nature of the institution is unable to bring sufficient change to the *status quo* as it cannot provide for the necessary conditions that would render the rulemaking truly democratic.

d) Chapter V – The Illegitimacy of Intellectual Property Protection under the WTO in Light of Implications for Technological Development

This chapter critically examines whether intellectual property protection under the WTO adds to its legitimacy gap considering its potentially disastrous effects on loss of policy space necessary for development. It outlines how the TRIPS Agreement has substantially strengthened international intellectual property protection and what this means for the remaining policy space of developing countries in their pursuit of technological advancement

and the upgrade of their productive structure. It analyses the theory behind strong intellectual property protection domestically and internationally and evaluates its main claims in terms of benefits to innovation and technology transfer. It further looks at the history of intellectual property protection in order to highlight the fact that much like free trade, countries have introduced stronger protection of intellectual property mostly after a certain level of development had already been achieved, whereas the protection of foreigners' intellectual property rights had been delayed for even longer. The chapter considers the different channels of potential technology transfers and aims to evaluate how intellectual property protection impacts each of them and whether the positive impacts on some channels justify the negative impacts on others or whether developing countries should be essentially left alone to devise their own intellectual property strategies instead of the WTO imposing a strict and non-discriminatory intellectual property protection scheme on them.

The main argument is that historically, theoretically and empirically speaking intellectual property protection can have opposite effects on innovation and technology transfer, depending on several factors and it is essential for developing countries to retain maximum flexibility in applying a policy which suits their particular situations. Taking away such policy space through strong intellectual property protection at the WTO thus adds to its illegitimacy gap.

e) Chapter VI – The Dispute Settlement Mechanism - a Strong Weapon in Rebalancing Power Inequalities and Carving out Necessary Policy Space for Development?

This chapter looks at the legitimacy of origin from the perspective of the dispute settlement mechanism by looking both at its democratic/participational legitimacy as well as the application of the law and whether the decisions reached are in line with broader international law obligations of the WTO. The first part considers capabilities of developing countries in terms of sufficient legal strength to bring disputes against more powerful players. It looks at challenges posed in terms of the costs involved which they have to surmount as well as the built up of necessary institutions. It examines the statistics of the dispute settlement and highlights successful strategies of a substantial number of developing countries in overcoming their capacity constraints. The chapter also delves into the question of enforcement against economically stronger parties and whether it can be successful. The second part of this chapter then looks at legal and political hurdles in terms of the Panels and Appellate Body taking into account developmental considerations beyond the rules agreed to at the negotiations which are many times tilted heavily against the developmental needs of poorer countries as explained in previous chapters, both in terms of loss of policy space and

in terms of restrictions on market access for goods of importance for developing countries. It thus analyses the effectiveness of recourse by developing countries to ‘development’ or ‘sustainable development’ as found in the WTO Preamble or other international as well as domestic laws and policies, the use of arguments based on sovereignty or a right to economic diversification, in order to justify developmental policies strictly speaking in breach of WTO. Similarly, it looks at the possibility of recourse to the objects and purposes of the TRIPS Agreement in this context. On the other hand it considers the (im)possibility of challenging market restrictions placed on goods of importance to developing countries.

The chapter concludes that the dispute settlement mechanism needs to be provided with a clear tool which the Panels and Appellate Body could use for more flexible interpretations of the binding agreements which could bring their decisions more in line with the core values of humanity and the broader international order, including the UN Charter and the commitment to sustainable development.

#### f) Chapter VII – Conclusion and Recommendations for Reform

This chapter reflects on the analysis of the previous chapters and posits that the problems of the WTO legitimacy gap are a reflection of the broader context of international relations and lawmaking and their undemocratic nature and failure to reflect core values of humanity. It then proposes reform in the form of the inclusion of the right to development as a constitutional norm at the WTO to address its both main legitimacy gaps by meaningfully including the voices of developing countries as well as a respect for their developmental needs into the system and to provide the dispute settlement mechanism with a legal tool that would enable it to deliver decisions in line with a concern for sustainable development beyond what is envisioned by the power politics of the negotiations. The chapter considers the main issues to be mindful of when including the right to development into the system, how it could function and its potential for finally bringing enforceability to the external aspect of the right to development thus far neglected in international law and discourse. It further backs the proposal for reform by considering a modern application of the right to self-determination and a right to resist. It concludes with final thoughts on legitimacy and why we should include constitutional principles and judicial enforcement of said principles to address the legitimacy gaps in international law and policy.

## **Chapter III**

### **DEVELOPMENT THROUGH LIBERALISATION**

#### **Introduction**

Reflecting the expectations of the general public and the majority of its Membership, the WTO Agreement declares ‘sustainable development’ and the ‘raising of standards of living’ as two of the main goals of the institution. In some aspects, such as ensuring predictability and providing market access for goods from developing countries, the WTO indeed contributes to their development, in many other aspects however, the link between WTO rules and the goal of development is rather less straight forward. Furthermore mutual trade liberalisation is envisioned as the only means with which the organisation will strive to achieve said goals. This chapter thus discusses some of the main benefits of WTO Membership as well as liberalisation more generally vis-à-vis the potential for economic development of its developing Members. It also considers why the neo-liberal vision of trade came to dominate the mandate of the organisation and how it further shapes developmental goals in the broader international agenda. The chapter critically analyses the economic theory behind this approach and identifies a need for the inclusion of flexibilities beyond the neo-liberal theory into the institution to address its legitimacy gap. To an extent this need is already recognised in the principle of special and differential treatment for developing countries, yet it has been understood very narrowly and implemented poorly.

#### **1. Positive Aspects of Membership in the WTO which Contribute to Economic Development**

Before delving into the negative aspects of the system vis-à-vis the potential for development, it is essential to firstly consider some of the main benefits of Membership in the WTO system in this regard. This section thus focuses on the importance of a rules-based system and the stability it provides for economic development as well as the main benefits to development brought about by liberalisation and globalisation in general.

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<sup>1</sup> Yiddish proverb.

### a) The Importance of Stability in a Rules-Oriented System

A valuable aspect of international institutions, including the WTO, is that they are designed based on a 'rules-oriented' approach, which compels parties to focus on the rule and what an impartial tribunal is likely to conclude about the application of a rule. This leads to greater certainty and predictability, essential in international, particularly economic, affairs driven by market-oriented principles of decentralized decision-making, with participation by millions of entrepreneurs.<sup>2</sup> According to Jackson, the vastness of the WTO membership is testimony to the apparent need of nation-states for some kind of overall institutional structure to assist in resolving many of the problems that are being thrust upon them by the growing globalization of economic affairs.<sup>3</sup> Rules set by such an institution can have important operational functions:

They may provide the only predictability or stability to a potential investment or trade development situation. Without such predictability or stability, trade or investment flows might be even more risky and therefore more inhibited than otherwise. If such 'liberal trade' goals contribute to world welfare, then it follows that rules which assist such goals should also contribute to world welfare. To put it another way, the policies that tend to reduce some risks lower the 'risk premium' required by entrepreneurs to enter into international transactions.<sup>4</sup>

This results in a general increase in the efficiency of various economic activities, contributing to economic development and greater welfare for everyone. The benefits of a rules-based system are not disputed - markets require the establishment of legal rules governing the rights and duties of those carrying out transactions.<sup>5</sup> To realize all the gains from trade, there has to be a legal system and political order in place.<sup>6</sup>

Rule orientation furthermore implies a less rigid adherence to 'rule' than concepts such as the 'rule of law' or a 'rule-based system' and connotes some fluidity in rule approaches. An overly strong emphasis on a strict application of rules sometimes scares policy-makers, even though in practice they may amount to the same thing. Ideally a system needs to accommodate the inherent ambiguities of rules and the constant changes in the practical needs of human society, while promoting as much as possible the stability and predictability.<sup>7</sup> A further flexibility is said to be simply the fact that Member states can withdraw from the

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<sup>2</sup> D. C. North, 'Institutions', 5 *Journal of Economic Perspectives*, (1991), pp. 97-112.

<sup>3</sup> J. H. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, (The Royal Institute of International Affairs, 1998), p. 8.

<sup>4</sup> *Ibid.*, p. 10.

<sup>5</sup> R. Coase, *The Firm, the Market and the Law*, (University of Chicago Press, 1990), ch. 5; see also C. A. E. Goodhart, 'Economics and the Law: Too Much One-Way Traffic?' 60 *Modern Law Review*, (1997), p. 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> J. H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, (Cambridge University Press, 2007), p. 8.

system if it no longer works for them.<sup>8</sup> One of the main criticisms of the WTO which this thesis upholds is its reduction of Member states' policy space to a point that it affects Members' potential to devise an effective economic strategy which would bring economic development. Governments sometimes feel that the loss of policy space has been too great and that they cannot take action sought even by their democratic constituencies. The question of sovereignty is essentially a question of remaining policy space once a nation state has become Member of the WTO. It impacts everything from who sets safety standards on products to how the most favoured nation (MFN) and national treatment principles are applied and how disputes are resolved.

Proponents of the system argue that the legal ability to withdraw within a reasonable period of notice reduces the worry of infringement on sovereignty in this regard. The Uruguay Round treaty provisions allow withdrawal upon six months' notice. Whether this is a realistic option for nations today, in light of the considerable dependence on international trade and the trade system of the GATT/WTO is a different question. WTO provisions appear to insert their rules quite deeply into national legal systems, yet the counter argument has been that global market forces already constrain governments, and sometimes in ways which are not as healthy as any WTO negotiated text.<sup>9</sup> In this sense being in the organisation represents the lesser evil. Furthermore, withdrawing from any system that has been around for a while and its membership is vast and acts in accordance with its rules over a significant period of time, basing economic decisions and planning on what is prohibited or allowed inside that system, presents a significant cost. In this sense, although globalisation is not irreversible, it has a firm institutional basis in the multilateral trading system of the WTO and drastic changes to the status quo it would present significant disruptions to the economies involved. This has perhaps never been more apparent than with the decision taken by the British electorate with regards to exiting the EU. Regardless of the faults and merits of the system, the cost of withdrawal will undoubtedly be great if not catastrophic for the UK economy, which has been for a long period of time basing its economic decisions on the fact that it enjoyed access to the single as have its trading partners within and outside of the EU.

A related question would concern the price to be paid in terms of economic prosperity for withdrawing altogether from the global economy which in today's world is nearly

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p. 5.

unimaginable. One could simply not flourish being cut off in such a manner.<sup>10</sup> A multilateral, rules-based system that nevertheless retains some flexibility in this sense presents a good framework for the inevitable forces of globalisation. The economics of many countries are to an ever-increasing degree dependent on trade. This is true for developed as well as developing countries. The ratio of global trade in merchandise and commercial services to GDP is a good indicator of this. In the two decades between 1990 – 2010 China increased this ratio from 31 to 55 percent, India from 15 to 46 percent, Bangladesh from 18 to 43 percent and Mexico from 38 to 62 percent.<sup>11</sup> Important to note is the fact that the composition of trade has changed for some developing countries. While many remain dependent on exports of primary commodities, the share of manufactured goods has been growing. Since the early 1990s, there has been a boom in high technology exports, with countries such as China, India and Mexico emerging as major suppliers of cutting edge technologies, as well as labour-intensive goods.<sup>12</sup> Inflows of foreign direct investment (FDI) have also increased notably over the past decades.<sup>13</sup>

#### **b) Protection of the Less-Powerful against Unhindered Dominance**

The WTO as well as international law in general, offers a protective shield, however fragile, to the less powerful States in the system. Gupta observes that international law is marked by contradictions best understood in the model of international human rights law which ‘even as it legitimizes the internationalization of property rights and hegemonic interventions, codifies a range of civil, political, social, cultural and economic rights which can be invoked on behalf of the poor and the marginal groups. It holds out the hope that the international legal process can be used to bring a modicum of welfare to long suffering peoples of the third and first worlds.’<sup>14</sup> Similarly, despite the WTO pushing a neoliberal agenda it does recognise the importance of development and special and differential treatment for its less developed Members. Although, as shown in the analysis of this thesis, most of the special and differential treatment (SDT) is little more than talk, it nevertheless exists and in some aspects offers at least basic protection to developing countries. Furthermore the dispute settlement mechanism and the possibility of standing together at negotiations provide developing

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<sup>10</sup> P. Van den Bossche, V. Zdouc, 3<sup>rd</sup> edn., *The Law and Policy of the World Trading System*, (Cambridge University Press, 2013), p. 8.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, p. 12.

<sup>14</sup> B. S. Chimni, ‘Third World Approaches to International Law: a Manifesto’, 8 *International Community Law Review*, (2006), pp. 26-27.



countries with power otherwise unattainable against more powerful states. Thus it is often argued that it is by default beneficial for the majority of small- and medium-sized countries to be a part of a relatively strong multilateral institution built on the norm of non-discrimination, than being in a much weaker position outside such an institution.<sup>15</sup> That is, even if the rules evidently embody the preferences of the ‘stronger’ much better than those of the ‘weaker’ because without such rules the imbalance would be even starker.<sup>16</sup> This cannot be stressed enough and it is important to understand both in terms of the critique and the praise of the system. On the one hand it means that the less powerful are automatically worse-off outside the organisation and on the other hand it implies that the organisation itself is merely a compromise between bare power relations and a truly just system. It is important thus to nevertheless seek a more equitable system and not merely acquiesce to a system which disproportionately benefits developed countries and curtails the possibility of pursuing development for poorer countries.

## **2. Designing the World Trading System**

The original blueprint for the modern international trading system was the Charter of the International Trading Organization (ITO/Havana Charter), which never entered into force. The first draft was produced by the UK and USA governments, however substantial amendments were made during subsequent multilateral negotiations, which brought together over fifty nations and negotiators influenced by different traditions of thinking.<sup>17</sup> The vision of the US drew most clearly on the ideas of classical economic liberalism and argued for an almost complete removal of non-tariff barriers to trade, while in the UK there was general support for a liberal international economic policy, however with a number of important qualifications.<sup>18</sup> Apart from the US and the UK positions, there was a range of alternative views, the most important of which came from a group of less developed countries, including India, Brazil and Chile, which argued for the need to use protective trade measures to promote industrial development and diversification, to protect their infant industries, and to stabilize their balance of payments.<sup>19</sup> These and other ideas left their mark on the final version of the Charter and the ITO Charter ‘represented a singular moment when ideas,

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<sup>15</sup> J. S. Odell, ‘How Should the WTO Launch and Negotiate a Future Round?’, 14 *World Trade Review*, (2015), p. 119.

<sup>16</sup> *Ibid*, p. 120.

<sup>17</sup> A. Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order*, (Oxford University Press, 2011), p. 24.

<sup>18</sup> *Ibid*, p. 24.

<sup>19</sup> A. A. Yusuf, *Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law*, (Kluwer Academic Publishers, 1982), p. 157.

institutions and actors shared a common interest'.<sup>20</sup> The Charter specified several issues as objectives of the ITO, such as the expansion of production, and industrial development particularly of those countries which are still in early stages of industrial development, access to the markets, products and productive facilities (for example, access to technology) and removal of restrictive business practices.<sup>21</sup> The text of the Charter included detailed discussion of modalities for employment creation, cooperation for reconstruction and development, labour standards, commercial policy, commodity agreements for stabilization of commodity prices, the operation of ITO and eventually the creation of a 'Special Fund' in the UN.<sup>22</sup> While the majority of the provisions regarding commercial disciplines in the ITO Charter were actually identical to those in the General Agreement on Tariffs and Trade (GATT) 1947, they differed substantially regarding the role of government assistance for economic development: the ITO Charter contained a complex and comprehensive mechanism for government protection of infant industries and trade restrictive measures to address balance of payment issues where countries could derogate from the main disciplines subject to consultations with affected Members and the organization (the latter sometimes having a power of approval over proposed measures.)<sup>23</sup> Unfortunately the Charter's deviation from the classical liberal perspective became unacceptable to the business community in the US and the US Congress, which never even took the Charter into consideration for ratification. The GATT, which was signed even before the final death of the Havana Charter in 1947 and was meant only as a temporary agreement, instead stole the limelight and marked the start of modern international trade law. The GATT spoke more pointedly to the economic interests of the leading powers at that time and it has, in turn, survived through a slow process of consolidation and legislation 'precisely because it has continued to speak to a narrow set of commercial imperatives.'<sup>24</sup> The GATT was 'almost a caricature of the intended ITO' and it did not make 'allowance for special problems of developing countries'.<sup>25</sup> Contrary to the detailed provisions in the ITO Charter, the GATT included Art. XIII only in 1955 to allow limited exceptions to its obligations for the purpose of supporting new industries and

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<sup>20</sup> D. Drache, 'The Short but Significant Life of the International Trade Organization: Lessons for Our Time', Centre for the Study of Globalisation and Regionalisation, Working Paper, (University of Warwick, 2000), p. 5.

<sup>21</sup> UNCTAD, *Trade and Development Report, 1984*, (United Nations, 1985), in M. Shafaeddin, 'The Political Economy of WTO with Special Reference to NAMA', Institute of Economic Research, (University of Neuchatel, 2010), p. 179.

<sup>22</sup> *Ibid.*

<sup>23</sup> S. E. Rolland, *Development at the World Trade Organization*, (Oxford University Press: 2012), p. 65.

<sup>24</sup> R. Wilkinson, *What's Wrong with the WTO and How to Fix It*, (Polity Press: 2014), p. 22.

<sup>25</sup> H. W. Singer, 'Lessons of Post-war Development Experience: 1945-1988,' Sussex, Institute of Development Studies, Discussion Paper no. 260 (Sussex University, 1989), pp. 6-7, in Shafaeddin, *supra note* 21, p. 179.

addressing balance of payment crises, however the framework was more limited while other subject matters, such as the inclusion of employment provisions into the GATT was successfully resisted by the US, UK and Canada.<sup>26</sup>

Since the above described events, the main mandate of both the GATT and later the WTO has been understood relatively narrowly and limited in the sense that its primary goal is to work towards trade liberalization by substantially reducing tariffs and other barriers to trade. Jackson found the stated purposes of the ITO and GATT ‘essentially the same’ with the ITO language being merely ‘a bit more detailed’ and a bit more pointedly aimed at aiding the poorest countries.<sup>27</sup> The GATT 1947 starts out in the following way:

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,  
Being desirous of contributing to these objectives by entering into 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 commerce.<sup>28</sup>

Jackson claimed that these objectives ‘coloured by’ the purposes of the ITO Charter, were to promote the economic welfare of the world and this would cover any additional reference to aiding the poorest countries found in the Havana Charter.<sup>29</sup> While there may be indeed little difference in the stated objectives, what the purported objectives or mandate of a treaty are and the way the treaty sets out to achieve these goals are two separate matters. With the advent of the WTO in 1994, new mandates were added still, while nothing much changed regarding the means of achieving them. The Preamble of the Marrakesh agreement introduced explicitly the goal of sustainable development. It thus changed the phrase ‘full use of the resources of the world’ to ‘optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.’ The Preamble further recognizes ‘that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.’ Still in terms of the means of achieving this, it remained much the same story as the Members set out to contribute to these

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<sup>26</sup> T. W. Zeiler, *Free Trade, Free World – The Advent of GATT*, (University of North Carolina Press, 1999), p. 269, in Rolland, *supra note 23*, p. 64.

<sup>27</sup> J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, (Cambridge University Press: 2009), p. 85.

<sup>28</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, (hereinafter GATT 1947), Preamble.

<sup>29</sup> Jackson, *supra note 27*, p. 85.

objectives ‘by entering into 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.’<sup>30</sup> In other words, despite clearly stating that the ‘ultimate’ purpose of the organization is not free trade in itself but the fostering of sustainable long-term economic development and improvement of living standards in rich and poor countries alike, there is still an essential lack of appreciation of the fact that liberalization does not always promote economic development, and that it may even retard it.<sup>31</sup> Rather than mainstreaming development, the Uruguay Round engrained a singular neoliberal understanding of trade, where allowances for development are considered anomalies to be eventually phased out.<sup>32</sup> The Uruguay Round also brought hitherto unthinkable issues into the arena of multilateral trade politics.<sup>33</sup> Issues such as protection of intellectual property (including sensitive areas such as health and agriculture), public services, public procurement, subsidization of domestic activities, and sanitary and phytosanitary measures, to name just a few, have become part and parcel of the WTO’s mandate,<sup>34</sup> bringing additional challenges for development in terms of the loss of essential policy space and additional costs in conforming with the agreements.

The above described philosophy of development through liberalisation, does not allow for exceptions to free trade (to the extent that it has been established in the WTO agreements) based on a concern for economic development. Rather the weighing of competing interests is always done along the lines of free trade, versus the concern for the environment or human rights (as envisioned in the provisions on the allowable general exceptions).<sup>35</sup> Only in the context of retaliation following a dispute settlement can one observe the recognition that the ability to impose restraints on trade is beneficial to the party who has been granted the right to retaliate. At the same time, the goal of sustainable development through liberalisation cannot even be used in legal proceedings to force market openings for developing countries’ exports, unless it concerns a question of discrimination in the way market access has been

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<sup>30</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1125, (1994), Preamble.

<sup>31</sup> F. Jawara and A. Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations: The Lesson of Cancun*, (Zed Books, 2004), Preface, xiii.

<sup>32</sup> Rolland, *supra note 23*, pp. 63-63.

<sup>33</sup> H.-J. Chang, ‘Policy Space in Historical Perspective – With Special Reference to Trade and Industrial Policies’, talk presented at Tufts University, October 27, 2005 on the occasion of the award of the 2005 Leontief prize.

<sup>34</sup> A. Reich, ‘The Threat of Politicization of the WTO’, 26 *University of Pennsylvania Journal of International Economic Law*, (2005), p. 810.

<sup>35</sup> G. Marceau and F. Morosini, ‘The Status of Sustainable Development in the Law of the World Trade Organization’, in U. C. Junior, et al., (eds.), *Arbitragem e Comércio Inernacional, Estudos em Homenagem a Luiz Olavo Baptista*, (Editora Quartier Latin do Brasil, 2013).

granted to them.<sup>36</sup> This is because the Preamble only functions as a tool to interpret obligations and permitted exceptions to those obligations that are already established in the agreements, and has in practice proved irrelevant beyond that point.<sup>37</sup>

### 3. Neoliberal Agenda Mostly Supported by UN Narrative

Similarly to the WTO Preamble, the UN Millennium Development Goals (MDGs) had been criticised for their proposed policy solutions, while continued and new concerns have been raised regarding the UN Sustainable Development Goals (SDGs).<sup>38</sup> Both sets of goals contain a mixture of economic and political discourses and are not entirely following the neo-liberal model.<sup>39</sup> Especially the SDGs reflect a stronger inclusion of Keynesian ideas following the 2008 financial crash reminiscent of the original rise of Keynesianism following the Great Depression from 1929-1939. Yet when it comes to questions of trade, both the MDGs and the SDGs strictly follow neoliberal ideas. Within this framework, the Keynesian goals and targets cannot realistically be achieved and they merely serve as a façade for pushing a neoliberal agenda, in the form of mixed economic solutions.<sup>40</sup> There are great similarities between MDGs and SDGs which reflect the fact that both were created by and for wealthy developed countries<sup>41</sup> and do little to change the structure that produced the present levels of poverty.<sup>42</sup> The foundation of MDG's Goal 1 of eradicating extreme poverty and hunger, is the Rome Declaration on World Food Security, which presents the opening up of trade as 'a key element' in this fight<sup>43</sup> with the oversimplified and false equation that lowering food prices will benefit the most impoverished. Recognising the insufficiency of yields in low-income food-deficit countries and their uncompetitiveness, it proposes as a solution increases in food imports and exports (see chapter IV for a discussion on the problems of this assumption). To

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<sup>36</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, DS 27.

<sup>37</sup> L. M. Costa, 'Desenvolvimento Sustentável no Órgão de Solução de Controvérsias da Organização Mundial do Comércio: Demolindo Mitos e Barreiras', 49 *Revista de Administração Pública*, (2015), p. 1365.

<sup>38</sup> J. B. Carant, 'Unheard Voices: a Critical Discourse Analysis of the Millennium Development Goals' Evolution into Sustainable Development Goals', 38 *Third World Quarterly* 1, (2017), p. 16.

<sup>39</sup> For example MDG goals of achieving universal primary education, promoting gender equality, combating diseases, etc. include Keynesian as well as liberal feminist ideas. See S. Iltan and L. Phillips, 'Developmentalities and Calculative Practices: The Millennium Development Goals,' 42 *Antipode* (2010), pp. 844-874.

<sup>40</sup> J. Hickel 'Why the New Sustainable Development Goals won't Make the World a Fairer Place', *The Conversation*, (23 August 2015), available at: <http://theconversation.com/why-the-new-sustainable-development-goals-wont-make-the-world-a-fairer-place-46374>, (last accessed, 10.7.2017).

<sup>41</sup> N. Poku and J. Whitman, 'The Millennium Development Goals and Development after 2015,' 32 *Third World Quarterly*, (2011), pp. 181-198.

<sup>42</sup> C. Barton, 'Where to for Women's Movements and the MDGs?', 13 *Gender & Development*, (2010), p. 29.

<sup>43</sup> Food and Agricultural Organization, Rome Declaration on World Food Security and World Food Summit Plan of Action, (17 November 1996), p. 12.

address the uncompetitiveness, it speaks of improving technologies and technology transfer (TT) yet it does not address how this TT will happen. The goal does not speak for example of potential conflicts between the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) and TT (see chapter V for a discussion on TT) and does not mention the agreement at all. The only time MDGs speak of TRIPS is when they praise it as essential for innovation and recognise the need for only minor exceptions to it.

Another problem is that industrialisation and the transformation of the productive structure, as inevitable components of economic development, have seen their value diminished in most of the international narrative surrounding development, including the MDGs, which placed no weight on industrialisation but rather focused on issues such as health and education and in terms of the WTO, again a freer market. In this vision developed countries were to remove their subsidies and tariffs on agriculture and textiles, but there was no notion that developing countries needed to get out of those activities which are keeping them poor, a process which requires the ability of using industrial policies, including protectionism. In a welcome change, SDGs finally recognize in their goal 9 that

[i]nclusive and sustainable industrial development is the primary source of income generation, [which] allows for rapid and sustained increases in living standards for all people, and provides the technological solutions to environmentally sound industrialization... Without technology and innovation, industrialization will not happen, and without industrialization, development will not happen.

It is encouraging that the protection of the environment and the industrialisation of developing countries are not presented as mutually exclusive in this goal. Yet the SDGs fail again to address the lack of policy space still available to achieve these goals including in the context of TT.

In the context of health, the MDGs Road Map<sup>44</sup> speaks of TRIPS as essential for supporting the innovation necessary to fulfil the goal of combating major diseases in the developing world with the *caveat* that it should not limit access to life-saving medicine. This formulation does not recognise the problems posed by TRIPS beyond the already agreed to exceptions and suggests that said exceptions would suffice in averting its negative impacts. The MDGs thus give no additional basis for a reformed IP system at the WTO or more policy space granted to developing countries in this regard. On the contrary, MDGs merely reiterate the same old narrative of strong IP protection being essential for innovation without mentioning any downside for TT. Goal 6 of the SDGs reaffirms this stance and speaks of the importance

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<sup>44</sup> UN, Road Map towards the Implementation of the United Nations Millennium Declaration, (UNGA Res. A/56/326 of 6 September 2001).

of TRIPS while emphasising the need to allow developing countries to provide their citizens with affordable medicines and vaccines.

MDG Goal 8 Target 12 plainly calls for ‘an open, rule-based, predictable, non-discriminatory trading and financial system’ or in other words for the lifting of restrictions on exports and trade to ensure global partnership for development. The narrative is thus that free trade is the main ingredient for development. The Road Map further states that World Bank and International Monetary Fund (IMF) loans and debt relief will only be provided to developing countries once conditions are met enabling them to service residual debt through export earnings, aid and capital inflows. This demonstrates the necessity of abiding by neoliberal conditions or risk defaulting on outstanding loans, forfeiting future loan obtainment.<sup>45</sup> Likewise, bilateral debt relief can only be obtained if capitalistic, market-driven policies are adopted.<sup>46</sup>

Goal 17 on global partnership for sustainable development once again presents an open market as the solution to underdevelopment and in Targets 10, 11, 12 calls for the opening of markets and the removal of trade restrictions to increase exports from developing countries. The goal further calls for the reduction of indebtedness of the least developed countries (LDCs) in Target 4 through debt restructuring.

In the context of the environment, the MDGs speak in Goal 7 Target 9 of integrating the principles of sustainable development into country policies and programmes and reversing the loss of environmental resources. This does not address the fact that domestic policies which do so can be in conflict with WTO rules (see chapters IV and VI for a detailed discussion), neither does it address the fact that WTO fails to sanction fossil fuel subsidisation. The Road Map merely supports the Kyoto Protocol which envisions emission trading – a system which fails to force companies to move towards environmentally friendly modes of production, as they find it cheaper to buy the excess credits than to install new pollution-abatement equipment.<sup>47</sup> One would expect the SDGs to be the most revolutionary in terms of the protection of the environment vis-à-vis ensuring economic growth, however in its Goal 8 dedicated to ‘sustained and sustainable economic growth’ the SDGs merely repeat the neoliberal prescription of the Structural Adjustment Programmes, i.e. the need to increase ‘Aid for Trade’ where nations are provided with aid in return for lifting trade restrictions.<sup>48</sup>

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<sup>45</sup> Carant, *supra note* 37, p. 23.

<sup>46</sup> R. Manning, ‘The Impact and Design of the MDGs: Some Reflections’, 41 *IDS Bulletin*, (2010), p. 10.

<sup>47</sup> O. Reyes and T. Gilbertson ‘Carbon Trading: How it Works and Why it Fails’ 45 *Soundings* (2010), p. 31.

<sup>48</sup> UN, Open Working Group Proposal for the Sustainable Development Goals, (Res. A/68/970 of 19 July 2010), p. 14.

Once again, therefore, the liberalisation of trade is presented as the ultimate solution. Governments are expected to adjust their institutional structures in order to enable more systematic considerations of the environment when economic decisions are made, yet there is no mention of adjusting the current system of allowable and prohibited subsidies under the WTO which in practice allows for fossil fuel subsidisation but not that of green energy programmes when these are conditioned upon local content requirements. It is clear from this example, how language can be manipulated to appear to the general public as procuring actual progress, while leaving root problems unaddressed. The WTO subsidies rules actively discourage divestment into green energy production, which in principle goes against Goal 8, yet technically speaking it does not conflict with it. Thus the reference to sustainable development in the WTO Preamble is not random or insignificant. It is a part of a wider narrative with the particular goal of providing perceived legitimacy to the neoliberal agenda of the most powerful countries, by presenting it as pro-developmental.

Despite the above, it is worth noting that many observers, including the UN Independent Expert on the Promotion of a Democratic and Equitable International Order, nevertheless find in the SDGs a tool for reforming the WTO. Thus for example, de Zayas finds the *India Solar Mission* decisions of the Panel and Appellate Body, which is directly based on the above mentioned subsidies rules, to be against the SDG and the Paris Agreement and he furthermore finds the outcomes of the Nairobi Ministerial to be in conflict with the said SDGs. Azevêdo on the other hand hailed Nairobi as a success in terms of achieving the SDGs.<sup>49</sup>

Apart from the well-deserved criticism, the SDGs also merit some praise. For example, Goal 1 no longer speaks merely of eradicating extreme poverty and reducing the proportion of people living in poverty, but also of reducing inequality. The basis for this is the 2013 UN Document, Report on the World Social Situation: Inequality Matters which exposes the need to reduce growing inequalities within and between countries<sup>50</sup> for the sake of ensuring equal economic and social opportunities, equal access to healthcare and educational opportunities, eliminating poverty traps and the wasting of human potential.<sup>51</sup> The document highlights the fact that failing to do so results in less dynamic, less creative societies<sup>52</sup> as well as a global

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<sup>49</sup> WTO, 'DG Azevêdo presents Ban Ki-Moon with WTO Agreement contributing to UN Development Goals', (10. November 2016), available at: [https://www.wto.org/english/news\\_e/news16\\_e/dgra\\_10nov16\\_e.htm](https://www.wto.org/english/news_e/news16_e/dgra_10nov16_e.htm), (last accessed, 8.7.2017).

<sup>50</sup> UN, Inequality Matters: Report on the World Social Situation. (Res. ST/eSA/45, 31 December 2013).

<sup>51</sup> *Ibid*, p. 22.

<sup>52</sup> *Ibid*.



loss of demand which translates into poor and unsustainable economic growth.<sup>53</sup> The recognition of the effects of growing inequality is highly significant as it moves the conversation beyond merely assuring the minimum level of human rights enjoyment as envisioned by the neoliberal doctrine (see chapter VII). There is no mention of the fact that neoliberal policies exacerbate such inequality, yet it opens the door for criticism in such a direction. In this sense the SDGs bring an important improvement and support to the call for the right to development (RTD) to become an integral part of international economic law, including the law of the WTO. Global trade rules and the theory behind them are all about the search for ‘the most efficient producer’ with absolute disregard of the fact that this contributes to growing inequalities between and within countries.

Commendably Goal 10 of the SDG’s sets out to reduce inequality within and *among* countries, with Target 6 focusing on the integration of developing countries’ voices in international economic decision-making processes, potentially increasing the inclusion of their ideas and opinions. In the context of the same goal, the WTO is furthermore expected to ‘implement the principle of special and differential treatment for developing countries, in particular LDCs.’<sup>54</sup> Thus this goal and its recognition of the importance of effective SDT give a mandate to demand a rebalancing of the current system tilted too heavily towards the voices and interests of developed countries. Goal 16, Targets 7 and 8 further focus on increasing the inclusion of developing countries in global decision-making processes more generally, to promote peaceful and inclusive societies for sustainable development. Yet such an inclusion needs to be meaningful and not restricted only to expressing ideas which inevitably end up being ignored, such as has been the practice at the WTO (see chapter IV).

#### **4. Development as the Objective of a Round of Negotiations**

Development was further identified as the main objective of the new round of WTO negotiations in 2001, which were to rebalance the system into a more development friendly model. The Doha Ministerial Declaration declared:

International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.<sup>55</sup>

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<sup>53</sup> *Ibid.*

<sup>54</sup> WTO, ‘The WTO and the Sustainable Development Goals’, available at: [https://www.wto.org/english/thewto\\_e/coher\\_e/sdgs\\_e/sdgs\\_e.htm](https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm), (last accessed: 8.7.2017).

<sup>55</sup> WTO, Doha Ministerial 2001: WT/MIN(01)/DEC/1 20 November 2001 *Ministerial Declaration*, adopted on 14 November 2001.

Despite this declaration and many issues relevant to development actually being raised in the so-called Doha development round, nothing much has changed in terms of the outcomes of the negotiations (see chapter IV). While the WTO in its recent publication speaks of the redundancy of explicitly identifying the round's objective to be development, as 'development is [already] a core aim -and main accomplishment - of much of what the WTO does', the reality is rather the opposite. As India sarcastically expressed at one point during the negotiations: 'We wonder now whether development here refers to only further development of the developed countries.'<sup>56</sup> Chang on the other hand simply called the Doha Development round yet another anti-development project wrapped in development theory.<sup>57</sup> One could say the masks finally fell in 2015 at Nairobi, when the Doha Development Agenda (DDA) was simply cast aside (see chapter IV). In the words of the UN Independent Expert on the Promotion of a Democratic and Equitable International Order, The Ministerial could have delivered good results, had it been true to the commitments made under the DDA, but it was instead 'seriously marred by the intransigence of some States that attempted to bury the Agenda and prevent progress on food, security and environmental protection.'<sup>58</sup> The Ministerial 'failed to implement target 17.10 [SDGs], pursuant to which States would 'promote a universal, rules-based, open, non-discriminatory and equitable trading system, under the WTO, including through the conclusion of negotiations under the DDA. That paradox highlights the need to rethink the global trading system and the skewed ideological approach taken by some negotiators. One problem with the WTO beyond Doha and Nairobi, is that the prevalent vision that equates 'progress' with the growth of trade volumes and exports or with a higher gross domestic product. The UN Charter advocates another vision of progress as development, solidarity and human rights in a progressively more democratic and equitable international order.'<sup>59</sup>

To sum up, economic development of poorer countries as an essential element of sustainable development is clearly set out as a mandate of the WTO. Arguably this mandate is also encompassed in the GATT/WTO goal of 'raising the standards of living', since economic development is a prerequisite for the long-term ability of states to provide the conditions for

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<sup>56</sup> India, Statement by India at the Heads of Delegation Meeting, Cancun, Mexico, 13 September 2003; in Jawara *supra* note 31, introduction xvii.

<sup>57</sup> H.-J. Chang, 'Hamlet without the prince of Denmark: How Development Has Disappeared from Today's Development Discourse', talk (London School of Economics, 25. 2. 2010) available at: <http://www.youtube.com/watch?v=INpCcb671KI> (last accessed: 22.8.2016).

<sup>58</sup> UN, Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, Human Rights Council, Thirty-third session, A/HRC/33/40, 2016, p. 2.

<sup>59</sup> *Ibid*, p.15, para. 67.

the enjoyment of all human rights in a progressive manner. Yet despite development being a mandate of the organisation, the means of achieving it are set out inadequately as they rest too heavily on the economic theory of comparative advantage and its modern adaptation with insufficient regard for the principle of SDT. This theory is thus analysed below.

### **5. The Underlying Economic Theory of the World Trading Regime**

The comparative advantage theory in economics is used as a legitimizing factor for the ultimate goal of the world trade regime, i.e. free trade. It claims its application benefits everyone and enhances welfare in all parties that open up. The bargaining at the GATT/WTO has thus far not yet achieved complete free trade, but this is what future rounds are called to do.<sup>60</sup> In terms of tariffs, almost 60% of global trade is now tariff free and the tariffs still applied have been substantially reduced since World War II.<sup>61</sup> These reductions have been especially dramatic in developing countries. For example India's average tariff has fallen from 38.6% to 13.5% in two decades; Morocco's from 33.5% to 12.5% and Indonesia's from 25.6% to 7.1%.<sup>62</sup> Leaving other trade barriers aside for a moment, this is a significant opening up of developing countries' markets.

There is a general consensus on the condemnation of developed countries in the way they have sought liberalisation in the GATT/WTO regime in sectors in which they have been superior in technology and production, while refusing the opening up of their markets for products in which developing countries have had an advantage (namely agriculture and textiles, see chapter IV). In this sense the critique is that developed countries have not been implementing the very free trade theory which they and the WTO preach when it does not serve their interests. True proponents of free trade unsurprisingly condemn the imposition of restrictions on the products of developing countries regardless of their existing or non-existing reciprocity. Friedman thus states that: 'Instead of making grants to foreign governments in the name of economic aid-thereby promoting socialism-while at the same time imposing restrictions on the products they produce-thereby hindering free enterprise-we could assume a consistent and principled stance.'<sup>63</sup>

However, it is important to understand that even if the pure form of the free trade theory had been implemented, it would pose serious challenges for the struggle against growing

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<sup>60</sup> G. Dunkley, *The Free Trade Adventure: the WTO, the Uruguay Round and Globalism - a Critique*, (Zed Books, 2001), p. 107.

<sup>61</sup> WTO, *The WTO at Twenty: Challenges and Achievements*, (WTO, 2015), p. 7.

<sup>62</sup> *Ibid.*

<sup>63</sup> M. Friedman and R. D. Friedman, 'The Case for Free Trade', *Hoover Digest* 4 (1979).

inequality in developed countries and for the ability of developing countries to achieve true development. As history shows, protectionism used in conjunction with other policies aimed at transforming the productive structure of a country, has been essential in nearly all successful instances of development. This has been conveniently forgotten and the free trade or comparative advantage theory, invented by Smith and Ricardo has become a sort of a religion of the majority of modern economists, where little about it is questioned. On the other hand '[t]hey have created a straw man, called the 'protectionist' with whom they associate anyone from List to Hamilton,'<sup>64</sup> as a sort of derogatory name for those they consider have erred in their approach to economics. The bias is also evident at the WTO, which has proclaimed the theory of comparative advantage to be 'the single most powerful insight into economics'.<sup>65</sup>

## **6. Benefits of Liberalisation for Development**

There are undoubted benefits to liberalisation in many aspects. Technological advancement and the emergence of a more secure and predictable trading environment, have allowed producers to fragment production across many countries.<sup>66</sup> Recent trade statistics highlight the importance of trade in intermediate products and the significance of such trade in improving the competitiveness of exports. Today, trade in intermediate products accounts for more than half of global merchandise exports; and the average import content of exported goods is 40%.<sup>67</sup> Cheap imports of intermediate products are the lifeblood of competitive exports. In 2012, Karel De Gucht, the European Commissioner for Trade referred to this fact when he expressed the need to convince Europeans about the value of free trade. He reminded that few businesses make a product from start to finish and sell it to a customer themselves. Rather it is as part of international teams that we create wealth.<sup>68</sup> Yet this realisation does not imply that any trade restriction is anti-developmental. Instead it implies that any economic policy needs to be well thought out and not impose restrictions on trade across the board. Furthermore the liberalisation of foreign markets expands the markets that local producers can access, allowing them to produce at the most efficient scale to keep down

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<sup>64</sup> P. Sai-wing Ho, 'Distortions in the trade policy for development debate: A re-examination of Friedrich List', 29 *Cambridge Journal of Economics*, (2005), p. 742.

<sup>65</sup> WTO, 'Understanding the WTO: The Case for Open Trade (undated), available at: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm), (last accessed 22.8.2016).

<sup>66</sup> Van den Bossche, *supra note* 10, p.12.

<sup>67</sup> *Ibid*, p. 13.

<sup>68</sup> K. De Gucht, 'Trading in Value and Europe's Economic Future', High-Level Conference on 'Competitiveness, Trade, Environment and Jobs in Europe: Insights from the New World Input Output Database (WIOD)' (16 April 2012).

costs. As the size of an enterprise increases, its average cost per unit falls, as the fixed costs are spread out over more products. This is vital for developing countries because even when they have a numerous population, low incomes make their potential local markets small.<sup>69</sup> Increased trade also diffuses new technologies and ideas, increasing local workers' and managers' productivity. TT through trade and investment are even more valuable for developing economies which employ less advanced technologies and typically have less capacity to develop new technologies themselves.<sup>70</sup>

In the words of one of its main proponents, free trade promotes a mutually profitable division of labour, greatly enhances the potential of real national product, and makes possible higher standards of living all over the globe.<sup>71</sup> A WTO study from 2000 claims that trade liberalisation allows people to exploit their productive potential, assists economic growth, curtails arbitrary policy interventions and helps to insulate against shocks in the domestic economy.<sup>72</sup> Yet not everything is as straight forward and developmental economists put substantive reservations on such claims. The main developmental argument in favour of restrictions on trade is that comparative advantage is not fixed but can be created. For example, efficient production techniques can be learned through practice while similarly innovation takes place mainly through the production process. If not yet competitive an industry which is exposed to outside competition too early, loses its chance to develop. While there is a short-term loss to domestic consumers, who have to put up with shoddy, expensive products for a while, once these companies get up to speed, workers and consumers are both better off.<sup>73</sup> While proponents of free trade acknowledge the negative impact on producers which are not able to compete with unrestricted imports, they do not perceive this as a problem for the development of the affected society but rather as a loss of 'a few' for the benefit of the majority which gains access to cheaper products and more choice.<sup>74</sup> Erecting any kind of trade barriers is thus seen as the protection of a few at the expense of the many. In this sense Stiglitz lamented the fact that compensation of the losers rarely happens, which

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<sup>69</sup> S. Lester et al., *World Trade Law: Text, Materials and Commentary*, 2<sup>nd</sup> ed., (Hart Publishers, 2012), p. 13.

<sup>70</sup> *Ibid.* Note that the quality and quantity of technological transfer are however heavily impacted by the intellectual property regimes in place. The WTO agreements include TRIPS which sets minimum standards for IP protection in Member States. A discussion on whether TRIPS is beneficial for technology transfer is undertaken in chapter V.

<sup>71</sup> P. Samuelson, *Economics*, 10<sup>th</sup> edn., (McGraw – Hill, 1976), p. 692.

<sup>72</sup> D. Ben-David, H Nordström and A. Winters, Trade, Income Disparity and Poverty, Special Studies Series (WTO, 2000), p. 6.

<sup>73</sup> Lester, *supra note* 69, p. 26.

<sup>74</sup> B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System, The WTO and Beyond*, 2<sup>nd</sup> edn. (Oxford University Press, 2001), p. 22.

in his opinion would have rectified the situation and neutralised opposition to free trade.<sup>75</sup> Furthermore the government is not trusted to be honest enough to pick the appropriate industries to protect or that it will remove protection once it is no longer necessary.<sup>76</sup> Krugman makes the same argument in the context of strategic trade policy where a country imposes a tariff or quantitative restriction to reserve the domestic market for a domestic industry with economies of scale to cut its costs and undercut foreign competitors in other markets. While those defending such policies believe that a domestic industry establishing itself on the world market would contribute to the national economic welfare, Krugman maintains that such interventions typically raise the welfare of small, fortunate groups by large amounts, while imposing costs on larger, more diffuse groups.<sup>77</sup> A similar sentiment is expressed with regards to subsidies. Proponents of free trade do not believe governments are capable of picking ‘the right’ industry to subsidise. In this sense Lester et al. find a government protecting and investing into ‘the wrong’ green technology worse than simply leaving it to the free market to pick its winner, whether it be coal, nuclear or wind power. This is because of the purported concern for the taxpayer’s money.<sup>78</sup> Friedman claims that amid the cacophony of the ‘interested sophistry of merchants and manufacturers’ and their employees, one voice is drowned out, i.e. the voice of the consumer.<sup>79</sup> As he explains, ‘protection’ really means ‘exploiting the consumer’:

A ‘favourable balance of trade’ really means exporting more than import, sending abroad goods of greater total value than the goods we get from abroad. In your private household, you would surely prefer to pay less for more rather than the other way around, yet that would be termed an ‘unfavourable balance of payments’ in foreign trade.<sup>80</sup>

He further dismisses what he calls the ‘extreme horror story’ depicted by the defenders of tariffs, i.e. a situation in which country A could produce all products cheaper than country B and trade would therefore only flow one way.<sup>81</sup> Basing his logic on the mechanism of (balance of payments), he claims that the inevitable fall in the value of the currency of country B would be followed by its products becoming cheaper for purchase by country A and everything would fall back into place as trade would achieve equilibrium.<sup>82</sup> According to

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<sup>75</sup> J. Stiglitz, ‘Addressing Developing Country Priorities and Needs in the Millennium Round’, in R. Porter and P. Sauvé (eds.), *Seattle, the WTO and the Future of the Multilateral Trading System* (Harvard University Press, 2000), pp. 51-3.

<sup>76</sup> Lester, *supra note* 69, p. 27.

<sup>77</sup> P. Krugman, ‘Is Free Trade Passé?’, 1 *Journal of Economic Perspectives*, (1987), p. 141; J. Bhagwati, ‘Is Free Trade Passé After All?’, 125 *Weltwirtschaftliches Archiv*, (1989), p. 125.

<sup>78</sup> Lester, *supra note* 69, p. 28.

<sup>79</sup> Friedman, *supra note* 63.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

Friedman even if a protected and supported industry could compete successfully once established, that does not of itself justify an initial tariff:

It is worthwhile for consumers to subsidize the industry initially – which is what they in effect do by levying a tariff-only if they will subsequently get back at least that subsidy in some other way, through prices lower than the world price or through some other advantages of having the industry. But in that case is a subsidy needed? Will it then not pay the original entrants into the industry to suffer initial losses in the expectation of being able to recoup them later?<sup>83</sup>

This proposition must however rest on the assumption that industries have such an amount of resources or loans at their disposal to be able to endure significant losses year in year out and still persist with investment and production until the situation eventually turns. Many free traders argue against protectionism because they claim it damages an industry's competitiveness.<sup>84</sup> They further maintain that an industry which holds true comparative advantage would be able to stand on its own feet from the outset.<sup>85</sup> Considering the nature of today's highly competitive market, it is hard to imagine how an industry can be sophisticated and advanced enough from day one of its operations to compete with the most established firms of the world without any protection. The more convincing argument against interventionist policy-making is the above mentioned fear that it might be susceptible to being captured by protectionist interests.<sup>86</sup> While this can certainly happen it is not unavoidable if protection is properly monitored and industries do not get the sense that they can relax and not put any effort into upgrading, since the government is making sure that they are not failing. Constructive protectionism requires a responsible government implementing a clear plan for industrialisation and being prepared to change the plan when necessary. As List observed: [A] statesman... must know, over and above that, how the productive powers of a whole nation can be awakened, increased, and protected, and how on the other hand they are weakened, laid to sleep, or utterly destroyed.<sup>87</sup> It has been argued that it was actually List's vision of a broad-based interventionist approach which was implemented by many of the East Asian successful economies: 'Far from confirming the common belief that a move away from trade intervention will improve efficiency and spur growth, these countries' experience suggest that a sensible combination of trade, industrial and technology policies, implemented through tariff and many non-tariff instruments and with safeguards in place, could bring forth rapid development and structural changes in an economy.'<sup>88</sup> List, largely being labelled a

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<sup>83</sup> *Ibid.*

<sup>84</sup> Dunkley, *supra note* 60, p. 112.

<sup>85</sup> M. Corden, *Trade Policy and Economic Welfare*, (Oxford: Clarendon: 1974), chapter 9.

<sup>86</sup> Bhagwati, *supra note* 77.

<sup>87</sup> F. List, *National System of Political Economy*, translated by G. A. Matile, (Lippincott & co., 1856), p. 356.

<sup>88</sup> Sai-wing Ho, *supra note* 64, p. 742.

‘protectionist’ was primarily interested in the economics of development rather than trade and understood clearly the multifarious ways of promoting industry, albeit he saw protectionism as integral to the support of the other instruments.<sup>89</sup> Some free traders have accepted certain arguments for divergence from their theory in the form of infant industry protection in the context of what they see as ‘market failure’ – for example, the capital market allocating inadequate resources to high-risk sectors – which in their view can best be rectified by domestic reforms or subsidies.<sup>90</sup>

Another common argument from the proponents of liberalisation is that export-led growth has been the industrial policy that enriched much of Asia and left millions of people better off.<sup>91</sup> This is true, yet the implication that this was accompanied by a liberalisation of the domestic market is not true. The frequently reiterated claim that China has used since 1978 a liberalised trade policy to increase growth and reduce poverty<sup>92</sup> is simply misleading. The benefits that their export-led growth brought to the economy in terms of providing China with the ability to buy capital equipment needed for its modernization and the benefits of FDI in terms of bringing in managerial and technical expertise are not disputed.<sup>93</sup> What is disputed is for example the image of China as a poster child for globalisation, since its economic policies have violated virtually every rule by which the proselytizers of globalisation would like the game to be played.<sup>94</sup> It did not liberalise its trade to any significant extent during its economic boom and it joined the WTO only in 2001 whilst still keeping its economy amongst the most protected in the world.<sup>95</sup> Furthermore even since joining the WTO in 2001 China continuously disregards rules which go against its aim of development in what can be called an ‘effective breach’ of the rules. As a consequence it has suffered many losses at the dispute settlement mechanism (DSM) to a point where it sought to put a limit on the amount of times a Member can be brought to the DSM. As Rodrik puts it: ‘The remarkable thing about China is that it has achieved integration with the world economy *despite* having ignored these rules – and indeed because it did so. If China were a basket case today, rather than the stunning success that it is, officials of the WTO and the World Bank would have fewer difficulties

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<sup>89</sup> G. Dosi, K. Pavitt and L. Soete, *The Economics of Technical Change and International Trade*, (New York University Press, 1990), p. 28.

<sup>90</sup> Dunkley, *supra note* 60, pp. 111-112.

<sup>91</sup> J. Stiglitz, *Globalization and Its Discontents*, (Penguin, 2002), pp. 4-5.

<sup>92</sup> Lester, *supra note* 69.

<sup>93</sup> D. Rodrik, ‘Globalization for Whom? Time to Change the Rules – and Focus on Poor Workers’, 104 *Harvard Magazine*, (2002), pp. 29-30.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*



fitting it within their worldview than they do now.<sup>96</sup> In short, global markets are good for poor countries, while the rules according to which they are being asked to play the game are often not.<sup>97</sup> In the context of meeting the SDGs, WTO Director-General Azevêdo brought up the case of China again in the following statement:

Those countries that have opened their economies and made efforts to join international markets have performed well. Recent research has shown that opening up to trade, such as through GATT and WTO membership, boosts economic growth... China is a case in point. A period of radical reform — supported by the process of WTO accession — saw China's simple average tariff falling from about 40 per cent in 1985 to under 10 per cent today. Its trade-weighted average tariff is now just over 4 per cent, the lowest among the big emerging economies. The pursuit of an export-led growth model has led China to become the world's second largest economy and now the world's biggest trading nation. And the developmental impact has been huge. China reduced poverty levels from 60 per cent to 12 per cent between 1990 and 2010.<sup>98</sup>

While technically not untrue, this statement purposefully oversimplifies the situation and attributes all the successes to China's (imperfect) liberalisation, despite it being merely a final step in a long process of building up competitiveness. Furthermore it is not only China, but also India, South Korea, Taiwan and Vietnam who are among those that have recently experienced outstanding rates of growth and participated in significant trade long before adopting liberalizing reforms.<sup>99</sup> China's economic rise lifted out of poverty a significant number of its population and consequently much of the debate on whether globalisation has brought progress in achieving developmental goals comes down to who gets to 'claim' China's success. There is however a risk of reversal of this progress which has been recognised by the Human Development Report in 2011 due to the failure to reduce grave environmental risks and deepening social inequality.<sup>100</sup> The question of whether economic globalisation makes things better or worse in this sense is controversial. While addressing this question, one should avoid falling into the trap of either being 'pro' or 'against' trade as such, which is often the case with those that disregard most of the evidence.<sup>101</sup>

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, p. 30.

<sup>98</sup> WTO, 'Trade must play a central role in post-2015 international work on development, Azevêdo tells UNCTAD meeting', (4 April 2014), available at: [https://www.wto.org/english/news\\_e/spra\\_e/spra13\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra13_e.htm), (last accessed: 8.7.2017).

<sup>99</sup> S. Joseph, *Blame it on the WTO: A Human Rights Critique*, (Oxford University Press, 2011), p. 164; D. Rodrik, *The Global Governance of Trade: As if Development Really Mattered* (UNDP, 2001), pp. 18, 21, 24, 26; J. R. Paul 'Do Institutions contribute to Economic Growth and Development?', 44 *Virginia Journal of International Law*, (2003) 312-313.

<sup>100</sup> UNDP, *Human Development Report 2011, Sustainability and Equity: A Better Future for All* (United Nations, 2011).

<sup>101</sup> Oxfam, *Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty* (Oxfam, 2002), Ch. I.

## 7. The Anti-Developmental Nature of the Theory of Comparative Advantage

Considering that the theory of comparative advantage, the core of the case for free trade, does not make any claims as to the benefits liberalisation for development, the use of the development language seems to be dishonest *ab initio*. According to the theory, consumers would benefit from liberalised international trade because goods become cheaper and available in larger amounts, and since we are all consumers, everyone will benefit. Dynamic developments like economic growth or the transformation of the productive structure are not integrated into the theory.

After the fall of the Berlin Wall, neo-liberalism and ‘market fundamentalism’ manifested themselves in the following prescriptions to developing countries: trade liberalization, liberalization of inflows of foreign direct investments, deregulation and privatization.<sup>102</sup> In 1989 the economist John Williams invented the term ‘Washington Consensus’ to cover these policies which formed the standard reform package that the Washington based institutions, such as the International Monetary Fund (IMF), World Bank and the US Treasury Department prescribed to developing countries. The WTO shares with minor differences a common ideology with these institutions, i.e. a very particular kind of capitalism, which gives free rein across the world to the profit-maximizing interests of a small number of huge, undemocratic and largely unregulated transnational corporations.<sup>103</sup>

In 2004, James Wolfensohn, President of the World Bank finally observed that ‘the Washington Consensus [had] been dead for years. It has been replaced by all sorts of other consensuses’.<sup>104</sup> Indeed it was not the countries which followed it, but the countries which did not who ironically managed the most successful development in history.<sup>105</sup> The effects of these economic and social theories which leave out key determinants of what creates wealth and poverty, have been arguably even more harmful in the so-called Third World in the long term than the crimes and injustices committed by whites, Europeans and others.<sup>106</sup> As demonstrated below, ‘[y]ou can call it historical amnesia or double standard’<sup>107</sup> but none of the now developed countries followed the prescriptions given today to developing countries, when they themselves were still developing. It is important to bear in mind that ‘economic

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<sup>102</sup> E. S. Reinert, *How Rich Countries Got Rich, and Why Poor Countries Stay Poor*, (Constable and Robinson, 2008), pp. 11-12.

<sup>103</sup> R. Peet, *Unholy Trinity, The IMF, World Bank and WTO*, (Zed Books, 2007), preface.

<sup>104</sup> Quoted in S. Maxwell, ‘The Washington Consensus is dead! Long live the meta-narrative!’, Working Paper 243, Overseas Development Institute (2005), p.1.

<sup>105</sup> J. Stiglitz, ‘More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus’, The 1998 WIDER Annual Lecture, (1998), p.2.

<sup>106</sup> Reinert, *supra note* 102, p. 12.

<sup>107</sup> H.-J. Chang, *supra note* 57.

policy analysis is a cultural, political and social endeavour, rather than a study of the application of proven, scientific truth.<sup>108</sup> Despite this, economic theory, when effectively promoted, can have an unimaginable impact on the convictions of ordinary people as well as politicians.<sup>109</sup> The free trade theory started capturing hearts and minds when a promotional movement began in the 19<sup>th</sup> century out of self-interest in Manchester, which was the centre of British manufacturing exports and relied heavily on markets in Europe, North America and the Empire.<sup>110</sup> The classical liberal theory experienced a renaissance when it was remade into the neoliberal ideology at a number of coordinated centres of influence and persuasion and was later spread by mass media and tactically supported by American big business.<sup>111</sup>

Thus it is essential not to take any mainstream economic theory at face value. In the context of the WTO it is thus absolutely necessary to understand the theory of comparative advantage, later reformulated into the marginal analysis framework, the fundament of neoclassical economics,<sup>112</sup> to form an informed judgement the organisation's legitimacy. In the same way that the Rule of Law is used to legitimise domestic legal systems, it is used to legitimise the international legal trading regime.<sup>113</sup> Such legitimations make certain claims about the nature of a system while concealing and preventing the understanding of its true nature - in this sense comparative advantage and its claim that 'everyone will profit' is used to

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<sup>108</sup> R. Peet, *supra note* 103, p. 15.

<sup>109</sup> J. M. Keynes, *The General Theory of Employment, Interest and Money*, (Management Laboratory Press, 2009), p. 372: 'the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back... in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest... soon or late, it is ideas, not vested interests, which are dangerous for good or evil.'

<sup>110</sup> E. Sheppard, 'Constructing Free Trade: From Manchester Boosterism to Global Management', 30 *Transactions of the Institute of British Geographers*, (2005), pp. 159, 163: the promotional techniques included recruiting capitalists around the country and organising events at key spaces for publicity and empowerment; in London, which proved to be one of the most difficult places to gain support they worked together with a Conservative Prime Minister who happened to share their background in cotton, and used a combination of verbal persuasion, voter registration drives and threats to back much more radical constitutional reform if the Corn Laws (which were preventing the import of less expensive foreign cereal products) were not repealed; making the case that what was good for Manchester was good for England – playing on feelings of national independence and pride. 'England's global positionality, as the hegemonic industrial and trading power controlling an empire of global scope, meant that national success simultaneously took free trade to the global scale. Once at this scale, moral arguments and Ricardian theory could be deployed to present the doctrine as being of global and not simply national interest.'

<sup>111</sup> Peet, *supra note* 103, pp. 9-13: large corporations and banks were financially backing right-ring think-tanks, social scientists, writers and journalists, financing television documentaries and journals.

<sup>112</sup> R. Schumacher, 'Deconstructing the Theory of Comparative Advantage', 2 *World Economic Review*, (2013), p. 3.

<sup>113</sup> M. H. Davis and E. D. Neacsu, 'Legitimacy globally: the incoherence of free trade practice, global economics and their governing principles of political economy', 69 *University of Missouri – Kansas City Law Review*, (2001), p. 733.

conceal the disastrous disparities in income and welfare created by the system and to ensure that developing countries will not demand special treatment.<sup>114</sup> The WTO holds two principles as being of utmost importance: most favoured nation (MFN) and national treatment, which derive directly from the law of comparative advantage. The theory of is one of the most successful theories in the history of economic doctrines and has acquired the reputation of science, some of its proponents going as far as saying that free trade is 'a scientific fact as *indisputable as gravity*'.<sup>115</sup> However many voices are challenging the theory, some calling it 'quaint and unreliable' or simply 'irrelevant'.<sup>116</sup> The author of the theory, David Ricardo, was a London stockbroker, self-made millionaire, and Member of Parliament who read Adam Smith's *The Wealth of Nations* on his holiday and declared himself an economist.<sup>117</sup> The essential components of his theory are quite simple and the implications that can be drawn from the model appear to be widely applicable.<sup>118</sup> From the idea that specialization is efficient, the theory forcefully makes the 'generalization that free trade must be in the best interest of all trading countries.'<sup>119</sup> Under the theory, advantages are determined by comparing national opportunity costs at the optima production compositions of different national economies. The optimum production composition of an economy lies where the production possibility frontier meets the highest attainable social indifference curve. Resources are scarce. If an economy employs them fully, this is production efficiency. The amount and ratio between produced goods or services in this state will depend on the way resources are distributed towards producing them. This is illustrated by the production possibility frontier. To produce one (more) unit of a particular product, one has to 'give up' a certain amount of another product, which is known as opportunity cost. Opportunity costs grow - i.e. with each additional unit of a particular product, a larger amount of another product needs to be given up. Bringing in the perspective of the consumer, the optimum production composition will be in the point where the production possibility frontier meets the highest possible social indifference curve. To put it simply, it is the point in which fully employed resources of an economy are distributed and managed in such a way that the ratio

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<sup>114</sup> *Ibid*, pp. 733-734, 747.

<sup>115</sup> F. Trentmann, 'Political Culture and Political Economy: Interest, Ideology and Free Trade', 5 *Review of International Political Economy* (1998), p. 226.

<sup>116</sup> R. Driskill, 'Deconstructing the Argument for Free Trade: A case Study of the Role of Economists in Policy Debates', 28 *Economics and Philosophy*, (2012).

<sup>117</sup> I. Fletcher, *Free Trade Doesn't Work: What Should Replace it and why*, ( U.S. Business and Industry Council, 2011), p. 95.

<sup>118</sup> R. E. Prasch, 'Reassessing Comparative Advantage: The Impact of Capital Flows on the Argument for Laissez-Faire', 29 *Journal of Economic Issues* 2, (1995), p. 247.

<sup>119</sup> *Ibid*, p. 247.

between the produced goods and services gives the most satisfaction to consumers' demands as possible. Let us imagine two different economies, which produce two different goods. In nation A's optimum the opportunity cost for one unit of product x is three units of product y. On the other hand in nation B's optimum, the opportunity cost is one y for one x. Before specialisation A produced 10 units of x and 30 units of y in its optimum. On the other hand B produced 30 units of x and 30 units of y. After specialization, A employs all its resources to produce y and creates 60 units, while B specializes in producing x and creates 60 units of x. This way they have jointly created 20 units more of product y. Ricardo illustrated this proposition with an example of two nations, England and Portugal, both producing two different products, namely cloth and wine. To manufacture any of the products, England needs more labourers than Portugal. To produce the same amount of wine it needs 120 labourers, while Portugal only needs 90 whereas to produce the same amount of cloth, England needs 100 labourers, while Portugal again only needs 90. Focusing on their comparative advantages both nations would benefit if England turned all its production into cloth making while Portugal specialised in wine making. Production of every product will automatically migrate to the nation that can produce it at the lowest opportunity cost, while the nation driven out of a particular industry in this process, is still to find its true comparative advantage.<sup>120</sup> The opportunity cost of producing something is the next most valuable thing one could be producing if it had not employed its factors of production for producing this particular product.<sup>121</sup> Direct cost, however, which is a matter of efficiency, can be even higher than in the nation from which the production migrated.

### **8. Problems of the Comparative Advantage Theory**

Ricardo's theory is plagued with dubious assumptions, while some of its necessary pre-conditions have been disregarded in its neoliberal reformulation. The theory and its reformulations presuppose that all resources are always fully employed and factors of production move easily between industries; that labour and capital do not move between nations; that there are no trade imbalances; and that international trade can be described by a comparative-static model, where every nation has a fixed 'comparative advantage'.<sup>122</sup> The theory takes for granted that factors move easily between industries. In reality this is not the case. Especially labour and real estate are not easily movable. If the factors are not easily

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<sup>120</sup> Fletcher, *supra note* 117, p. 99.

<sup>121</sup> *Ibid*, p. 98.

<sup>122</sup> Schumacher, *supra note* 112, p. 3.

movable imports will not push a nation's economy into industries better suited to its comparative advantage but will merely kill off or drive out its existing industries and leave nothing in their place.<sup>123</sup> This will manifest itself as outright unemployment, or as a less visible phenomenon, underemployment – a decline in quality rather than quantity, as many workers will have to take lower-paying jobs.<sup>124</sup> In all fairness to Ricardo, it has been suggested that ‘a close reading and comparison of the first and third editions of his *Principles of Political Economy and Taxation* indicates that he had reservations concerning the effects of free trade on the interests of labour.’<sup>125</sup> However there is an additional, purely economic cost for a nation which never again uses these individuals’ skills which took investment to acquire.<sup>126</sup> It is also established in the neoclassical theory of production itself, that workers working with less capital become less productive.<sup>127</sup> The killing off of industries can have disastrous consequences for developing countries and it can put them back into more primitive models of production, instead of helping with the upgrading of the productive structure. This is not to say that trade cannot increase the efficiency of resource allocation and thus provide an ‘engine for growth’, however this requires a structural adjustment of an economy<sup>128</sup> which is not always possible considering the limited resources of some countries as well as the limitations put on their policy space by international organisations. Ricardo also falsely believed that only finished products were mobile across borders.<sup>129</sup> Similarly Adam Smith used the famous metaphor of the ‘invisible hand’ that allegedly makes sure of this. Realising that free movement of capital across borders would hurt the British economy as capitalists would invest abroad, he nonetheless believed that they would feel their capital was more secure if they invested at home.<sup>130</sup> Both Smith and Ricardo were clear that the immobility of capital was essential for comparative advantages to determine

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<sup>123</sup> Fletcher, *supra note* 117, p. 107.

<sup>124</sup> *Ibid*, p. 107.

<sup>125</sup> Prasch, *supra note* 118, p. 428.

<sup>126</sup> Fletcher, *supra note* 117, p.108.

<sup>127</sup> Prasch, *supra note* 118, p. 428.

<sup>128</sup> Dunkley, *supra note* 60, p. 109.

<sup>129</sup> D. Ricardo, *On The Principles of Political Economy and Taxation*, (1817, third edition 1821) (Kitchener, Batoche Books, 2001), p. 90: ‘Experience... shews, that the fancied or real insecurity of capital, when not under the immediate control of its owner, together with the natural disinclination which every man has to quit the country of his birth and connections, and intrust himself with all his habits fixed to a strange government and new laws, check the emigration of capital. These feelings, which I should be sorry to see weakened, induce most men of property to be satisfied with a low rate of profits in their own country, rather than seek a more advantageous employment of their wealth in foreign nations.’

<sup>130</sup> A. Smith, *An Inquiry Into The Nature and Causes of The Wealth of Nations*, (Electronic Classics Series Publication), pp. 363-364: ‘By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain; and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.’

international trade, yet this is now discarded as irrelevant. Two of the most important propositions of the modern theory of international trade are extensions of the Heckscher-Ohlin analysis of comparative advantage and the so-called Stolper-Samuelson theorem which suggests that free trade equalizes factor prices and that the removal of protective barriers decreases the return of the scarce factor and increases that of the abundant factor.<sup>131</sup> Factor price equalisation means that labour will receive the same wage, capital the same interest rate, etc., in each country.<sup>132</sup> This then leads to the same effect as if capital and labour were immobile. Many economists have used the Heckscher-Ohlin framework to argue that trade liberalization should raise the incomes of unskilled labour in developing countries. In a developed country like the US the abundant factor would be capital whereas unskilled labour would be the abundant factor in developing countries. In other words, for unskilled labour in the US wages should drop, but in developing countries they should increase. However this holds only if all countries produce all goods, if the goods imported from abroad and produced domestically are close substitutes, or if a nation's comparative advantage is the same in respect to all trading partners.<sup>133</sup> A poor country in a world with many factors and many goods may no longer have a comparative advantage in producing unskilled intensive goods.<sup>134</sup> For example, Mexico might have a comparative advantage in producing low skill goods in trade with the US, however its comparative advantage switches vis-à-vis trade with China.<sup>135</sup> There is no evidence that factor-prices actually do equalise worldwide.<sup>136</sup> If anything, there is a race to the bottom as countries compete for investment. Labour also moves between nations but it is more restricted unless it is skilled labour, then it is encouraged. This creates a vicious circle in which the brightest minds usually emigrate from poorer to more developed countries creating more wealth for the latter and contributing less to the economies of the former.

Another essential assumption of the theory is that trade cannot be unbalanced for a longer period of time, as the adjustment mechanism inherent in the theory transforms comparative

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<sup>131</sup> J. E. Stiglitz, 'Factor Price Equalization in a Dynamic Economy', 78 *Journal of Political Economy*, (1970), p. 456.

<sup>132</sup> D. Davis and P. Mishra, 'Stolper-Samuelson is Dead And Other Crimes of Both Theory and Data', in Ann Harrison, (ed.), *Globalization and Poverty*, (University of Chicago Press for NBER, 2007), p. 89.

<sup>133</sup> *Ibid.*

<sup>134</sup> A. Harrison, 'Globalization and Poverty', Working Paper 12347, National Bureau of Economic Research, (2006), p. 11.

<sup>135</sup> *Ibid.*

<sup>136</sup> T. Subasat, 'What Does the Heckscher-Ohlin Model Contribute to International Trade Theory? A Critical Assessment', 35 *Review of Radical Political Economics*, (2003), p. 152.

production cost advantages into absolute price advantages.<sup>137</sup> A perpetual trade surplus or deficit is impossible under this theory, because Ricardo drew on the price-specie-flow mechanism, developed by David Hume, which maintains that changes in the quantity of the means of payment (gold at the time), only have a price effect, not a real one. Applying it to the England-Portugal example, since Portugal needs less labourers for the production of any of the goods, it is assumed prices in Portugal are lower in the moment when the countries start trading. Consumers will consequently buy both goods from Portugal, the quantity of gold (money) in Portugal will increase, leading to a rise in prices, while the exact opposite process will take place in England, leading eventually to lower prices and competitiveness in one good, namely cloth, which England will now be able to sell cheaper. Finally, the prices of both goods will adjust in a way that the trade is balanced, the value of imports equals the value of exports and an equilibrium state is achieved in which both nations produce the commodity they have a comparative advantage in.<sup>138</sup> Comparative production cost advantages are thus transformed into absolute money price advantages for the consumer. In the neoclassical theory the exchange rate adjustment mechanism is responsible for creating the equilibrium.<sup>139</sup>

When a nation has a deficit, its currency will be depreciated and internationally its goods will become cheaper. The opposite process will take place in a nation with a surplus.<sup>140</sup> When exports become equal to imports in money value, the exchange rate will stop moving and equilibrium will exist.<sup>141</sup> In the case that exchange rates are fixed trade will be balanced via wage rate changes.<sup>142</sup> In the quantity theory of money, used by Ricardo, money is seen as neutral and the velocity of a currency is neglected, however 'neither is velocity constant in practise, nor is money neutral to the real economy. Additionally, if money quantities change, interest rates are affected.'<sup>143</sup> 'Though there is generally a positive correlation between the increase of the quantity of money and inflation, this correlation is not a 1:1 correlation.'<sup>144</sup> These assumptions are simply wrong. The fact that exchange rates are influenced by financial factors as well as rational and irrational expectations cannot be ignored, neither can it be ignored that money can be used for other purposes, such as storing value, which all leads to

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<sup>137</sup> Schumacher, *supra note* 112, p. 13.

<sup>138</sup> *Ibid*, pp. 6, 7.

<sup>139</sup> *Ibid*, p. 7.

<sup>140</sup> *Ibid*, p. 10.

<sup>141</sup> T. Eicher et al., *International Economics*, 7<sup>th</sup> edn., (Routledge, 2009), p. 65.

<sup>142</sup> G. Haberler, 'The Theory of Comparative Cost Once More', 43 *The Quarterly Journal of Economics*, (1929), p. 377.

<sup>143</sup> Schumacher, *supra note* 112, p. 14.

<sup>144</sup> *Ibid*, p. 14.



the fact that the capitalistic world is not characterised by a barter economy.<sup>145</sup> In reality trade imbalances are a constant occurrence and some countries are regularly forced to adjust their domestic policies for balance of payments purposes.<sup>146</sup> As Culbertson pointed out, ‘trade must be kept in balance by trade policy.’<sup>147</sup>

Another problem of the theory is its misrepresentation of mercantilism. When the liberal theory was introduced it presented itself as a saviour from the ‘dark ages’ of mercantilism when nations were openly pursuing policies for their benefit at the expense of other nations. However, free trade is essentially not any different apart from claiming that it benefits everyone. As one commentator observed:

[i]n an international system, that is a system composed of nations, the relations among those elements are bound to be pervaded by power both as ends and means. Mercantilism and free trade are not basically different, but both are the manifestation of, and the instrument by which, power is exercised. Free trade is the mercantilism of the strongest power, and it leads to imperialism almost as surely as thought-out commercial policy.<sup>148</sup>

The mercantile system was in operation for more than 200 years between the sixteenth and eighteenth centuries.<sup>149</sup> Central to the system was the belief that governments should advance the goal of maintaining a positive balance of trade with nations by assuming a protectionist role in the economy.<sup>150</sup> The taxation of trade was the main source of wealth for political elites and imperial powers.<sup>151</sup> However, sometimes unintentionally, and at other times intentionally this taxation also served as protection for domestic infant industries successfully fostering domestic manufacturing at the expense of other countries’ industries.<sup>152</sup> Historically, countries which replaced duties on exports of raw materials with duties on imports of manufactured products, attracted merchants, seamen, and manufacturers of cities and countries more industrially advanced to take up residence in countries with such policies carrying their skill and capital where they found the greatest encouragements and support.<sup>153</sup> Since Adam Smith, mercantilism has been mostly vilified as merely a delusion of early-modern monarchs trying to maximize their gold supplies.<sup>154</sup> Instead of being dismissed in

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<sup>145</sup> *Ibid*, p. 16.

<sup>146</sup> N. Kaldor, *Essays on Economic Policy*, (Duckworth and Co: 1964), chapter 18; J. Culbertson ‘A Realist’s View of International Trade and National Policy’, 18 *International Law and Politics*, p. 1132.

<sup>147</sup> Culbertson, *ibid*.

<sup>148</sup> S. Sideri, *Trade and Power: Informal Colonialism in Anglo-Portuguese relations*, (Rotterdam University Press, 1970), p. 6.

<sup>149</sup> O. Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries*, (Routledge, 2011), p. 8.

<sup>150</sup> *Ibid*, p. 9.

<sup>151</sup> R. Gilpin, *The Political Economy of International Relations*, (Princeton University Press, 1987), p. 171.

<sup>152</sup> M. Lind, *Land of Promise: An Economic History of the United States*, (Harper, 2013), p. 25.

<sup>153</sup> List, *supra note* 87, p. 412.

<sup>154</sup> Lind, *supra note* 152, p. 12.

such a manner it is viewed by others, as a variant of developmentalism.<sup>155</sup> In developmental economics the basic unit is not the individual or the firm but the polity, which today corresponds to a nation-state and the competition or collaboration among them is considered to be the central fact of economics.<sup>156</sup> Friedrich List deemed ‘mercantile’ to be an improper name altogether and called it simply ‘the industrial system’.<sup>157</sup> He commended it for firstly, assuming the importance of manufactures and their influence on agriculture, commerce, and navigation of a country, and frankly acknowledging their importance; secondly, trying to find the best mode of establishing manufacturing industry in a nation; and thirdly, for taking the idea of a nation as its starting point, treating nations as unities, which keeps the attention constantly fixed upon national interests.<sup>158</sup> Furthermore he envisioned only temporary protection, until all countries had attained comparable industrial development, after which there should be global free trade.<sup>159</sup> In fact it may be important to shift between protectionism and free-trade based on the changes in a country’s relative position in the international economic hierarchy.<sup>160</sup> In the words of Reinert:

Cumulative factors and path dependencies cause the winds of the market to blow towards progress only when a high level of development has already been reached. The poorer the nation, the less the winds of laissez-faire blow in the right direction. For this reason, the issue of free trade and other policy decisions is one of context and timing.<sup>161</sup>

## 9. Questions of Context and Timing

Nations which have historically championed free trade, most notably the United States and Britain, have not been founded on the free market neither have they picked random moments in their histories to introduce it. England waited until reaching its economic zenith, a consequence of centuries of protectionism and industrial policy, before embracing the free trade theory. Reinert notes that ‘history of economic thought tells us what Adam Smith said England ought to have done, but no branch of academia seemed to worry much about what England actually did, which proved to be very different from what Smith had advised.’<sup>162</sup>

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<sup>155</sup> Keynes, *supra note* 109.

<sup>156</sup> Lind, *supra note* 152, p. 13.

<sup>157</sup> List, *supra note* 87, p. 411.

<sup>158</sup> *Ibid*, p. 414.

<sup>159</sup> Dunkley, *supra note* 60, p. 112.

<sup>160</sup> H.-J. Chang, ‘Under-explored Treasure Troves of Development Lessons – Lessons from the Histories of Small Rich European Countries (SRECs), in M. Kremer, P. van Lieshout and R. Went (eds.), *Doing Good or Doing Better – Development Policies in a Globalising World*, (Amsterdam University Press, 2008), p. 90.

<sup>161</sup> Reinert *supra note* 102, p. 18.

<sup>162</sup> Reinert, *supra note* 102, p. 12.

England was the first country to invent infant industry protection. In its post-feudal age, Britain was a relatively backward economy and relied on imports of technology, raw wool and low-value-added wool cloth.<sup>163</sup> In the 14<sup>th</sup> century, Edward III was the first of the British monarchs to try and develop local wool cloth manufacturing by bringing in Flemish weavers, centralizing trade in raw wool and banning the import of woollen cloth.<sup>164</sup> To set an example he wore only English cloth.<sup>165</sup> With the reign of Henry VII and the other Tudor monarchs, policies aimed at protecting their infant industry reached a new level. History's first deliberate large-scale policy was born out of Henry VII spending his youth in Burgundy and observing how the woollen textile production created general wellbeing in the area, while ironically importing both the wool and the material used to clean it from England.<sup>166</sup> He witnessed that not only were the textile producers well off in Burgundy but also the bakers and the other craftsmen.<sup>167</sup> 'England was in the wrong business, the king recognized and decided on a policy to make England into a textile-producing nation, not an exporter of raw materials.'<sup>168</sup>

Henry VII created quite an extensive economic policy toolbox. His first and most important tool was export duties, which ensured that foreign textile producers had to process more expensive raw materials than their English counterparts. Newly established wool manufacturers were also guaranteed tax exemption for a period, and were given monopolies in certain geographical areas for certain periods. There was also a policy to attract craftsmen and entrepreneurs from abroad, especially from Holland and Italy. As English wool-manufacturing capacity grew, so did the export duties, until England had sufficient production capacity to process all the wool they produced. Then, about a hundred years later, Elizabeth I could place an embargo on all raw wool exports from England... Several English historians point out that the industrial policy plan of the Tudors was the real foundation of England's later greatness.<sup>169</sup>

It is therefore not hard to understand that Ricardo's choice of England and Portugal for his seemingly logical exercise was not random, and neither was Smith's choice of the same two nations for a discussion on economic specialisation in Chapter VI of *The Treaties of Commerce*.<sup>170</sup> Smith chose as his main case the Methuen Treaty signed by England and Portugal in 1703, by which Portugal agreed to take English woollen cloth at the existing low tariffs in exchange for England taking Portuguese wine at two-thirds of the tariffs imposed on France, its main competitor.<sup>171</sup> 'Therefore Smith reasoned the treaty seemed to benefit

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<sup>163</sup> H.-J. Chang, *Kicking, Away the Ladder: Development Strategy in Historical Perspective*, (Anthem Press, 2002), p. 19.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> Reinert, *supra note* 102, p. 79.

<sup>167</sup> *Ibid.*, p. 79.

<sup>168</sup> *Ibid.*, p. 79.

<sup>169</sup> *Ibid.*, p. 80.

<sup>170</sup> R. Peet, 'Ten Pages that Changed the World: Deconstructing Ricardo', 2 *Human Geography*, (2009), p. 6.

<sup>171</sup> *Ibid.*

Portugal rather than England. Yet the treaty had, nevertheless, been celebrated as a masterpiece of English commercial policy.<sup>172</sup> It was in fact Britain who was benefiting not both countries and certainly not Portugal alone. For Portugal the result of the deal was a complete devastation of its cloth industry, while the skilled workers did not turn to wine-making or agriculture, as the theory goes, but rather emigrated from the country.<sup>173</sup> Britain's not only comparative, as Ricardo described in his model, but absolute advantage in wool, was the result of centuries of protectionism. Britain's economy got its initial boost also thanks to the Navigation Acts, another protectionist measure, according to which exporters were obliged to use British ships, which played an essential role in establishing British maritime supremacy, something even Adam Smith and J. S. Mill recognised.<sup>174</sup>

With Robert Walpole, the first British Prime Minister, British industrial and trade policies aimed at promoting manufacturing industries spread to other industries, with measures such as lowering or dropping altogether import duties for raw materials used for manufactures; increasing duty drawbacks on imported raw materials for exported manufactures; abolishing export duties on most manufactures; significantly raising duties on imported foreign manufactured goods; extending export subsidies to new items; and regulation was introduced to control the quality of manufactured products, for the sake of the reputation of British products.<sup>175</sup> Through the king's address to Parliament, Walpole stated, 'it is evident that nothing so much contributes to promote the public well-being as the exportation of manufactured goods and the importation of foreign raw material.'<sup>176</sup>

As List once put it 'whoever is not convinced of the infant industry argument should first study the history of English industry.'<sup>177</sup> Even more instructive, however, is the economic history of the US; the development there was fast and the periods of free trade and regulated trade followed each other in rapid succession.<sup>178</sup> Before achieving their independence 'the colonies of North America were held by the mother country, in regard to manufactures, in such absolute subjection, that besides the common domestic industry and the ordinary mechanical employments, no kind of manufacture was permitted' or as the great Chatham believed: the colonies ought not to be allowed to manufacture so much as a hob-nail.<sup>179</sup> As

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<sup>172</sup> *Ibid.*

<sup>173</sup> S. M. Hudson, *Trade, Development and Foreign Debt*, (Pluto: 1992), p. 127.

<sup>174</sup> Dunkley, *supra note* 60, Smith, *supra note* 130; J.S. Mill, *Principles of Political Economy*, (Penguin, 1848), p. 282.

<sup>175</sup> Chang, *supra note* 163, p. 21-22.

<sup>176</sup> List, *supra note* 87, p. 40.

<sup>177</sup> *Ibid.*, p. 39.

<sup>178</sup> *Ibid.*, p. 166.

<sup>179</sup> *Ibid.*, pp. 166-167.

other colonies, the American colonies served to help the British Empire in its rivalry with other major powers of Europe and were used to provide markets and raw materials for the mother country.<sup>180</sup>

This was one of the principal causes of the American Revolution. Once separated from England and its manufactured products and on the other hand possessing all the material and intellectual conditions needed for manufacturing, all kinds of manufacturers received a remarkable impulse during the war of independence which in turn benefited the agriculture, ultimately raising the value of the soil and the wages of labour in the whole country.<sup>181</sup> However these infant manufacturers were quickly extinguished when English products made their way back into America sold at lower prices ‘than at Liverpool and London’.<sup>182</sup> This state of affairs lasted until the adoption of the Federal Constitution which gave Congress the power to establish a uniform system of commerce within America. The issue of the federation and federally imposed tariffs was the apple of contention between the manufacturing North and the agricultural South which eventually led to the civil war and not the slavery issue as is commonly believed.<sup>183</sup> In essence the United States, disregarded Adam Smith’s advice to forsake manufacturing and keep specializing in agriculture.<sup>184</sup> It was Alexander Hamilton, the first finance minister of the USA, who copied and re-invented the protectionist philosophy of Walpole’s England. In his famous ‘Report on Manufactures’ submitted to the USA House of Representatives in December 1791 he focused on methods of promoting manufacture with the unshakable belief that this was expedient for the United States. He refutes in the introductory passages of the Report, the idea that ‘to endeavor by the extraordinary patronage of Government, to accelerate the growth of manufactures, is in fact, to endeavour, by force and art, to transfer the natural current of industry, from a more, to a less beneficial channel.’<sup>185</sup> Hamilton, using quotation marks, attributes this thinking to

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<sup>180</sup> Lind, *supra note* 152, p. 22.

<sup>181</sup> List, *supra note* 87, p.167.

<sup>182</sup> Citing a member of congress, List, *supra note* 87, pp. 167-168.

<sup>183</sup> A. H. Stephens, *A Constitutional View of the Late War Between the States, Vol. II*, (National Publishing Company, 1868), p. 613 quoted in L. Bennett, *Forced into Glory: Abraham Lincoln’s White Dream*, (Johnson Publishing Co., 2000), p. 19.

<sup>184</sup> Smith, *supra note* 130, p. 299: ‘It has been the principal cause of the rapid progress of our American colonies toward wealth and greatness that almost their whole capitals have hitherto been employed in agriculture.... Were the Americans, either by combination or by any sort of violence, to stop the importation of European manufactures, and by thus giving a monopoly to such of their own countrymen as could manufacture the like goods, divert any considerable part of their capital into this employment, they would retard instead of accelerating the further increase in the value of their annual produce, and would obstruct instead of promoting the progress of their country toward real wealth and greatness.’

<sup>185</sup> Annals of Congress, Alexander, Report on Manufactures, (5 December 1791), p. 972.

‘respectable patrons of opinion’ believed to be a reference to Adam Smith.<sup>186</sup> Hamilton realised that the manufacturing establishments render the produce and revenue of the society ‘greater than they could possibly be, without such establishments’ due to a number of circumstances which together add to the industrious effort in a community ‘a degree of energy and effect, which are not easily conceived’.<sup>187</sup> He divided these circumstances into the division of labour (within the country); an extension of the use of machinery; additional employment of individuals not ordinarily engaged in business;<sup>188</sup> promotion of emigration from foreign countries; allowing greater scope for the diversity of talents and dispositions of individuals; creating a more ample and various field for enterprise (cherishing and stimulating the activity of the human mind by multiplying the objects of enterprise);<sup>189</sup> securing a more certain and steady demand and creating new demand for the surplus of agriculture from within the country. To encourage manufacturing he set out a detailed plan, which included government aid, protecting tariffs, prohibition of rival articles, or duties equivalent to prohibitions, prohibition of the exportation of raw materials, direct subsidies to private firms, the exemption of raw materials from tariffs and other industrial policy tools.<sup>190</sup> Luckily for America, these were implemented, mildly at first, but progressively throughout the century that followed.<sup>191</sup>

### **10. Myth of a Static Comparative Advantage**

This brings us to possibly the most important deficit of the comparative advantage theory – its definition of comparative advantage itself. One cannot stress enough the importance of what is considered a comparative advantage of a country. In the words of Ricardo:

our enjoyments should be increased by the better distribution of labour, by each country producing those commodities for which by its *situation, its climate, and its other natural or artificial advantages*, it is adapted, and by their exchanging them for the commodities of other countries, as that they should be augmented by a rise in the rate of profits.<sup>192</sup>

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<sup>186</sup> F. M. Scherer, ‘General Hamilton and Dr Smith’, Faculty Research Working Paper Series, Harvard Kennedy School, (2012), p.1.

<sup>187</sup> Hamilton, *supra note* 185, p. 980.

<sup>188</sup> The main group of such individuals seen as potential manufacturers were women and children. Hamilton did not see as a problem but rather as an inspiration the fact that in the Cotton Manufactories of Great Britain the majority of persons employed were women and children and many of the children were of a very tender age. The WTO has no stance on child labour, therefore it indirectly allows the practice. Some developing countries such as India claim child labour is essential for their development.

<sup>189</sup> Hamilton, *supra note* 185, p. 983.

<sup>190</sup> *Ibid*, p. 988-1010.

<sup>191</sup> Chang, *supra note* 163, pp. 25-30.

<sup>192</sup> Ricardo, *supra note* 129, p. 80, *emphasis added*.

Ricardo made two main arguments - specialisation based on national comparative advantage increases the total production and that benefits all participants in a trading system.<sup>193</sup> He did not however demonstrate that real income could improve in both places.<sup>194</sup> Going back to his choice of England and Portugal, as mentioned, wool and wine were not random choices. England's absolute advantage in wool was due to five hundred years of protectionism and not a naturally unusual endowment with sheep. Portugal on the other hand was England's most important market, because Portugal's own cloth manufacture barely had any support from the state, which was a result of class structure and mercantilist political alliance more than any natural determination and the fact that its rulers were relying on overseas possessions and had little interest in Portugal's industrialisation, while the focus on wine production was closely associated with England's rivalry with France.<sup>195</sup> To be fair to Ricardo, he does mention 'artificial advantages' but it seems he is referring to those already artificially created *sometime in the past* and not as potentially created in the future. Therefore his theory does not explain how underdeveloped states can upgrade their economies or diversify their production.<sup>196</sup> It is content with such countries staying locked in their low quality static comparative advantage.<sup>197</sup> Anglo-Portuguese trade treaties of 1641, 1654 and 1661, already provided more or less free trade between the countries, which led to Portugal's reliance on English cloth. Marquis de Pombal, who was chief minister under Jose 1 was one of the rare politicians who tried to reverse the situation, however after he was dismissed from politics because of his anti-Jesuit and secular stance, there was a return to dependency, further deepened by Portugal's reliance on Britain against Napoleon's invasion, which it had to pay for by further opening up its market to Britain including that of its colony Brazil.<sup>198</sup> Essentially, the imbalance in these trading relations led to deficits in Portugal's balance of payments which caused its gold and diamonds to flow to England. These diamonds and gold, which were ironically not Portugal's in the first place, but extracted from its colony Brazil with not a little force, then became the bullion basis of the British banking and currency systems, which enabled the industrial revolution, while Portugal's later attempts at industrialization failed due to balance of payment problems.<sup>199</sup>

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<sup>193</sup> Peet, *supra note* 170, p. 15.

<sup>194</sup> *Ibid.*

<sup>195</sup> Peet, *supra note* 170, p. 20, 21.

<sup>196</sup> S. M. Shafaeddin, *Does Trade Openness Favour or Hinder Industrialization and Development?*, Third World Network Trade and Development Series No 31, (TWN Malaysia, 2006), p. 12.

<sup>197</sup> S. M. Shafaeddin, 'Towards an Alternative Perspective on Trade and Industrial Policies', 36 *Development and Change* (2005), pp. 1145-6.

<sup>198</sup> Peet, *supra note* 170, p. 22.

<sup>199</sup> *Ibid.*, pp. 22, 24, 26, 27.

A similar fate was in store for Spain. For both England and France trade with Spain and the Indies was of first importance for its own commercial prosperity as a source of bullion.<sup>200</sup> 'In certain British circles the trade was so highly regarded that it was referred to in poetical and offensively proprietorial tones as "England's silver mine, her darling." ... The British balance of trade was almost always favourable.'<sup>201</sup> Attempts made by Charles III, king of Spain in the 1760s to discontinue the treaties of privilege granted to England (claimed also by the French under the most-favoured nation treatment, an emerging notion of free trade doctrine) and revive Spain's own economy were bound to fail as Spain had already become dependent on Britain for her textiles and other indispensable imports.<sup>202</sup> Hudson has shown that for many other European countries the beginning of their industrial development began when British exports stopped being imported because of the Napoleonic wars.<sup>203</sup> However after trade resumed, these countries regressed again.<sup>204</sup> As Peet describes the advantage of industrial specialization (cloth) lay not only in the far higher rate of technology change in manufacturing, as compared with agriculture, but also in the fact that cloth was an utter necessity and thus imported in large quantities, whereas wine was consumed by the British upper classes who, 'if absolutely necessary, could do without their glass of port after dinner.'<sup>205</sup> Several economists, including the United Nations Conference on Trade and Development (UNCTAD) founder Raoul Prebisch and Sir Arthur Lewis exposed the fact that the free trade theory ignores income elasticities (i.e. the responsiveness of demand to a rise in consumers' incomes) and potential trade asymmetries; they argued that the demand for manufactured imports in developing countries outgrew developed countries' demand for primary products, which lead to declining terms of trade and a perpetual balance of trade deficit for developing countries.<sup>206</sup> Not to mention that specialization in raw materials, or less processed products means selling something and buying it back ten times the price in a semi or fully processed form. States whose comparative advantages are solely in primary commodities and low-skilled manufacturing, which is the situation of most developing countries today, are extremely vulnerable in the global economy and their prospects for

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<sup>200</sup> A. Christelon, 'Economic Background of the Anglo-Spanish War of 1762', 18 *Journal of Modern History*, (1946), p. 23.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*, pp. 24, 29.

<sup>203</sup> Hudson, *supra note* 173, chapters 5 & 6.

<sup>204</sup> *Ibid.*

<sup>205</sup> Peet, *supra note* 170, p. 25.

<sup>206</sup> Dunkley, *supra note* 60, p. 118.



sustained growth are low without potential diversification.<sup>207</sup> Furthermore economies based on mineral or energy resources, also a common phenomenon amongst developing countries, may experience a rise in their GDP however the development is uneven as there is a disconnect from other parts of the economy; overinflated currencies harm other exports in the country and there is vulnerability to volatile prices.<sup>208</sup> Even worse, the desire to capture the profits from such resources has led to conflicts and military dictatorships supported by foreign powers eager to access raw materials at cheap prices with complete disregard for the peoples' of such resource-rich countries.<sup>209</sup>

Therefore one should take Ricardo's 'artificially,' but disregard the static nature of his theory. That however destroys the theory itself, as free trade is intrinsically incompatible with the concept of artificially *creating* advantages. It denies the importance of targeted economic policies which create dynamic comparative advantages and thus does not recognize the means for a state to graduate from the former to the latter.<sup>210</sup> If an industry is to diversify from first stage to second stage, from let us say production of textiles into the higher value and higher skilled arena of textile machinery, it has to enjoy infant industry protection at this time.<sup>211</sup> The same goes for the next step of diversification into even higher stages of industry.<sup>212</sup> The way England was giving 'advice' to its American colonies, was the same for all the other colonies who were instructed to open up, but not compete with the colonizer nor upgrade capacities beyond primary production, which lead to de-industrialisation and weak economies.<sup>213</sup> The retardation of the growth of the manufacturing sector in these colonies due to policies imposed on them has been estimated to have been as high as 85%-95%.<sup>214</sup> Ironically, African states are now advised at WTO forums that '[i]n order to gain from its exports, a country should aim to engage in processing, in order to add value to its exports of raw products.'<sup>215</sup> As if this is some new piece of information and as if it will just happen by itself, when the free trade agenda of the international economic system has prohibited or limited the use of a large part of industrial policies a government might use to promote and

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<sup>207</sup> UNDP, *Human Development Report 2005*, International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World (United Nations, 2005).

<sup>208</sup> Joseph, *supra note* 99, p. 172, footnotes omitted.

<sup>209</sup> T. Pogge, *Politics As Usual*, (Cambridge: Polity Press, 2010).

<sup>210</sup> Shafaeddin, *supra note* 196, pp. 1145-6.

<sup>211</sup> Shafaeddin, *supra note* 196, pp. 1152-4.

<sup>212</sup> *Ibid*, pp. 1152-4.

<sup>213</sup> Shafaeddin, *supra note* 196, p. 22.

<sup>214</sup> P. Bairoch, *Economic and World History*, (Wheatsheaf, 1993), p. 88.

<sup>215</sup> V. D. Ancharaz, Paper presented at the WTO Public Forum 2012, Geneva, World Trade Organization, p. 67; see also United Nations A/CONF.219/3 Fourth United Nations Conference on the Least Developed Countries Istanbul, Turkey 9.-13. May 2011 A/CONF.219/3.

protect its infant industry. Not surprisingly, African countries' exports which saw a sharp increase from 2000 onwards until the global crisis in 2008 were mostly commodities – fuels and minerals only.<sup>216</sup> Many countries are exporting mainly one good (e.g. oil in Angola).<sup>217</sup> Countries such as Gambia are nevertheless showing a gradually diversified export base.<sup>218</sup> The most important addition to the free trade theory in the 20<sup>th</sup> century has been that of Heckscher and Ohlin which have argued that a nation's comparative advantage is shaped by its resource base, implying that capital-scarce developing countries should specialise in labour-intensive products.<sup>219</sup> This again advises such countries against being 'too ambitious' and to stay in a less than optimal stage of development. The inherent economic disadvantages of labour-intensive industries, unfairly low-wages and differences in technological levels between rich and poor countries which may be amplified by trade and the 'backwash effects' of trade on traditional industries all lead to inherently unequalising effects of free trade.<sup>220</sup> Even some orthodox theorists accept that some countries can actually lose.<sup>221</sup> A further problem with free trade theory is that it does not take into account increasing returns to capital, economies of scale in production, cumulative advantage or 'first mover' benefits, learning-by-doing and unequal access, which may all contribute to locking countries into an existing industry pattern, to their long-term disadvantage, making capital and trade flows favour industrially developed countries.<sup>222</sup> Of today's advanced industrial economies, according to Chang, only three - the Netherlands, Hong Kong, and Switzerland<sup>223</sup> - refrained from erecting trade barriers and subsidizing infant industries during the early stages of their development. Stiglitz goes further in claiming that '[t]o date, not one successful developing country has pursued a purely free market approach to development.'<sup>224</sup>

## Conclusion

This chapter identifies one of the core issues in the GATT/WTO legitimacy gap and its perpetuation in the overwhelmingly pro-liberalisation mandate of the organisation which renders other purported goals such as the sustainable development and the raising of

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<sup>216</sup> Ancharaz, *ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

<sup>219</sup> Dunkley, *supra note* 60, p. 110.

<sup>220</sup> *Ibid.*, p. 119.

<sup>221</sup> *Ibid.*, referring to Samuelson 'The Gains from International Trade Once Again' in J. Baghwati (ed.) *International Trade* (Penguin:1969).

<sup>222</sup> *Ibid.*, p. 119-120, citing findings by Maurice Allais, Paul Krugman, Robert Solow and Robert Lucas.

<sup>223</sup> It is important to note, however, that Switzerland did not recognize protection of intellectual property.

<sup>224</sup> Stiglitz, J. E., A. Charlton, *Fair trade for All, How Trade Can Promote Development*, (Oxford University Press, 2005), p.17.

standards of living as well as the principle of special and differential treatment assume a secondary role, if taken into account at all. The analysis of the economic theory behind this mandate clearly shows that it does not include a developmental element. Despite this names such as David Ricardo and Adam Smith alongside their respective theories are revered as untouchable authorities to provide perceived legitimacy and soft power in the pursuit of liberalisation in many aspects beyond what even they had imagined, while the theory is ignored completely in areas such as intellectual property or any sector where developed countries are set to gain from protectionism. Even if implemented in their pure forms, however, these theories can be considered to have been flawed from the beginning, prescribing the wrong kind of policies for the then developing countries as they are for today's developing countries. By denying history, ample evidence and even in some cases mainstream economics on issues of development, the WTO, World Bank, IMF and even the UN are using development language to achieve anything but the right conditions for it. As Carant describes, the UN continuously fails to produce the transformational systemic shifts necessary for long-term sustainable and equitable change for all.<sup>225</sup> Some improvements can be identified in the Sustainable Development Goals which provide at least a good start in the push for reform, however they fall short of a sufficient departure from neoliberal theory in the sphere of trade.

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<sup>225</sup> Carant, *supra note* 37, p. 34.

*Who controls the past controls the future.  
Who controls the present controls the past.<sup>1</sup>*

## **Chapter IV**

# **THE UNEQUAL PROTECTION OF MEMBERS' INTERESTS AT THE WTO AND ITS IMPACT ON POLICY SPACE AND MARKET OPENINGS FOR DEVELOPMENT**

### **Introduction**

The fact that accession to any regime is voluntary implies that it enhances the welfare of its Members.<sup>2</sup> Since countries accede to the WTO by their own will, the assumption is that it is to their benefit. However, '[t]hat a regime makes its member states better off does not mean, of course, that its gains are distributed uniformly across them.'<sup>3</sup> It is beyond dispute that the WTO does not serve the interests of its Members equally well. However, worse than that, the regime in practice has locked in an imbalanced set of rules and practices that have contributed to the vulnerability in the world's poorest countries.<sup>4</sup> Furthermore there are very few features of the WTO system that do anything to address this imbalance, which shows time and again in the outcomes of the negotiations.<sup>5</sup> Most of the bias is a consequence of the economic power, possession of superior knowledge, abundance of resources and the monopoly on propaganda by developed countries which all play a role in the negotiations, however it also does not help that the Secretariat itself is mostly made up of staff from developed countries, with employees from developing countries making up only 21% in 1995 and 37% in 2014.<sup>6</sup> Perhaps most problematic, however is that this Secretariat, the body which should be facilitating negotiations in a neutral and essentially administrative way, could rightly be accused of aiding and abetting the rich countries' quest for their 'narrow, short-term mercantilism rather than the long-term interests of the world economy as a whole.'<sup>7</sup> Yet

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<sup>1</sup> George Orwell, 1984.

<sup>2</sup> J. Gowa and S. Y. Kim, 'An Exclusive Country Club, The Effects of the GATT on Trade, 1950-94', 57 *World Politics* 4, (2005), p. 453.

<sup>3</sup> *Ibid.*

<sup>4</sup> J. Clapp and K. Burnett, 'Governing Trade in Global Food and Agriculture', in M. Moschella and C. Weaver, *Handbook of Global Economic Governance: Players, Power and Paradigms*, (Routledge, 2014), p. 79.

<sup>5</sup> S. E. Rolland, *Development at the World Trade Organization*, (Oxford University Press: 2012), p. 107.

<sup>6</sup> WTO, *The WTO at Twenty: Challenges and Achievements*, (WTO, 2015).

<sup>7</sup> F. Jawara and A. Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations: The Lesson of Cancun*, (Zed Books, 2004), preface, xiii.

more than all of the above, there is another and ultimately decisive factor that disables the consensus rule from giving equal power in the negotiations to all the Members and that is the fact that the economically more powerful states can simply destroy the institution and make a new one or turn to regional agreements if developing countries push too far for their interests within the existing system. In order to avoid this and keep the certainty, stability and predictability that the WTO provides, developing countries are reluctant to demand 'too much' regardless of how legitimate their demands would have been or how necessary for their development. Thus Anghie's observation that whenever international law attempts to renew itself, its colonial origins are re-enacted, applies both to GATT and WTO rulemaking.<sup>8</sup> It is important to also note however, that some developing states have withdrawn from the GATT in the past due to their interests being too marginalised. The hurdles posed against developing countries' exports in the early GATT years caused China to withdraw from the system in 1950, Lebanon and Syria in 1951, and Liberia in 1953.<sup>9</sup> Therefore the idea that developing states are always eager to be part of this system, no matter what, is misleading.

In a recent WTO publication, the Director-General, Azevêdo makes the well-known claim that through the WTO '[i]nternational rules, not power, increasingly govern trade relations, and conflicts are settled, not in trade wars, but in the WTO's dispute settlement system'.<sup>10</sup> Although not technically untrue, the statement is nevertheless misleading, as the international rules he speaks of are hugely dictated by power and the dispute settlement mechanism (DSM) in turn adjudicates based on these rules.

This chapter discusses to what extent the majority of the WTO Membership, which are developing countries, are able to pursue in the institution their most legitimate interests, i.e. those serving developmental needs, namely market openings for products of interest to them and policy space for the protection and development of their industry and technological capabilities. It looks at their status in the organisation in terms of an equal voice and equal opportunity to impact rule making and rule changing and how this impacts the rules themselves. It illustrates the problems of negotiations and accession protocols and how the biased rules that result therefrom are violating the right to development by denying market access to goods of most importance to developing countries, by permitting extensive protectionism to still exist in developed countries while prohibiting essential policy space for developing countries. In this context it also examines several rules and the ineptitude of the

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<sup>8</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge University Press, 2005), p. 313.

<sup>9</sup> Rolland, *supra note 5*, p. 67.

<sup>10</sup> Foreword by WTO Director-General Roberto Azevêdo, WTO, *supra note 6*, p. 4.

so-called special and differential treatment granted to developing countries. It finally argues that a rebalancing of the rules is necessary, if the organisation wants to achieve true legitimacy, however recognising that this is impossible to a truly meaningful extent under the current framework.

This chapter thus addresses the core claim of the legitimacy gap at the WTO, i.e. that to a substantial extent its rules and practices negatively impact the potential for economic development of its poorer Members and it further establishes that this is intrinsically linked to the democratic legitimacy gap present in the institution.

### **1. Negotiations Lead to Anomalies in Rules**

Considering its purported goals, it is unsurprising that the WTO is commonly thought of as an institution with the main aim of expanding free trade and thereby enhancing consumer welfare everywhere in the world. However,

[i]n reality, it is an institution enabling countries to bargain about market access. "Free trade" is *not* the typical outcome of this process; nor is consumer welfare (much less development) what the negotiators have chiefly in mind... instead the agenda of multilateral trade negotiations has been shaped in response to a tug-of-war between exporters and multinational corporations in the advanced industrial countries (which have had the upper hand), on one side, and import-competing interests (typically, but not solely, labour) on the other.<sup>11</sup>

In this it differs importantly from the International Trade Organisation, which in its Charter abolished the logic of country-versus-country competition and looked at economic growth through trade and employment as a collective policy.<sup>12</sup>

It is no secret that, '[m]uch of the development of the international trade order in the 20<sup>th</sup> century has been driven by the initiatives, and caprice of the US'.<sup>13</sup> Essentially proposals put forward for the negotiations are a result of informal meetings between the US and EU which come together and decide on a common position.<sup>14</sup> For a long time these bilateral consultations then evolved into larger 'green room' sessions adding only Japan and Canada to the circle, at which point they together formed the 'Quad' and later still the circle would be enlarged to include only friendly developing countries, such as South Africa, Chile and Singapore, who are known as 'Friends of the Chair'.<sup>15</sup> Finally other influential developing countries were brought on board, whereas for the majority of the Membership, proposed texts

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<sup>11</sup> D. Rodrik, *One Economics Many Recipes, Globalization, Institutions, and Economic Growth*, (Princeton University Press, 2007), pp. 233-234.

<sup>12</sup> Rolland, *supra* note 5, p. 64.

<sup>13</sup> A. H. Qureshi and A. Z., *International Economic Law*, 3<sup>rd</sup> ed., (Sweet and Maxwell, 2011), p. 310.

<sup>14</sup> A. Kwa, *Power Politics in the WTO*, 2<sup>nd</sup> ed. (Focus on the Global South, 2003), pp. 36-37.

<sup>15</sup> *Ibid.*

seemed to suddenly ‘appear from nowhere’.<sup>16</sup> ‘At moments of intransigence, particularly during the final stages of the negotiations these groups would then break back down to very small groups, almost always involving the US and EU with a range of other members periodically playing a role.’<sup>17</sup> The ‘green room’ has been compared to the UN Security Council, with quasi-permanent members and other members meant to represent the membership at large, with the difference that the non-permanent members of the SC are at least elected by the full UN membership based on geographical representation and other criteria, whereas participation in the green room is ‘by invitation from the main powers on political criteria’ thus being even less democratic.<sup>18</sup> Many times the only strategy left to most developing countries has essentially been that of defence instead of offence and it is because of this that they had been characterized in the past as merely passive or defensive.<sup>19</sup> It did not help either that about a quarter of WTO Members, as recently as 2007, could not even afford a WTO mission.<sup>20</sup>

The very nature of negotiating rules at the WTO, has led to a serious imbalance between the benefits that the Members of the regime enjoy. The politics of such negotiations are further directly influenced by strong lobbying at home. A study from 2006 revealed the statistical data on lobbying in the EU and US capitals, where the two trade superpowers develop their policies for WTO negotiations; it found that around 15,000 lobbyists are based in Brussels and around 17,000 in Washington DC, outnumbering lawmakers in US Congress by about 30 to one.<sup>21</sup> Annual corporate lobbying expenditure in Brussels is estimated to be between €750 million and €1 billion, while US corporations and lobby groups spent nearly \$13 billion influencing Congress and federal officials from 1998 to 2004, with the pharmaceutical industry spending over \$1 billion lobbying in the US in 2004 alone.<sup>22</sup> Sometimes the lobbying is more direct, for example when companies such as Pfizer negotiate directly with the Director-General of WTO and officials from WTO Member states against developing

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<sup>16</sup> *Ibid.*

<sup>17</sup> R. Wilkinson, E. Hannah and J. Scott, ‘The WTO in Nairobi: The Demise of the Doha Development Agenda and the Future of the Multilateral Trading System’, *Global Policy*, (2016), p. 3.

<sup>18</sup> Rolland, *supra note* 5, p. 92.

<sup>19</sup> J. M. Finger, ‘Implication and Imbalance: Dealing with Hangover from the Uruguay Round’, 23 *Oxford Review of Economic Policy*, (2007), pp. 440-460.

<sup>20</sup> K. Bohl, ‘Problems of Developing Country Access to the WTO Dispute Settlement’, 9 *Chicago-Kent Journal of International and Comparative Law*, (2009), p. 162 (citing N. Meagher, ‘Representing Developing Countries in WTO Dispute Settlement Proceedings’, in G. Bermann and P. Mavroidis (eds.), *WTO Law and Developing Countries*, (Cambridge University Press, 2007), p. 239.

<sup>21</sup> Actionaid, ‘Under The Influence: Exposing Undue Corporate Influence over Policy-Making at the World Trade Organization’, (2006) available at:

[http://www.actionaid.org.uk/sites/default/files/doc\\_lib/174\\_6\\_under\\_the\\_influence\\_final.pdf](http://www.actionaid.org.uk/sites/default/files/doc_lib/174_6_under_the_influence_final.pdf) , (last accessed: 22.8.2016), p. 2.

<sup>22</sup> *Ibid.*

countries' proposals on the right to import cheaper generic drugs during public health emergencies.<sup>23</sup>

It is rather ironic, that Adam Smith, already in 1776 warned against what were then known as 'joint stock companies' which he said had corrupted and captured many European and non-European governments and undermined their societies' ability to engage in peaceful transnational affairs and equitable self-rule.<sup>24</sup> Smith's lengthy critique of these companies is often noted wrongly as an example of his contempt for state intervention in commercial affairs.<sup>25</sup> Although originally chartered by European monarchs and legislative assemblies, some of the most important of these companies had acted in various degrees of independence from the state by Smith's time.<sup>26</sup> Therefore according to him by the mid-eighteenth century, a state-driven mercantilist system had been largely transformed into a company-driven mercantilist system.<sup>27</sup> Smith's account of global commerce is characterized by gross imbalances of power, destructive economic inefficiencies, and horrific cruelties and he claimed international trading companies were the principle agents of these global injustices.<sup>28</sup> It is still this system which drives the world international economic system today, however now it is under Smith's name.

Ironically however, the blame for the failure of GATT/WTO to adequately advance the interests of its developing Membership has often been placed rather on the developing countries themselves. One scholar identifies the major themes in the literature enumerating three reasons for this failure: 1) that until the Uruguay Round developing countries did not play an active but rather a passive and defensive role, 2) that they were unwilling to make concessions 3) and that they placed all their focus on demanding special and differential treatment (SDT).<sup>29</sup> A more accurate description of their efforts would be that 1) they have been putting forward proposals and voicing their interests from the ITO negotiations onward, but these rarely made it into law, resulting in even core principles of the institution (such as that of reciprocity) failing to reflect their vision; 2) that despite this, they were offering concessions and accepting restrictions throughout the various rounds, while 3) the legitimate focus on demanding special and differential treatment had to be constant, because SDT was

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<sup>23</sup> *Ibid*, p. 3.

<sup>24</sup> S. Muthu, 'Adam Smith's Critique of International Trading Companies', 36 *Political Theory*, (2008), p. 185.

<sup>25</sup> *Ibid*, p. 186.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*, p. 188.

<sup>29</sup> F. Ismail, 'Rediscovering the Role of Developing Countries in the GATT', in Y.-S. Lee, G. N. Horlick, W.-M. Choi and T. Broude, (eds.), *Law and Development Perspective on International Trade Law: The Law and Development Institute*, (Cambridge University Press, 2013).



never sufficiently granted, however developing countries did not place any less of a focus throughout the negotiations also on asserting their demands for increased market access for products of interest to them, which they had been denied.

Another obstacle to meaningful participation by developing countries has been mentioned, i.e. their lack of expertise, especially when in the Tokyo round ‘rules and regulations themselves’ became the outcome of negotiations which required a very different type of negotiator than before.<sup>30</sup> This shift in expertise proved to be a major issue for developing countries with limited resources.<sup>31</sup> Nevertheless it is important to note, that from the very beginning developing countries played an active role and made known that they did not want a system based on the principles of reciprocity and most favored nation (MFN). Being aware of their economically unequal position they wanted to be able to protect their infant industries and they also called for the recognition of the need for special measures of assistance in their development.<sup>32</sup> That they actively participated from the beginning is clear from the ITO negotiations where alongside the Proposed Charter submitted by the UK and US, there was also a Proposed Charter submitted by Brazil. Along with other developing countries Brazil thought the ITO should have as a central aim to ‘encourage and promote the industrial and economic development of Member countries, particularly of those whose development is less advanced.’<sup>33</sup> Developing countries also managed to get at least some of their concerns into the finally agreed Charter. Unfortunately, however it was partly for this reason that the US rejected the Charter altogether (see chapter III).<sup>34</sup>

The export interests and demands of developing countries were later clearly articulated in documents such as the Haberler Report on trade negotiations in the 1950s and in the proposed program of action by a Nigerian-led group of developing countries (G21) in 1963.<sup>35</sup> The Haberler Report showed that the developed country barriers to imports from developing countries contributed significantly to the problems they were facing and the GATT set up Committee III to review such barriers.<sup>36</sup> Tariffs on tropical products, tariff escalation, quotas and certain taxes were identified as problematic, however this did not lead to their

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<sup>30</sup> Rolland, *supra note 5*, p. 74.

<sup>31</sup> *Ibid.*

<sup>32</sup> R. Wilkinson and J. Scott, ‘Developing Country Participation in the GATT: A Reassessment’, 7 *World Trade Review*, (2008), pp. 473-510.

<sup>33</sup> UNCTE, Charter for the International Trade Organisation of the United Nations, Presented by the Government of the United States of Brazil, E/PC/T/W.16 (1946), paragraph 3

<sup>34</sup> Ismail, *supra note 29*, p. 136.

<sup>35</sup> Ismail, *supra note 29*, pp. 138, 140.

<sup>36</sup> Rolland, *supra note 5*, p. 68.

reduction.<sup>37</sup> Developing countries were further continuously submitting proposals throughout the various rounds, however these were many times outright ignored while at other times there would be promises and resolutions but no actual change. Still more frustratingly, change would sometimes be achieved according to the wishes of developing countries, but would be insufficient or exceptions and other measures by the industrialised countries would be used to nullify the positive effects of any such change.

The reason for the failure therefore lies not in the inactivity, nor so much in the inability of developing countries to understand the situation but rather mostly in their inability to stand their ground. Especially since in the beginnings the framework of the GATT did not allow them to organize and promote their interests in a systemic and coherent fashion.<sup>38</sup> Developing countries became even more active in the Uruguay Round, however at that time it was too late. It is now widely accepted that they had ‘lost the round’ and that Uruguay was ‘a bum deal’.<sup>39</sup> However as Rolland notes, ‘all the issues that surfaced since the inception of the GATT later became major roadblocks in WTO negotiations... they did not actually *result* from the Uruguay Round agreement. Rather they were *built* into the negotiations before the Round even began.’<sup>40</sup> It is until the present day, that developing countries continue to give up more and more of their own policy space in various areas in return for a broken promise that initial biases would be rectified yet they never are. However Rolland fails to mention another, more important aspect of why developing countries agreed to disciplines they did not want, in new areas as a part of the ‘single undertaking’ of the Uruguay round and that is, that the alternative was to be locked out of the whole system. The ‘Final Act’ of the round included GATT 1994 which superseded GATT 1947. The US and EU both withdrew from GATT 1947 which meant that their obligations and the MFN access to their markets granted under that agreement ceased to exist and the only way to regain them was for developing countries to accept GATT 1994 as part of a package with all the other agreements they had been rejecting until then, i.e. the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), The Trade Related Investment Measures Agreement (TRIMS), The General Agreement on Trade in Services (GATS), the Subsidies and Countervailing Measures Agreement (SCM Agreement), etc.<sup>41</sup> In other words the EC and US created a new institution

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, p. 76.

<sup>39</sup> S. Ostry, ‘Trade Development and the Doha Development Agenda’, in D. Lee and R. Wilkinson (eds.), *The WTO after Hong Kong: Progress in, and prospects for, the Doha Development Agenda* (Routledge, 2007).

<sup>40</sup> Rolland, *supra* note 5, p. 76.

<sup>41</sup> R. Steinberg, ‘In the Shadow of Law and Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO’, 56 *International Organization* (2002), p. 339.

to take away the power of developing countries to block new deals unfavourable to their interests given to them by being Members of the old institution.

Negotiating tactics used to manipulate developing countries into accepting less than perfect deals, also play an important role. Jawara and Kwa describe those used during and after the Cancun negotiations, but which are largely not confined to this particular period of negotiations:

- Secretariat and the Quad driving the process, with developing countries attending only meetings they are invited to and ‘left groping in the dark, guessing each step along the way how the preparatory process would unfold’<sup>42</sup>
- prolonging Ministerials, calling meetings late into the night and ‘negotiating into the early hours, relying on last-minute brinkmanship to ram through their agenda’
- deliberate neglect of positions expressed by developing countries and elaboration of draft texts which simply exclude their views. The chairs of the committees formulating their own negotiating texts after unrecorded and non-transparent consultations with Members. As one negotiator observed at Cancun: ‘Members can say whatever they want, but ultimately, what is decided is what the Chair says the meeting has decided.’ Most such texts drafted by the WTO Secretariat, tended to reflect primarily the positions of the major players, particularly the US and EC.<sup>43</sup>
- issuing the final draft of the Cancun declaration, which was strictly reflecting the US/EC position, only two weeks before the Ministerial to make it as hard as possible to reflect on and oppose. After comments were made to the final draft of the Cancun declaration by outraged developing countries at an informal meeting, they were discouraged from ‘repeating’ themselves at the formal meeting.<sup>44</sup>
- loans promised by the International Monetary Fund (IMF) and World Bank if developing countries give up their resistance to further opening up<sup>45</sup>
- offering aid (military or other) or promising market access in bilateral agreements under the same condition
- threats by the US of abandoning the WTO altogether
- divide et impera tactics whenever the unity of developing country coalitions is strong. A telling example is that of US efforts in trying to break up the G21 when it emerged, which involved: convincing African countries that the real threat to their economies was coming from Asian and Latin American countries and not developed countries;<sup>46</sup> threats of launching investigations against some countries, while offering loans or increased quotas to others; convincing Latin American countries not to multilateralize things, when they can come to agreements with the US in bilateral contexts and threatening to terminate benefits or ongoing free trade agreement negotiations otherwise. Using bilateral deals as their main tool, the US managed to achieve a departure of five

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<sup>42</sup> Jawara, *supra note 7*, xxxv.

<sup>43</sup> *Ibid*, xliii-xliv.

<sup>44</sup> *Ibid*, xlv.

<sup>45</sup> *Ibid*, xliiii.

<sup>46</sup> Ugandan President Yoweri Museveni sent a letter to African Ministers - largely believed to be under the influence of the US – urging them to break away from the G21 pointing at Asian countries on dumping, when the real damage was done by the USA and others dumping food and depressing prices agriculturally based core industries; T. Khana, ‘Museveni Letter’ Threatens Third World Unity at Mexico’s WTO Talks’, *The East African*, 15 September 2003 in Jawara, *ibid*, Introduction xxxvi – xxxvii.

countries from the group, one month after Cancun (Colombia, Costa Rica, Guatemala, Peru and Ecuador). On the other hand the EC was working on distancing from the G21 the ACP countries, which enjoy preferential trade agreements with them.

Since the launch of the Doha Round the Quad has expanded to include Brazil, India, China and Australia, now forming together the so-called “new Quad”.<sup>47</sup> Bringing India, China and Brazil into that early phase of negotiations can clearly be seen as an improvement in assuring the participation of developing countries in negotiations, however larger developing countries may have drastically different needs and wishes than the rest of the developing Members and can thus not really be said to represent all of them. More importantly the general shift in power at the WTO where Brazil, Russia, India, China and South Africa (BRICs) now collectively possess as much bargaining power as the USA and the European Union, has not brought an amelioration of the rules in favour of developing countries but rather first a stalemate and now a so-called ‘variable geometry’ at the negotiations (see below).<sup>48</sup>

After 1995 many countries improved the way they prepared for negotiations, including the weakest Members which began frequently using the option of standing together as coalitions.<sup>49</sup> In the Doha round the coalitions formed around specific issues, such as the,<sup>50</sup> G90, NAMA 11, G33, or representing least developed countries (LDCs), small and vulnerable economies (SVEs) and regional groups such as the African Caribbean and Pacific (ACP).<sup>51</sup> In the words of one scholar, ‘[t]hese groups have tended to be relatively organized and articulate in expressing their interests and advancing their negotiating positions. Some of the major developing-country groups such as the G20, NAMA11, and G33 are technically competent and have been able to match the capacity of the major developed countries in the Doha negotiations.’<sup>52</sup> The proposals put forward by developing countries vary in scope and nature and their ‘quantity and increasing sophistication is unprecedented in the history of the GATT and WTO.’<sup>53</sup>

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<sup>47</sup> Also known as the “Four/Five Interested Parties” (FIPS), the “Quint” and the “G-6.”

<sup>48</sup> M. Matsushita, ‘A View on Future Roles of the WTO: Should There be More Soft Law in the WTO?’ 17 *Journal of International Economic Law*, (2014), p. 705.

<sup>49</sup> J. S. Odell, ‘Negotiating from Weakness in International Trade Relations’, 44 *Journal of World Trade*, (2010) pp. 545-566.

<sup>50</sup> G20 emerged at Cancun (comprising Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand and Venezuela).

<sup>51</sup> Ismail, *supra note* 29, p. 130.

<sup>52</sup> *Ibid.*

<sup>53</sup> Rolland, *supra note* 5, p. 90.

Developing countries have been forming alliances amongst themselves since the Seattle Ministerial of the WTO in 1999 to create an effective mechanism of defensive blocks against unfair proposals.<sup>54</sup> The lack of any real offer on cuts in agricultural subsidies by the EU or US created a large alliance of developing world nations standing firm and refusing to make new commitments on opening up industrial and services markets and a ‘coming together of two developing country groupings, the G20 and the G90 – to form G110 – united not in what they wanted to get out of the negotiations but in their resolve not to be used against each other by the EU and the US’.<sup>55</sup> At the collapse of the Cancun Ministerial, developing countries felt that their refusal to accept another bad deal was a victory in itself. In the words of Brazilian Foreign Minister Celso Amorin: ‘[W]e think that we have achieved some important things. Firstly, the respect for our group’<sup>56</sup> and that ‘[t]he voice of the developing world was taken into consideration’<sup>57</sup> However jubilation at ‘no deal’ outcomes needs to take into account that the more time is given to US and EC, the more they can bring DCs round to their thinking. Time is on their side – it is never on developing countries’ side.<sup>58</sup> It is highly problematic that the moment developing countries finally put up an effective mechanism of defense, the whole system came to a standstill.

During the Uruguay Round the former Quad decided the subject matters of negotiations, and the round was concluded, whereas after the shift in power and a significant increase in the WTO Membership, consensus became nearly impossible to achieve other than in less significant matters.<sup>59</sup> In light of this failure, many Members turned to concluding bilateral and regional trade agreements creating the belief that the WTO was losing its relevance for rulemaking in competition with such agreements.<sup>60</sup> The return to bilateral relations of course brings nothing but an even stronger divide-and-rule approach, where every developing country is left to fend on its own and is thus inevitably in a weaker position.<sup>61</sup> In a bid to make WTO relevant again, the last two Ministerials thus desperately pushed for agreement to

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<sup>54</sup> A list of current coalitions in the WTO which speak with one voice using a single coordinator or negotiating team is available at: [http://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf)

<sup>55</sup> House of Commons: International Development Committee: The WTO Hong Kong Ministerial and the Doha Development Agenda, Third Report of Session 2005-06, Volume II, p. 17.

<sup>56</sup> R. Waddington, ‘Failed Cancun Talks Throw up New Trade Power’, *Reuters*, 15 September 2003; in Jawara, *supra note 7*, introduction xxii.

<sup>57</sup> C. Amorin, ‘The Real Cancun’, *Wall Street Journal*, 25 September 2003; Jawara, *supra note 7*, introduction xxii.

<sup>58</sup> Jawara, *ibid*, introduction iv, quoting Anon.

<sup>59</sup> Matsushita, *supra note 48*, p. 705.

<sup>60</sup> J. S. Odell, ‘How Should the WTO Launch and Negotiate a Future Round?’, 14 *World Trade Review*, (2015), p. 117.

<sup>61</sup> R. Okediji, ‘Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection’, *University of Ottawa Law and Technology Journal*, (2004), p. 127.

end the stalemate with an eventual sacrifice of the single undertaking and the DDA at Nairobi along with ‘a 14-year effort to agree to a wide-ranging multilateral deal on trade measures for development that has been a key demand of developing countries.’<sup>62</sup> The two Ministerials are considered below and an observation is made about what recent developments in negotiations indicate for the future of developing countries’ struggle for a rebalancing of the current rules.

a) Bali Ministerial Conference, December 2013

In December 2013 in what one could call another display of ‘stiff resistance and sudden collapse’<sup>63</sup> Member states in Bali again signed a deal marginalizing developing countries’ interests, especially in terms of the most legitimate interest imaginable, i.e. providing food security through public stockpiling where only a 4-year ‘peace clause’ on bringing such subsidies to the DSM was achieved (see below: ‘Domestic Support’). As Professor Bello suggests, the collapse was due to: ‘pressure exerted by developed countries; Brazil, one of whose representatives fills the post of director general; and host country Indonesia, which wanted a deal at any cost for prestige reasons.’<sup>64</sup> Bribery and blackmail have also played an important role, as the package of measures to support LDCs was used as a bargaining chip to get low-income countries on board.<sup>65</sup> The package included another ‘carrot and stick’ proposal, where the carrot was a trade facilitation initiative, and the stick was a demand that developing countries get rid of significant support programs for farmers and consumers while nothing would change in terms of developed countries’ subsidies.<sup>66</sup>

Even the ‘carrot’, i.e. trade facilitation, was not something that developing countries were really asking for as they understood that it would not happen magically on its own and they were afraid of costly commitments, with little aid from developed countries.<sup>67</sup> As noted by the Africa Trade Network, the text on trade facilitation is the very opposite of what African countries need to address in terms of the fundamental and peculiar challenges that they face in moving goods and services across national borders as it obliges all countries to adopt customs procedures which are already standard in the advanced industrial countries, but would mean massive legislative, policy and infrastructural changes for African countries to implement. In Art. 9 of Section II of the Bali Declaration donor Members agree to facilitate

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<sup>62</sup> Wilkinson, *supra note* 17, pp. 1-2.

<sup>63</sup> Ismail, *supra note* 29, p. 132.

<sup>64</sup> W. Bello, ‘Spineless in Bali’, *Foreign Policy in Focus*, December 16, 2013, available at: <http://fpif.org/spineless-bali/>, (last accessed: 22.8.2016).

<sup>65</sup> N. Dearden, ‘Hypocrisy, blackmail and power politics: same old WTO’, available at: <http://newint.org/blog/2013/12/11/power-politics-free-trade/>, (last accessed: 22.8.2016).

<sup>66</sup> Bello, *supra note* 64.

<sup>67</sup> C. Bellmann, ‘The Bali Agreement: Implications for Development and the WTO’, *The Graduate Institute, Geneva, International Development Policy, Articles and Debates* 5.2 (2014), para. 15.

the provision of assistance and support for capacity building to developing country and least developed country Members, on mutually agreed terms, however, the prior understanding to provide commensurate policy, technical, institutional and financial space and support for African countries to meet these changes was not adequately addressed.<sup>68</sup> Others feared that the only outcome would be increased imports but there would be no positive effects on the supply-side constraints affecting exports.<sup>69</sup>

Above all, rather than simplify customs procedures, the text introduces new processes which stand to give foreign corporations undue influence in the customs of African countries and diminish the role of domestic customs operators, further undermining African agenda of boosting intra-African trade and regional integration.<sup>70</sup> The network claims that there is ‘hardly anything of substance in the just adopted Bali package that addresses Africa’s developmental imperatives.’<sup>71</sup>

Another part of the ‘carrot’ should have been the least controversial part of the Bali deal, i.e. the LDC package, however it turned out to be its weakest part bringing minimal improvements. Apart from the LDCs limited bargaining power, the reason for the weakness of this package was also due to the fact that LDCs had difficulties in articulating common positions during the negotiations.<sup>72</sup> The package dealt with rules of origin<sup>73</sup>, trade in services<sup>74</sup> and duty-free and quota-free (DFQF) market access for LDCs<sup>75</sup> however it failed at a substantial improvement on all three fronts. In Bali guidelines were introduced urging states to adopt transparent, simple and objective Rules of Origin (RoO), however these guidelines were unfortunately non-binding, which robbed them of any real significance.

In terms of trade in services the package was no more revolutionary, as it merely set up a process towards operationalising a waiver enabling trade preferences for services and service suppliers of LDCs, already adopted at the 8<sup>th</sup> ministerial conference in 2011. Finally, the commitment to duty free/quota free (DFQF) market access for LDCs was not strengthened since the 2005 ministerial conference, but merely reiterated at Bali.

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<sup>68</sup> Africa Trade Network Statement on the Bali Package adopted at the end of the 9 Ministerial Conference of the WTO in Bali, in ‘From Bali with Empty Hands’, 16 *African Agenda* 5, (2013) p. 8.

<sup>69</sup> Bellmann, *supra* note 67, para. 15.

<sup>70</sup> Africa Trade Network, *supra* note 68, p. 8.

<sup>71</sup> *Ibid.*

<sup>72</sup> Bellmann, *supra* note 67, para. 34.

<sup>73</sup> WTO, *Preferential Rules of Origin for Least Developed Countries, Ministerial Decision of 7 December 2013*, WT/MIN(13)/42, WT/L/917 (Geneva: WTO).

<sup>74</sup> WTO, *Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least Developed Countries, Ministerial Decision of 7 December 2013*, WT/MIN(13)/43, WT/L/918 (Geneva: WTO).

<sup>75</sup> *Duty Free and Quota Free (DFQF) Market Access for Least Developed Countries, Ministerial Decision of 7 December 2013*, WT/MIN(13)/44, WT/L/919 (Geneva: WTO).

Professor Bello provides us with an insight into Philippine's negotiating team's positions in a bid to understand the 'collapse' at Bali. Before going to Bali the Philippine's Secretary of Trade and Industry Gregory Domingo was of the opinion that the proposals put on the table were unbalanced in favour of the developed countries as they were not even willing to entertain cuts in their export subsidies while demanding cuts in the subsidies of developing countries, whereas the proposed trade facilitation deal, favoured mainly big corporate players, and not the small and medium enterprises of developing countries that were engaged in global agricultural commerce.<sup>76</sup> 'In other words, the Philippine negotiating team was going to Bali with eyes wide open.'<sup>77</sup> As the negotiations drew to a close in the early morning of December 7th, however, the Professor got the following message from Secretary Domingo: "Congressman Bello, the Bali Package is a balanced package, and while parts of it, like some parts in the Trade Facilitation deal, will benefit others more, we benefit also big time in the more transparent processes that we will have, particularly in customs. The peace clause is also of significant benefit to the Philippines as revised without a fixed term limit."<sup>78</sup> In the words of the Professor:

There is now a consensus that the Philippines -and most other developing countries- lost out by joining the WTO nearly 20 years ago. Our agriculture and industry are now on their last legs after becoming part of a global organization whose main "principle" is trade liberalization for developing countries and continued protectionism for the developed countries. I thought we had learned from the debacle of 1995. Our negotiators have not, being steeped in the art of swallowing the rosy calculations of the WTO spinmasters and caving in at the slightest pressure from the powerful. As in 1995, developing countries will live to regret joining the frightened herd and signing the Bali deal.

In the same tone of blaming the weakness of developing country negotiators rather than the approach of developed countries, another commentator states that '[t]ime was when developed countries could be blamed mostly for the state of affairs during ministerials but in Bali African ministers could be blamed for their own downfall as they gave in without a fight to the so-called Bali Package.'<sup>79</sup> African civil society groups present at Bali have said in a statement that the welcoming of the package by their Ministers, 'underlies the fact that at this ministerial, African ministers can be said to have colluded with the marginalization of the interests of their people by the developed countries.'<sup>80</sup> The African Trade Network further states that they 'will expect [their] States to wake up, go back to the drawing board, take the negotiations seriously as having grievous implications for their people, and revisit the numerous proposals for redressing the imbalances in the multilateral trade system, arrest the

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<sup>76</sup> Bello, *supra note* 64.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> Editorial, 'From Bali with Empty Hands', 16 *African Agenda* 5, (2013) p. 4.

<sup>80</sup> Africa Trade Network, *supra note* 68, p. 8.



introduction of new issues that expand and deepen the inequity of the WTO and to deliver development for Africa's peoples in international trade.<sup>81</sup>

Despite the limited nature of what had been agreed at Bali, the outcome was significant as an indicator of the lack of developing countries' ability to protect their interests at the WTO. Furthermore there seems to be a discrepancy in the perception of the merits of the Bali deal between developing country ministers who mainly hail it as a success, and the civil society which despite intensive efforts has failed yet again to significantly affect the outcome of the negotiations. At the same time this is the first multilateral trade deal since the creation of the WTO and it would not be hard to imagine that developing countries preferred to accept a less than perfect deal than to admit the defeat of the system in rulemaking altogether. Wilkinson rightly warns against this sort of search for 'quick fixes to the ills of the multilateral trading system in a way that privileges expediency over contemplation and root-and-branch reform' trying to get the system working 'quickly and at almost any cost'.<sup>82</sup>

Bali brought what seemed to be improvements in the negotiating process itself, at least when it came to trade facilitation. Since the beginning of discussions in the mid-1990s and up until Bali, developing countries played an active role and were expressing their concerns about various issues such as a lack of capacity and resources to implement potential Trade Facilitation Agreement (TFA) obligations<sup>83</sup>; not being able to reap the benefits of such an agreement (or merely in a disproportionate way); and the fear of mandatory disciplines potentially subject to the dispute settlement mechanism, preferring non-binding disciplines.<sup>84</sup> During the process they managed to shift what was at first an ambitious mandate to one that emphasized flexibilities and implementation support for developing countries and LDCs, however there was disagreement with developed countries on matters such as the amount of assistance and the specifics of SDT.<sup>85</sup> This disagreement was one of the last to be resolved before the Bali conference<sup>86</sup> where a rather 'lacking' deal was accepted in the end. Nevertheless just in terms of how negotiations had been conducted, the TFA brought some welcome changes, especially during and after the period in which a Negotiating Group was established with ambassador Muhamed Noor of Malaysia as its first president who adopted a

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<sup>81</sup> *Ibid.*

<sup>82</sup> R. Wilkinson, *What's Wrong with the WTO and How to Fix It*, (Polity Press: 2014), p. 2.

<sup>83</sup> N. Neufeld, 'The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement', WTO, Economic Research and Statistics Division, Staff Working Paper ERSD-2014-06 (April &, 2014), p. 6.

<sup>84</sup> *Ibid.*, pp. 3-4, 6.

<sup>85</sup> *Ibid.*, p. 9.

<sup>86</sup> *Ibid.*

transparent and Member-driven mode of operation where the main input would come bottom-up from the delegations and there was an approach of inclusion in stark contrast to the infamous green room meetings characteristic of WTO negotiations.<sup>87</sup>

b) Nairobi Ministerial Conference, December 2015

Headlines accompanying results of the Bali Ministerial were almost identically repeated after the Nairobi Ministerial in 2015. While the WTO reported that this was a historic deal, headlines in India read ‘Nothing at Nairobi: WTO Ministerial leaves India and developing countries in the lurch,’<sup>88</sup> ‘An Opportunity missed at Nairobi,’<sup>89</sup> etc. The blaming of the ministers and bureaucrats acting on behalf of developing countries was again one of the main issues raised and some accused them of clearly ‘collude[ing] with developed countries, perhaps out of ignorance’ whereas the UN Independent Expert on the Promotion of a Democratic and Equitable International Order, Mr Alfred de Zayas noted that pressure was once again put on developing countries aimed at the introduction of new issues that would undermine the promotion of the right to development.<sup>90</sup> As mentioned in chapter III, the DDA, although not completely abandoned, was not reaffirmed unanimously and most of the pending agricultural issues of utmost importance for developing countries were again not resolved (see below discussion under the Agreement on Agriculture (AoA) on public stockholding, special safeguard mechanism, export subsidies and cotton). India’s former commerce finance secretary SP Shukla, who has a wealth of experience representing India at such meetings, described the current status of the Doha Development Agenda (DDA) as ‘dead in the water.’<sup>91</sup> From paragraph 32 which shows no unanimity on the Doha structure to paragraph 34 which states that ‘[s]ome wish to identify and discuss other issues for negotiations, while *others* do not’, the Nairobi Declaration brings back contentious topics such as investment, global value chains, competition policy, transparency in government procurement, labour standards, environment and so on, which can now be used by developed countries as bargaining chips to stall any progress on all pending issues of the Doha Round.<sup>92</sup> In trying to identify reasons for the latest failure of India’s negotiators, Shukla enumerates

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<sup>87</sup> *Ibid.*

<sup>88</sup> Seetha, ‘Nothing at Nairobi: WTO Ministerial leaves India and Developing Countries in the Lurch,’ *F Business* (21 Dec. 2015).

<sup>89</sup> Editorial ‘An Opportunity Missed at Nairobi’, *The Hindu*, (24. Dec. 2015).

<sup>90</sup> K. M. Chenoy, ‘How India led developing nations surrender at Nairobi’, *Daily O*, (27. Dec. 2015); UN, Human Rights Council, *Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas*, (Thirty-third session, A/HRC/33/40, 2016), p. 14.

<sup>91</sup> *Ibid.*

<sup>92</sup> WTO (2015) ‘Draft Nairobi Ministerial Declaration’, WT/MIN(15)/W/33/Rev.3, agreed 19 December.

intimidation of developing countries' representatives; the fact that there was no reference to the Trade Negotiating Committee, the supreme organ for conducting the Doha negotiations; the fact that India chose not to mobilize other developing countries and most importantly, the fact that it surrendered its only bargaining chip by agreeing to the Trade Facilitation Agreement (TFA) unilaterally without asking in return for a resolve on the disputed issues in the field of agriculture.<sup>93</sup> This was despite the Commerce minister Nirmala Sitharaman and commerce secretary Rita Teotia repeatedly indicating in the run up to the ministerial that India would play hard ball on the issues of the public stockholding of food and the special safeguard mechanism for developing countries (see below in the section on the Agreement on Agriculture) and despite the fact that prior to the Ministerial India refused to agree to a protocol on a TFA until the peace clause on public stockholding became indefinite.<sup>94</sup> The UN Independent Expert on the Promotion of a Democratic and Equitable International Order, Mr Alfred de Zayas has since suggested that developing countries now withhold the deposit of their instruments of ratification of the TFA until they secure their own demands, including on public stockpiling.<sup>95</sup>

India's refusal to act as a deal-breaker was attributed also to the fact that the Ministerial was held in Africa for the first time, while regional and plurilateral trade agreements were also seen as having cast their shadow, but most importantly the blame was to be placed on India's lack of a clear-cut strategy, lack of preparation and even a lack of the best and brightest trade experts and lawyers amongst its delegation.<sup>96</sup> The newspaper the Hindu further made this disillusioned comment: 'so much for all the talk of solidarity among developing countries making them a formidable block to reckon with.'<sup>97</sup> The cohesion of G33, G90 and the Cairns group had indeed been eroded by changes in the global economy. For example while the G90 has been calling for the extension of preferences (APC, LDC and African groups) this runs counter to the agenda of G20 and in some cases even the interest of a member of a group may differ from those of the group itself. For example South Africa's interests sometimes strikingly differ from the African Group it seeks to lead.<sup>98</sup> Nairobi exposed clearly the growing reluctance of smaller Members to get behind India and other larger developing

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<sup>93</sup> Chenoy, *supra note* 90.

<sup>94</sup> *The Hindu*, *supra note* 89.

<sup>95</sup> UN, Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, Human Rights Council, Thirty-third session, A/HRC/33/40, 2016, p. 14.

<sup>96</sup> *Ibid.*

<sup>97</sup> Seetha, *supra note*, p. 88.

<sup>98</sup> Rolland, *supra note* 5, p. 96; P. Draper and R. Sally 'Developing-Country Coalitions in Multilateral Trade Negotiations', Paper, Jawaharlal Nehru University 2004, in Rolland, *supra note* 5, p. 96.

countries in opposing aspects of the negotiations in order to further interests which do not necessarily align with their own.<sup>99</sup> However it is important to note that India is not the only country with public stockholding programmes and several African countries like Tunisia, Zambia, Zimbabwe, Morocco, Egypt and Kenya also have such programmes in place, thus it is rather odd that so little of a fight was put up and the issue ended up being the most neglected at the ministerial.<sup>100</sup>

The ministerial did however bring an important step forward for development, in terms of market access for LDCs. It achieved for the first time a binding multilateral agreement on the Rules of Origin to be implemented by December 2016 (see below: Generalized System of Preferences). In other parts of the LDC package, the C4 – Benin, Burkina Faso, Chad and Mali finally got their demands for both developed and developing countries to eliminate export subsidies in cotton as well as provide DFQF access for cotton from LDCs. However the biggest issue for C4, i.e. domestic cotton subsidies, remained as before. On the issue of the services' waiver<sup>101</sup> all Nairobi brought was 1) an extension of the waiver in light of the three year lag between the initial adoption of the waiver and the first notification of a Member indicating their intention to make use of it; and 2) another best-effort commitment by Members to 'redouble efforts' to operationalise it.<sup>102</sup>

All in all the gains for the LDCs could not rebalance the losses sustained by developing countries as a whole.<sup>103</sup> Importantly, the ministerial introduced a new mode of negotiating which built consensus through a complex multi-layered series of bilateral processes in behind-the-scene meetings. Despite this appearing to be a radical departure from the old 'green room' style of negotiations, Wilkinson, Hannah and Scott, who attended the conference explain that it was in reality rather an evolution thereof.<sup>104</sup> Participation was at the core of the talks, which unfolded in a multi-layered process of concurrent bilateral meetings aimed at building consensus on easy-to-reach areas before tackling the thornier issue of the future of the DDA as a negotiating framework.<sup>105</sup> This approach – which built a critical mass of agreement as the conference proceeded - also built trust among Member delegations while

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<sup>99</sup> Wilkinson, *supra note* 17, pp. 3-4.

<sup>100</sup> P. Brasher, 'Nairobi Deal Ends Export Subsidies, Sets Credit, Aid Rules', Agri-Pulse Communications, Inc., 21 Dec. 2015.

<sup>101</sup> The waiver was first agreed to in 2011 at the eight ministerial conference allowing members to grant preferential treatment to service suppliers from LDCs.

<sup>102</sup> WTO, *Draft Decision – Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade*, WT/MIN(15)/W/39, agreed 19 December, 2015.

<sup>103</sup> Wilkinson, *supra note* 17, p. 7.

<sup>104</sup> *Ibid*, p. 3.

<sup>105</sup> *Ibid*, pp. 1-4.

at the same time buying them into the idea that a Nairobi package could be agreed.<sup>106</sup> At the very last stages of the conference when Members were trying to finalise the most contested issues, however, there was an evident move back to the more undemocratic and exclusionary small group style negotiating involving the key protagonists USA, EU, China, Brazil and India to resolve outstanding differences in agriculture.<sup>107</sup> As mentioned above, at Nairobi the single undertaking was abandoned in favour of a ‘variable geometry’, much like that at the Hong Kong ministerial, with similar implications for developing countries from the loss of the DDA to a prospect of future gains of almost certainly lesser potential value than before.<sup>108</sup> Much like the resort to regional trade agreements, this move clearly sends the signal that developed countries will not be coerced into adjusting the current system in order to be able to pursue their interests in new sectors. All this does not bring much hope for the future. As Shadlen describes, the blocking power of developing countries is based on them being Members of the institution and can be made useless with a *de iure* or *de facto* abandonment of this institution by Members which exert more power without it – this happened with the creation of a new GATT in 1994 and is happening now with the proliferation of regional agreements bringing WTO-plus rules.<sup>109</sup> While the WTO may not need to step back and leave the floor to bilateral and regional agreements, it will stay relevant at the expense of a meaningful rebalancing of the existing rules as developing countries give up on their coalitions putting up meaningful demands and resistance. For the sake of stability, certainty and predictability, developed countries are willing to give up the power they would enjoy outside the system, however only to a very limited extent. Unsurprisingly on the other hand, developing countries are prepared to give up much more and accept unfavourable agreements to protect the system. In a world of power asymmetries bad rules are better than no rules.<sup>110</sup> In other words, they do not want to push too far for their interests for fear of diminishing developed countries’ respect of and support for the institution, which is why time and again they are willing to accept bad deals.<sup>111</sup> A recent WTO publication asks the following question: ‘How can you ensure that trade is as fair as possible and as free as is practical?’ to

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<sup>106</sup> Wilkinson, *supra note* 17, p. 4.

<sup>107</sup> *Ibid*, pp. 4-5.

<sup>108</sup> *Ibid*, pp. 1-2.

<sup>109</sup> K. Shadlen, ‘Resources, Rules and International Political Economy; the Politics of Development in the WTO’ in S. Joseph, D. Kinley and J. Waincymer (eds.), *The World Trade Organisation and Human Rights: Interdisciplinary Perspectives*, (Edward Elgar, 2009), p. 132.

<sup>110</sup> *Ibid*, p. 115.

<sup>111</sup> *Ibid*, 115-116.

which it then replies: ‘By negotiating rules and abiding by them.’<sup>112</sup> Considering the above described and what will be presented in the following pages, such a conclusion is nothing short of comical.

## 2. Accession and WTO Plus Obligations

Another crucial problem that creates an *ab initio* unfair position for many developing country Members is the process of accession itself. Acceding Members (also known as Art. XII Members) are often bound by additional terms and conditions compared to the original Members on everything from export subsidies and export restrictions to rules of origin, trade related investment measures, intellectual property, state ownership and privatization of enterprises, etc. Acceding Members have set tariff ceilings (‘bound rates’) for virtually all their agricultural and non-agricultural goods, while existing Members have, on average, bound only 74% of their product tariffs.<sup>113</sup> Furthermore the average final bound rate of Art. XII Members for all products is 13.8 %, significantly lower than the corresponding 45.5 per cent of original Members and they have made significant specific commitments in services sectors and sub-sectors, including in financial and business services.<sup>114</sup> Acceding Members are also required to put in place appropriate mechanisms for submitting notifications upon accession and thus have a consistently higher ‘notification’ rate than original Members<sup>115</sup> thus exposing themselves more to potential litigation or pressure to remove certain measures than the original Members. When Russia acceded in 2012 it had to enact a staggering 1166 legislative/regulatory changes, second only to China from which the WTO demanded no less than 2300 changes.<sup>116</sup>

These ‘WTO Plus’ conditions are then reciprocated by the original Members with ‘WTO minus’ conditions. Needless to say, most acceding states are developing countries and how this discrepancy in obligations can be justified remains a mystery. The narrative is that this is for their own good, as ‘more liberal commitments’ supposedly bring stronger trade growth and stability,<sup>117</sup> however if more commitments were indeed that beneficial, one would expect original Members to voluntarily and unilaterally commit themselves to the same standards, however this is clearly not the case.

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<sup>112</sup> WTO, ‘The World Trade Organization in Brief’, undated, available at: [https://www.wto.org/english/res\\_e/download\\_e/inbr\\_e.pdf](https://www.wto.org/english/res_e/download_e/inbr_e.pdf), (last accessed: 22.8.2016).

<sup>113</sup> WTO, *supra note* 6, p. 27.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, p. 24.

<sup>116</sup> *Ibid.*, p. 30.

<sup>117</sup> WTO *supra note* 6, p. 24.

### 3. Results of Unbalanced Negotiations – Free Trade or a War of Interests?

It is important to understand that in spite of the world today being ‘under a single economic orthodoxy which presents trade liberalisation as the only way to economic growth and development’,<sup>118</sup> actual ‘free trade’ has hardly been the result of the unbalanced negotiations at the WTO. The Preamble of the GATT instructs Members to pursue ‘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 commerce’. Instead, however, the GATT/WTO rules coming out of unbalanced negotiations have generally rather reflected the interests of specific exporter groups in the US or Europe or compromises between them and other domestic groups, which can for example clearly be seen in the different treatment of manufacturing and agriculture, or of clothing and other goods within manufacturing, the antidumping regime, and the intellectual property rights regime among other anomalies within the WTO rules.<sup>119</sup> GATT kick-started a deep inequality of opportunity for the Member states which was only extended, consolidated and amplified once the Tokyo round (1973-9) ushered in a codification of rules.<sup>120</sup> Even within the same category of products, differentiation can be found for example between allowed and illegal subsidies, along the lines of those that are used chiefly by the rich countries and those that can be afforded by the poorer countries. Their agricultural subsidies are notorious, but they have also very actively used the permitted research and development subsidies to promote high-tech industries in amounts which are impossible to match for developing countries or regional equalisation subsidies for foreign investors (provided that they locate in a poor region), or so-called green subsidies, to bail out national manufacturers in the name of the environment<sup>121</sup> while prosecuting discriminatory subsidization of local green energy providers in developing countries. Furthermore, while stepping up the ‘ideological crusade’ against government intervention in developing countries through the Washington Institutions, the US has many times increased government assistance to business by giving subsidised finance specifically targeting manufacturing industries as well as providing tax reductions for

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<sup>118</sup> K. Kwandiwe, (ed.), *Perspectives on Thought Leadership for Africa’s Renewal*, (Africa Institute of South Africa, 2014), p. 219.

<sup>119</sup> Rodrik, *supra note* 11, p. 234.

<sup>120</sup> Wilkinson, *supra note* 82, p. 36.

<sup>121</sup> For example the £2.5bn rescue package for British carmakers, was defended by the British business secretary Peter Mandelson, as ‘a ‘greening’ initiative for a fundamentally sound industry and not subsidising an industry in trouble,’ H.-J. Chang, ‘Painting carmakers green: Developed nations are trying to get around WTO subsidy rules by portraying their industry bail-outs as green initiatives’, *The Guardian*, 3 February 2009, available at: <http://www.theguardian.com/commentisfree/2009/feb/03/automotive-wto-green-politics>, (last accessed, 22.8.2016).

exports of industrial goods worth billions to companies including GE, Boeing, IBM and Microsoft.<sup>122</sup>

It is quite clear that even though internationally regulated, there is still a mercantilist trade war being fought, mainly through negotiating the rules themselves, but also later on in successfully circumventing the rules and carving out policy space even when it constitutes a breach of the rules, as long as it is a so-called ‘efficient breach’.

In the words of Dani Rodrik:

The rules for admission into the world economy not only reflect little awareness of development priorities, they are often completely unrelated to sensible economic principles. WTO rules on anti-dumping, subsidies and countervailing measures, agriculture, textiles, TRIMs, and TRIPs are utterly devoid of any economic rationale beyond the mercantilist interests of a narrow set of powerful groups in the advanced industrial countries. The developmental payoff of most of these requirements is hard to see.<sup>123</sup>

The bias in the rules has even been recognized by former Director General Mr Lamy, when he stated that ‘a number of the current substantive rules of the WTO do perpetuate some bias against developing countries’ and that negotiations needed to continue the rebalancing of rules in favour of developing countries otherwise the economic colonization would persist.<sup>124</sup>

Lamy was referring to rules on subsidies in agriculture that allow for trade-distorting subsidies which favour developed countries and high tariffs applied by developed countries on imports of agricultural and industrial products, in particular from developing countries.<sup>125</sup>

However the bias goes further than what has been recognized by Lamy.

It is further reflected in the status of organizational bodies within the WTO. Development issues which undoubtedly concern the vast majority of the Membership are relegated to a committee, i.e. the Committee on Trade and Development (CTD), while intellectual property rights, which only a small number of states promoted at the Uruguay Round, went on to get their own full Council instead of a Committee,<sup>126</sup> and a separate agreement, namely the Agreement on Trade Related Intellectual Property Rights (TRIPS Agreement), to deal with

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<sup>122</sup> F.S. Reinert, ‘The Other Canon and the History of Economic Policy’, Norsk Investor Forum and SVN, University of Oslo, Centre for Development and Environment, (2000), pp. 18-19.

<sup>123</sup> D. Rodrik, ‘The Global Governance of Trade: as if Development Really Mattered’, Paper prepared for the UNDP (2001), p. 31.

<sup>124</sup> P. Lamy, Speech given to ECOSOC, (2 July 2007), available at: [https://www.wto.org/english/news\\_e/sppl\\_e/sppl64\\_e.htm](https://www.wto.org/english/news_e/sppl_e/sppl64_e.htm), (last accessed: 22.8.2016), referring to rules on subsidies in agriculture that allow for trade-distorting subsidies which favour developed countries and high tariffs applied by developed countries on imports of agricultural and industrial products, in particular from developing countries.

<sup>125</sup> S. Joseph, *Blame it on the WTO: A Human Rights Critique*, (Oxford University Press, 2011), p. 145.

<sup>126</sup> Apart from the CTD the organisational structure further includes the Subcommittee on LDCs aided by the Training and Technical Cooperation Institute under the WTO Secretariat.



complex and long-term intellectual property issues in the WTO.<sup>127</sup> Furthermore the mandate of the CTD is limited and the WTO's activities to assist developing countries have been confined to a focus on technical capacity-building, insufficient to address complex and long-term development issues on trade and development.<sup>128</sup> It has thus been suggested that in order to address this imbalance the WTO would have to elevate the CTD into a Council which would cooperate with United Nations Conference on Trade and Development (UNCTAD) and the United Nations Industrial Development Organization (UNIDO) to set a trade and development agenda on a regular basis and impose certain commitments on Member states.<sup>129</sup> In its recent publication, the WTO justifies the discrimination between the TRIPS *council* and the CTD *committee* by relying exactly on the fact that the committee's scope is 'more limited', basically contradicting its earlier claim that everything at the WTO is about development which would imply that the CTD's scope would extend to all the issues at the WTO.<sup>130</sup>

#### **4. Obstacles to Meaningful Participation of Developing Countries in the Early GATT**

Developing countries faced major obstacles in trying to meaningfully participate in the shaping of the system already in the early periods of the GATT, mainly due to the principal supplier rule and the focus on tariffs only.

It is natural that during the creation of international institutions some of the founding states will try to ensure that its decision making conforms to the prevailing distribution of power.<sup>131</sup> Some ponder about whether this process was consciously undertaken in the case of the GATT due to its 'accidental' beginnings, however in terms of actual trade expansion it certainly only benefited a small subset of privileged signatories, while the trade of states that acceded to the regime was not significantly impacted.<sup>132</sup>

##### a) Product-by-product, principle supplier rule and principle of reciprocity

Under its protocol, GATT tariff bargaining followed the product-by-product, principal supplier method, a method, insisted on by the US, which meant that a country could only be

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<sup>127</sup> Y.-S. Lee, 'World Trade Organization and Developing Countries, Reform Proposal', in Lee, *supra note 29*, p. 108.

<sup>128</sup> *Ibid*, pp. 107, 108.

<sup>129</sup> *Ibid*, p. 110.

<sup>130</sup> WTO, *supra note 6*, p. 14.

<sup>131</sup> Gowa, *supra note 2*, p. 454.

<sup>132</sup> *Ibid*, pp. 455, 476.

requested to make tariff cuts on a particular product by the principal supplier of that product to that country.

This led to the expansion of trade only between Britain, Canada, France, Germany, and the US.<sup>133</sup> Developing countries at that time were seldom principal suppliers of any product, except raw materials that entered industrialized countries duty-free.<sup>134</sup> This meant that they were effectively prevented from requesting concessions on items that they did not produce in large quantities but in which they hoped to expand production<sup>135</sup>, thus denying them the possibility of trade-led development. Only at the Fourth Geneva Round of GATT in 1956 was this rule modified to allow developing countries to negotiate collectively in requesting concessions.<sup>136</sup> However, they were still effectively prevented from requesting concessions in any products that they did not produce in large quantities. Thus the principal supplier rule had the effect of locking out developing countries from the tariff-cutting negotiations and their lack of significance across a range of products ensured that they had little say in negotiations as a whole. The situation of the non-principal suppliers was supposed to be mitigated by the fact that according to MFN concessions were extended to all Members without discrimination, allowing tariff cuts to trickle down.<sup>137</sup> However, GATT's focus was only on manufactures, semi-manufactures and capital goods, and not agriculture or textile and clothing. Interestingly this locked out also Japan and Italy, who might have been equally plausible candidates for membership in the privileged group, however because both countries specialised in products which the group succeeded in exempting from GATT rules, namely textiles, labour-intensive products and agriculture they were equally unwelcomed.<sup>138</sup> The benefits of trade liberalisation were therefore in fact even more narrowly concentrated than conventional wisdom long held.<sup>139</sup>

The adoption of the principal supplier rule was consistent with the balance of power that prevailed at the end of World War II, however divergent trade policy goals in US domestic politics also played a crucial role. Officials of the Roosevelt administration sought to promote European and transatlantic trade, to create a Western bloc strong enough to deter Soviet expansion<sup>140</sup> while the Congress merely wanted to maximize market access abroad without

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<sup>133</sup> *Ibid.*, p. 455.

<sup>134</sup> K. Kock, *International Trade Policy and the GATT, 1947-1967*, (Almqvist and Wiksell, 1969).

<sup>135</sup> Wilkinson, *supra note* 82, p. 32.

<sup>136</sup> Ismail, *supra note* 29, p. 137.

<sup>137</sup> Wilkinson, *supra note* 82, p. 32.

<sup>138</sup> Gowa, *supra note* 2, pp. 456, 476.

<sup>139</sup> *Ibid.*

<sup>140</sup> A. S. Milwar, *The Reconstruction of Western Europe, 1945-51*, 2<sup>nd</sup>. ed. (University of California Press, 2000), pp. 441, 456.

jeopardizing domestic industry. To respect the MFN principle and expand exports while protecting domestic industry, administration officials developed ‘the so-called chief-source, or ‘Principal Supplier’ rule which enabled the administration to defend itself against complaints that ‘other countries were getting something for nothing.’<sup>141</sup>

The GATT was further based on the principle of reciprocity. This meant that all contracting parties were expected to reciprocate for concessions received, which proved troublesome for the developing countries that participated in the negotiations.<sup>142</sup> In these principles, the GATT system was, in the opinion of the developing countries, which joined later on, in essence biased in favour of the rich countries, which is reflected nicely in the following quotation from a report to the Economic and Social Council (ECOSOC) meeting preparatory to the 1964 UNCTAD Conference

By the very nature of its philosophy, which is based on liberalism, GATT inevitably shows a marked lack of understanding of the interest of the underdeveloped and developing countries. This is primarily due to the inequality between the industrialized and developing countries in the matter of bargaining power. Article 1 of the General Agreement is based on the fiction that there is complete equality among Contracting Parties. There is however no equality of treatment except among equals.<sup>143</sup>

Developing countries ‘could not participate on an equal footing in tariff negotiations partly because their need for tariffs, as an indispensable weapon of economic development and as a source of revenue, is much greater than that of developed countries; and partly because the role of quantitative restrictions is very different in the two groups of countries’.<sup>144</sup>

#### b) Focus on tariffs only

Another major problem for developing countries’ export interests was the fact that negotiations focused on tariffs only, while internal taxes on tropical products in industrial markets and quotas posed a bigger problem for their exports. Internal taxes were included in the negotiations in the Dillon Round, but faced fierce opposition by the US and EEC and were rendered rather useless for developing country interests as the non-tariff barriers increased in agriculture which was excluded from the negotiations.<sup>145</sup> Quotas put in place by developed countries to protect against adverse balance of payments situations were further

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<sup>141</sup> J. M. Leddy, staff member of the Trade Agreements Division, Department of State, Harry S. Truman Library, Oral History, available at: <http://trumanlibrary.org/oralhist/leddyj>, (last accessed: 22.8.2016), pp. 8-9.

<sup>142</sup> Wilkinson, *supra note* 82, p. 33.

<sup>143</sup> UNCTAD, Proceedings, Vol. IV, 1964, p. 409, quoted in Y. Abdulqawi *Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law*, (Kluwer Academic Publishers, 1982), p.14.

<sup>144</sup> Abdulqawi, *ibid.*

<sup>145</sup> Ismail, *supra note* 29, p. 138.

not a part of the negotiations. While these countries were supposed to lift the quotas once their balance of payments improved, they tended not to do so on products from developing countries.<sup>146</sup>

Actually the GATT was no accident. It fit perfectly with the post-war US plan of perpetuating its, at the time, unrivalled economic pre-eminence, which meant the US was in a position to sell ‘everything to everybody’ while needing to buy very ‘little of anything’ from anybody.<sup>147</sup> The GATT ‘facilitated the liberalization of those sectors at the cutting edge of US industrialization, largely manufactures, semi-manufactures and capital goods) while forestalling liberalization in areas of political and economic sensitivity (at that point in time largely agriculture)’.<sup>148</sup> Apart from ensuring that its goods entered foreign markets as competitively as possible, it further took care of the lacking capacity to pay for those goods by giving financial assistance to partner states.<sup>149</sup> Europe was thus offered a programme of loans and grants known as Marshall Aid, i.e. European Recovery Program.<sup>150</sup>

Developing countries unsuccessfully tried to change the rules of the system from within for quite a long time only to conclude that the whole system should be challenged, since it was heavily biased in favour of the rich countries, and it hampered their efforts to achieve growth through trade.<sup>151</sup> The Western dominant view on the universal beneficial impact of liberal trade was challenged by the political struggles of newly independent countries in the 1960s and 1970s and with the emergence of dependency theories, which served as the theoretical complement for developing countries’ requests for more flexibility within GATT.<sup>152</sup> Other factors such as ‘the rise to prominence of Keynesian theories, the concomitant experience with public intervention in Western economies and the Cold War with the tensions it generated with respect to the geopolitical influence on the so-called Third World’ led to the fact that eventually developing countries managed to retain a degree of autonomy in their tariff regimes to pursue industrial policy programmes.<sup>153</sup> Initiatives such as Part IV of the GATT and especially non-reciprocity, the so-called Enabling Clause, the Generalised System

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<sup>146</sup> GATT, *Basic Instruments and Selected Documents: Tenth Supplement* (Geneva: GATT) (1962), p. 187.

<sup>147</sup> C. Wilcox, *A Charter for World Trade* (Macmillan, 1949), pp. 10-11.

<sup>148</sup> Wilkinson, *supra* note 82, p. 29.

<sup>149</sup> *Ibid.*, pp. 25-29.

<sup>150</sup> M. J. Hogan, *The Marshall Plan*, (Cambridge University Press, 1987).

<sup>151</sup> H. G. Johnson, *Economic Policies Towards Less-Developed Countries*, (Brookings Institution, 1967), p. 237 quoted in *Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law*, (Kluwer Academic Publishers, 1982), p. 11.

<sup>152</sup> D. Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*, (Hart Publishing, 2010), p. 66.

<sup>153</sup> *Ibid.*, p. 66.

of Preferences and other initiatives came to be in this context.<sup>154</sup> Even though de facto the flexibility applied only insofar as it did not challenge the interests of the major capitalist powers<sup>155</sup> it nevertheless proved the theoretical need for exceptions to the underlying principles and a formal acceptance by developed countries of the non-reciprocity principle. However of the initiatives in Part IV of GATT resulted in not much more than lip service (see below for further analysis) and its ‘emptiness... is a measure of how little developed countries were willing to spend to save GATT from UNCTAD – or, perhaps, a measure of how little it took to persuade developing countries that abandoning the GATT was not in their best interest.’<sup>156</sup>

### **5. Unfair Rules in Agriculture – The Mother of all Injustices**

Perhaps the biggest injustice of the GATT/WTO system and a constant cry from developing countries for reform has been the lack of liberalization in developed countries’ agricultural markets. The promises of correcting the enormous unfairness of the *status quo* have acted as a perpetual bargaining chip in the hands of developed countries making developing countries accept deals less favourable to them in other areas throughout the rounds for the sake of incremental improvements on agricultural rules. Thus the nature of the system has enabled the initial bias in the field of agriculture to work as a mechanism to achieve biased rules also in other areas and while developing countries have been trying to reverse the damage done in agriculture they have been losing important policy space needed to protect their manufacturing elsewhere.

As mentioned above, the US conceived of GATT as a tool for the liberalisation of only those sectors in which it had a clear advantage over its partners. At the time agriculture was not among these sectors. GATT provisions dealing with agriculture thus excluded it from the general rules. Despite persistent calls by the ever increasing number of developing country Members for the inclusion of agriculture in the remit of the general GATT rules, for decades the situation remained the same: there were no tariff bindings in agriculture,<sup>157</sup> there were important exemptions from the prohibition on non-tariff barriers;<sup>158</sup> quotas were permitted to

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<sup>154</sup> *Ibid*, p. 66.

<sup>155</sup> *Ibid*, p. 66.

<sup>156</sup> R. E. Hudec, *Developing Countries in the GATT Legal System*, (Cambridge University Press, 2010), p. 65.

<sup>157</sup> This is significant especially since tariffs in agriculture have been traditionally much higher than in other sectors.

<sup>158</sup> General Agreement on Tariffs and Trade, October 30, 1947, 58 U.N.T.S. 187 Can.T.S. 1947 No. 27 (entered into force January 1, 1948), (hereinafter GATT), Art. XI:2; in addition to these exemptions the US demanded a waiver of obligations under Article XI on the prohibition of quantitative restrictions which other countries used as an excuse for their own violations of said prohibitions (Decision of March 5, 1955, GATT B.I.S.D. (3d

protect domestic industry against a surge in imports;<sup>159</sup> export subsidies were permitted as long as the country did not gain a ‘more than equitable share of world export trade’ by doing so;<sup>160</sup> and domestic subsidies were only indirectly addressed.<sup>161</sup> US was practicing heavy export subsidisation and imposition of quotas on imports of dairy products, while the EU was imposing substantial levies on agricultural imports in addition to tariffs under its Common Agricultural Policy.<sup>162</sup> It was not until the US wanted to slightly curb its own subsidies for budgetary reasons and felt it could only do so by restraining EU subsidies as well, that agricultural reform became a priority at the GATT.<sup>163</sup> Developing countries’ voices calling for more drastic change were therefore soon left out of the negotiation process and the EU-US bargaining took central stage.<sup>164</sup> The Agreement on Agriculture (AoA) which came out as a result was thus an embodiment of US and EU back-room negotiations presented to the rest of the world as a *fait accompli*.<sup>165</sup> In the words of one commentator, ‘the current agricultural trade rules are an affront to the principles of free trade and fairness that the multilateral trading system is meant to embody’.<sup>166</sup>

Below is a brief account of the current rules governing agriculture, exposing their deficiency.

- Agreement on Agriculture - market access

The AoA sets out in Art. 4(2) that all quantitative restrictions or other non-tariff measures,<sup>167</sup> should be replaced with tariffs, while Members should subsequently reduce these tariffs: developed countries by an average cut of 36% over 6 years (minimally by 15% for each product line), and developing countries by an average cut of 24% over 10 years (minimally by 10% for each product line), while LDCs had no reduction commitments imposed.<sup>168</sup> The majority of OECD countries (and only a few developing countries), however, engaged in so-called ‘dirty tariffication’ and set the tariff equivalents for the removed non-tariff barriers at excessive rates to nullify the benefits of tariff bindings and tariff reductions which resulted in

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Supp.) at 32; W. J. Davey, ‘The Rules for Agricultural Trade in GATT’ in M. Honma et al., (eds.), *GATT and Trade Liberalization in Agriculture*, (Otaru Hokkaido, 1993), p. 5.

<sup>159</sup> GATT 1947, Art. XIX.

<sup>160</sup> GATT 1947, Art. XVI:3; what was more than an ‘equitable share of export trade’ turned out to be nearly impossible to prove at the dispute settlement mechanism; Davey, *supra note* 158, p. 6.

<sup>161</sup> Davey, *ibid*, p. 3-6.

<sup>162</sup> *Ibid*, p. 6.

<sup>163</sup> T. P. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, p. 172.

<sup>164</sup> *Ibid*, p. 178-81.

<sup>165</sup> The so-called Blair House Accord of 1992; ‘An Agreement to Deal; WTO Trade Talks’, *The Economist*, 16 August 2003, p. 65.

<sup>166</sup> *The Economist, ibid*.

<sup>167</sup> except those justified by health and safety reasons.

<sup>168</sup> Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (1994), (hereinafter: AoA), Art. 4(1).

even higher protection than before.<sup>169</sup> Moreover, since most of the reductions had to happen only on the *average*, tariff peaks as high as 350-900 percent ad valorem remained on certain food exports from developing countries and generally speaking sugar, tobacco, meat, milk products, cereals, fruits and vegetables, all of particular interest to developing countries, were subject to the highest tariffs.<sup>170</sup> Even today tariffs on products from developing countries which compete with developed countries' products, remain higher and more complex than those on products which do not pose such competition.<sup>171</sup> Under the Generalized System of Preferences (GSP) schemes, which are purportedly set up to encourage trade from developing countries into developed countries, tariffs nevertheless remain on products such as cotton, sugar, cereals and horticulture (see below Generalized System of Preferences).<sup>172</sup> Meanwhile tariff escalations discourage processing industries and the export of higher-value-added products by developing countries. The United Nations Development Programme (UNDP) described tariff escalation as 'one of the more pernicious forms of perverse graduation'.<sup>173</sup> In its 2005 Human Development Report it noted that developed countries typically apply low tariffs to raw commodities but rapidly rising rates to intermediate and final products with Japan putting 7 times higher tariffs on processed food products than first stage products; Canada applying the same concept with a ratio of 12 to 1; and the EU tariffs rising from 0% to 9% on cocoa paste to 30% on the final product.<sup>174</sup> In the words of the Report:

Tariff escalation is designed to transfer value from producers in poor countries to agricultural processors and retailers in rich ones – and it works. It helps explain why 90% of the world's cocoa beans are grown in developing countries, while only 44% of cocoa liquor and 29% of cocoa powder exports originate in those countries. Escalating tariffs help to confine countries like Côte d'Ivoire and Ghana to the export of unprocessed cocoa beans, locking them into a volatile, low value-added raw cocoa market. Meanwhile, Germany is the world's largest exporter of processed cocoa, and European companies capture the bulk of the final value of Africa's cocoa production.<sup>175</sup>

The *status quo* clearly illustrates the battle over interests played out at the WTO instead of a true 'free trade' agenda. Especially with tariff escalation one can clearly recognize the mercantilist golden rule of 'import raw, export processed'.

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<sup>169</sup> UNCTAD/WTO, *The Post-Uruguay Round Tariff Environment for Developing Country Exports: Tariff Peaks and Tariff Escalation*, Joint Study, TD/B/COM.1/14/Rev. (2000), pp. 1,4-6.

<sup>170</sup> *Ibid.*

<sup>171</sup> O. De Schutter, 'International Trade in Agriculture and the Right to Food', in O. de Schutter and K.Y. Cordes, eds., *Accounting for Hunger: The Right to Food in the Era of Globalisation*, (Hart Publishing, 2011), p. 145.

<sup>172</sup> *Ibid.*, p. 145.

<sup>173</sup> UNDP, *Human Development Report 2005*, International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World (United Nations, 2005), p. 127.

<sup>174</sup> *Ibid.*, p. 127.

<sup>175</sup> *Ibid.*, p. 127.

On the other hand the AoA further exacerbated the one-sided market opening in developing countries already demanded by the IMF and World Bank conditionalities in the preceding decades. Unlike the adoption of aggregate decreases which allowed developed countries to engage in selective tariff reductions, many developing countries agreed to implement a uniform (sometimes very low) rate of binding and a uniform level of reduction across all agricultural products taking away the flexibility of providing higher tariffs for sensitive products.<sup>176</sup> The increase of cheap food imports from heavily subsidised developed countries' producers, including surges in meat and dairy products, caused a decline in food production and threatened key agricultural sectors in developing countries that were important for economic development, employment, food security and poverty alleviation.<sup>177</sup> The deficiencies of the AoA in tackling this subsidisation are described below.

- Agreement on Agriculture - domestic support

In terms of domestic support, the AoA instructs the reduction of Members' Aggregate Measure of Support (AMS)<sup>178</sup> by 30% in 6 years for developed countries and by 13% over 10 years for developing countries. Exempt from these reductions is product specific support that does not exceed 5% of total value of production of that product in the case of developed countries or 10% in the case of developing countries. Non-product specific support is exempt from reductions in equal percentage of the value of total agricultural input (5% for developed and 10% for developing countries).<sup>179</sup> Developing countries are also exempt from reducing direct or indirect investment subsidies generally available to agriculture in these countries, input subsidies for low-income or resource-poor farmers and support to encourage diversification from growing illicit narcotic crops.<sup>180</sup> The AoA further exempts from reduction obligations the so-called 'green' and 'blue box' subsidies, which are purportedly minimally trade-distorting,<sup>181</sup> such as direct income payments to farmers that are decoupled from production, income safety net programs, and crop insurance programs.<sup>182</sup>

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<sup>176</sup> FAO, 'Experiences with the Implementation of the Uruguay Round Agreement on Agriculture: Developing Country Experiences', Symposium on Agriculture, Trade and Food Security, Paper No. 3, (FAO, 1999), para. 20.

<sup>177</sup> *Ibid*, paras. 18-19.

<sup>178</sup> This is domestic support considered to distort production and trade, i.e. amber box subsidies (such as measures to support prices, or subsidies directly related to production quantities) as calculated in annexes 3 and 4 of the AoA.

<sup>179</sup> AoA, Art. 6.

<sup>180</sup> AoA, Art. 6 (2).

<sup>181</sup> AoA, Art. 6 (4)-(5).

<sup>182</sup> Annex 2:6-2:8; Annex 2 includes subsidies for agricultural research, food security, environmental protection and rural infrastructure.



This does not reflect the reality that no matter under which box they fit, subsidies have a considerable protectionist effect and the actions following *Upland Cotton* and *EU-Export Subsidies on Sugar* clearly exposed the game of merely recasting the subsidies under another category when a certain kind is found not to comply with the AoA scheme. The AoA furthermore creates a system in which developed countries were exempted from the reduction of many subsidies that they had been traditionally using. They are furthermore allowed to use even officially trade distorting subsidies as long as these are subject to reductions, regardless of the fact that the period which provided the base for the reductions was 1986-1988, a period of extremely high subsidisation in these countries. On the other hand developing countries were prohibited from utilizing such support beyond the *de minimis* 10% described above as they had no subsidies in place at the base period. Furthermore, most developing countries lack the resources for even such a low level of subsidisation or the subsidies allowed under the green or blue box.<sup>183</sup>

An additional problem has been the subject of controversy at recent negotiations, especially at Bali, i.e. that even though green box subsidies are generally not capped, footnote 5 of Annex 2, Art. 3 still contains a limitation that has important implications for the protection of the right to food and the protection of local agriculture, a vital issue for many developing countries. Government stockholding of food procured from domestic farmers is allowed under this section, provided that the difference between the acquisition price and the external reference price (ERP) is accounted for in the AMS.<sup>184</sup> In other words if the government sets the administered price for acquiring and releasing stocks higher than the ERP which was based on the years 1986 to 1988, the difference must not exceed 10 % of the value of production. Anything above that constitutes what is considered an introduction of a trade distorting (amber box) subsidy. It was this cap that was legitimately being opposed to in Bali. On behalf of G-33, India proposed the expansion of policy space beyond the AMS threshold which would allow its government to continue procurement of wheat and rice at the minimum support price from low-income resource-poor producer, claiming it is not trade distorting as it is meant for domestic distribution.

Such a proposal was highly reasonable especially since the ERP based on the years 1986 to 1988 fails to reflect the effects of inflation. Even though, for example, India's administered prices for rice and wheat between the years 2007 and 2011 have been substantially higher than the ERP, they have been actually lower than what would have been the ERP adjusted for

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<sup>183</sup> De Schutter, *supra* note 171, p. 146.

<sup>184</sup> AoA, Annex 2(3), fn. 5.

inflation.<sup>185</sup> In the case of wheat especially the administered price would have to be much higher to even reach such an adjusted ERP.<sup>186</sup> Furthermore as Matthews puts it, from an economic perspective, if the administered price merely reflects domestic inflation, it cannot be said to be creating trade distortions on world markets.<sup>187</sup>

However countries such as the US and Canada were not willing to allow the crossing of the 10% of the total value of food production limit of already allowable subsidy levels. India was vilified and singled out as the one responsible for the impasse at the ministerial, while in fact, its stance was supported by the G-33 who were further supported by campaign groups from over 30 countries<sup>188</sup> and the UN Special Rapporteur on the Right to Food, who was even tweeting his support during the talks. In the end nothing more than a 4-year ‘peace clause’ on bringing such subsidies to the DSM was achieved. A merely short-term solution, which is further only applicable to traditional staple food crops and to existing food support programs, meaning any new such measure is open to a complaint under the DSM. In this sense ‘[p]oorer African countries who have the need to, but have not yet mobilised the finances to start these programmes, are restrained’ from introducing them in the future while again ‘[o]ther issues that affect agriculture in Africa such as subsidies and dumping have been effectively sidelined.’<sup>189</sup> Therefore it is hard to understand statements which accompanied the outcome of the ministerial in western media such as that of a Guardian journalist saying that ‘[t]he [positive] implications [of Bali] for developing countries are huge.’<sup>190</sup> Expectations were high also at the Nairobi ministerial for an unrelenting push on the issue of developing countries’ rights in stockholding, however the outcome brought zero improvement on what has already been stated in previous Ministerials and no short deadline for a permanent solution was introduced.<sup>191</sup>

All of this is despite the UN Secretary-General’s High-Level Task Force on the Global Food Security Crisis, which includes the WTO secretariat, calling on states to use strategic grain reserves for the purpose of stabilizing prices and to immediately review trade policy options

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<sup>185</sup> A. Hoda and A. Gulati, *India’s Agricultural Trade Policy and Sustainable Development*, (ICTSD, 2013), p. 2.

<sup>186</sup> *Ibid.*

<sup>187</sup> A. Matthews, *Food Security and WTO Domestic Support Disciplines post Bali*, (ICTSD, 2014).

<sup>188</sup> The Ecologist, US ‘Holding WTO Talks to Ransom’, available at: [http://www.theecologist.org/News/news\\_round\\_up/2187189/us\\_holding\\_wto\\_talks\\_to\\_ransom.html](http://www.theecologist.org/News/news_round_up/2187189/us_holding_wto_talks_to_ransom.html), (last accessed, 22.8.2016).

<sup>189</sup> Africa Trade Network, *supra note* 68, p. 8.

<sup>190</sup> P. McClanahan, ‘Why the WTO Agreement in Bali has Finally Helped Developing Countries’, *The Guardian*, Poverty Matters Blog, 6 Dec. 2013, available at: <http://www.theguardian.com/global-development/poverty-matters/2013/dec/06/wto-agreement-bali-helped-developing-countries-india>, (last accessed, 22.8.2016).

<sup>191</sup> WTO, *NMD Decision on Public Stockholding* (WT/MIN (15)/W/46).

and their impacts on poor consumers and farmers.<sup>192</sup> The Special Rapporteur pointed out the unfairness of the existing system by saying that: '[i]t should not be forgotten that developed countries are able to subsidize their farmers to the tune of more than US\$ 400 billion per year, without breaching WTO rules... Support must also be allowed to reach smallholders in developing countries.'<sup>193</sup> Perhaps most ironic is the fact that OECD countries have actually increased the total level of their domestic support since the 1986-1988 period when they were subsidising at a level of around US\$ 308 billion a year.<sup>194</sup> And it is not small farmers which are getting these subsidies; a recent report has found that from 1995 to 2012, 50 billionaires or their businesses in the US were on the list of those being subsidized.<sup>195</sup>

- Agreement on Agriculture – export subsidies

In stark contrast to the prohibition on export subsidies in terms of non-agricultural products in the Subsidies and Countervailing Measures Agreement (SCM), in agriculture export subsidies were allowed until Nairobi and some continue to be until 2020. The AoA merely required developed countries to reduce their export subsidies by 36% and the volume of subsidized exports by 21 % over 6 years, while the corresponding percentage for developing countries was a 24% reduction of subsidies and 14% reduction of the volume of subsidised exports over 10 years.<sup>196</sup> Subsidies for marketing cost reduction and transporting exports are excluded from reduction commitments for developing countries, while LDCs are exempted from reducing export subsidies altogether however no Member is allowed to introduce new subsidies for products which were not subsidised from 1986-1990.<sup>197</sup> Like in domestic support, here too the levels of subsidisation in the base period were vastly different for developed and developing countries. While the former had historically subsidised their

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<sup>192</sup> High Level Task Force on the Global Food Crisis, 'Comprehensive Framework for Action', (2008), p. 19.

<sup>193</sup> O. de Schutter, 'Bali package must allow ambitious food security policies – UN expert on WTO Summit', available at: <http://www.srfood.org/en/bali-package-must-allow-ambitious-food-security-policies-un-expert-on-wto-summit>, (last accessed: 22.8.2016); Focus on the Global South, 'India (G-33) Proposal on Food Security: A Wrong Move can Jeopardize India's Food Security Forever', 6. Nov. 2013, available at: [http://focusweb.org/content/india-g-33-proposal-food-security-wrong-move-can-jeopardize-india%E2%80%99s-food-security-forever#\\_edn2](http://focusweb.org/content/india-g-33-proposal-food-security-wrong-move-can-jeopardize-india%E2%80%99s-food-security-forever#_edn2), (last accessed: 22.8.2016).

<sup>194</sup> OECD, *Agricultural Policies in OECD Countries: Monitoring and Evaluation 2000*, table. III.1 (OECD, 2000).

<sup>195</sup> R. Nixon, 'Billionaires Received U.S. Farm Subsidies, Report Finds', *The New York Times*, 7 Nov. 2013, available at: [http://www.nytimes.com/2013/11/07/us/billionaires-received-us-farm-subsidies-report-finds.html?\\_r=1&](http://www.nytimes.com/2013/11/07/us/billionaires-received-us-farm-subsidies-report-finds.html?_r=1&), (last accessed: 22.8.2016).

<sup>196</sup> Only six kinds of export subsidies were subject to reduction, i.e. a) direct subsidies to producers, including in-kind payments, contingent on export performance; b) the sale or disposal for export by governments of agricultural products at a price lower than the comparable price charged for the like product on the domestic market; c) subsidies to reduce marketing costs (other than export promotion or advisory services), including handling and transportation costs AoA, Art. 9(1).

<sup>197</sup> AoA, Art. 3(3).

production, the latter actually taxed the agricultural sector in that period in their focus on building the manufacturing sector. Therefore the AoA reduction commitments were completely inadequate at adjusting the situation. Furthermore while some export subsidies were reduced, similarly to re-boxing in domestic subsidisation, the OECD countries resorted to promoting their exports through what remained permitted and not subject to reductions under the AoA.<sup>198</sup> Also the reductions were to be applied on a commodity-by commodity basis which proved to give additional policy space for developed countries. Some have treated for example wheat, wheat flour and other wheat derivatives as a single group and in the event that they had subsidised these products during the base period they can now shift subsidies between the subgroups while the commodity as a whole would still not exceed the allowed level of subsidisation.<sup>199</sup>

In the words of Azevêdo, Nairobi brought the ‘most significant outcome on agriculture in the organization’s 20-year history’ in its Decision on Export Competition, which tackles the issue of the enormous distorting potential of developed countries subsidies for farm exports ‘once and for all’.<sup>200</sup> Azevêdo however fails to mention that Art. 6 of the decision which states that: ‘Developed Members shall immediately eliminate their remaining schedule export subsidy entitlements as of the date of the adoption of this Decision’<sup>201</sup> also has a footnote stating that

This paragraph shall not cover processed products, dairy products, and swine meat of a developed Member that agrees to eliminate as of 1 January 2016 all export subsidies on products destined for least developed countries, and that has notified export subsidies for such products or categories of products in one of its three latest export subsidy notifications examined by the Committee on Agriculture by the date of adoption of this Decision. For these products, scheduled export subsidies shall be eliminated by 2020, and quantity commitment levels shall be applied as a standstill until the end of 2020 at the actual average of quantity levels of the 2003-05 base period. Furthermore there shall be no export subsidies applied either to new markets or to new products.<sup>202</sup>

This is not a minor exception as processed products and dairy products from the EU and US are increasingly posing an existential threat to local developing countries’ food industries.<sup>203</sup> Other export subsidies have largely already been discontinued by developed countries, due to historically high food prices seen after the 2008 financial crisis and they were thus not giving

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<sup>198</sup> C. G. Gonzalez, ‘Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries’, 27 *Columbia Journal of Environmental Law*, (2002), pp. 464-465.

<sup>199</sup> D. Hathaway and M. Ingco, ‘Agricultural Liberalization and the Uruguay Round’, in W. Martin and A. Winters, (eds.), *The Uruguay Round and the Developing Countries*, Paper No. 307 (World Bank, 1995), p. 19 in Gonzalez, *ibid*, p. 455.

<sup>200</sup> WTO: 2012 News Items: WTO Members secure ‘historic’ Nairobi Package for Africa and the World, available at: [www.wto.org/english/news\\_e/news15\\_e/mc10\\_19dec15\\_e.htm](http://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm) (last accessed: 22.8.2016).

<sup>201</sup> WTO, *Export Competition*, WT/MIN(15)/W/47, *Draft Decision* – agreed 19 December 2015.

<sup>202</sup> *Ibid*, fn 4.

<sup>203</sup> Focus On the Global South, ‘Developing Countries return Empty-Handed from WTO’s Nairobi Ministerial’, 24. Dec. 2015, available at: <http://focusweb.org/content/endwto-developing-countries-return-empty-handed-wto-s-nairobi-ministerial>, (last accessed: 22.8.2016).

up much at Nairobi.<sup>204</sup> In the words of US Department of Agriculture economist, Sharon Dydow, '[a] big objective here was to harvest what has been done and put it on paper'.<sup>205</sup>

The welcome part of the Nairobi deal is that surprisingly, developing countries have been allowed to continue subsidising transportation, processing and marketing costs until 2023 (the poorest Members until 2030) despite the US and many others claiming that such subsidies had already expired in 2004, with the end of the implementation period set by the Uruguay Round.<sup>206</sup> On the other hand under the Hong Kong Ministerial Declaration of 2005, developed countries were supposed to eliminate all their export subsidies already by December 2013 and have now effectively extended the ones which they need until 2020.<sup>207</sup>

It is important to note that in the negotiations on export competition issues, the EU and Brazil along with Argentina, New Zealand, Paraguay, Peru, Uruguay and Moldova submitted their draft proposal with the view of tackling not only export subsidies, but also food aid and credit guarantees which have a similar effect.<sup>208</sup> Opposing this were the US and several developing countries which have recently started to use export subsidies in breach of their WTO commitments, among them India (sugar), Thailand (rice) and China (cotton) none of whom appreciated the sudden focus on export competition.<sup>209</sup> Despite the progress on export subsidies, in the other areas of export competition the results were merely best-endeavour provisions. Thus the US can continue to use its large and extremely trade distorting export credits.

In terms of cotton, the C4 – Benin, Burkina Faso, Chad and Mali finally got their demands for both developed and developing countries to eliminate export subsidies at Nairobi - developed countries have to end theirs immediately, while developing countries have one year to do the same (by 2017). Furthermore both developed and developing countries have to provide DFQF access for cotton from LDCs. However the biggest issue for C4, i.e. domestic cotton subsidies, remain as before.

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<sup>204</sup> WTO (2014), 'Export subsidies, Export Credits, Export Credit Guarantees or Insurance Programmes, International Food Aid and Agricultural Exporting State Trading Enterprises', 21 May G/AG/W/125.

<sup>205</sup> Brasher, *supra note* 100.

<sup>206</sup> R. Wilkins, American Soybean Association President remarked that 'The Nairobi agreement effectively raises these subsidies from the dead and legitimizes their use', cited in ASA, 'ASA Disappointed in Nairobi WTO Results', available at: <https://soygrowers.com/asa-disappointed-in-nairobi-wto-results/>, (last accessed, 22.8.2016).

<sup>207</sup> Brasher, *supra note* 100.

<sup>208</sup> WTO, 'Proposal on Export Competition from Brazil, European Union, Argentina, New Zealand, Paraguay, Peru, Uruguay and the Republic of Moldova', 16 November 2015, JOB/AG/48/Corr.1.

<sup>209</sup> Wilkinson, *supra note* 17, p. 6.

- Import surges

Subsidisation in developed countries is a huge, although not the only cause of repeat import surges in developing markets, which have been occurring before and after the introduction of the AoA causing great damage to local farmers.<sup>210</sup> Apart from the mechanisms to combat the negative impact of import surges provided for in the Agreement on Safeguards (AS), the AoA allows Special Safeguards under its Art. 5., which gives the permission to states parties to trigger higher safeguards duties automatically when import volumes rise above a certain level, or if prices fall below a certain level and unlike under the AS it is not necessary to demonstrate that serious injury is being caused to the domestic industry. However, the special agricultural safeguard can only be used on certain products that are already subject to tariffication – which amount to less than 20% of all agricultural products and they cannot be used on imports within the tariff quotas.<sup>211</sup> Since developing countries mostly did not use tariffs on their products prior to the AoA, they have little use of this mechanism.<sup>212</sup> Out of 39 WTO Members which reserved the right to use special safeguards on agricultural products, only 22 were developing countries while in 1999 FAO reported that more than 80% of tariffied items of the OECD were subject to this provision.<sup>213</sup> Not surprisingly, the mechanism itself was included in the AoA at the insistence of the EU, not developing countries. In practice it has been used in relatively few cases.<sup>214</sup> A study by the FAO came to the conclusion that existing WTO compatible policy options are relatively limited and difficult to implement by many developing countries.<sup>215</sup> The revised first draft ‘modalities’ under the Doha Round negotiations thus proposed a removal of developed countries from entitlement under the AoA Art. 5 and the establishment of a new so-called Special Safeguard Mechanism (SSM) additionally available above bound ceilings for developing countries. Already in 2005, the Hong Kong Ministerial Declaration stated that developing countries will have the right to have recourse to a SSM<sup>216</sup> however until today this has remained unusable since common ground on its contours has been unattainable. This issue was among the

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<sup>210</sup> M. A. Rakotoasrisoa, R. P. Sharma, and D. Hallam, (eds.), *Agricultural Import Surges in Developing Countries, Analytical framework and insights from case studies*, (FAO, 2011), p.50.

<sup>211</sup> WTO: Agriculture Negotiations, Background: Market Access: Special Agricultural Safeguards, available at: [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgmd11\\_ssg\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgmd11_ssg_e.htm), (last accessed, 22.8.2016).

<sup>212</sup> AoA, Art. 5(1)

<sup>213</sup> FAO, ‘Issues at Stake Relating to Agricultural Development, Trade and Food Security’, Symposium on Agriculture, Trade and Food Security, Paper No. 4, (FAO, 1999), para. 34.

<sup>214</sup> *Ibid.*

<sup>215</sup> FAO, ‘Import Surges: What is Their Frequency and Which are the Countries and Commodities most Affected?’, Briefs on Import Surges – Issues No. 2 (FAO, 2006), p.4.

<sup>216</sup> WTO, *Doha Work Programme*, Ministerial Declaration of 22 December 2005, WT/MIN(05)/DEC, (hereinafter Hong Kong Declaration), para. 7.

disappointments at Nairobi, where literally nothing apart from a reaffirmation of what was stated in 2005 has been achieved.<sup>217</sup>

- Food aid

While stockpiling has been severely attacked, food aid remains mostly unchallenged even when clearly used as a form of subsidy. There have been recognitions of this problem and at the Hong Kong Ministerial, WTO Members reiterated the need to eliminate the abuse of food aid while ensuring genuine food aid in emergencies, however how this will be achieved was still to be worked on.<sup>218</sup>

As one observer notes: ‘direct delivery of in-kind food aid constitutes a form of agricultural subsidy. The US food aid program was originally set up to dispose of agricultural surpluses generated by domestic farm subsidies.’<sup>219</sup> The focus on the US economy becomes even more apparent, when you consider the fact that

US legislation requires that 75 percent of food aid be procured, processed and packed domestically and that it be transported by US vessels. The US government buys this food aid from a handful of large agribusiness companies and then pays for shipping – all at above-market prices. In 2003, Cargill and Archer-Daniels Midland provided a third of all US food aid and in 2001, four shipping companies – Wilson Logistics, BKA Logistics, Fettig & Donalty and Panalpina – handled 84 percent of US food aid.<sup>220</sup>

If the aim was to provide long term benefit to affected areas, such food programs would consist of mainly local and regional food purchases, however in 2007 the US Department of Agriculture suggested using only up to 25 percent of the aid budgets for such purchases and even that was rejected by the US Congress under the pressure from agribusinesses, shipping companies and an unconventional alliance of relief non-governmental organisations (NGOs).<sup>221</sup>

Thus instead of bringing benefit to the affected areas, food aid often plays a role detrimental in the long run, similar to that of import surges. Even if on the one hand, food aid is aimed as a genuine effort to relieve affected areas from hunger, its overriding motivation of providing

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<sup>217</sup> WTO, *Special Safeguard Mechanism for Developing Country Members*, WT/MIN(15)/W/45, *Draft Ministerial Decision* – agreed 19 December 2015, para. 2.

<sup>218</sup> Hong Kong Declaration.

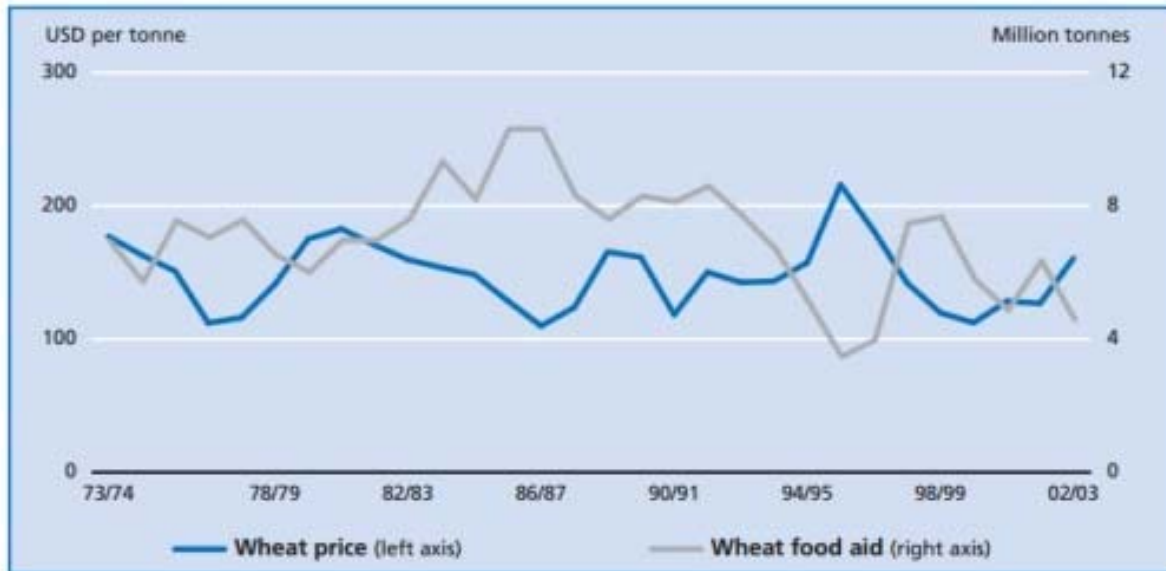
<sup>219</sup> K. Wahlberg, ‘Food Aid for the Hungry?’, *Global Policy Forum*, (2008) available at: <http://www.globalpolicy.org/component/content/article/217/46251.html>, (last accessed: 22.8.2016).

<sup>220</sup> *Ibid*, footnotes omitted.

<sup>221</sup> *Ibid*.

an outlet for surplus production results in ‘non-optimal targeting with respect to development issues. An example for this is the high prevalence of food aid in periods of low world market prices as shown in the case of wheat.’<sup>222</sup>

The illustration below shows a graph of wheat food aid in its relation to international wheat prices (1973-74-2002/03).<sup>223</sup>



The Nairobi agreement on food aid continues to allow aid in-kind and merely encourages countries to ‘increasingly procure international food aid from local or regional sources to the extent possible’ but does not mandate it. Furthermore, monetization of food aid, whereby such aid is sold to raise cash for non-food activities, is still permitted. Thus in the frank words of David Salomon, a trade policy specialist for the American Farm Bureau Federation, the food aid provision ‘basically leaves [US] programs to continue as they are.’<sup>224</sup>

The Nairobi text furthermore does not distinguish between emergency and non-emergency food aid, effectively legalising dumping by labelling food exports as food aid which is actually a step back from the mandate of the Hong Kong Ministerial Declaration which demands such a distinction.<sup>225</sup>

Thus the unbalance in favour of developing countries’ agricultural sectors is profound and multi-layered and it is the initial exclusion of agriculture from the general GATT obligations through the completely inadequate AoA that have created a situation where developed countries can use its incremental improvements as bargaining chips to get developing

<sup>222</sup> Rakotoasrisoa, *supra note* 210, p. 25.

<sup>223</sup> *Ibid.*

<sup>224</sup> Brasher, *supra note* 100.

<sup>225</sup> P. Bomzan, LDC Watch, cited in ‘WTO Nairobi Declaration: Death Certificate for the Doha Development Mandate’, *Fahamu*, 19 December 2015, available at: <http://www.fahamu.org/node/2462>, (last accessed: 22.8.2016).



countries to accept all sorts of deals not beneficial to them in other areas. The DDA was supposed to rectify this imbalance without a ‘payment’ by developing countries in other areas, however as mentioned, the Nairobi ministerial made it clear that this was not going to happen.

It is interesting to note that when Mr Gary Horlick, who on the side of the US legal team participated in the drafting and negotiating of the SCM Agreement, was asked about distorting subsidies in agriculture, he replied that the AoA was ‘negotiated in clinical isolation from the subsidies agreement by different people with different concepts and different definitions, which has proven ... quite a problem in litigation.’<sup>226</sup> The statement seems to reflect the reality of the US approach to negotiations, where each of their lobbies fights for their own benefit, leading to a very incoherent and unbalanced system, a far cry from a uniformly applied free trade agenda.

## **6. Unjustified Protectionism in Textiles**

Agriculture has not been the only notorious area where the system had been blatantly tilted in favour of developed countries. Trade had been restricted also for manufactured products of interest to developing countries. Like agriculture, the issue of restricting trade in textiles ‘was one of the hardest fought issues in the WTO, as it was in the former GATT’.<sup>227</sup> Due to the limited possibility of developing countries to actively participate in the early negotiating rounds it was easy for developed countries to create mechanisms such as the so-called Multi-Fibre Agreements (MFAs). Through these judicially separate agreements in early 1960s and then from 1974 until 2005 ‘voluntary’ quotas were imposed on the imports of textiles and clothing in a discriminatory manner, which would otherwise have been – and *de facto* was - a violation of the GATT disciplines. The Multi-Fibre Agreement was later replaced with the Agreement on Textiles and Clothing (ATC) under which the EC, US, Canada and Norway were permitted to maintain quotas but were supposed to progressively decrease them in three stages until 2005 when no quotas would remain. However these countries only partially implemented the ATC.<sup>228</sup> They backloaded their quota reduction commitments and used permissible safeguards as much as possible to delay the liberalisation to the detriment of

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<sup>226</sup> WTO, ‘Is Multilateralism in Crisis?: Subsidies and CVD: The Agreement on Subsidies and Countervailing Measures: Past, Present and Future’, Public Forum, 26 September 2012.

<sup>227</sup> WTO, The Agreements: Textiles: Back in the Mainstream, available at: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm), (last accessed: 22.8.2016).

<sup>228</sup> M. Shafaeddin, *Trade and Policy at the Crossroads; the Recent Experience of Developing Countries*, (Palgrave, Macmillan, 2005), p. 116.

developing countries.<sup>229</sup> This was in stark contradiction to the theory being sold at the same time to the developing countries about how bad quantitative restrictions were in general and how they should not be allowed. Developed countries' protectionism, furthermore, had no basis for legitimacy as they had by that time dominated the exports in the textile sector, with the ATC states increasing their export shares between 1995 and 2002.<sup>230</sup> Other measures to restrict trade in textiles have included tariff peaks, tariff escalations, safeguard measures and arbitrary anti-dumping practices.<sup>231</sup> For example in the DFQF scheme of the US, only 82.4 % of imports from LDCs are duty-free, with exclusions hitting 1,834 national tariff lines, essentially covering textiles and clothing to avoid competition from countries like Bangladesh and Cambodia.<sup>232</sup> In 2005 the UNDP noted that:

On average, low-income developing countries exporting to high-income countries face tariffs three to four times higher than the barriers applied in trade between high-income countries... For example, while the average tariff on imports from developing countries is 3.4%, Japan imposes a tariff of 26% on Kenyan footwear. The European Union taxes Indian garment imports at 10%, Canada levies a 17% tariff on garments from Malaysia... Developing countries account for less than one third of developed country imports but for two-thirds of tariff revenues collected. They also account for two-thirds of developed country imports subjected to tariffs higher than 15%. In concrete terms this means that Viet Nam pays \$470 million in taxes on exports to the United States worth \$4.7 billion, while the United Kingdom pays roughly the same amount on exports worth \$50 billion. Customs revenue collection as a share of imports... illustrates perverse taxation in operation. The effective US import duty for countries like Viet Nam and Bangladesh is some 10 times higher than for most countries in the European Union.<sup>233</sup>

In the same vein the US collected more tariffs from Cambodia than from French imports, even though the amount of the former equated with one tenth of the latter.<sup>234</sup>

Just as a result of the Uruguay round, some estimate the losses suffered by 48 LDCs to be around US\$ 600 million per year<sup>235</sup> while the World Bank in its Development Report of 2008 estimated that the annual welfare gains for developing countries would have been five times the amount of aid they receive, had developed countries removed their protectionist measures against them.<sup>236</sup> Keeping these figures in mind it is not surprising that developing countries have been fixated on rectifying said anomalies.

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<sup>229</sup> Joseph, *supra note* 125, p. 159.

<sup>230</sup> *Ibid.*

<sup>231</sup> B. L. Das, *The Current Negotiations in WTO, Options, Opportunities and Risks for Developing Countries*, (Zed Books and TWN, 2005), pp. 34-36.

<sup>232</sup> WTO, *Market Access for Products and Services of Export Interest to Least Developed Countries*, WT/COMTD/LDC/W/56, (Geneva: WTO).

<sup>233</sup> UNDP, *supra note* 173.

<sup>234</sup> V. Sendanyoye-Rugwabiza, 'Is the DDA a Development Round', address at the London School of Economics, 31 March 2006, p. 3 in Joseph, *supra note* 125, p. 158.

<sup>235</sup> J. E. Stiglitz, A. Charlton, *Fair trade for All, How Trade Can Promote Development*, (Oxford University Press, 2005), p. 47.

<sup>236</sup> World Bank, *World Development Report 2008: Agriculture for Development*, (World Bank, 2008), p. 11.

In the same way as the imbalance in agricultural rules, the promise of removal the removal of blatantly unfair rules in textiles served as a bargaining chip to get developing countries to accept agreements in areas such as intellectual property, services, investment and other areas against their interests.

### **7. Proposed Swap between Agriculture and Industry**

However, giving up essential policy space for development in the said areas did not bring the rectifying of the imbalances of the system. As Wilkinson explains, the limited liberalisation of agriculture and textiles in the Uruguay round gave hope to developing countries that they would finally benefit from it, however their lack of capacity and resources ensured that this was not to be the case. On the other hand developed countries were to benefit greatly by the liberalisation of services and investment measures and the codification of intellectual property rights:

What Uruguay clearly did, then, was to further divide up the areas of economic activity in which member states could specialize and in so doing, accentuated the problems facing developing countries seeking to diversify their export portfolios.<sup>237</sup>

This division has since been perpetuated through projects such as the DDR's Non-Agricultural Market Access (NAMA) negotiations which propose a swap between the liberalisation of agriculture by developed countries and a further liberalisation of industry in developing countries along the lines of the comparative advantage theory. This would bring the former too late and the latter too soon. Paragraphs 16, 31 (iii) and 50 of the Doha Ministerial Declaration declare the objective to reduce or eliminate tariffs including tariff peaks, high tariffs, tariff escalation and non-tariff barriers. This deal would lower industrial tariffs in developing countries and in return they would 'get' the reduction of subsidies in the rich countries. This would take away essential policy space for industrialisation, which as described above is essential for development.<sup>238</sup> Such a swap would therefore hardly be encouraging for true economic development.

Before Doha, many developing countries opposed the launch of yet another round of industrial tariff reductions. Being at the core of the WTO's agenda, however, they found it difficult to oppose strongly such reductions, despite proving their negative implications for

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<sup>237</sup> Wilkinson, *supra note* 82, p. 38.

<sup>238</sup> See chapter V for a further discussion.

development.<sup>239</sup> Kenya, Mozambique, Nigeria, Tanzania, Uganda, Zimbabwe and Zambia, with the support of Egypt, India and Brazil, called for a study process taking into account the impacts of previous liberalization on domestic firms, employment and government revenue, and tariff peaks and tariff escalation in developed countries. The result was a paper showing that the liberalization under the structural adjustment programs led to serious problems, such as local industries losing market share and closing down, causing unemployment and loss of government revenue in Senegal, Côte d'Ivoire, Nigeria, Sierra Leone, Zambia, Zaire, Uganda, Tanzania, Sudan, Kenya, Ghana, Zimbabwe, Mozambique, Cameroon, Malawi, Peru, Nicaragua, Ecuador and Brazil.<sup>240</sup> These results are no surprise, considering what this thesis has argued in chapter III.

As Chang points out, we have been made to believe that the main beneficiaries of the proposed swap between agriculture and industry would be 'poor farmers in Ghana', however even according to the World Bank, the main beneficiaries would actually be agro-corporations in the US, Canada, Australia and New Zealand which would gain some 70-75% of the benefits, while the only two developing countries that would benefit would be Brazil and Argentina, leaving small farmers in developed countries as the only real casualties of such a deal.<sup>241</sup>

Most developing countries have long lost their 'comparative advantage' in agriculture. They have been unable to attract investment in agriculture for more than 30 years due to the regime being heavily biased against them and the fact that structural adjustment programmes lead to the dismantling of whatever limited support schemes existed in the past in favour of the agricultural sector.<sup>242</sup> This vast discrepancy in support given to farmers in the richest and the poorest countries over more than 30 years has led to an almost unimaginable discrepancy in productivity between them. Most African countries thus have an old-fashioned agriculture – not industrialised and 'not the type of agriculture that is bringing development'.<sup>243</sup> Of the United States population, less than 1% claim farming as an occupation and only 45% of those

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<sup>239</sup> Jawara, *supra note* 7, p. 25.

<sup>240</sup> *Ibid*, 25-26.

<sup>241</sup> H.-J. Chang, 'Hamlet without the prince of Denmark: How Development Has Disappeared from Today's Development Discourse', talk (London School of Economics, 25. 2. 2010) available at: <http://www.youtube.com/watch?v=INpCcb671KI>, (last accessed: 22.8.2016).

<sup>242</sup> De Schutter, *supra note* 171, p. 152.

<sup>243</sup> R. Hall, 'Farming and food in Africa and the mounting battle over land, water and resource rights' 3 *Great Insights* (2013), citing Honourable Roger Nkodo Dang of Cameroon, President of the Pan African Parliament at a meeting of the Economic and Monetary Community of Central Africa.

claim farming as their principal occupation.<sup>244</sup> Corporate farms account for only 4% of US farms.<sup>245</sup> It is quite clear that this is not an agricultural society, yet their farmers' productivity is far greater than that in the poorest agricultural societies to a ratio of 1:1000. One can speak of the benefits of traditional farming for the environment, the preservation of the culture of ethnic groups living this lifestyle or even food security of the small farmers<sup>246</sup>; however one cannot speak of international competitiveness. So unless there is a return to self-sufficiency and a disconnect from global markets altogether, the mere liberalisation of developed countries markets will not be help much.

Therefore at present times, even though the anomalies stemming from the reluctance of the developed countries' to end their subsidies and open their markets in their once weaker areas such as agriculture and textiles, are rightly criticised and fought against, development scholars identify as a bigger impediment to development in the present situation the diminishing policy space available to developing countries to support domestic economic activities and promote industrial policies more actively. In this regard it is not just the AoA or diminishing tariffs, but agreements such as the TRIPs, TRIMs, General Agreement on Trade in Services (GATS) and the Agreement on Subsidy and Countervailing Measures (SCM Agreement) which all severely limit such policy space for developing countries.<sup>247</sup> It is therefore pertinent to examine some of the most important restrictions on Members' policy space and whether developing countries have been provided with enough special and differential treatment in this regard, which is the aim of the next part of this chapter.

## **8. The Background of a Call for Special and Differential Treatment – Legitimate Effort for the Retention of Necessary Policy Space**

Before analysing several aspects of the WTO rules in terms of policy space still available and the limited nature of the so-called special and differential treatment for developing countries which they provide, it is important to explain that developing countries sought to retain their policy space from the very beginning of the world trade project. They maintained that their position demanded meaningful exceptions from the rules applicable to developed countries and sought to preserve policy space, especially in terms of the right to impose tariffs and quantitative restrictions. Their loss of policy tools for development to the present extent has

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<sup>244</sup> US Environmental Protection Agency, Demographics, available at: <http://www.epa.gov/oecaagct/ag101/demographics.html>, (last accessed: 22.8.2016).

<sup>245</sup> *Ibid.*

<sup>246</sup> Hall, *supra note* 243.

<sup>247</sup> S. M. Shafaeddin, 'Towards an Alternative Perspective on Trade and Industrial Policies', 36 *Development and Change* (2005).

thus been met with reluctance every step of the way, yet one way or another they were coerced into accepting it while being told that this is for their own good. On the other hand, already in the beginnings, both the ITO and the GATT Charter contained a very large number of exceptions written for the benefit of developed-country producers. The US had to ask for two glaring exceptions of this kind – the right to use quantitative import restrictions on agricultural imports and the right to use export subsidies.<sup>248</sup> Hudec describes the position of the US as being full of internal contradictions, since while claiming that:

market distortions do not ‘help’ in the long run, from the very beginning their own conduct belied this message... In addition, the theory of the United States legal design made it very hard to argue that freedom from GATT legal obligations was not a valuable good that developing countries ought to seek... The fixation with reciprocity, expressed a clear mercantilist view of international trade: ‘Reductions in our own trade barriers hurt us by permitting more imports; they must be paid for, therefore, by reductions in your trade barriers, which will help us by increasing our exports.’ In short, the theory was saying that higher trade barriers were better than lower trade barriers. While it was possible to rationalize the insistence on reciprocity in non-mercantilist terms - ‘It’s for your own good’, or ‘The gains from trade are maximized this way’, or even ‘We need it for political reasons back home’ – most developed-country governments behaved otherwise.<sup>249</sup>

On the other hand, having had experienced several massive disruptions to their exports and critical imports through external shocks in the 30 years prior, developing countries lost their confidence in an export-led growth strategy.<sup>250</sup> They wanted to retain the capability to pursue industrialisation and develop a capacity to produce necessary manufactured goods domestically. Developing countries were furthermore aware of the hypocrisy in the stance against tariffs and quantitative restrictions, ‘given the extensive use of tariffs and quantitative restrictions used by the industrialised countries during their own industrialisation.’<sup>251</sup> There were other reasons for developing countries to be sceptical regarding tariff cuts requirements. Firstly their tariffs were already low at that time compared to developed countries<sup>252</sup> and secondly their exports were primarily raw materials which were already entering core markets duty-free.<sup>253</sup>

The legitimate interest of developing countries to industrialise however, was being dismissed by the USA with one commentator even calling it the ‘fetish of industrialisation’, claiming that it was an ‘irrational belief’ to think that industrialisation was necessary to raise the

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<sup>248</sup> Hudec, *supra note* 156, p. 34.

<sup>249</sup> *Ibid*, footnotes omitted.

<sup>250</sup> R. Findlay and K. H. O’Rourke, *Power and Plenty: Trade, War and the World Economy in the Second Millennium*, (Princeton University Press, 2007), p. 477.

<sup>251</sup> J. Scott, ‘Developing Countries in the ITO and GATT Negotiations’, 9 *Journal of International Trade Law*, (2010), p. 16.

<sup>252</sup> M. A. Clemens and J. G. Williamson, *A Tariff-growth Paradox? Protection’s Impact the World Around 1875-1997*, National Bureau of Economic Research Cambridge (2001), p. 35.

<sup>253</sup> UNCTE (1946) Government of India: Comments on US Proposals for Expansion of World Trade and Employment, E/PC/T/W.14 and E/PC/T/5, p.26

standards of living, and characterizing the role of developing countries as being purely oppositional with an attempt to destroy the enterprise.<sup>254</sup>

The Final Act establishing the GATT did not end up prohibiting governments from protecting domestic industries but all such protection was to be in the form of tariffs, and governments committed themselves to participate in periodic negotiations aimed at gradually reducing existing levels. Hudec described the trade-policy discipline required, as ‘a far cry from free trade’:

Moreover, the actual code of behaviour adopted in 1947 contained a substantial number of exceptions. Nevertheless, the rules of the General Agreement did represent a coherent discipline requiring gradual trade liberalization.<sup>255</sup>

In the 20 years that followed the developed countries achieved a very substantial reduction of trade barriers. As Hudec points out, however, the developing Members, ‘never agreed to accept the same discipline’.<sup>256</sup> For example, in the ITO negotiations they highly contested the principle of reciprocity and raised concerns about their own lack of bargaining power to extract concessions on a reciprocal basis.<sup>257</sup> The proposed Charter submitted by Brazil also stated that the MFN principle should be adhered to unconditionally only by countries in the advanced stage of development and it talked about the need for special measures to assist less developed countries facing their unique problems.<sup>258</sup> Despite this, both MFN and the principle of reciprocity later became core GATT principles, however developing countries never stopped challenging them.

Developing countries did accept the overall principle of tariff liberalisation, at least at the Preparatory Committee at the ITO negotiations, however by Havana other developing countries joined the process and Latin American countries put up substantial resistance against the requirements to negotiate on tariffs.<sup>259</sup> Despite opposition to reducing tariffs in principle however, during the GATT Geneva Round in 1947, it was only two developing countries Syria-Lebanon and Brazil that, according to the US negotiators, made offers for tariff cuts considered to be sufficient, whereas countries such as France and the UK were making insignificantly small offers.<sup>260</sup> When the US made cuts on the other hand, with an average cut of 35 per cent, this was made only on select industrial products, and not across

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<sup>254</sup> Wilcox, *supra note* 147, pp. 30, 47.

<sup>255</sup> Hudec, *supra note* 156, p. 23.

<sup>256</sup> *Ibid.*, p. 24.

<sup>257</sup> Wilkinson, *supra note* 32.

<sup>258</sup> Ismail, *supra note* 29, p. 136.

<sup>259</sup> W. A. J. Brown, *The United States and the Restoration of World Trade: An Analysis and Appraisal of the ITO Charter and the General Agreement on Tariffs and Trade*, (The Brookings Institute, 1950), p. 157.

<sup>260</sup> T. W. Zeiler, *Free Trade, Free World: The Advent of the GATT*, (University of North Carolina Press, 1999), pp. 93-5, 106.

the board or applied to import-sensitive sectors, such as agriculture goods or labour-intensive manufactures, reflecting the protection of the interests of the major powers.<sup>261</sup> This approach was then repeated in each further GATT round.

In the US/UK first proposal for the ITO, there was no reference to development and as India pointed out at the time, it was only '[u]nder pressure exerted by countries of the British Empire, [that] the UK made a half-hearted attempt to assert the right of undeveloped countries to apply tariffs 'for a limited period under adequate safeguards for the protection of infant industries' - the USA, however, forgetful of its own history was not prepared to concede even this limited right.<sup>262</sup>

In terms of quantitative restrictions, developing countries were being persuaded by the US that these are the most damaging of all measures and should not be allowed; instead the US suggested supporting infant industries through the granting of subsidies to domestic producers.<sup>263</sup> Since developing countries would *de facto* not be able to use subsidization to the same degree as developed countries due to fiscal restraints, this would suggest that they would have preferred other countries to be more constrained in their rights to offer subsidies, since they could never win a 'subsidy war'.<sup>264</sup> Indeed as the US delegate observed during the early GATT negotiations:

These countries, deeply concerned with the problem of industrialization and full employment, want to use restrictive measures to protect their infant industries. In general, they remain unimpressed with our contention that subsidies offer the least objectionable method for this purpose. They point out that, while tariffs and subsidies both amount to charges on their economies, the very real difficulties in raising the revenue to pay subsidies make the latter impractical for them.<sup>265</sup>

Therefore, while the USA was trying to achieve complete freedom for the use of export subsidies on primary goods in Havana, countries such as Brazil and India were actually looking for a more restrictive approach towards their use.<sup>266</sup>

Despite several exceptions for the benefit of developed countries, in the end the original GATT from 1947 only contained one article which exempted developing countries from any obligations, i.e. Art. XVIII on 'Governmental assistance to economic development and

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<sup>261</sup> D. A. Irwin, P. C. Mavroidis and A. O. Sykes, *The Genesis of the GATT*, (Cambridge University Press, 2008), pp. 92-94.

<sup>262</sup> UNCTE (1946) Government of India: Comments on US Proposals for Expansion of World Trade and Employment, E/PC/T/W.14 and E/PC/T/5, p. 5.

<sup>263</sup> Scott, *supra note* 251, p. 16.

<sup>264</sup> D. Coppens, *WTO Disciplines on Subsidies and Countervailing Measures, Balancing Policy Space and Legal Constraints*, (Cambridge University Press, 2014), p. 553-4.

<sup>265</sup> Irwin, *supra note* 261, pp. 76, 104-105; See also London Draft (E/PC/T/33) at 8, 16, 17, 32 in Coppens, *supra note* 264, p. 553.

<sup>266</sup> Brown, *supra note* 259, p.16.



reconstruction’, but this applied as much also to countries undergoing post-war reconstruction, such as the UK or France.<sup>267</sup>

It was only at the 1954 review where a significant part of the temporary exemptions was introduced to Art. XVIII, followed by the waiving of reciprocity in tariff negotiations as an element of Part IV (Art. XXXVI.8) in 1964 and the introduction of GSP in 1971.<sup>268</sup> The GATT went on to incorporate a number of exceptions to its general principles of MFN and national treatment through SDT provisions, which are however considered to be largely ineffective.<sup>269</sup> These measures were agreed to by developed countries partly because of the increasing pressure that developing countries created in the GATT for them and also because of the recognition by developing countries that the prevailing techniques of negotiation, the increasing protectionism in developed countries for products of interest to developing countries, and the outcomes of the early rounds were not resulting in market access gains for developing countries.<sup>270</sup>

In the 1980s trade policy changed in a lot of developing countries and there was a move from the belief in import substitution industrialisation to export orientation and integration into world trade.<sup>271</sup> This shift had an important influence on the SDT resulting from the Uruguay Round as it no longer took the form of derogation from multilateral rules, but the form of more flexible time frames for adhering to multilateral rules and provisions of technical assistance in the implementation of these rules in domestic legal and administrative systems.<sup>272</sup> When trying to protect their policy space, developing countries have not only been vilified at the international institutions, but have also had to deal with domestic interest groups and domestic economists ideologically committed to the free market who would like to see the policy space of their own governments to be restricted in the name of the ‘science’ of economics.<sup>273</sup> These governments have further been accused of not representing the needs of their people but acting out of their own interests ‘at the expense of their poorest and most

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<sup>267</sup> Scott, *supra note* 251, p. 8.

<sup>268</sup> *Ibid.*

<sup>269</sup> Ismail, *supra note* 29, p. 131.

<sup>270</sup> *Ibid.*, p. 144.

<sup>271</sup> T. Fritz, ‘Special and Differential Treatment for Developing Countries’ Heinrich Böll Foundation, Global Issue Paper, No. 18, May 2005, p. 10 in A. Ansong, *Special and Differential Treatment of Developing Countries in the GATT/WTO: Past, Present, Future*, (Law Research Associates, 2012), p. 34.

<sup>272</sup> *Ibid.*, p. 35.

<sup>273</sup> H.-J. Chang, ‘Policy Space in Historical Perspective – With Special Reference to Trade and Industrial Policies’, talk presented at Tufts University on the occasion of the award of the 2005 Leontief prize, 27 Oct. 2005, p. 5, 6.

defenceless citizens.<sup>274</sup> All of this has undoubtedly played a role in the lowering of developing countries' demands and the limited nature of the resulting SDT, which is analysed in the next section of this chapter.

### 9. Limitations of SDT and Remaining Policy Space

While the anomalies in favour of developed country interests have no particular name, rules providing for some very limited positive discrimination for developing countries are called 'special and differential treatment' and in the name of creating a 'level playing field' their removal is constantly called for. WTO Agreements are full of statements recognizing special needs of developing countries, which are supposedly taken into account in the SDT provisions. However it is questionable whether they amount to much more than lip service. It is important to recognize that when measures aim to merely alleviate to some extent the harshness of an existing economic system, they 'could be another way of stabilizing this system.'<sup>275</sup> Thus it has to be examined just how *special* this treatment really is.

As Chang points out, the problem with SDT starts with the word 'special' itself, which implies that the recipient of the treatment is getting an unfair advantage; 'in the same way we wouldn't call stair-lifts for wheelchair users or Braille writings for the blind 'special treatments', we should not call the higher tariffs and other means of protection more extensively (but not exclusively) used by the developing countries 'special treatments' – they are just differential treatments for countries with differential capabilities and goals'.<sup>276</sup> In the same vein Rajamani has stated that:

Differential treatment is the legitimate outcome of the democratic dialectic process that sets the fact of inequality against the fiction of equality.<sup>277</sup>

There are several SDT provisions found in the WTO agreements, especially from the Uruguay round, and they usually relax the requirements for developing countries, give them more compliance time or require the protection of the interests of developing countries by developed countries.<sup>278</sup> Also traditionally considered as SDT are limited reciprocity in trade negotiations and trade preferences given to LDCs through the Generalized System of Preferences (GSP) and other provisions aimed at increasing the trade opportunities of

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<sup>274</sup> W. Buiters, the then chief economist of the European Bank for Reconstruction and Development after the collapse of the Cancun ministerial talk of the WTO in 2003, cited in Chang, *ibid*, p.18.

<sup>275</sup> T. Hayer, *The Creation of World Poverty* (Pluto Press Limited, 1982), p. 10.

<sup>276</sup> Chang, *supra note* 273.

<sup>277</sup> L. Rajamani, *Differential Treatment in International Environmental Law*, (Oxford University Press, 2006), p. 7.

<sup>278</sup> Lee, *supra note* 127, p. 115.

developing countries.<sup>279</sup> SDT is supposed to serve three broad objectives: promoting trade between developed and developing countries, promoting trade between developing countries themselves and preserving domestic policy instruments used for development.<sup>280</sup> In practice it has however largely constrained policy space, while promoting the other two objectives unevenly.<sup>281</sup>

There are several problematic aspects of SDT provisions and only a handful of them proven useful enough to be invoked consistently during GATT years and even fewer since the beginning of the WTO.<sup>282</sup> Furthermore most have had a time limit put on them of roughly between 10 to 15 years, expecting development after decades and centuries to happen literally overnight and then regardless of whether it actually does, the SDT is removed.<sup>283</sup> Permanent exceptions are often given only to a very limited number of developing countries. For example in the case of export subsidies, only a handful of LDCs enjoy a permanent exception from the prohibition. Some have thus advocated for permanent SDT in areas such as tariff bindings, subsidies, antidumping and trade-related IP.<sup>284</sup> A welcome change in the WTO practices in terms of time limits has happened at the Bali conference, however, with the Trade Facilitation (TF) agreement<sup>285</sup> allowing developing countries and LDCs to self-define their implementation period. The TF essentially divides its provisions into those which are to be implemented immediately upon the entry into force of the agreement; those that will be implemented after a transition period selected by the countries themselves; and those for which a transition period does not have to be notified by the LDCs until assistance arrangements are notified by donor countries. Hopefully this model will be used also in future SDT provisions, better yet an objective and generous criterion for when a country reaches an adequate level of development could be put in place which would trigger the removal of the SDT.

In the case of some other SDT provisions, even though they are technically still available (for example balance of payment provisions) they have been in practice virtually phased out in the early years of the WTO, due to WTO's committees aggressively pushing for the

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<sup>279</sup> B. Hoekman, 'Operationalizing the concept of policy space in the WTO: Beyond special and differential treatment', Paper presented at the Third Annual Conference on Preparing the Doha Development Round – WTO Negotiators Meet the Academics. European University Institute, 2-3 July 2004, p. 3.

<sup>280</sup> Rolland, *supra* note 5, p. 110.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*, p. 106.

<sup>283</sup> Unless it is renewed which is not such an unusual occurrence (for example TRIPs implementation period for LDCs, the extension of the services' waiver, etc.).

<sup>284</sup> Lee, *supra* note 127, p. 116.

<sup>285</sup> WTO, *Agreement on Trade Facilitation, Ministerial Decision of 7 December 2013*, WT/MIN(13)/36, (Geneva: WTO).

discontinuation of their use.<sup>286</sup> On the other hand, sometimes SDT is cancelled already in the accession process which demands ‘WTO Plus’ obligations from Art. XII Members. For example Tonga has been fully bound by TRIPS since day one of becoming a Member.<sup>287</sup> Recent proposals put forward by developed countries at negotiations further threaten to limit much of the SDT.

Another important problem of SDT provisions in terms of increasing the trade opportunities of developing countries is that out of fourteen dedicated to that goal, only three contain actual legal obligations: GATS Art. IV:I and IV:2 and Art. 2.18 of the now defunct ATC.<sup>288</sup> Somewhat better is the situation with provisions aimed at safeguarding the interests of developing countries, where twenty-one out of fifty-four are binding according to the CTD.<sup>289</sup> Also problematic is that, many provisions mix the language of legal obligation with a ‘best efforts’ substance, such as the word ‘shall’ coupled with ‘make every effort’/‘give active consideration’/‘have special regard,’ etc.<sup>290</sup> Historically such clauses have not been understood to embody any legal obligation<sup>291</sup> and it is politically unlikely to reverse the trend now.<sup>292</sup> However Rolland claims that because of the long-standing connection between development and human rights, and because most SDT clauses were drafted in the 1990s when ‘best efforts’ provisions became commonplace in other areas, one can argue that they now express a legal commitment and that the historical view no longer holds as firmly in the trade law context.<sup>293</sup> She finds support for this ‘new’ interpretation in reference to environmental law, where ‘best efforts’ and ‘endeavour’ are now commonly understood to translate into an obligation of due diligence by the state<sup>294</sup> and in reference to human rights law, where many treaties are drafted with ‘best efforts’, ‘reasonable efforts’, ‘endeavour’ and similar language without rendering the provisions devoid of any legal substance.<sup>295</sup> Despite the convincing nature of Rolland’s legal reasoning, the current DSM shows no signs of going into the direction of any revolutionary interpretations in this regard. In fact time and again the

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<sup>286</sup> Rolland, *supra note 5*, p. 110.

<sup>287</sup> Joseph, *supra note 125*, p. 157.

<sup>288</sup> WTO, Committee on Trade and Development, Implementation of Special and Differential Provisions in WTO Agreements and Decisions, WT/COMTD/W/77 (25 October 2000) (and subsequent correcting documents), at 93, in Rolland, *supra note 5*, p. 111.

<sup>289</sup> Rolland, *supra note 5*, p. 112.

<sup>290</sup> Rolland, *supra note 5*, p. 119.

<sup>291</sup> J. E. S. Fawcett, ‘The Legal Character of International Agreements’, 30 *British Yearbook of international Law*, (1953), p. 390, in Rolland, *supra note 5*, p. 119.

<sup>292</sup> Rolland, *supra note 5*, p. 112.

<sup>293</sup> *Ibid*, p. 119.

<sup>294</sup> *Ibid*, p. 112.

<sup>295</sup> For the whole discussion, see *ibid*, pp. 119-126.

dispute settlement bodies show reluctance in giving practical and enforceable meaning to such provisions.

The diminished usefulness of SDT provisions has therefore been criticised and the 2001 Doha Ministerial Declaration notes

the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.<sup>296</sup>

At Bali a monitoring mechanism on SDT has been established which is to analyse and review all SDT provisions and make recommendations when deemed necessary.<sup>297</sup> Although this may sound encouraging one must not lose sight of the fact that this agreement came to be instead of discussions on concrete changes proposed for the strengthening of several SDT provisions, which were dropped from the package a few months ahead of the ministerial<sup>298</sup> therefore it can be just another way of trying to avoid actual reform.

#### **a) Shrinking Policy Space**

The limited nature of SDT has meant that the process of substantive liberalisation and the drastic shrinking of policy space for development has not meaningfully been mitigated. In terms of tariffs as a result of the Uruguay Round developing countries undertook proportionally deeper tariff cuts than developed countries. Although their tariff bindings were higher before, which allowed room for significant cuts, many were forced to maintain tariff levels lower than those they had committed to, due to loan conditionalities imposed on them after the Debt Crisis of 1982 by the World Bank and the International Monetary Fund.<sup>299</sup> Instead of being tied to a particular project, the loans have been concerning budget deficits, monetary expansion, privatisation, trade liberalisation, and following the 1997 financial crisis even areas such as democracy, judicial reform, corporate governance, health and education; in other words ‘there is virtually no area on which the Bank and the Fund do not have (often very strong) influence.’<sup>300</sup> In terms of trade and industrial policies the shrinkage in policy space has been particularly striking with a key condition attached to the loans being trade

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<sup>296</sup> Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 44.

<sup>297</sup> WTO, *Monitoring Mechanism on Special and Differential Treatment, Ministerial Decision of 7 December 2013*, WT/MIN(13)/45 (Geneva: WTO).

<sup>298</sup> Bellmann, *supra note* 67, Note 10.

<sup>299</sup> Joseph, *supra note* 125, p. 149.

<sup>300</sup> Chang, *supra note* 273, p.2.

liberalisation – involving tariff cuts, tariffication of quantitative restrictions, and the reduction in non-tariff barriers.<sup>301</sup> Similar conditions have also been attached to aid by donor developed countries.<sup>302</sup> The lowering or removal of tariffs is problematic from the point of view of necessary policy space for the protection of local industries but also from the point of view of lost revenues. Tariff revenues comprise one third of the budgets of LDCs and they are easier to collect than other types of taxes due to lack of infrastructure for proper policing of the collection and the prevalence of informal workforces and black markets in these countries.<sup>303</sup> At the moment developing countries still have the freedom to protect certain industries up to the ceiling tariff rates, which can be quite high, while having low tariffs on other products to preserve the average level at the capped level. However, the Non Agricultural Market Access (NAMA) negotiations are threatening to drastically cut tariffs line by line, on every product and under the so-called Swiss formula which means that higher tariffs would be cut steeper. The push for a steep cut of tariffs in developing countries in exchange for a slight cut in the tariffs and domestic support for agriculture in developed countries is hardly surprising. The share of non-agricultural products in the goods exports of the US is drastically growing and now amounts to more than 90% of total goods exports so it is not surprising that the US is ‘seeking significant new competitive opportunities for US businesses through cuts in applied tariff rates’, especially in key emerging markets like India and Egypt, which still retain ceiling tariff rates as high as 150 percent.<sup>304</sup> The US has been joined by the EU in their aggressive attempts to achieve market opening in other economies.<sup>305</sup> Oxfam, War on Want, Action Aid and other NGOs see the NAMA proposals as ‘an unacceptable recipe for de-industrialisation’<sup>306</sup> and they have been trying to persuade developed country governments to ensure that a development-friendly result is reached at any negotiations, in a sense that it will ensure poor countries are given the flexibility to decide, plan and sequence trade reforms as part of a wider poverty reduction and development strategy.

Similarly to goods, in the area of services, The General Agreement on Trade in Services (GATS) brought liberalization, unsurprisingly in areas where developed countries have a comparative advantage, i.e. financial, telecommunications and other similar services, while

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<sup>301</sup> *Ibid*, p.3.

<sup>302</sup> *Ibid*.

<sup>303</sup> Joseph, *supra note* 125, p. 170.

<sup>304</sup> Office of the United States Trade Representative, Non-Agricultural Market Access (NAMA), available at: [www.ustr.gov/trade-topics/industry-manufacturing/non-agricultural-market-access](http://www.ustr.gov/trade-topics/industry-manufacturing/non-agricultural-market-access), (last accessed, 22.8.2016).

<sup>305</sup> House of Commons: International Development Committee: The WTO Hong Kong Ministerial and the Doha Development Agenda, Third Report of Session 2005-06, Volume II.

<sup>306</sup> Oxfam, What happened in Hong Kong?, Briefing Paper, 85, (2005), Action Aid, ‘Trade Ministers must not sell out the world’s poorest people’, Press Release 8 March (2006), in House of Commons, *ibid*, p. 21.

unskilled labour, where developing countries have a comparative advantage, has seen little progress with regard to its cross-border provision.<sup>307</sup> The WTO has further severely curtailed policy space in areas such as intellectual property protection which also has important implications for development (see chapter V).

There is no doubt that the policy space of developing countries has been substantially lessened,<sup>308</sup> however the important question is whether the WTO has gone too far in this, or are there still some policy options available which allow countries to pursue industrialisation. While some developmental scholars argue that the 'ladder has been kicked away',<sup>309</sup> others claim it is still there albeit a bit harder to climb.<sup>310</sup> For instance, while measures such as voluntary export restraints (VERs) are no longer allowed, countries could still increase tariffs up to their bound levels to protect their infant industries. In addition, countries have at their disposal, other types of mechanisms to protect their industries, such as non-tariff barriers and anti-dumping measures.<sup>311</sup> They can theoretically further use safeguards in emergency situations and use exceptions which allow them to increase tariffs to address balance of payments problems and to support infant industries.<sup>312</sup> It has been claimed therefore that the main problem lies in a political vision infected with the liberal trade tenets, rather than the law itself.<sup>313</sup> However it is more likely that in different situations governments may find different tools to be more or less useful, therefore it is hard to defend the withholding of any important policy tools which had been used for successful development in the past, for the low income countries of today. It is also important to note that most of the policy options available to developing countries do not fall under SDT and are thus equally available to

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<sup>307</sup> Joseph, *supra note* 125, p. 152.

<sup>308</sup> K. Gallagher, *Putting Development First*, (Zed Books, 2005); S.R. Khan 'WTO, IMF and the Closing of Development Policy Space for Low-Income Countries: A Call for Neo-Developmentalism', 28 *Third World Quarterly*, (2007), pp. 1073-1090; R. Wade, 'What Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of 'Development Space'', 10 *Review of International Political Economy* (2003), pp. 621-644; UNDP, *supra note* 173.

<sup>309</sup> H-J. Chang, *Kicking Away the Ladder*, (Anthem Press, 2003); S. J. Lee and T. Han 'The Demise of Korea, Inc.: Paradigm Shift in Korea's Developmental State', 36 *Journal of Contemporary Asia*, (2006); I. C. Moon and S. J. Rhyu 'The State, Structural Rigidity, and the End of Asian Capitalism: A Comparative Study of Japan and South Korea', in R. Robinson, M. Besson, K. Jayasuriya, and H.R. Kim (eds) *Politics and Markets in the wake of the Asian Crisis*, (Routledge, 2000).

<sup>310</sup> A. H. Amsden and T. Hikino, 'The Bark is Worse than the Bite: New WTO Law and Late Industrialization', *Annals of the American Academy of Political Science*, July 2000; R. Rasiah, 'Trade-related Investment Liberalization under the WTO: The Malaysian Experience', 34 *Global Economic Review*, (2005); D. Rodrik, 'Industrial Policy for the Twenty-First Century' Research Paper prepared for UNIDO, (2004); K.C. Shadlen, 'Exchanging Development for Market Access? Deep Integration and Industrial Policy under Multilateral and Regional-Bilateral Trade Agreements', 12 *Review of International Political Economy* (2005); UNCTAD, *Trade and Development Report, 2006*, Global Partnership and National Policies for Development (United Nations, 2006).

<sup>311</sup> Amsden, *ibid*, p. 109.

<sup>312</sup> *Ibid*, p. 110.

<sup>313</sup> *Ibid*, p.105.

developed countries, who usually have more technical expertise and resources to use them more efficiently and also against developing countries, while the latter may be reluctant to use them to avoid starting a tit-for-tat war. Other options require a particular ‘payment’ in return or have strict conditions placed on them which may make them too costly or practically useless in some instances. In the next sections some of the most important policy tools still allowed are analysed and whether they are practically useful and broad enough for a meaningful pursuit of development.

### **b) Increasing Tariffs to Support Infant Industries or for Balance-of-Payment Purposes**

As previously mentioned, the first time provisions were adopted to address specifically the needs of the developing part of the Membership, was during the 1954-55 GATT review session. During that time Art. XVIII was revised allowing the imposition of trade restrictions for developmental reasons.<sup>314</sup> The requirement of binding concessions under Art. II of GATT is relaxed in Art. XVIII, which allows for the possibility of increasing tariffs for certain purposes.

Tariff structures remain flexible in a sense that the Schedule of Concessions can be modified to grant tariff protection for infant industries (GATT XVIII:A). However reciprocity is required and in order to be able to modify the Schedule, the applicant must go through several steps, if it considers it ‘desirable, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule.’<sup>315</sup> The applicant,

shall notify the CONTRACTING PARTIES to this effect and enter into negotiations 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 substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

(b) If agreement is not reached within sixty days ... the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made *every effort to reach an agreement and that the compensatory adjustment offered by it is adequate*, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken,

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<sup>314</sup> C. Michalopoulos, ‘Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries’, Working Draft, 28 Feb. 2000, p. 5.

<sup>315</sup> GATT, Art. XVIII, para. 7(a) of Section A.



any other contracting party referred to in sub-paragraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.<sup>316</sup>

Therefore a modification of the Schedule requires a compensatory adjustment offered by the modifying country, which is further subject to acceptance. If an agreement is not reached and the contracting parties do not think that the offer was adequate, other Members with a substantial interest are free to adopt retaliatory measures, in case the modifying Member chooses to take unilateral action. A provision granting the right of veto to certain affected contracting parties was deleted, to make the imposition of quantitative restrictions easier<sup>317</sup>, however, the requirement of offering compensation may still impose a substantial burden on the economy of the modifying developing country, while the consultations and negotiations may cause considerable delays in implementing trade measures for development purposes.<sup>318</sup> The fact that no state has ever made use of it, was identified by Van den Bossche as the clearest indicator of its uselessness.<sup>319</sup> A more flexible approach should be available, one which would allow unilateral imposition of modification of the schedule, when a country can demonstrate the need for it with a concrete plan for industrial facilitation.<sup>320</sup>

Similarly, modifications are allowed under GATT XVIII:B for balance-of-payment purposes. Unlike GATT XVIII:A, this instrument has been the main ‘flexibility’ prominently used by a small but diverse group of developing countries for prolonged periods of time to adjust their obligations to the challenges of economic development.<sup>321</sup> The main users were Asian countries, but also Latin American countries and from Africa, Egypt, Tunisia and Ghana.<sup>322</sup> These countries pursued very different developmental models, from import-substitution policies and export-driven development models to models used by Members transitioning from a communist to a capitalist economy - however they all found GATT XVIII:B a useful policy tool.<sup>323</sup> Despite this, such measures have been virtually phased out in the early years of

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<sup>316</sup> GATT, Art. XVIII, para. 7(a) of Section A, emphasis added.

<sup>317</sup> Michalopoulos, *supra note* 314.

<sup>318</sup> Lee, *supra note* 127, p. 113.

<sup>319</sup> P. Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2005), p. 678.

<sup>320</sup> Lee, *supra note* 127, p. 113.

<sup>321</sup> Rolland, *supra note* 5, p. 113, 132.

<sup>322</sup> *Ibid*, 131.

<sup>323</sup> *Ibid*.

the WTO due to the overseeing Committee aggressively demanding countries to remove such measures or not impose them at all, *de facto* stripping them of this policy tool.<sup>324</sup>

### c) Safeguards

One of the other remaining tools which can be used for the protection of domestic industry are so-called safeguards. The GATT Art. XIX and the Agreement on Safeguards (AoS) allow for the use of restraint on trade flows in certain situations of import surges. Like many other tools still available, safeguards however have a number of conditions attached to them which have proven to be hard to use in practice. For example the AoS defines import surges in Art. 2 as follows:

When a product is imported into a country in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

Thus safeguards can be applied only after a detailed investigation has been conducted to substantiate the presence of significant injury or threat of serious injury. Furthermore, a causal link needs to be established between the claimed damage and the import surge. The rules are generally cumbersome and difficult to interpret particularly as regards to causality and the non-attribution of other factors to the damage.<sup>325</sup> Another requirement for the safeguards to be justified is proof that the surge is a result of ‘unforeseen developments’.<sup>326</sup> The subjectivity of this requirement contributes to the difficulty of constructing a reasoned and adequate account of the causal chain.<sup>327</sup> Numerous disputes involving safeguard measures have been brought before the WTO, however the Appellate Body decisions have failed to give useful guidance for resolving the vagueness of the terms found in the provision, which only makes employing safeguard measures increasingly difficult and can defeat one of its major purposes – to help countries nurture their infant industries.<sup>328</sup> To date no measure brought before the DSM has been ruled to be an acceptable safeguard measure. Safeguard measures allowed under the AoA are also severely limited for use by developing countries in their own way, as discussed above.

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<sup>324</sup> *Ibid*, 132.

<sup>325</sup> FAO, *supra note* 215.

<sup>326</sup> GATT, Art. XIX (a).

<sup>327</sup> T. Raychaudhuri, ‘The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance’, 11 *Estey Centre Journal of International Law and Trade Policy*, (2010), p. 302.

<sup>328</sup> A. O. Sykes, ‘The Safeguards Mess: A Critique of the WTO Jurisprudence’, John M. Olin, Law and Economics Working Paper No. 187 (2D Series), May 2003.

Furthermore safeguards can also be used against developing countries' imports. As Stiglitz observes, the 'safeguard measure has probably been underused by developing countries and been overused by developed countries, especially the United States'.<sup>329</sup> The vagueness of the rules has enabled the latter to abuse the system, until affected countries go through the costly procedure of dispute settlement to stop the abuse.<sup>330</sup> Stiglitz describes a lack of distinction made in the US safeguard legislation between industries which are declining because of trade and those which would be in decline even in the absence of trade liberalization<sup>331</sup> and advocates for SDT in terms of higher standards that would need to be met by developed countries when imposing such measures (for example demonstrating that at least 1% of jobs in the country have been lost and the burden on the country's social safety net is such that it cannot absorb it) and lower standards when developing countries want to use them.<sup>332</sup>

There is currently SDT in the sense that AoS, Art. 9.1 demands an exemption from putting safeguard measures on developing countries' imports, however only when those imports are lower than 3%, and lower than 9% collectively with imports from other such developing countries. These ceilings are too tight. On the other hand Art. 9.2 provides for the possibility of an extension of the period of safeguard measures for two years for developing countries. This extension is too small.<sup>333</sup>

Furthermore a country implementing a safeguard measure needs to offer compensation in trade concessions of equivalent value, regardless of whether it is a developed or developing country. If no compensation can be agreed to, other Members can 'retaliate', by increasing tariffs on products from the country in question (Art 8) but not in the first 3 years if the measure is taken based on an absolute increase of imports and otherwise conforms to the provisions.

#### **d) Antidumping Measures**

Anti-dumping law is one of the most controversial areas of WTO law. It is regulated by GATT VI and the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994 (ADA). Similarly to safeguards, antidumping duties can be used for the protection of domestic industry when it is established that imported goods have been

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<sup>329</sup> Stiglitz, *supra note* 235, pp. 128-129.

<sup>330</sup> See for example *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body, WT/DS/248/AB/R, WT/DS/249/AB/R, WT/DS/251/AB/R, WT/DS/252/AB/R, WT/DS/253/AB/R, WT/DS/254/AB/R, WT/DS/258/AB/R, WT/DS/259/AB/R.

<sup>331</sup> *Ibid.*

<sup>332</sup> Stiglitz, *supra note* 235, p. 129.

<sup>333</sup> Lee, *supra note* 127, p. 116.

‘dumped’ on the market, i.e. sold below their price on the domestic market or below the price of production with the intent of driving out competition and establishing a monopoly in the market. Unfortunately when it comes to antidumping measures, exports from developing countries have been the primary target. This has been a critical problem for developing countries which rely on low prices (based on low labour cost) for the competitiveness of their products.<sup>334</sup> Between January 1985 and December 2011 China suffered more than 630 such measures imposed against its exports, which is more than four times the amount of such measures that were imposed against products from the US (i.e. 136 anti-dumping measures).<sup>335</sup> It has been said that the complexity of the rules favours those with more technical expertise, i.e. developed countries.<sup>336</sup> However, the impression that anti-dumping measures are used *only* by developed countries against developing countries would be misleading as the most avid user has recently been India which had imposed 534 such measures between 1995-2014, followed by the US with 345 and the EU with 298 measures respectively.<sup>337</sup>

An example of anti-dumping duties imposed in 2006 by the EU against shoes from China illustrates the classic conflict between the official free trade/WTO goal of lowering prices for consumers and the desire for continued protectionism by EU manufacturers via anti-dumping measures after the removal of quotas on footwear in 2005. Italian and European footwear manufacturers, alarmed by an increase of 300% in imports of leather footwear from China depressing prices by 25% and forcing thousands of footwear firms out of business, made an appeal to the EU Commissioner Peter Mandelson for implementation of anti-dumping measures. Despite opposition by many EU countries (Scandinavian countries, Germany, UK), the measures were eventually implemented, with 16.5% extra duties placed on shoes from China and 10% on those from Vietnam.<sup>338</sup> The most interesting statement in this regard, however came from Mendelson in respect of Europe’s own manufacturers, which have outsourced their production to maintain a competitive edge. He observed that:

while Europe should tackle unfair trade, globalisation means the definitions of what is European-made have become blurred... If producing cheaply in China helps generate profits and jobs in Europe, how should we treat these companies when disputes over unfair trading arise?<sup>339</sup>

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<sup>334</sup> Lee, *supra note* 127, p. 122.

<sup>335</sup> P. Van den Bossche and V. Zdouc, 3<sup>rd</sup> edn., *The Law and Policy of the World Trading System*, (Cambridge University Press, 2013) p. 680.

<sup>336</sup> Joseph, *supra note* 125, p. 156.

<sup>337</sup> WTO, [www.wto.org/english/tratop\\_e/adp\\_e/AD\\_MeasuresByRepMem.pdf](http://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf) (last accessed 15.3.2016).

<sup>338</sup> Van den Bossche, *supra note* 335, pp. 681-682.

<sup>339</sup> A. Bonnds, ‘Mandelson Warns over Extra Taxes on Asian Imports,’ *Financial Times*, 4 September 2007 in Van den Bossche, *supra note* 335, p. 682.

While it is not quite clear how such outsourcing would create jobs in Europe, the war between ours and theirs is rather transparent. So-called unfair practices quickly become fair, when they are practiced by ‘our own’.

Similarly to safeguards, there is an inherent arbitrariness and complexity in determining dumping and its particular components, such as what is ‘the normal value’ of the product. There may not be a single home market price to compare and thus the complex adjusted average may have to be calculated; the home price may not even represent the true market price, or the product may not even be sold (in sufficient quantities) in the home market to determine a valid home price.<sup>340</sup> In these cases the price needs to be constructed by an evaluation of cost and reasonable profit.<sup>341</sup> Depending on the methodology adopted in assessing the ‘market price’ and other variables (i.e. ‘reasonable profit’, ‘export price’) results can vary greatly.<sup>342</sup> According to one study of the US antidumping laws, these do not reliably identify either price discrimination or below cost sales.<sup>343</sup> ‘Of the five different calculation methodologies used by the Commerce Department... only one has any relevance to detecting market-distorting price discrimination; only 2 of the 107 affirmative dumping findings reviewed in this study relied exclusively on this methodology... [T]he law lacks any mechanism for determining whether the pricing practices it condemns as unfair have any connection to market-distorting practices abroad... [and] frequently punishes foreign firms for unexceptionable business practices routinely engaged in by American companies.’<sup>344</sup> As Stiglitz and Charlton describe, the US standards used to determine if the company of another state is engaging in dumping are not the same as those used for determining predatory pricing of their domestic firms under their anti-trust law.<sup>345</sup> Therefore their goal does not seem to be protecting competition but merely to reduce the threat of foreign competition.<sup>346</sup>

Particularly harmful for developing country imports has been the notorious method called zeroing. The dumping margin is calculated by getting the average of the differences between the export prices and the home market prices. Zeroing happens when export prices higher than the home market prices are disregarded or a value of ‘zero’ is attributed to them in the calculation, artificially inflating the dumping margins. This method has been highly

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<sup>340</sup> Lee, *supra note* 127, p.121.

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.*

<sup>343</sup> B. Lindsey and D. Ikenson, ‘Reforming the Anti-Dumping Agreement: A Road Map for WTO Negotiations’, Cato Institute Trade Policy Analysis No. 21 (11 Dec. 2002).

<sup>344</sup> *Ibid.*

<sup>345</sup> Stiglitz, *supra note* 235, p. 130.

<sup>346</sup> *Ibid.*

contentious and several disputes have been launched by the EU, Japan and a number of developing countries including Brazil, China, Ecuador, Korea, Mexico, Thailand and Vietnam against the US for its use. Over a period of ten years the Appellate Body has consistently condemned the practice and upheld Art. 2.4 claims against its use,<sup>347</sup> finding that ‘it cannot be viewed as involving a ‘fair comparison’ within the meaning of the first sentence of Art. 2.4.2’.<sup>348</sup> However the US failed to commit itself to bringing its methods into conformity with WTO rulings until 2010 when it adopted the Uruguay Round Agreements Act and published a notice<sup>349</sup> entitled "Antidumping proceedings: Calculation of the Weighted Average Dumping Margin and Assessment of the Rate in Certain Antidumping Duty Proceedings" by means of which it proposed abandoning the use of zeroing. Regardless, the method is still being used, and most recently in US – Washing Machines the Panel confirmed its inconsistency with ADA Art. 2.4.2<sup>350</sup> as it artificially inflates dumping margins which furthermore leads to a violation of ADA Art. 9.3.<sup>351</sup> The latter article stipulates that the ‘amount of the anti-dumping duty shall not exceed the margin of dumping as established under Art. 2’ while the dumping margins artificially inflated by zeroing lead to any collected duties being excessive.<sup>352</sup>

SDT treatment in anti-dumping is set out in Art. 15 of the ADA which states that

special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

However the Panel in *India Steel Plate* made it clear that the first sentence of this article does not impose any specific or general obligation on Members to undertake any particular action as ‘[m]embers cannot be expected to comply with an obligation whose parameters are entirely undefined.’<sup>353</sup> This clearly illustrates the uselessness of SDT when expressed in such terms as ‘special regard’ and interpreted in a restrictive way at the dispute settlement.

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<sup>347</sup> *United States – Measures Relating to Zeroing and Sunset Reviews*, Appellate Body Report, WT/DS322/AB/R, (US-Zeroing (Japan)), paras. 123-125; *European Communities – Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India*, Panel Report, WT/DS141/R, para. 55; *United States – Final Dumping Determination on Softwood Lumber from Canada*, Recourse to Article 21.5 of the DSU by Canada, WT/DS264/AB/RW (US – Softwood Lumber V (Article 21.5 – Canada)), paras. 138-143.

<sup>348</sup> US-Zeroing (Japan), *ibid*, para. 168.

<sup>349</sup> US, Federal Register, Vol. 75, No. 248 (28 December 2010).

<sup>350</sup> *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Report of the Panel*, WT/DS464/R, para. 7.206.

<sup>351</sup> *Ibid*, para. 7.207.

<sup>352</sup> *Ibid*.

<sup>353</sup> *United States Anti-Dumping and Countervailing Measures on Steel Plate from India*, Panel Report WT/DS206/R, para. 7.110.

Furthermore the ‘*special situation* of developing country Members’ was not interpreted to extend to its exporters.<sup>354</sup>

As for the second sentence, the Panel stressed in *EC-Brazil Cotton Yarn*, that the obligation is to explore the *possibilities* of constructive remedies, not the remedies themselves, which clearly does not require the investigative authorities to adopt such remedies (merely because they were proposed).<sup>355</sup> All that is required is that they *actively consider* such possibilities with an *open mind* (i.e. a willingness to reach a positive outcome) prior to imposing anti-dumping measures that would affect the essential interests of a developing country.<sup>356</sup>

The *constructive remedies* have been interpreted as encompassing only two options, the possibility of which need to be considered: a lesser duty as provided for in Art. 9 of ADA or price undertakings as provided for in Art. 8 of ADA.<sup>357</sup> Thus the investigative authority does not need to consider the possibility of any other remedy (such as using a different methodology for calculating the dumping margin in the case of developing countries from that used for developed countries exports).<sup>358</sup> Furthermore, since a lesser duty is only desirable under Art. 9.1 it is not mandatory that domestic legislation even provides for this option.<sup>359</sup>

The disappointing outcomes in these disputes concerning the interpretation of Art. 15 may have been the reason why it was subsequently not invoked at the DSM for a long time. Some more recent disputes, still under consideration, however, do invoke it and one can hope for a more useful interpretation to emerge.

#### e) Trade Related Investment Measures

Historically managing foreign direct investment (FDI) was at the heart of countries’ development strategies.<sup>360</sup> Amongst the tools widely used in the past with the goal of increasing domestic value added, job creation and technology transfer are the following now WTO-prohibited tools; local content requirements (LCR) and trade-balancing investment

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<sup>354</sup> *Ibid*, para. 7.111.

<sup>355</sup> *European Communities – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*. GATT Doc. ADP/137 adopted 30 Oct. 1995, Panel Report para. 584 referring to EU’s rejection of India’s offer of price undertakings.

<sup>356</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India*, Panel Report, WT/DS141/R, para 6.233.

<sup>357</sup> *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, DS 219; *EC – Bed Linen*; *US – Steel Plate*.

<sup>358</sup> *US-Steel Plate*, para. 7.116.

<sup>359</sup> *Ibid*.

<sup>360</sup> Shadlen, *supra note* 109, p. 126.

measures.<sup>361</sup> LCRs require the purchase or use by an enterprise of products of domestic origin or domestic source, while trade balancing measures limit the allowed purchase or use of imported products by an enterprise to an amount related to the volume or value of local products that it exports. Such policies are now prohibited under the Agreement on Trade Related Investment Measures (TRIMs)<sup>362</sup> and are furthermore inconsistent with Art. III:4 of the GATT as they involve discrimination against imported products in favour of domestic products.<sup>363</sup> Also prohibited under TRIMs<sup>364</sup> and in violation of the prohibition on imposition of quantitative restrictions of Art. XI:1 of GATT are measures which limit the *importation* by an enterprise of products used in its local production, generally or to an amount related to the volume or value of local production exported by the enterprise. Similarly a contravention of TRIMs and Art. XI:1 of GATT are measures which restrict an enterprise's access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise, in order to restrict imports.<sup>365</sup>

Not surprisingly on the issue of investment measures developed and developing countries again had quite different objectives in the Uruguay round.<sup>366</sup> Despite the outcome restricting policy space in some key areas, developing countries nevertheless managed to exploit the differences between developed countries during the negotiations and thus prevented the prohibition of a wide range of measures.<sup>367</sup> A significant degree of latitude in investment regulation therefore still exists whereby states can demand joint ventures, or require foreign firms to transfer technology to local firms or regulate their hiring practices, with the aim of enhancing development of human capital and skills.<sup>368</sup> A stricter agreement has however been sought by developed countries ever since and with the fall of the DDA it is questionable whether developing countries can continue to successfully block new disciplines in this regard.

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<sup>361</sup> Shadlen, *supra note* 310; UNCTAD, *supra note* 310.

<sup>362</sup> Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Results of the Uruguay Round of Negotiations (hereinafter TRIMs), para. 1 (a)-(b) of the Illustrative List.

<sup>363</sup> Already before TRIMs it was determined in *Canada-Administration of the Foreign Investment Review Act* ('FIRA') (BISD 30S/140, 1984) that such policies were inconsistent with the national treatment principle contained in Article III:4 of the GATT.

<sup>364</sup> TRIMs, para. 2 (a) of the Illustrative List.

<sup>365</sup> TRIMs, para. 2 (b) of the Illustrative List.

<sup>366</sup> WTO: Trade and Investment: Technical Information: Agreement on Trade Related Investment Measures, available at: [www.wto.org/english/tratop\\_e/invest\\_e/invest\\_info\\_e.htm](http://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm), (last accessed, 22.8.2016).

<sup>367</sup> Shadlen, *supra note* 109, p. 125.

<sup>368</sup> *Ibid.*, p. 125.



When TRIMS was to be implemented in 2000, 26 developing countries notified LCRs and other TRIMS related policies mostly in their automotive industry (or agro-foods).<sup>369</sup> The automotive industry offers scope for the progressive import-substitution of a very wide range of components by local firms, therefore it is not surprising that developing countries such as Thailand and Malaysia chose this industry together with local content policies as their way into industrialisation.<sup>370</sup> It has been observed for example that the Australian motor industry became more efficient after liberalisation, however the local component supply would have not even come into existence, if local content policies had not been used in the first place.<sup>371</sup>

The TRIMS agreement takes away an important development instrument and it further

‘seems to mainly target the investment regulations of developing countries, but there is no clear need for such multilateral control on investment... [since M]ajor investors are often in a position to negotiate the terms of their investment with the host country’<sup>372</sup>

Around 2600 bilateral investment treaties exist around the world which already require national treatment of foreign investors and prohibit a wider range of TRIMs than those restrained by the TRIMs Agreement. If a developing country is ready to give up certain TRIMs it will do so unilaterally or bilaterally and multilateral control should not prevent it from adopting TRIMs if it deems them necessary for its development objectives.<sup>373</sup>

The SDT under TRIMs stipulates that developing countries that notified TRIMs inconsistent measures after the entry into force of the WTO Agreement could keep them if the Council for Trade in Goods extended their transition period.<sup>374</sup> The Hong Kong Ministerial Declaration further allowed LDCs to introduce new TRIMs inconsistent measures for a duration of up to five years subject to the Council for Trade in Goods giving them ‘positive consideration’ when notified.<sup>375</sup> The measures can be renewed after a review and decision by the Council for Trade in Goods. However no such notifications have been made so far.

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<sup>369</sup> K. Natsuda and J. Thoburn, ‘How Much Policy Space still Exists under the WTO? A Comparative Study of the Automotive Industry in Thailand and Malaysia’, 21 *Review of International Political Economy*, (2014), p. 1349.

<sup>370</sup> N. Segawa, K. Natsuda and J. Thoburn, ‘Affirmative Action and Economic Liberalisation: the Dilemmas of the Malaysian Automotive Industry’, 38 *Asian Studies Review*, (2014).

<sup>371</sup> B. Bora, P.J. Lloyd and M. Pangestu, ‘Industrial Policy and the WTO’, in B. Hoekman and W. Martin (eds.) *Developing Countries and the WTO: A Pro-Active Agenda*, (Blackwell, 2001), p. 175.

<sup>372</sup> Lee, *supra note* 127, p. 123.

<sup>373</sup> *Ibid.*

<sup>374</sup> TRIMS Art. 5(1) with TRIMS Art. 5(3); List of notifications: G/L/900, 21 October 2009, Annex 1

<sup>375</sup> Hong Kong Declaration, Annex F.

## f) Subsidies

As has been noted, subsidies undoubtedly play an important role in a successful development process, especially when a country is trying to venture out of specializing in the production of primary goods. However there exists a disagreement as to which types of subsidies are essential for this and whether the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) leaves enough policy space to developing countries in this regard. The wide scope of possible countervailing duty (CVD) action does not reflect the explicit recognition in the SCM Agreement that subsidies may play an important development role.<sup>376</sup>

As mentioned before, at the ITO negotiations the USA and UK's Suggested Charter proposed to phase-out export subsidies, however from the outset they included the exceptions which they wanted such as the exclusion of agriculture and provisions for applying domestic and export subsidies to fit in with their agricultural policies.<sup>377</sup> It is not surprising that regarding export subsidies on primary goods, developing countries actually sought 'a *more* restrictive Charter' contrary to the perception of them demanding no restrictions on commercial policy, although their wishes were not reflected in the Havana Charter which remained as the USA and UK intended.<sup>378</sup> Articles 25-28 of the Charter dealt with subsidies in general and separately with export subsidies while primary commodities fell under Art. 28 which limited them merely with the condition that such subsidies would not lead to a Member gaining 'more than an equitable share of world trade' in the product. The GATT however did not include a principle prohibition on export subsidies nor any substantive discipline on subsidies.

However the battle resumed in the 1950s between the different interests as developing countries kept opposing the idea of a more flexible treatment of primary products while calling for more policy space for their needs.<sup>379</sup> Thus they were unwilling to subscribe to the 1960 Declaration which would have provided a list of prohibited subsidies on non-primary products. In the Tokyo Round, the adopted Subsidies Code was a sort of a compromise between the conflicting interests and while it strengthened CVD disciplines, prohibited export subsidies on non-primary products and allowed flexible disciplines on domestic subsidies it

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<sup>376</sup> Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (hereinafter SCM Agreement).

<sup>377</sup> Scott, *supra note* 251, p. 18.

<sup>378</sup> *Ibid.*

<sup>379</sup> Hudec, *supra note* 156, p. 23.

excluded developing countries from virtually all new subsidy disciplines.<sup>380</sup> Furthermore the Subsidies Code was only signed by 24 countries.

However this prompted the US to declare that it would not offer Subsidies Code treatment (i.e. they refused to use the injury test in their domestic law) to any developing country which did not commit to reducing its export subsidies, even though this was a condition for signing up to the Agreement.<sup>381</sup> Disagreeing with this, Colombia, Chile and India as well as a list of other developing countries stated that such forcing into these commitments was not in line with the provisions of the SCM Agreement itself and it did not open the way for wide participation of developing countries in the Agreement.<sup>382</sup>

During the Uruguay round, interests formed along the same lines, however this time the SCM Agreement managed to bring stronger subsidy disciplines for developing countries, arguably curtailing their policy space too severely. The 2006 UNCTAD Trade and Development Report concluded that the Agreement 'impinges directly on national rulemaking authority'.<sup>383</sup> According to Art. 1 and 2 the Agreement only applies to subsidies which are specific. These exist when a government directly or indirectly through a private body provides a financial contribution which confers a benefit to an industry or group of industries. If such subsidies are contingent upon export performance (export subsidies) or upon the use of domestic over imported goods (local content subsidies), they are prohibited according to Art. 3. This is because 'they are designed to directly affect trade and thus are most likely to have adverse effects on the interests of other Members.'<sup>384</sup> Most subsidies however are not prohibited but actionable, which means they are subject to challenge, either through multilateral dispute settlement or through countervailing (CVD) action, if they cause adverse effects to the interests of another Member.

The SDT treatment excludes from the prohibition of export subsidies those developing countries that are listed in Annex VII, which includes LDCs and all Members whose GNI per capita was below US\$ 1000 per year at the time of the conclusion of the Uruguay Round until they reach such GNI. The initial interpretation considered current US dollars which meant Members could graduate based upon inflation and changes in exchange rates rather than real

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<sup>380</sup> D. Coppens, 'How Special is the Special and Differential Treatment under the SCM Agreement? A Legal and Normative Analysis of WTO Subsidy Disciplines on Developing Countries', 12 *World Trade Review*, (2013), p. 82.

<sup>381</sup> Committee on Subsidies and Countervailing Measures, Minutes of the Meeting held on 8 May 1980, SCM/M/3 (27 June 1980), para. 11.

<sup>382</sup> *Ibid*, paras. 14- 18.

<sup>383</sup> UNCTAD, *supra note* 310, p. 169.

<sup>384</sup> SCM Agreement.

economic growth, thus at the Doha Ministerial in 2001 the WTO adopted an alternative approach, calculating the threshold in constant US\$ 1990 GNI per year, which must be reached for three consecutive years.<sup>385</sup> Members can further be re-included in the list if their GNP falls back below this threshold. However the possibility of a Member who has never been on the list to be included on it, does not exist, even if their GNP is below the threshold. Thus Vietnam was surprised to learn during the negotiations that it could not benefit from SDT treatment, even though its GNP was below the threshold.<sup>386</sup> The exemption extinguishes for products that have reached export competitiveness, after which the subsidies are to be phased out in eight years. Furthermore such subsidies can still be subject to an actionable subsidy claim and CVD action.<sup>387</sup>

All other developing countries<sup>388</sup> were to phase out their export subsidies in eight years after 2003 but the SCM Committee was allowed to authorise extensions based on the development needs of the Member. The needs had to be reviewed on an annual basis with a phase-out period of two years after a negative determination, which generated large uncertainty for governments and their business communities.<sup>389</sup> The phasing out has to happen in reference to the overall level of a country's export subsidies in terms of the actual expenditure (not merely budgeted amounts) in the year 1994.<sup>390</sup> This posed an unjustifiable prejudice against those that perhaps could not afford such subsidisation in the said year. Another possible benchmark year is provided, i.e. 1986, if the developing country autonomously eliminated its export subsidies before the entry into force of the WTO Agreement, without a multilateral obligation to do so.<sup>391</sup> If said country did not have a useful level of subsidisation at this time either, the additional benchmark did not add much flexibility. Thus for example, in *Brazil - Aircraft*, Brazil wanted its ceiling level of export subsidies to be determined by its levels of subsidisation in 1991, when the main export subsidy programmes were put in place. This was however not accepted by the Panel and only a choice between either 1994 or 1986 benchmark

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<sup>385</sup> See WT/MIN(01)/17 (20 November 2001), para. 10.1. As of 1 January 2003 the calculation methodology in G/SCM/38, Appendix 2 applies. G/SCM/110/Add.4 (21 December 2007), referenced in S. Creskoff and P. Walkehorst, 'Implications of WTO Disciplines for Special Economic Zones in Developing Countries', World Bank Policy Research Working Paper (World Bank, 2009), p. 21.

<sup>386</sup> Coppens, *supra note* 264, p. 255.

<sup>387</sup> SCM Agreement, Art. 27.7.

<sup>388</sup> In 2007 the General Council also granted some flexibility to certain small trading developing countries for those export subsidy programmes in force in 2001 that provided full or partial exemptions from import duties and internal taxes for capital goods (WT/L/691, 31 July 2007).

<sup>389</sup> R. A. Torres, 'Free Zones and the World Trade Organization, Agreement on Subsidies and Countervailing Measures', 2 *Global Trade and Customs Journal* (2007), p 221.

<sup>390</sup> *Brazil-Aircraft; Brazil-Export Financing Programme for Aircraft*, Panel Report, WT/DS46/R, paras. 7.59, 7.65, 7.62.

<sup>391</sup> SCM Agreement, Footnote 55.

levels was considered appropriate.<sup>392</sup> The proposal by Brasil to at least consider a weighted average of the three or four years prior to 1994 as the relevant period - which would have helped to reduce the distortion of the impact of a single year on the volatile economies of developing country Members - was also rejected.<sup>393</sup>

The SDT treatment for local content subsidies has expired, so developing countries are treated the same as developed countries in this regard. This prohibition of local content subsidies from Art. 3.1(b) of the SCM Agreement also annihilates any SDT in this regard still allowed under the TRIMS Agreement.<sup>394</sup>

When it comes to actionable subsidies all developing countries enjoy SDT treatment in the sense that action against their subsidies may not be authorized or taken unless nullification or impairment of tariff concessions or other obligations under GATT is found to exist as a result of such subsidies or unless injury to a domestic industry in the market of an importing Member occurs,<sup>395</sup> however action can be taken also on the basis of presumption of serious prejudice.<sup>396</sup> Serious prejudice can be demonstrated and action taken in four situations:

- (a) the total ad valorem subsidization of a product exceeds 5 per cent;
- (b) if subsidies are covering operating losses sustained by an industry;
- (c) if subsidies are covering operating losses sustained by an enterprise
- (d) direct forgiveness of debt and grants to cover debt repayment.<sup>397</sup>

This SDT treatment however does not restrict the use of CVDs which Members can impose to offset specific subsidies from developing countries causing injury to their domestic industry. Still the threshold set by Art. 27.10 calls for CVD investigations to be terminated if (a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or (b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member. Despite these higher thresholds<sup>398</sup> the majority of CVD action is still taken against developing countries' imports, more than one third of those against Chinese and Indian

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<sup>392</sup> *Brazil-Aircraft*, Panel Report, para. 7.63.

<sup>393</sup> *Ibid*, para. 7.64.

<sup>394</sup> *Indonesia – Certain Measures Affecting the Automotive Industry*, Panel Report (WT/DS54, 55, 59, 64 R, adopted 23 July 1998), paras. 14.47-14.55.

<sup>395</sup> SCM Agreement, Art. 27.9.

<sup>396</sup> SCM Agreement, Art. 5.

<sup>397</sup> SCM Agreement Art.27.9 with Art. 6.1.

<sup>398</sup> The thresholds for developed countries' subsidies are set in SCM Agreement, Art. 11.9.

imports.<sup>399</sup> On the other hand, the reason why developing countries are less able to take advantage of this tool themselves is because it is quite resource intensive and there is no SDT in terms of relaxing procedural requirements.<sup>400</sup> Furthermore as all other remedy tools this one is no less politically sensitive, which might be another reason for the reluctance to use it. From the argument of ‘enhancing welfare’, subsidised imports should be considered beneficial anyway, since they are cheaper, thus contributing to an aggregate gain in national economic welfare, while the effect of CVDs will be much like the effect of any other tariff and should therefore be considered equally damaging to the importing country’s economy.<sup>401</sup> Coppens advocates for a non-challengeable, green light category of domestic subsidies, which he believes are more essential at least in later stages of development than export subsidies, although he thinks there is also space for export subsidies, especially in terms of battling market failures while ‘budgetary restraints might de facto prevent governments from overly subsidizing their exporting sector or entering into subsidy wars’.<sup>402</sup> Hoekman et al. propose the reactivation of the green light status of research and development (R&D) subsidies for developing countries that would go beyond the current Art.8 rule which allows R&D subsidies aimed at inventing new product, and that would also allow subsidies supporting firms to discover which existing products could be produced domestically at competitive prices.<sup>403</sup>

However despite the predominant belief that domestic subsidies are more essential for development than export subsidies, it has been shown that selective interventions with export subsidies to enable export diversification are useful for low-income countries, especially to overcome market failures related to inducing self-discovery as well as other market failures which are more prevalent in developing countries and particularly in the trading sector.<sup>404</sup> Rodrik is a firm believer in export subsidies and claims that their prohibition may prevent

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<sup>399</sup> See WTO Secretariat statistics based on notifications by WTO Members, available at: [http://www.wto.org/english/tratop\\_e/scm\\_e/cvd\\_init\\_exp\\_country\\_e.pdf](http://www.wto.org/english/tratop_e/scm_e/cvd_init_exp_country_e.pdf); [http://www.wto.org/english/tratop\\_e/scm\\_e/cvd\\_meas\\_exp\\_country\\_e.pdf](http://www.wto.org/english/tratop_e/scm_e/cvd_meas_exp_country_e.pdf). (last accessed: 22.8.2016).

<sup>400</sup> Coppens, *supra note* 380, p. 94.

<sup>401</sup> A. O. Sykes, ‘Countervailing Duty Law: An Economic Perspective’, 89 *Columbia Law Review*, (1989), pp. 199-263 in A. Guzman and A. O. Sykes, eds. *Research Handbook in International Economic Law*, (Edward Elgar, 2007), p. 107.

<sup>402</sup> Coppens *supra note* 380, pp. 103, 107.

<sup>403</sup> B. M. Hoekman, K. E. Maskus, K. Saggi, ‘Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options’, IBS Research Program on Political and Economic Change, Working Paper PEC 2004-2003 (May 2004), p. 34.

<sup>404</sup> J. N. Bhagwati, ‘Export-Promoting Trade Strategy, Issues and Evidence’, 3 *World Bank Research Observer* (1988), pp. 27-57; World Bank, *The East Asian Miracle: Economic Growth and Development, The Growth Report-Strategies for Sustained Growth and Inclusive Development*, (The World Bank, 2008), p. 190; R. Newfarmer, W. Shaw, and P. Walkenhorst (eds.), *Breaking into New Markets – Emerging Lessons for Export Diversification*, (The World Bank, 2009), p. 7.

developing countries from adopting the same strategies for as were followed by the Asian Tigers.<sup>405</sup>

At the moment the SDT is too restrictive as export competitiveness is measured in terms of the product having reached a share of at least 3.25% in world trade of that product in two consecutive years, which is too short to neutralize increased market shares due to short-term fluctuations in the market.<sup>406</sup> Furthermore re-inclusion should be allowed if exports fall back under the 3.25%.<sup>407</sup> Subsidies to enterprises or industries in difficulties might be warranted at least temporarily, in cases of enterprises having a dominant position in an undiversified market.

Furthermore it is important to understand that those subsidies that are prohibited or actionable under the WTO rules, are not the only trade distorting subsidies and vice versa. Distinguishing between those that are allowed and those that are not on unconvincing grounds can create more undesirable than desirable effects. An important example can be seen in the case of energy subsidies, where those given for renewable energy have caused bigger controversies and a greater number of requested consultations and disputes at the WTO than fossil fuel subsidies, due to the current rules allowing the former while prohibiting the latter because of their discriminatory application, despite the fact that fossil fuel subsidies also lead to market distortions.

Fossil fuel subsidies ‘encourage wasteful consumption, distort markets, impede investment in clean energy sources and undermine efforts to deal with climate change.’<sup>408</sup> Fatih Birol, director of the International Energy Agency further claims that a phase-out of such subsidies could potentially avoid 2.6 gigatonnes of CO<sub>2</sub> by 2035, which could provide around half the emissions reductions needed ‘to reach a trajectory that would limit global warming to 2C, considered the limit of safety by many scientists.’<sup>409</sup> Furthermore neither the cost of global warming resulting from the use of fossil fuels, nor the cost to human health from particulate matter and air pollution are internalised by the polluters and thus emission externalization has

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<sup>405</sup> Rodrik, *supra note* 11, pp.148-149; UNCTAD, *supra note* 310, p. 237, p. 171; Y.-S. Lee, ‘Economic Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in the WTO’, in T. Chantal and J. Trachtman (eds.), *Developing Countries in the WTO Legal System* (Oxford University Press, 2009) pp. 291-319.

<sup>406</sup> WTO, *Proposal on Export Competitiveness*, G/SCM/W/431/Rev.1, 20 March 2001, para. 3. Coppens *supra note* 380, p. 88.

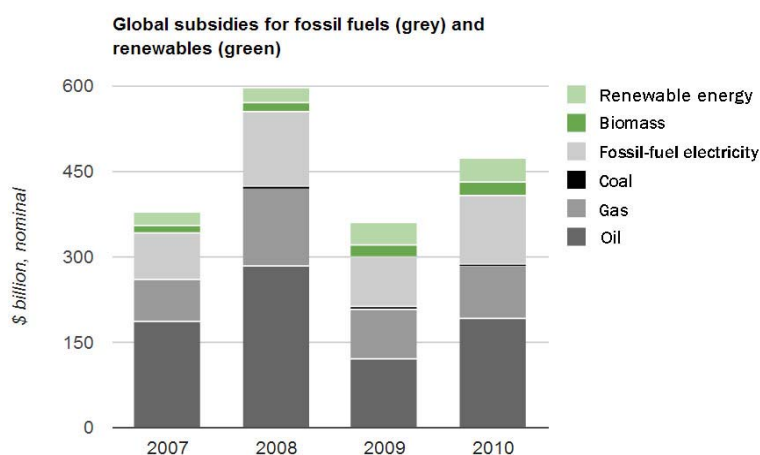
<sup>407</sup> *Ibid*, para. 4.

<sup>408</sup> G20, Leader’s Statement: The Pittsburg Summit, Sept. 24-25, 2009.

<sup>409</sup> D. Clark, ‘Phasing out Fossil Fuel Subsidies Could Provide Half of Global Carbon Target’, *The Guardian*, (19. Jan. 2013), available at: <http://www.theguardian.com/environment/2012/jan/19/fossil-fuel-subsidies-carbon-target>, (last accessed, 22.8.2016).

rightly been characterized by many as an implicit subsidy.<sup>410</sup> In the Paris Climate Agreement, the G7 countries pledged a phase-out of fossil fuel subsidies by 2025, yet the WTO makes no plan for enforcing this. The US subsequently withdrawing from said Agreement furthermore does not indicate any positive steps in changing the *status quo* at the WTO. Currently, because these subsidies neither fulfil the conditions of prohibited nor actionable subsidies under the SCM Agreement they cannot be challenged at the WTO, even if it is a case of dual pricing, where a lower price is set for domestic consumption than the price charged for exported fuel. Pascal Lamy has rightly noted that fossil-fuel subsidy reform and renewable energy incentives are two of the most important contemporary challenges, however the ‘discussion on the reform of fossil-fuel subsidies has largely bypassed the WTO.’<sup>411</sup> It is thus not surprising that fossil fuel subsidies average 400-600 billion US dollars annually worldwide while renewable energy subsidies amounted to 66 billion in 2010 and are predicted to rise to 250 billion annually by 2035.<sup>412</sup>

The below graph shows the absurdity of the situation.<sup>413</sup>



The WTO’s ‘plan’ in terms of climate change mitigation is merely removing trade barriers to environmental goods and services, thereby lowering their prices and making it ‘easier’ for countries to move towards climate-friendly alternatives from carbon intensive technologies. In this context a group of WTO Members are negotiating an Environmental Goods

<sup>410</sup> Committee on Health, Environmental, and Other External Costs and Benefits of Energy Production and Consumption and National Research Council, *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use*, (National Research Council, 2010).; See also J. Stiglitz, ‘A New Agenda for Global Warming’ 13 *The Economists’ Voice*, (2006), article 3, p. 2.

<sup>411</sup> International Institute for Sustainable Development, *Energy Subsidies and the WTO*, (2013) available at: <http://www.iisd.org/gsi/news/energy-subsidies-and-wto>, (last accessed).

<sup>412</sup> ICTSD, *Strengthening the Global Trade and Investment System for Sustainable Development: Subsidies, Clean Energy, and Climate Change*, (ICTSD, 2015) p. 1.

<sup>413</sup> D. Clark, ‘Fossil Fuel Subsidies: a Tour of the Data’, *The Guardian*, (19 Jan. 2012), available at: <http://www.theguardian.com/environment/datablog/2012/jan/18/fossil-fuel-subsidy>, (last accessed, 22.8.2016).



Agreement to lower their trade barriers on a number of important environmental products. The second part of WTOs plan in combating climate change is merely allowing for exceptions to its rules, when the Members voluntarily decide to pursue legitimate environmental policy goals, ‘keeping protectionism firmly in check’<sup>414</sup> however, to prevent countries from using measures for environmental protection simultaneously as a tool to pursue economic development (see detailed discussion in Chapter VI). Arguably this goes against the goal claimed by the WTO which is to create a ‘virtuous circle of trade and environmental policies which promote sustainable production and consumption while being pro-growth and development’; a system in which ‘trade, development and environmental agendas complement each other’.<sup>415</sup> It is further this effort of preventing any advantage from being given to domestic producers, which allows renewable energy programmes to be continuously brought to the DSM. These have included a Canadian feed-in tariff program guaranteeing certain prices to renewable energy facilities; the Indian Jawaharlal Nehru National Solar Mission Program, providing benefits to solar power generators; a number of US states’ and local incentives for renewable energy; Chinese grants, funds or awards to enterprises manufacturing wind power equipment or silicon solar panels and solar glass; as well as some EC renewable energy measures.<sup>416</sup> The reason for the challengeability of these programs is that they are conditioned upon the use of domestic inputs, potentially violating a number of WTO provisions, such as GATT Art. III:4, TRIMS Art. 2.1 and the SCM Agreement. The most recent case at the DSM has resulted in a US victory over India regarding its domestic content requirements concerning solar cells and/or modules used to generate solar power in the initial phases of its ongoing National Solar Mission.<sup>417</sup> In the dispute India argued that the domestic content requirement measures are justified under Art. XX(d) of the GATT, on the grounds that they secure India's compliance with laws or regulations requiring it to take steps to promote sustainable development. India submitted that its ‘international law obligations ... embodied in various international instruments’ are: (a) the Preamble of the WTO Agreement; (b) the United Nations Framework Convention on Climate Change; (c) the Rio Declaration on Environment and Development; and (d) the

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<sup>414</sup> WTO, ‘DDG Brauner Urges Trade Community to build on COP21 momentum and support climate action’, (9 December 2015), available at: [https://www.wto.org/english/news\\_e/news15\\_e/ddgra\\_09dec15\\_e.htm](https://www.wto.org/english/news_e/news15_e/ddgra_09dec15_e.htm), (last accessed: 12.7.2017).

<sup>415</sup> *Ibid.*

<sup>416</sup> T. Meyer, ‘Energy Subsidies and the World Trade Organization’, 12 *ASIL Insights* (2013), UGA Legal Studies Research Paper No. 2013-27, p. 8.

<sup>417</sup> *India – Certain Measures Relating to Solar Cells and Solar Modules*, Report of the Panel, WT/DS456/R (24 Feb 2016).

United Nations General Assembly Resolution adopting the Rio+20 Document: The Future We Want, adopted by the United Nations General Assembly in 2012.<sup>418</sup> However, the Panel considered that international agreements may constitute ‘laws or regulations’ within the meaning of Art. XX(d) only insofar as they are rules that have ‘direct effect’ in, or otherwise form part of, the domestic legal system of the Member concerned and that the instruments identified by India did not meet that standard.<sup>419</sup> Therefore, the Panel found that India failed to demonstrate that the challenged measures were justified under Art. XX(d). In other words the Panel did not allow for sustainable development commitments to trump the liberalisation commitments. In the words of one researcher: ‘[t]he existence of domestic content requirements in renewable energy programs is likely a political condition for passage by governments that wish to show that they are not subsidizing foreign investors.’<sup>420</sup> And why should they not be allowed to gear the necessary expenses for converting from a carbon economy to a green economy towards the growth of their own industry at the same time? As Bill Waren, senior trade analyst at Friends of the Earth, remarks, it is ‘reasonable’ that India would provide some preferences for local producers of solar energy in this process. Such common sense however, unfortunately means nothing in the legal framework of the WTO and because of the *status quo*, instead of investing into green energy innovating, \$700 billion have been invested by companies in 2014 looking for new fossil fuels, even though climate change will reach catastrophic levels if we burn as much as slightly above one fifth of the fossil fuels already dug out of the ground. It is important to note, that India is not one of the countries negotiating for an Environmental Goods Agreement. It prefers to protect its industry and it furthermore perceives this sectoral agreement as merely another cherry picking by developed countries for liberalisation in sectors where they are strong, so that there is nothing left to negotiate on in terms of the DDA in favour of developing countries’.<sup>421</sup> Current rules regulating the subsidisation of energy provide a good example of why an enforceable right to economic development is needed in the system. Bringing into the equation a broad interpretation of said right, the current rules would have to drastically and quickly change. The current level of development attained by most developed countries is to

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<sup>418</sup> *Ibid*, para. 7.269.

<sup>419</sup> *Ibid*, paras. 7.290-7.301.

<sup>420</sup> Meyer, *supra note*, 416, p. 8.

<sup>421</sup> Firstpost, ‘Why India won’t Accept WTO Agreement on IT, environment’, (20 December 2014), available at: <http://www.firstpost.com/business/economy/why-india-wont-accept-wto-agreement-on-it-environment-586883.html>, (last accessed 12.7.2017); WTO Members negotiating the agreement are: Australia; Canada; China; Costa Rica; the EU; Hong Kong, China; Iceland; Israel; Japan; Korea; New Zealand; Norway; Singapore; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; and the United States.

a large extent thanks to a vast degradation of the environment globally, not just in said countries.

Unfortunately, climate change is not karma which would come back and punish strictly those who have created the most pollution. All the models of climate change suggest that developing countries in the equatorial regions of the world will be hit the most, greatly affecting not just their possibilities for development, but their bare livelihoods. And the only ‘punishment’ for the developed world will be when billions of people from the affected regions start migrating North for survival because they will no longer have a place to live, there will be no water and their agricultural systems will be gone. Incorporating and enforcing the right to development (RTD) at the WTO should take all such questions into equation when evaluating current rules. Currently in the development debate historical injustices which have led to the *status quo* are being ignored.<sup>422</sup> An enforceable RTD would hopefully bring them all back on the discussion table. One of the ways it could do that is by declaring the current subsidy rules to be incompatible with the RTD in the sense that they are against the use of certain industrial policies aimed at encouraging economic development but also in the sense that they perpetuate global warming by encouraging fossil fuel consumption and thus inflict disproportionate harm on LDCs. Furthermore WTO intellectual property rules, as much as they inhibit the transfer and dissemination of carbon-reducing, ‘green’ technologies, to developing countries, could further be declared against the RTD for both above mentioned reasons. As in every other area, IP protection here can function as an incentive for research, development, but it may also severely limit the transfer and dissemination of these technologies to developing countries (see chapter V for general discussion). All these rules would thus have to be revised or exceptions to them allowed in the context of enforcing the RTD.

### **10. Is There Still Enough Policy Space for Development?**

On the question of the amount of policy space left for a meaningful pursuit of development, let us look at one example, i.e. that of the automotive industry in Thailand and Malaysia. It is evident that many of the tools heavily used by these two countries in the past to promote the domestic production of vehicles and vehicle components are now prohibited, however other tools which are still allowed have been used since. However the growth in Malaysia has since stagnated while Thailand has become one of the leading countries in automotive producing.

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<sup>422</sup> P. Uvin, ‘From the Right to Development to the Rights-Based Approach: How ‘Human Rights’ Entered Development’, 17 *Development in Practice*, (2007), p. 601.

In the 1960s both countries were in the repair business importing completely built up vehicles (CBU).<sup>423</sup> To move into local automotive assembly industry in collaboration with foreign capital and to develop local content manufacturing for the industry Thailand at first used higher tariffs on CBU vehicles than on completely knocked down kits (CKD).<sup>424</sup> These tariffs kept rising until an import ban was put on CBU passenger vehicles under 2300 cc and a 300% tariff on such vehicles over 2300 cc.<sup>425</sup> Thailand further used LCR with a peak of 72% in 1994 and mandatory deletion programmes, forcing smaller assemblers unable to meet the conditions out of the market.<sup>426</sup> Shifting its policies to become WTO-compliant, Thailand later picked two products (pick-up trucks and Eco-cars) and provided tariff exemptions and tax incentives for consumers, parts suppliers and assemblers regardless of whether they were foreign or domestic, however under the Eco-cars scheme it linked these incentives to local content requirements in 4 out of 5 most important components. These policies are TRIMS compliant.<sup>427</sup>

Malaysia similarly used mandatory deletion programmes (MDPs) and high tariffication of passenger vehicles, however unlike Thailand it also established 2 joint ventures, i.e. Malaysian national car, Proton, between state-owned enterprise and Mitsubishi Motors Corporation and Mitsubishi Corporation as well as Perodua, between Malaysian Firms and Daihatsu Motor.<sup>428</sup> Malaysia further gave US\$ 22 million in subsidies to Proton to create greater linkages with the domestic high-tech component manufacturers as well as supporting industry drastically increasing the numbers of domestic supplier firms.<sup>429</sup> It further gave 50% discount on excise duties and low interest subsidised loans for the purchase of national cars for public servants, possibly in violation of SCM rules.<sup>430</sup> To be WTO-compliant, Malaysia lowered tariffs, removed preferential tariff rates on CKD and preferential excise duties for

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<sup>423</sup> Natsuda, *supra note* 370, pp. 1353, 1355.

<sup>424</sup> F. Adachi, 'Jidosha Sangyo – Konnan na Kokusananka he no Michi' [The Automobile Industry – Obstacles for Localisation Process], in A. Suhehiro, and Y. Yasuda (eds) *Tai no Kogyoka: NAIC he no Cyosen* [Industrialisation in Thailand: Challenge for NAIC], (Tokyo: Institute of Developing Economies, 1987) pp. 256-277 in Natsuda, *ibid*, p. 1353.

<sup>425</sup> Natsuda, *ibid*, p. 1354.

<sup>426</sup> *Ibid*, p. 1353-1354.

<sup>427</sup> G. Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalism – A Critique*, (Zed Books, 1997).

<sup>428</sup> K. S. Jomo, 'The Proton Saga: Malaysian Car, Mitsubishi Gain', in K.S. Jomo (ed.) *Japan and Malaysian Development*, (Routledge, 1994), pp. 263-90; S.Y. Tham, 'Malaysian Policies for the Automobile Sector', in R. Busser and Y. Sadoi (eds) *Production Networks in Asia and Europe*, (Routledge, 2003), pp. 51-70.

<sup>429</sup> K. Abdulsomad, 'Promoting Industrial and Technological Development Under Contrasting Industrial Policies: The Automobile Industries in Malaysia and Thailand', in K.S. Jomo, G. Felker, and R. Rasiah (eds) *Industrial Technology Development in Malaysia: Industry and Firm Studies*, (Routledge, 1999) pp. 274-300.

<sup>430</sup> M. Anazawa, 'Mareisia no Jidosha Sangyo' [The Malaysian Automotive Industry], in D. Hiratsuka (ed.) *Higashi Ajia no Chosen* [The Challenges to East Asia], Chiba, IDE, pp. 295-325, in Natsuda, *supra note* 370, p. 1357.

national producers and abolished LCRs and MDPs.<sup>431</sup> However it implemented a new excise duty system linking refunds to the local content ratio and it further gave subsidies based on this ratio, while providing low interest loans to component manufacturers to enable them to merge and thus survive the effects of the reduction of tariffs.<sup>432</sup>

As mentioned above, Malaysia's automotive industry has remained more or less at the same level of exports since 2002, while Thailand has seen unprecedented rapid growth in vehicle exports. Before declaring it a success story, however, it is important to know that 90% of Thailand's market share is made up of Japanese producers<sup>433</sup> and the component makers are also predominantly Japanese, whereas there has not been much upgrading of the technology and efficiency of domestic suppliers.<sup>434</sup> In Malaysia Proton and Perodua still have leading positions on the market and the component suppliers are predominantly domestic, however they are still having problems in meeting international standards.<sup>435</sup>

While Thailand's ability to attract FDI has been praised one can question the ultimate usefulness of such investment if it brings little development to domestic component manufacturers. In this respect one has to distinguish between measuring economic performance by Gross Domestic Product (GDP) and Gross National Income (GNI). GDP measures the value of all goods/services created within a state, while GNI measures income which stays within a country or is imported into it by its nationals, but not income exported out of the economy by MNCs.<sup>436</sup> If production in a state is dominated by foreign MNCs with little trickle-down to local business and the state is home to a few investors with offshore activities, its GNI will lag significantly behind its GDP. In such a situation, GDP is an over-optimistic indicator of the state's economic performance.<sup>437</sup> Furthermore if tomorrow conditions for investment are even better in another country the MNCs can pack up their business and leave with little left behind.

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<sup>431</sup> Natsuda, *ibid*, p. 1359.

<sup>432</sup> J. Onozawa, 'Malaysia Jidosha Sangyo no Jiyuka to Nihon niyuru Jidosha Sangyo Kyoryoku' [Liberalization of the Malaysian Automobile Industry and Japan's Industrial Cooperation], Kokusai Boeki to Toshi [International Trade and Investment], (2008) 74; 41-59; MACPMA Malaysian Automotive Component Parts Manufacturers Directory 2008/2009, Kuala Lumpur: Malaysian Automotive Component Parts Manufacturers Association (2008); in Natsuda, *supra note* 370, p. 1360.

<sup>433</sup> Fourin, *Ajia Jidosha Sangyo* [The Automobile Industry in Asia] Nagoya: Fourin, (2011), pp. 198, 244 in Natsuda, *supra note* 370, p. 1362.

<sup>434</sup> R. Doner, *The Politics of Uneven Development: Thailand's Economic Growth in Comparative Perspective* (Cambridge University Press, 2009), ch. 7; L.S. Lauridsen, 'The Policies and Politics of Industrial Upgrading in Thailand during the Thaksin Era (2001-2006)', 1 *Asian Politics and Policy*, (2009) pp. 409-34

<sup>435</sup> R. Rasiah, 'Trade-related Investment Liberalization under the WTO: The Malaysian Experience', 34 *Global Economic Review*, (2009) pp.453-71.

<sup>436</sup> Joseph, *supra note* 125, p. 163.

<sup>437</sup> *Ibid*.

Both countries would have been better off keeping LCRs and MDPs however coupled with WTO-compliant tax incentives and more importantly R&D investment in the components industry and investment conditionalities demanding the sharing of technology by the foreign assemblers. One of the biggest obstacles for Proton's development has been its reliance on Mitsubishi for technology in a TRIPS-compliant manner. Mitsubishi's high licensing fees and a reluctance to share latest technologies<sup>438</sup> forced Proton to search for access to such technologies elsewhere at high expenses and with unsuccessful results in order to avoid TRIPs non-compliant activities.<sup>439</sup> This brings us to the questions of IP protection and arguably one of the biggest problems posed by the WTO to developing countries' policy space, i.e. the protection of intellectual property under the WTO, discussed in chapter V.

Although some studies have doubted the positive impact of LCRs on economic growth generally<sup>440</sup> one should not over-generalize. Certainly all circumstances have to be taken into account, such as how much restrictions can a country put on FDI before it starts jeopardising its entry into the market and what other measures it is taking to ensure the technological development of the component industries, before LCRs can have a good chance at spurring economic development and growth in the long run. Some have suggested that more useful than LCRs would be to directly subsidize the downstream industry or provide subsidies for FDI in this industry.<sup>441</sup> However it is hard to find a justification as to why both approaches could not be taken at the same time, i.e., LCRs for FDI, coupled with direct subsidization and R&D in the downstream industry, which might give the best results. Furthermore, direct subsidisation of domestic manufacturers is not an economically feasible option for developing countries with limited resources.<sup>442</sup>

In the opinion of Professor Rodrik, industrial policy is a 'state of mind more than anything else', meaning that as long as there is some policy space left, the instrument or modality of intervention is not essential, as long as one can identify which are the areas which necessitate intervention<sup>443</sup> That being said, he also recognizes that 'the pendulum between policy autonomy and international rules may have swung too far in the direction of the latter in recent trade rounds' especially in terms of the SCM Agreement and its prohibition on export subsidies and the TRIPS Agreement's prohibition of copying and reverse-engineering (see

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<sup>438</sup> Jomo, *supra note* 428.

<sup>439</sup> Fourin *supra note* 433.

<sup>440</sup> T. H. Moran, E. M. Graham, and M. Blomström (eds.), *Does Foreign Direct Investment Promote Development?* (Institute for International Economics, 2005).

<sup>441</sup> Coppens, *supra note* 380, p. 96.

<sup>442</sup> *India – Solar Cells*, Panel Report, para. 7.375; India's first written submission, para. 236, subheading (iv).

<sup>443</sup> Rodrik, *supra note* 310, p. 38.

chapter V).<sup>444</sup> In conclusion, there is still some policy space available for the pursuit of development and it goes without saying that it should be used wisely by developing countries. However the law of the WTO does overly restrict policy space in many aspects and there is further a tendency towards more restriction and lesser SDT. Furthermore the liberal narrative makes developing countries reluctant to use the remaining policy space, as does the fear of being brought before the DSM or suffering other repercussions.

In other words the ladder is still there, however with only half the rungs remaining most of which are being slowly sawed off, while others will give you an electric shock if you step on them and you do not know which ones they are, and all the while there is someone standing next to the ladder telling you it is unwise to climb it at all.

### **11. Limitations of SDT in Market Access for Developing Countries' Products**

The analysis below turns to the question of market openings for goods of importance to developing countries. The current framework at least officially embraces an asymmetrical liberalisation where developed countries open up unilaterally without developing countries having to reciprocate, however this has proved to be far less ideal in practice than it sounds in theory.

In 1964 the GATT adopted Part IV: Trade and Development, which was the first time it addressed development considerations in three new articles, XXXVI to XXXVIII.<sup>445</sup> The Principles and Objectives elaborated on in Art. XXXVI recognize the wide gap between standards of living in less-developed countries and other countries and recall that the basic objective of the GATT is raising those standards and the progressive development of the economies of all contracting parties.<sup>446</sup> They further recognize the essential need for individual and joint action to further the development of less-developed contracting parties and the need for international trade rules to be consistent with these objectives.<sup>447</sup> The article elaborates on the need for the expansion of the export earnings of developing countries and to secure their share in the growth in international trade.<sup>448</sup> This is to be achieved through more favourable and acceptable conditions of access to world markets for products of export interest to developing countries and the stabilization of these markets.<sup>449</sup> Furthermore to

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<sup>444</sup> *Ibid*, p. 35.

<sup>445</sup> Protocol amending the General Agreement on Tariffs and Trade to introduce a Part V on Trade and Development and to amend Annex I (Geneva, 8 February 1965; 572 UNTS 320).

<sup>446</sup> GATT, Art. XXXVI, para. 1 (a)(c).

<sup>447</sup> GATT, Art. XXXVI, para. 1 (d)(e).

<sup>448</sup> GATT, Art. XXXVI, para. 2, 3.

<sup>449</sup> GATT, Art. XXXVI, para. 4.

enable the necessary diversification of the economies of less-developed Members a need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products from these countries is recognized.<sup>450</sup> Also stressed is the need for close and continuing collaboration between the contracting parties and the international lending agencies so that they can contribute most effectively to alleviating the burdens the less-developed contracting parties assume in the interest of their economic development.<sup>451</sup> Paragraph 8 states that ‘developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties’. However the adoption of measures to give effect to these principles and objectives shall be merely a matter of conscious and purposeful effort on the part of the contracting parties.<sup>452</sup>

Art. XXXVII then states the commitment of developed countries to pursue these objectives and claims that they ‘shall to the fullest extent possible — that is, except when ‘compelling reasons’, which may include legal reasons, make it impossible — give effect to the following’:

- a) Accord high priority to the reduction and elimination of barriers to products of export interest to developing Members, including restrictions which differentiate unreasonably between products in their primary and in their processed forms.
- b) Refrain from introducing or increasing import barriers to such products
- c) According high priority to the reduction and elimination of fiscal measures which hamper the growth of consumption of primary products, in raw or processed form developing countries<sup>453</sup>

The article further allows for the reporting of situations when it is considered that effect is not being given to any of these commitments<sup>454</sup> followed by consultations, if requested, with the contracting party concerned and all interested parties with a view to reaching a satisfactory solution.<sup>455</sup>

Developed country Members are also required to make every effort, in cases where a government directly or indirectly determines the resale price of products from developing countries, to maintain trade margins at equitable levels<sup>456</sup>; give consideration to adopting measures designed to provide greater scope for the development of imports from these countries and collaborate in appropriate international action to this end<sup>457</sup>; and have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.<sup>458</sup>

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<sup>450</sup> GATT, Art. XXXVI, para. 5.

<sup>451</sup> GATT, Art. XXXVI, para. 6.

<sup>452</sup> GATT, Art. XXXVI, para. 9.

<sup>453</sup> GATT, Art. XXXVII para. 1.

<sup>454</sup> GATT, Art. XXXVII para. 2.

<sup>455</sup> GATT, Art. XXXVII para. 2(b).

<sup>456</sup> GATT, Art. XXXVII para. 3(a).

<sup>457</sup> GATT, Art. XXXVII para. 3(b).

<sup>458</sup> GATT, Art. XXXVII para. 3(c).



Also, these articles are littered with declaratory, best endeavour statements, such as ‘making every effort’ or ‘having special regard to’ rather than obligatory provisions and as such do not appear to trigger any legal obligation. Apart from the ability to report and request consultations there is no enforcement mechanism backed by effective sanctions. It is therefore doubtful if these articles have affected the policies of developed countries in any significant way at all.<sup>459</sup>

However, here also, an interpretation has been suggested that would give mandate to the GATT parties to act towards the objectives of increasing trade from developing countries, as it would be unreasonable or ‘manifestly absurd’ to suppose that the parties intended no legal obligations to flow from the addition of an entire part to a treaty.<sup>460</sup> Yet it has also been acknowledged that any claim to give more legal force to the provisions of Part IV may seem spurious, considering how little relevance it has had to date and states’ practice is unlikely to evolve for political reasons, not to mention that during the drafting of Part IV, it was not considered ‘binding’.<sup>461</sup> At the same time it would be premature to shelve these provisions entirely, since some renewed interest has appeared on the part of China raising development arguments under Part IV in recent disputes.<sup>462</sup>

Another problem is that regardless of the nature of the commitments, these can be disregarded for ‘compelling reasons’ which includes the option of simply legislating against them in domestic legal systems.

It is also important to note, that although recognizing and covering many important considerations for development for the first time since the failure of the ITO Charter, these provisions remained subordinate to a narrow perspective on trade liberalization.<sup>463</sup> In effect, developing countries did not gain any additional opportunity to derogate from GATT obligations for developmental reasons or a duty for developed countries to make additional concessions to them, however it did include for the first time, the principle of non-reciprocity (see below).<sup>464</sup>

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<sup>459</sup> Lee, *supra note 127*, p. 114; T. N. Srinivasan, *Developing Countries and the Multilateral Trading System*, (Westview, 1998); J. W. Evans, *The Kennedy Round in American Trade Policy: The Twilight of the GATT?* (Cambridge University Press, 1971), p. 121.

<sup>460</sup> Rolland, *supra note 5*, pp. 126-127; Vienna Convention on the Law of Treaties, Art. 32: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is *manifestly absurd or unreasonable*, emphasis added.

<sup>461</sup> *Ibid*, pp. 70, 126-127.

<sup>462</sup> Rolland, *supra note 5*, p. 128.

<sup>463</sup> *Ibid*, p. 62.

<sup>464</sup> *Ibid*, p. 70.

### **a) Limited Reciprocity**

At the insistence of developing countries that they were unable to make the same level of concessions as their developed counterparts, non-reciprocity was introduced. In the Tokyo round this meant that the new agreements would only bind those parties that specifically opted into them, thus giving developing countries more flexibility. They were thus able to retain policy space, for example in government procurement. However this flexibility came at a price, i.e. developing countries could also not gain important concessions, as in the logic of the mercantilist GATT/WTO ‘getting something for nothing is not really an option, which strips non-reciprocity of its value as a flexibility instrument.’<sup>465</sup> The same system with the same problems seems to be the way forward after the last ministerial re-introduced variable geometry in terms of Members’ obligations. The other aspect of non-reciprocity are generalized system of preferences schemes described below.

### **b) Generalized System of Preferences**

A mixture between allowing policy space while still opening up foreign markets for developing country products is the Generalized System of Preferences (GSP) which allows for the exemption from the more general rules of the WTO, such as the most favoured nation principle for the purpose of lowering tariffs for developing countries without lowering them also for rich countries. Arguably the best SDT in principle, it nevertheless proved less than ideal in practice due to its several limitations.

The concept of preferential tariff rates for developing countries in the markets of industrialized countries was first introduced in 1964 by Raul Prebisch, the first Secretary-General of the UNCTAD at its first session and adopted in New Delhi in 1968 at UNCTAD II under the title of Generalized System of Preferences (GSP) with the objective of increasing the export earnings, industrialization and economic growth of developing countries.<sup>466</sup> The UNCTAD observed that the MFN rule had been discouraging richer countries from reducing tariffs or other trade restrictions for developing countries because they would then have to do the same for everyone else.

In 1971, ‘recognizing that a principal aim of the contracting parties is promotion of the trade and export of developing countries for the furtherance of their economic development’ and ‘recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-

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<sup>465</sup> *Ibid*, p. 111.

<sup>466</sup> UNCTAD, Resolution 21 (ii), II Conference in New Delhi (1968).

discriminatory preferences beneficial to the developing countries<sup>467</sup> the GATT enacted two waivers to the MFN principle which permitted that ‘without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties... to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment... without according such treatment to like products of other contracting parties.’

Later, the Contracting Parties decided to adopt the 1979 Enabling Clause,<sup>468</sup> entitled "Differential and more favourable treatment, reciprocity and fuller participation of developing countries", creating a permanent waiver to the most-favoured-nation clause to allow preference-giving countries to grant preferential tariff treatment under their respective GSP schemes. The enabling clause was seen as the first instance of ‘real’ preferential treatment for developing countries, even though it was expected that they would ‘reciprocate appropriately’ for it in future rounds.<sup>469</sup>

As the name suggests, this ‘enables’ developed countries to provide preferences but does not oblige them to do so. The fact that these schemes can be withdrawn with no consequences for the developed countries which are providing them, has given these countries the power to manipulate such schemes ‘to secure desirable outcomes for the importer rather than the intended beneficiary, the exporter.’<sup>470</sup> Similarly to aid, the threat of removal of GSP schemes has been used to pressure developing countries into accepting duties they otherwise would not have accepted. In this manner the US has threatened to remove its preference for states that do not apply TRIPS plus standards.<sup>471</sup> As Rolland observes, the cost of playing the GSP card has been substantial for developing countries both in terms of their bargaining power within GATT/WTO and the impact of these schemes on their domestic policies.<sup>472</sup>

Developed countries can further put requirements on any preferences granted and these requirements discriminate between developing countries sometimes in a very controversial way. For example the way the EC accorded tariff preferences based on the recipient country (i) combating drug production and trafficking and (ii) their protection of labour rights and the environment; denying it to all other developing countries. This was however successfully

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<sup>467</sup> Waiver, Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24.

<sup>468</sup> Decision of the Contracting Parties of 28 November 1979 (26S/203).

<sup>469</sup> Y. A. Abdulqawi, ‘“Differential and More Favourable Treatment”: The GATT Enabling Clause’, 14 *Journal of World Trade Law*, p. 488.

<sup>470</sup> Joseph, *supra note* 125, p. 148.

<sup>471</sup> Shadlen, *supra note* 109.

<sup>472</sup> Rolland, *supra note* 5, p. 71.

challenged by India at the DSM where the Appellate Body concluded that, in granting differential tariff treatment, preference-granting countries are required, by virtue of the term ‘non-discriminatory’, to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the same ‘development, financial and trade needs’ to which the treatment in question is intended to respond.<sup>473</sup>

There are currently 13 national GSP schemes notified to the UNCTAD secretariat. For example, the EU sets out its GSP schemes in ten-year cycles. Currently 176 developing countries and transitional economies are included in its Generalised Scheme of Preferences (EU GSP). Out of these, 101 countries fall under the standard EU GSP scheme, which offers a partial or entire removal of tariffs on two thirds of all product categories; 16 countries are included in the GSP+, which offers a full removal of tariffs on essentially the same product categories, based on the willingness of the benefiting country to ratify and implement international conventions relating to human and labour rights, environment and good governance; while 49 LDCs are benefiting from the Everything But Arms (EBA) scheme, which grants duty-free quota-free (DFQF) access to all products, except for arms and ammunitions.<sup>474</sup> Other countries granting GSP preferences are: Australia, Belarus, Bulgaria, Canada, Estonia, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the US.<sup>475</sup>

It is important to note however that the preferences have little impact on the beneficiaries if their main exports already have duty-free access. With tariffs falling rapidly in general, DFQF access does not present as much benefits as would improvements in tackling non-tariff barriers such as sanitary and phytosanitary measures, technical barriers to trade, safeguards and the above mentioned rules of origin.<sup>476</sup> Even more importantly, LDCs cannot benefit if their main exports do not enjoy duty-free access already, but are nevertheless left out of the preference schemes. The LDCs portfolio of exports is normally very limited, therefore a less than 100% coverage ‘is of little practical use’.<sup>477</sup> The EBA is a welcome departure from the normal practice of states excluding goods of the greatest interest to developing Members

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<sup>473</sup> *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body, WT/DS246/AB/R, paras. 163-165.

<sup>474</sup> EU Generalised Scheme of Preferences, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/>, (last accessed: 22.8.2016).

<sup>475</sup> UNCTAD: About GSP, available at: <http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx>, (last accessed 22.8.2016), emphasis omitted.

<sup>476</sup> Y. Basnett, ‘WTO Bali Declaration: what does it mean?’, *Shaping Policy for Development*, Comment available at: <http://www.odi.org/comment/8056-wto-bali-declaration-least-development-countries-trade-facilitation-agriculture-doha-round>, (last accessed, 22.8.2016).

<sup>477</sup> *Ibid.*

from GSP schemes, however even this scheme used exclusions for a long period of time.<sup>478</sup> It set out to cover at least 97% of the tariff line items from LDCs to have DFQF access by 2008, however implementation was stalled because agreement could not be reached on the determination of the 3% which would be excluded.<sup>479</sup> Even with only a 3% exclusion, large volumes of LDC exports can be precluded from enjoying preferential access, since their exports are not diversified, especially if the designating of the 3% is specific to each LDC, rather than applying it across the board to all of them.<sup>480</sup> Similarly the US excluded 3% of tariff lines for each country differently. This has been dubbed the ‘EBP’ or ‘everything but what LDCs produce’ initiative, since agricultural products, processed food and textiles could all be excluded.<sup>481</sup> For example in the case of Bangladesh, the 3% exclusion could cover its top twelve tariff lines exported to the US which accounted for 59.7% of the total value of its exports to this country; for Cambodia this would be 62% of its trade to the US.<sup>482</sup>

For those LDCs with exports that could substantially benefit from the schemes another obstacle has been posed by the cumbersome rules of origin (RoO). These determine whether goods from LDCs may or may not enjoy preferential treatment based on how much processing has to actually happen in a LDC for a good to qualify. The RoO of particular countries determine the criteria differently and they pose substantial administrative and compliance costs on the LDCs in terms of proving that the production of the product took place in a LDC thus they have been suspected to be the main cause of the low percentage of requests (only 50% of non-ACP LDCs) for preferential access to the EU under the EBA.<sup>483</sup> LDCs have long been demanding that RoO be harmonized and made more flexible. As mentioned above, the Bali package addressed both the rules of origin and the percentage of goods covered in the preference schemes, however in both instances developed countries were again only urged to make necessary reforms, with no actual obligation to do so. It was promised that those developed countries that do not yet provide DFQF market access for at least 97% of tariff lines exported from LDCs, ‘shall seek to improve’ their existing coverage,

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<sup>478</sup> Joseph, *supra note* 125, p. 147.

<sup>479</sup> Rolland, *supra note* 5, p. 99.

<sup>480</sup> *Ibid.*

<sup>481</sup> J. Stiglitz and H. Rashid, ‘Making a Travesty of Free Trade’, (2006) available at: <http://agoa.info/news/article/3834-making-travesty-of-free-trade.html>, (last accessed, 22.8.2016).

<sup>482</sup> *Ibid.*

<sup>483</sup> P. Brenton, ‘Integrating the Least Developed into the world trading system: the current impact of EU preferences under Everything but Arms’, Policy Research Working Paper No. 3018, (World Bank, 2003); S. Laird, ‘A Review of Trade Preference Schemes for the World’s Poorest Countries’, International Centre for Trade and Sustainable Development Programme on Competitiveness and Development; Issue Paper No. 25, ICTSD, 2012) p. 53; O. Cadot and J. de Melo, ‘Why OECD Countries Should Reform Rules of Origin’, 23 *World Bank Research Observer* (2008); P. Collier, *The Bottom Billion*, (Oxford University Press, 2008) p. 169; Stiglitz, *supra note* 235, p. 181.

whereas developing countries, declaring themselves in a position to do so, 'shall seek to provide' DFQF market access for such products, or if they are already providing it 'shall seek to improve' their existing coverage.

Members were instructed to notify their DFQF schemes pursuant to the Transparency Mechanism for Preferential Trade Arrangements and The Committee on Trade and Development would continue to annually review the steps taken and report to the General Council for appropriate action, while the Secretariat would prepare a report on DFQF access for LDCs based on their notifications. The General Council was further instructed to report, including any recommendations, on the implementation of this Decision to the next Ministerial Conference. Thus apart from the procedural improvements and a call to those that have not yet provided a 97% DFQF access, to do so, the commitment was not extended to the 100% necessary to make a substantial difference.

Nairobi on the other hand brought an important progress in terms of RoO, allowing 75% of the final value of export products to contain materials not originating from a LDC to still qualify for preferential treatment and furthermore introducing relaxed administrative requirements. Most importantly preference-giving Members also agreed to grant standard preferential treatment, finally addressing the problem of variable preference giving.<sup>484</sup>

Current GSP schemes hardly make full use of the potential provided by the GSP waivers, however in the opinion of UNCTAD itself 'Even the most generous market access enhancements alone may not be sufficient to strengthen the links between trade and development in the poorest countries in the world.'<sup>485</sup> This is mainly due to supply-side factors, rather than limitations on market access which resulted from the longterm existence of unfair rules and three to four times higher tariffs imposed on low-income developing country exports.

A study of potential gains from expanded country and product coverage, as well as a deepening of the preferences (where the preferential rate is non-zero) has estimated an overall increase in LDC exports to the markets it analysed at 2.9 per cent, with important variations across these markets.

For example, in the Canadian and EU markets the increase is very small but positive. This is also the case for China, where the rates facing LDCs are very low on average. However, LDCs could make important increases in exports to the Indian, Korean and US markets – 21.7 percent, 12.9 per cent and 11.8 percent, respectively – a combined increase of over US\$5 billion. With regard to the US market, Bangladesh, Cambodia and Haiti stand to gain

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<sup>484</sup> WTO, *Draft Decision – Preferential Rules of Origin for Least Developed Countries*, WT/MIN(15)/W/38, agreed 19 December 2015.

<sup>485</sup> UNCTAD, 'Duty and Quota Free Market Access for LDCs: An Analysis of Quad Initiatives', (UNCTAD, 2001).

the most as they currently face MFN tariffs on a substantial proportion of their textiles and clothing exports. Malawi would also benefit (mainly tobacco). There are few losses (less than 2 percent), notably for Lesotho and Madagascar, most likely linked to trade diversion in textiles and clothing to Asian LDCs.

In short, there is still much to be gained if developed countries improve the existing market access by completely eliminating tariffs for LDCs products. The impact would be even great if non-tariff measures affecting access were also addressed.<sup>486</sup> These results are similar to those of other recent studies<sup>487</sup> and indicate that there is still much to be gained by improving the existing market access for LDCs products, however this would have to be coupled also with addressing the non-tariff measures affecting the access.

## **Conclusion**

Negotiations between countries have always brought results in line with the interests of the most powerful among them. At the WTO one can however further talk about the better organized, better represented and more consistent states versus the seemingly more confused, mislead, under-represented and unorganized ones. Despite coalitions being formed at the WTO, there is still not enough unity between developing countries at the negotiations. This is hardly surprising in situations where larger and stronger developing countries do not share the same interests or concerns with smaller low-income countries; however this is not always the reason for a lack of unity.

For example, at the 8<sup>th</sup> Ordinary Annual Meeting of the Conference of African Union Ministers of Trade held in Addis Abeba, a declaration was issued which strongly objected to ‘any attempt to link non-trade issues or add new issues to the DDA, before development issues such as agriculture (including cotton), LDC issues, SDT and implementation related concerns are satisfactorily addressed and the DDA is fully exhausted and successfully concluded’. The declaration, wholly agreed to by African countries in preparation for the Bali Ministerial, was outright ignored at Bali, where the same countries accepted a package that clearly runs counter to the declaration, not to mention what happened with the DDA at Nairobi.<sup>488</sup> At least where their interests conform, developing countries should strive to be

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<sup>486</sup> Laird, *supra note* 483, p. 53.

<sup>487</sup> K. A. Elliott, ‘Open Markets for the Poorest Countries - Trade Preferences That Work’, (Center for Global Development, 2010); A. Bouët, D. Laborde and S. Mevel, ‘What Can Least Developed Countries Really Expect from the Doha Development Agenda?’ (2008), available at SSRN: <http://ssrn.com/abstract=1162941> , (last accessed, 22.8.2016); D. Laborde, ‘Looking for a Meaningful Duty Free Quota Free Market Access Initiative in the Doha Development Agenda,’ International Centre for Trade and Sustainable Development, Geneva, Issue Paper No. 4, (ICTSD, 2008).

<sup>488</sup> *Supra note* 79, p. 4.

more prepared to put up a unified front against undesirable rules and for the achievement of what they want to get out of the negotiations. Before developing countries can stand as one at the WTO, however, they need to set firm development agendas at home. As one commentator describes:

Lack of institutionalisation of trade policy by African countries is also a great setback to efforts by Africa to remain on point as far as trade negotiations are concerned. As developed countries and blocs of countries like the US and the EU have trade policy entrenched in their development agenda and so whether governments, ministers and negotiators change or not keep to their 'regional or national strategies' African countries keep vacillating or at best change their policies at will depending on who is in control.<sup>489</sup>

All that being said, it is questionable whether better organised, stronger and more consistent developing countries' coalitions could have made any significant difference considering the above mentioned threat by the developed countries to abandon the enterprise altogether when developing countries' coalitions demand too much.

Current results of the negotiations clearly show a lack of meaningful SDT for developing countries which would have safeguarded the necessary policy space for their development, their pursuit of diversification and to be able to venture out of their current comparative advantage into more technologically advanced and beneficial areas. At the same time allowance is still made for developed countries' protectionism while past and present constraints placed on external market access against developing countries reveal the profit maximising approach to negotiations rather than a desire to provide for meaningful opportunities for developing countries to pursue export-led development.

This goes to the heart of the legitimacy gap claim of this thesis both in terms of the lack of democratic legitimacy as well as the legitimacy of substantive rules, both of which are inevitably and intrinsically linked to one another.

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<sup>489</sup> *Ibid*, p. 8.



## Chapter V

# THE ILLEGITIMACY OF IP PROTECTION UNDER THE WTO IN LIGHT OF IMPLICATIONS FOR TECHNOLOGICAL DEVELOPMENT

### Introduction

Technological capabilities of a country determine its level of industrialisation, success in export activity and the sophistication of the production and export structures.<sup>2</sup> In other words ‘a prerequisite for sustainable development in any country is the development of an indigenous scientific and technological capacity.’<sup>3</sup> One cannot stress enough the importance of the possession of superior knowledge when it comes to true development, especially in the current world economy. There are several determinants of successful technological capability building. Arguably the main reason for the wide gap between the scientific and technological capabilities of states is their availability of resources to support research and development (R&D). The US remains the world’s largest R&D investor with around \$465 billion spending in 2014, which equals around 2.8% of US GDP.<sup>4</sup> Not only is manufacturing innovation directly being subsidised<sup>5</sup> but spillovers of innovation and technology from other areas, such as the US defence industry, the largest benefiter of investment into research, have long benefited civilian industries such as information technology and aviation.<sup>6</sup> China has recently

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<sup>1</sup> On June 14, 2014, Tesla Motors CEO Elon Musk, referencing the phrase from popular culture ‘All your base are belong to us’ announced in a blog post titled "All Our Patent Are Belong To You" that the company would open source their various patents and would not initiate patent lawsuits against anyone who, in good faith, wanted to use their technology.

<sup>2</sup> S. Lall, *Indicators of the Relative Importance of IPRs in Developing Countries*, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 3, (ICTSD, 2003), p.19.

<sup>3</sup> Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights*, (2002), p. 20.

<sup>4</sup> ‘2014 Global R&D Funding Forecast’, *Battelle and R&D Magazine* (December 2013) available at: [http://www.battelle.org/docs/tpp/2014\\_global\\_rd\\_funding\\_forecast.pdf](http://www.battelle.org/docs/tpp/2014_global_rd_funding_forecast.pdf), (last accessed, 22.8.2016), p. 4.

<sup>5</sup> J. F. Sargent Jr., Congressional Research Service, Federal Research and Development Funding: FY2013, CRS Report Prepared for Members and Committees of Congress, December 5, 2013, available at: <https://www.fas.org/sgp/crs/misc/R42410.pdf>, (last accessed, 22.8.2016).

<sup>6</sup> S. Joseph, *Blame it on the WTO: A Human Rights Critique*, (Oxford University Press, 2011), p. 162. p. 156; J. E. Stiglitz, A. Charlton, *Fair trade for All, How Trade Can Promote Development*, (Oxford University Press, 2005), p. 131, H.-J. Chang, *Kicking, Away the Ladder: Development Strategy in Historical Perspective*, (Anthem Press, 2002), p. 31.

surpassed Japan for the number two position in funding R&D aiming at a 2.2% of GDP investment by 2015.<sup>7</sup> Together with the EU, they spend nearly 80% of the total \$1.6 trillion invested in R&D around the world.<sup>8</sup> Needless to say, most developing countries cannot compete with such investments. Another very important element in building scientific and technological capabilities is of course education, which is also largely dependent on the availability of resources of states. Last but not least, however, the ability of developing countries to progress technologically and eventually catch up with developed countries is dependent both on the industrial policy still allowed as well as the international intellectual property (IP) regimes in place.

When opening their domestic markets to trade, developing countries exposed themselves to political and economic pressure to protect foreign IP, which has resulted in the ‘odd scenario of developing countries financing not just or primarily their own growth, but promoting the economic growth of developed countries, possibly to the detriment of their own economic development.’<sup>9</sup> The cost of paying royalties and licensing fees that intellectual property rights (IPR) protection requires for the use of IP, may more than offset gains in potential to increase foreign direct investment (FDI).<sup>10</sup> Three main negative points of over-protecting IP is that it drains developing countries’ scarce resources; renders cutting-edge technologies inaccessible and prevents the development of local industries.<sup>11</sup> The Marrakesh Agreement establishing the WTO included in its single undertaking the controversial Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) with important implications for developing countries in various aspects, including their technological advancement.

This chapter critically examines whether intellectual property protection under the WTO negatively affects essential policy space necessary for technological development, including technology transfer and whether this contributes to WTO’s legitimacy gap. The chapter outlines how the TRIPS Agreement has substantially strengthened IP protection and what this means for the policy space of developing countries in their pursuit of technological advancement and the upgrade of their productive structure. It analyses the theory behind strong IP protection domestically and internationally and evaluates its main claims in terms

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<sup>7</sup> Sargent, *supra note 5*, p. 5.

<sup>8</sup> *Ibid*, p. 4.

<sup>9</sup> R. L. Ostergard, Jr. ‘Economic Growth and Intellectual Property Rights Protection: A Reassessment of the Conventional Wisdom’, in D. J. Gervais, (ed.), *Intellectual Property, Trade and Development, Strategies to Optimize Economic Development in a TRIPS Plus Era*, (Oxford, 2007), p. 155.

<sup>10</sup> *Ibid*, p. 141.

<sup>11</sup> T. K. Giunta and L. H. Shang, ‘Ownership of Information in a Global Economy’, 27 *George Washington Journal of International Law & Economics* (1993).

of benefits to innovation and technology transfer (TT). It further looks at the history of IP protection in order to highlight the fact that much like free trade, countries have introduced stronger protection of IP mostly after a certain level of development had already been achieved, whereas the protection of foreigners' IP rights had been delayed for even longer. The chapter considers the different channels of potential technology transfers and aims to evaluate how IP protection impacts each of them and whether the positive impacts on some channels justify the negative impacts on others or whether developing countries should be essentially left alone to devise their own IP strategies instead of the WTO imposing a strict and non-discriminatory IP protection scheme on them. Finally it looks at whether the flexibilities under TRIPS can help developing countries regain necessary policy space.

The main argument is that historically, theoretically and empirically speaking IP protection can have opposite effects on innovation and technology transfer, depending on several factors and it is essential for developing countries to retain maximum flexibility in applying a policy which suits their particular situations. Taking away such policy space with the TRIPS Agreement thus unnecessarily curtails the ability of pursuing economic development and can be perceived as adding to WTO's legitimacy gap. Furthermore the negotiations and the events leading up to them show the absolutely undemocratic origins and nature of the push for the intellectual property protection at the WTO which was based solely on special interests in developed countries.

### **1. The TRIPS Agreement**

The TRIPS Agreement has become one of the most important agreements of the WTO, even though its predecessor GATT contained only a few IP provisions.<sup>12</sup> TRIPS encompasses almost all types of intellectual property rights (IPR) from copyright and related rights, trademarks, geographic indications, industrial designs, patents, layout designs (topographies) of integrated circuits, and the protection of undisclosed information.<sup>13</sup> Yet the 'biggest money in intellectual property is in the protection of inventions, via patents, sought by companies in technology, bio-technology, pharmaceuticals and related fields.'<sup>14</sup> It is exactly this part of

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<sup>12</sup> General Agreement on Tariffs and Trade, October 30, 1947, 58 U.N.T.S. 187 Can.T.S. 1947 No. 27 (entered into force January 1, 1948) (hereinafter GATT), Art. XX(d), XII.3(iii), XVIII.10, IX.6.

<sup>13</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (hereinafter TRIPS), Art. 9-39; however, authors' moral rights, utility model protection, and protection against unfair competition are left to individual Members' legislation.

<sup>14</sup> L. Crump and D. Druckman, 'Turning Points in Multilateral Trade Negotiations on Intellectual Property', 17 *International Negotiation*, (2012), p.12.

intellectual property rights protected by TRIPS and other laws and agreements that is most relevant to technological development and will be the focus here.

TRIPS introduced so-called minimum standards of protection, which have significantly strengthened IPRs in comparison to previous international treaties such as the Paris Convention for the Protecting of Industrial Property (1883) or the Berne Convention for the Protection of Literary and Artistic Works (1886). Under the Paris Convention, countries were allowed to determine the duration of patents and they could also revoke them, plus they could exclude chosen fields of technology from protection. TRIPS has drastically restricted policy space – precluding or at least seriously complicating the use of many instruments historically used to manage knowledge and technology.<sup>15</sup> With TRIPS there has been a widening of exclusive rights; the extension of duration of protection, i.e. at least 20 years counted from the filing date; a legal recognition of the patentee's exclusive rights to import the patented products; a strengthening of the enforcement mechanism; patent rights are enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced; virtually all fields of technology have become patentable, including such areas as software, pharmaceuticals, agriculture, chemicals, food, and micro organisms where most developing countries previously used to provide no or little patent protection; and new restrictions have been placed on the state's ability to issue compulsory licences.<sup>16</sup> Furthermore it has brought a number of new obligations in relation to geographical indications, trade secrets, and measures governing how IP rights should be enforced both domestically and at national borders. The increase in IP protection after TRIPS was especially sharp in developing countries, which generally were given until 2000 to comply with the Agreement.<sup>17</sup> In the case of least developed countries (LDCs), these were granted a far longer implementation period, firstly set as ending on 1<sup>st</sup> January 2006, but later extended to July 2013, and until 1 January 2016 for pharmaceutical patents. Further extensions were granted in 2015 postponing the obligation to implement patents for pharmaceuticals until January 2033. On the other hand the general special and differential treatment (SDT) transition periods were not just too short, but the US furthermore pressurised and threatened developing countries to forego them and accelerate implementation as well as to forego other policy measures still allowed by TRIPS, such as compulsory licensing. Thus countries,

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<sup>15</sup> K. C. Shadlen, 'Resources, Rules and International Political Economy: the Politics of Development in the WTO' in S. Joseph et al., eds., *World Trade Organisation and Human Rights: Interdisciplinary Perspectives*, (Edward Elgar, 2009), p. 117.

<sup>16</sup> C. M. Correa, 'Patent Rights' in C. M. Correa and A. A. Yusuf (eds.) *Intellectual Property and International Trade: The TRIPS Agreement*, 2<sup>nd</sup> edn., (Kluwer, p. 2008), pp. 227, 229.

<sup>17</sup> TRIPS, Art. 65(4).

although not in breach of TRIPS, were still subject to penalties for not adapting ‘TRIPS Plus’ regimes.<sup>18</sup>

Furthermore since the adoption of TRIPS continuing efforts by the IP lobby have been pushing for further international harmonisation through the World Intellectual Property Organisation (WIPO) and stronger standards of protection, i.e. ‘TRIPS Plus’ standards or even higher, through bilateral and regional negotiations on intellectual property agreements, free trade agreements and investment treaties attempting to conform patent law of the ratifying countries to the standards in force in the USA, and in some aspects arguably even stronger.<sup>19</sup> One of the key elements of US bilateral agreements is a higher protection of pharmaceutical inventions where the conditions for compulsory licensing are stricter than under TRIPS.<sup>20</sup> It has been suggested that further harmonization would be welcome through WIPO would at least discourage stricter US bilateral agreements, which due to the most favoured nation (MFN) principle than have a multilateral effect.<sup>21</sup> While development within the WTO and WIPO sometimes show a certain sensitivity to the perceived needs of developing countries including broad exceptions to obtain permissions and licenses, the bilateral and regional trade agreements mirror the so-called maximalist approach.<sup>22</sup>

These trends of strengthening IP protection make it increasingly difficult for today’s developing countries to adopt strategies for acquiring technical capabilities similar to those that were followed by countries such as Japan, South Korea and Taiwan during their development.<sup>23</sup> Furthermore the flow of royalties and licence fees from developing to developed countries has substantially increased, due to the vast differences in technology generation between countries.<sup>24</sup> During the negotiations on TRIPS India, supported by other developing countries demanded that any principle or standard relating to IP rights was to be carefully tested against the needs of developing countries and it further highlighted the inappropriateness of focusing only on the protection of monopoly rights of IP holders when

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<sup>18</sup> Shadlen, *supra note* 15, p. 118.

<sup>19</sup> S. K. Sell, ‘The Geo-politics of the World Patent Order’, in F. M. Abbott, C. M. Correa, P. Drahos, (eds.), *Emerging Markets and the World Patent Order*, (Edward Elgar, 2013), p. 8; M. F. Jorge, ‘TRIPS-Plus Provisions in Trade Agreement and Their Potential Adverse Effects on Public Health’, 1 *Journal of Generic Medicines*, 2004), pp. 99-211; F. M. Abbott, ‘Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law’, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 12, (UNCTAD-ICTSD, 2006).

<sup>20</sup> J. Strauss, ‘The Impact of the New World Order on Economic Development: The Role of the Intellectual Property Rights System’, 15 *European Law Review*, (2007), p. 53.

<sup>21</sup> *Ibid*, p. 53.

<sup>22</sup> D. J. Gervais, ‘TRIPS and Development’, in Gervais, *supra note* 9.

<sup>23</sup> L. Kim, ‘The Dynamics of Technological Learning in Industrialisation’, UNU/INTECH Discussion Paper Series, (2000).

<sup>24</sup> N. Kumar, ‘Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries’, 38 *Economic and Political Weekly*, (2003), p. 222.

almost 99% of the patents were owned by industrialised nations.<sup>25</sup> Although this was discussed at the negotiations, developing countries were eventually forced to drop their demands and accept, in the words of Bhagwati, the legitimization of the WTO ‘to extract royalty payments’ from the poor to the rich.<sup>26</sup> Stiglitz agreed with Bhagwati in characterizing the efforts of including IPRs into the WTO as pure rent-seeking.<sup>27</sup>

## 2. TRIPS: Issues of Concern for Developing Countries

The TRIPS Agreement is creating several grave problems for developing countries. For example it is affecting the right to health by raising the prices of essential drugs to levels unaffordable by poor people; it is negatively affecting the right to food by making it increasingly difficult for poor farmers to be self-reliant; it is allowing piracy of traditional knowledge, and furthermore the mere enacting of laws and the creation of necessary institutions and enforcement mechanisms for the protection of IPRs in poor countries cost them several million dollars.<sup>28</sup>

The effect of TRIPS on the increase of drug prices has garnered perhaps the most attention and condemnation. TRIPS does allow for certain flexibilities, however a ‘combination of factors, namely the TRIPS Plus provisions introduced through free trade agreements, political pressure from developed countries through trade sanctions, and pressure from transnational pharmaceutical companies – either through protracted court proceedings, and or lobbying, have robbed the developing countries and the LDCs from exercising their rights under the TRIPS Agreement.’<sup>29</sup> Furthermore through the practice known as evergreening (i.e. patent-

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<sup>25</sup> UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, (Cambridge University Press, 2005), p. 7.

<sup>26</sup> J. Sundaram, ‘Analysis of TRIPS Agreement and the Justification of International IP Rights Protection in the WTO’s Multilateral Trading System, with Particular Reference to Pharmaceutical Patents’, *24 Information and Communications Technology Law*, (2015), p. 127; J. Bhagwati, ‘Afterword: The Question of Linkage’, *96 American Journal of International Law*, (2002), p. 127; UNDP, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (United Nations, 2005), p. 135

<sup>27</sup> J. Stiglitz, *Making Globalization Work*, (Norton, 2006), pp. 116-117.

<sup>28</sup> UNCTAD, *The TRIPS Agreement and Developing Countries*, (UNCTAD/ITE/1, 1996); for some of the research on the effects on public health see: H. Hestermeyer, *Human Rights and the WTO – The Case of Patents and Access to Medicines*, (Oxford University Press, 2007); M. Varela, ‘The WTO, Intellectual Property and Aids – Case Studies from Brazil and South Africa’, *The Journal of World Intellectual Property*, (2004); F. Abbott, ‘The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO’ *Journal of International Economic Law*, (2002); D. Matthews, ‘WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?’, *7 Journal of International Economic Law*, (2004); ‘UN Economic and Social Council, The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights’, E/CN.4/Sub.2/2001/13 (27 June 2001); UNHCR Sub-Commission on Human Rights, ‘Intellectual property rights and human rights’, resolution 2000/7.

<sup>29</sup> Sundaram, *supra note* 26, p. 155; see also P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Earthscan, 2002), pp. 6-8.

layering or life-cycle management) some pharmaceutical companies effectively block the entry of generics into the market beyond the 20-year period.<sup>30</sup>

While not denying the urgency of these issues which has brought them to the limelight and helped garner public outrage and support for reform, arguably in the long term there is another more important issue at stake, which is the impact of TRIPS on development itself. Because the impact on technological development is less evident and less immediate than for example the lack of sufficient food for survival during a famine or the lack of medicine during an outbreak of a deadly disease, it is harder to draw attention of the general public to it and easier to selectively present data in a manner that distort the real impact.

As mentioned, it is the protection of inventions which is most relevant to technological development and is the main focus here, yet it needs to be mentioned that copyright may also affect access to knowledge and is particularly relevant in terms of access to academic journals, textbooks and increasingly software. For instance ‘a reasonable selection of academic journals is far beyond the purchasing budgets of university libraries in most developing countries.’<sup>31</sup> Based on the three-step test enacted in the 1967 revision of the Berne Convention, TRIPS does allow for the limitations and exceptions to copyright in Art. 13:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

However there are concerns that certain forms of encryption designed to counter widespread copying from digital resources, will make the materials even less accessible for fair use purposes than it has applied to printed works, and ‘at the extreme may provide the equivalent of perpetual copyright protection, by technological rather than legal means.’<sup>32</sup> This will have an additional negative impact on scientists and researchers in developing countries who already experience difficulties accessing printed media due to lack of resources.<sup>33</sup>

### **3. Intellectual Property and Innovation**

Similarly to how the push for the liberalisation of developing countries was based on Ricardo’s comparative advantage theory, TRIPS was introduced based on the dogmatic theory that introducing ‘Western IP norms would induce development and not on actual

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<sup>30</sup> L. J. Glasgow, ‘Stretching the Limits of Intellectual Property Rights: Has the Pharmaceutical Industry Gone Too Far?’, 41 IDEA (2001), p. 227; J. Sundaram, ‘India’s Trade Related Aspects of Intellectual Property Rights Compliant Pharmaceutical Patent Laws: What Lessons for India and Other Developing Countries?’, 23 *Information and Communications Technology Law*, (2014), pp.1-30.

<sup>31</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 17.

<sup>32</sup> *Ibid*, p. 7.

<sup>33</sup> *Ibid*.

supporting analyses or data. In other words, TRIPS put the policy cart before the empirical horse.<sup>34</sup> This theory and its controversies are thus analysed below.

In essence IPRs confer an exclusive legal right on the owner to exploit them, and the monopoly over whether to allow licensing (and under what conditions) to third parties who may wish to exploit them. According to the mainstream economic theory IP protection is necessary for an optimal allocation of resources to invention and creation. Because to copy a product costs less than investing into inventing it and marketing it originally, lack of protection would lead to ‘market failure’ where the initial investment could not be recovered.<sup>35</sup> This would take away the incentive to invest into research and development (R&D) unless a separate incentive would be provided by the government. A solution would be for the government to subsidise innovators until the costs of the subsidies equalled the benefits to society and to allow the dissemination of knowledge gained this way, at marginal cost.<sup>36</sup> It is claimed that this is nearly impossible in practice, and thus IPRs are introduced as a second-best solution. A look at some of the most important innovations in the US in the past decades however reveals that the most risky and creative work is subsidised by the public for decades but then handed over to private corporations for marketing and profit protected by monopoly pricing rates.<sup>37</sup>

However some have argued that such market failures are exaggerated and they would not happen in situations where the initial investment was not great. They also point out the fact that there would still exist an essential competitive advantage just by the fact that the initial investor is the first on the market.<sup>38</sup> Arguably when it comes to basic innovations, which can be used in wide areas, a lack of patent protection, may cause the innovator to delay the disclosure of his discovery to get a head start in developing the applications of it before commercializing any product, which would in turn postpone the diffusion of the knowledge

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<sup>34</sup> Gervais, *supra* note 22, p. 28, referring to W. G Park and D. Lippoldt ‘International Licensing and the Strengthening of Intellectual Property Rights in Developing Countries, OECD Economic Studies, Executive Summary (OECD, 2005), p. 1.

<sup>35</sup> S. Martin and J. T. Scott, ‘The Nature of Innovation Market Failure and the Design of Public Support for Private Innovation’, 29 *Research Policy*, (2000), pp. 437-47; M. G. Colombo and M. Delmastro, ‘How effective are Technology Incubators? Evidence from Italy’, 31 *Research Policy*, (2002), pp. 1103-22.

<sup>36</sup> K. Maskus, *Intellectual Property Rights in the Global Economy*, (Institute for International Economics, 2000), p. 30.

<sup>37</sup> N. Chomsky, ‘On contact: Noam Chomsky - Part II’, interview by Chris Hedges, (9.7.2017), available at: <https://www.youtube.com/watch?v=ZkWVRlqzAMk>, (last accessed, 20.7.2017).

<sup>38</sup> H. V. J. Moir, ‘What are the Costs and Benefits of Patent Systems?’, Working Paper, Centre for Governance of Knowledge and Development, (October, 2008); R. Posner, ‘Why There Are Too Many Patents in America’, *The Atlantic*, (12 July 2012); A. E. F. Schäffle, *Die Nationalökonomische Theorie der ausschliessenden Absatzverhältnisse*, (Tübingen) (1867), p. 141, in F. Machlup and E. Penrose, ‘The Patent Controversy in the Nineteenth Century’, 10 *The Journal of Economic History*, (1950), p.18.



of the basic innovation and secondly withhold desirable products from the market.<sup>39</sup> Still patents which are too broad do more harm than good in terms of development, as other parties are often more active or creative than the pioneer patent holder, while it is superior design, production, and marketing rather than strong patent protection which are the principal sources of profit, and the inventor has a natural lead time advantage in incorporating his or her own invention into the product or process.<sup>40</sup> In any case, limiting imitation with high IP protection slows down the global rate of innovation, as expecting a slower loss of their technological advantages, firms which own the patent do not need to engage in further R&D.<sup>41</sup>

The value of IP also depends on the industry in question. An important study from 1986 revealed that IP protection had only been essential in the pharmaceutical industries, where it was shown that around 65% of pharmaceutical and 30% of chemical inventions would not have taken place but for patent protection, whereas in the case of most engineering industries, especially electrical and electronic goods and instruments, IPRs were not essential for bringing about inventions.<sup>42</sup>

It is clear that IP protection can bring costs as well as benefits in terms of innovation. The costs of excluding people from valuable information via IP rights may take the form of a simple barrier to access to existing technology or it can take the form of another dynamic cost such as preventing follow-on innovation. If IP protection goes to extremes the costs outweigh the benefits in terms of social welfare.

This leads to the conclusion that there exists a balance that would create an optimal level of IP protection.<sup>43</sup> Parameters such as the length of protection should be limited at a point where longer protection would unduly stifle further innovation by non-rights holders. Ideally the length of patent protection would vary instead of being set uniformly, however due to asymmetry of information and inherent uncertainty of invention, the perfect length would be

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<sup>39</sup> C. Matutes, P. Regibeau, and K. Rockett, 'Optimal Patent Design and the Diffusion of Innovations', 27 *RAND Journal of Economics*, (1996), pp. 60-83.

<sup>40</sup> R. Merges and R. Nelson, 'On Limiting or Encouraging Rivalry in Technical Progress: The Effect of Patent Scope Decisions', 25 *Journal of Economic Behaviour and Organization*, (1994), pp. 1-24.

<sup>41</sup> J. A. Glass and K. Saggi, 'Intellectual Property Rights and Foreign Direct Investment', 56 *Journal of International Economics*, (2002), pp.387-410; E. Helpman, 'Innovation, Imitation, and Intellectual Property Rights', 61 *Econometrica*, (1993), pp. 1247-80

<sup>42</sup> E. Mansfield, 'Patents and Innovation: An Empirical Study', 32 *Management Science*, (1986), pp. 173-181.

<sup>43</sup> P. Drahos, "IP-World" - Made by TNC Inc.' in G. Krikorian and A. Kapczynski, (eds.), *Access to Knowledge in the Age of Intellectual Property*, (Zone Books, 2010), p. 198.

nearly impossible to determine in reality.<sup>44</sup> TRIPS unfortunately sets the uniform length of 20 years protection, which takes away the necessary flexibility for determining the right balance by individual countries according to their needs. In the words of Bhagwati, ‘few believe that the optimum [level of protection] extends as high as the 20-year patent rule that was forced into the World Trade Organization by the business lobbies.’<sup>45</sup> Yet it should be acknowledged that the length is not always the problem but more the breadth of the patent which is not determined by TRIPS but left to Member parties’ interpretation. If the duration of a patent is too long but it is not overly broad, competitors can start ‘inventing around’.<sup>46</sup>

Similarly, if a patent is too broad, that is, if it goes considerably beyond the claimed invention itself, it discourages subsequent innovation by other researches, whereas narrower claims will encourage others to ‘work around’ the patent, putting less restriction on further related research.<sup>47</sup> Thus the former leads to the so-called ‘tragedy of anti-commons’ as opposed to the famous ‘tragedy of commons’.<sup>48</sup> The granting of too many patents, or in other words patents for minor improvements of the product, can further unduly prolong monopolies. Despite the clearly mixed effects of IP protection on innovation, it is being presented by the IP lobby as an inherently positive thing and along the lines of the conviction that if IPRs are good, more IPRs must be better, there has been an unprecedented increase in the level, scope, territorial extent and role of IP protection.<sup>49</sup> However, ‘countries with little export trade in industrial goods and few, if any, inventions for sale have nothing to gain from granting patents on inventions worked and patented abroad except the avoidance of unpleasant foreign retaliation in other directions.’<sup>50</sup> It is hard to understand what a country such as for example New Guinea whose economy is based on weak manufacturing and minerals, could gain from adopting a patent system, however as the single undertaking of the WTO only offered an indivisible package, New Guinea has had to sign up to TRIPS like all the other Members. As UK High Court Patents Judge Sir Hugh Laddie replies to the question of whether IPRs are generally ‘a good or a bad thing’:

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<sup>44</sup> W. Nordhaus, *Invention, Growth and Welfare: A Theoretical Treatment of Technological Change*, (MIT Press, 1969); F. M. Scherer, ‘Nordhaus’ Theory of Optimal Patent Life: A Geometric Reinterpretation’ 62 *American Economic Review*, (1972), pp. 422-7.

<sup>45</sup> J. Bhagwati ‘Economic Freedom: Prosperity and Social Progress (keynote speech at the Conference on Economic Freedom and Development in Tokyo, 17-18 June 1999, in Joseph, *supra note 6*, p. 153.

<sup>46</sup> N. T. Gallini, ‘Patent Policy and Costly Imitation’, 23 *Rand Journal of Economics*, (1992), pp. 52-63.

<sup>47</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 14.

<sup>48</sup> Heller and Eisenberg coined the phrase ‘tragedy of anti-commons’ to describe the underuse of scarce resources due to the blocking effect of patents, as opposed to the overuse of such resources due to a lack of patents, i.e. ‘tragedy of commons’ coined by Garrett Hardin. M. Heller and R. Eisenberg, ‘Can Patents Deter Innovation? The Anticommons in Biomedical Research’, *Science*, (1998), pp. 698-701.

<sup>49</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 2.

<sup>50</sup> E. Penrose, *The Economics of the International Patent System*, (The John Hopkins Press, 1951) pp. 116-117.

[T]he developed world has come to an accommodation with them over a long period. Even if their disadvantages sometimes outweigh their advantages, by and large the developed world has the national economic strength and established legal mechanisms to overcome the problems so caused. Insofar as their benefits outweigh their disadvantages, the developed world has the wealth and infrastructure to take advantage of the opportunities provided. It is likely that neither of these holds true for developing and least developed countries.<sup>51</sup>

Despite this, all but 3 of the 30 African LDCs have long been providing patents according to TRIPS,<sup>52</sup> regardless of the SDT allowing them not to do so.<sup>53</sup>

Looking at the history of national patent systems one finds ‘enormous diversity in terms of both administration and standards relating to things such as patentable subject matter, infringement and duration of protection. This diversity, at least on the face of it, suggests that states have engaged in a process of steering their systems to suit their industrial context’.<sup>54</sup> It is essential to recognize that the optimal level of IP protection is struck at a different point for different states, depending on their particular stage of development, capabilities, R&D expenditures, nature of the innovative process and other particular circumstances. In terms of GDP per capita, some have found the optimal break point to be at US\$ 3,400, where only countries above that level can see an increased growth with stronger IP protection.<sup>55</sup> However in terms of actual policy, available historical cross-section evidence shows that the turning point at which countries chose to strengthen their patent protection was even higher than that at US\$ 7,750 per capita in 1985 prices, a fairly high-income level for the developing world.<sup>56</sup> An increasing convergence on standards of IPR protection is therefore hardly desirable, even though this is exactly what has been the international development.

Diversity does not exist only between developed and developing countries, but also among developing countries’ themselves in terms of technical capabilities as well as their other relevant circumstances, such as social and economic structures and inequalities of income and wealth. For example China, India and several smaller developing countries have significant scientific and technological capabilities, including ‘world class capacity in a number of scientific and technological areas including, for instance, space, nuclear energy, computing, biotechnology, pharmaceuticals, software development and aviation.’<sup>57</sup> On the

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<sup>51</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 2.

<sup>52</sup> P. Thorpe, ‘Study on the Implementation of the TRIPS Agreement by Developing Countries’, Study Paper 7, Commission on Intellectual Property Rights, Commission Secretariat, (2002), p. 2.

<sup>53</sup> K. Maskus and J. Reichman, ‘The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods’ (2004) 7 *Journal of International Economic Law*, p. 279.

<sup>54</sup> Abbott, *supra note 19*, p. 5.

<sup>55</sup> M. Thompson and F. Rushing, ‘An Empirical Analysis of the Impact of Patent Protection of Economic Growth’, 21 *Journal of Economic Development*, (1996), pp. 61-79.

<sup>56</sup> Lall, *supra note 2*, p. 8.

<sup>57</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 2.

other hand Sub-Saharan Africa mainly has weak technical capacity and accounts for only 0.5% worldwide research expenditure.<sup>58</sup> Several scholars have also pointed out that because not all industrial sectors develop at the same time, even within the same country, certain industries may benefit from a weaker and others from a stronger protection of IPRs. China may well welcome stronger protection in entertainment, software, semi-conductors and selected areas of biotechnology, but not in pharmaceuticals, chemicals, fertilizers, seeds, and foodstuffs.<sup>59</sup> In its Art. 27, TRIPS however prohibits discrimination not only as to the place of invention and whether products are imported or locally produced, but also as to the field of technology. Therefore the minimum protection as set out by TRIPS has to be guaranteed across the spectre yet there is no reason to assume that such a unitary patent system would encourage innovation in the wide range of diverse industries that it is expected to cover.<sup>60</sup>

In Articles 7 and 8, the TRIPS Agreement spells out its Objectives and Principles which talk about the balance between rights and obligations and the fact that IPR should contribute to the promotion of technological innovation and the transfer and dissemination of technology in a manner conducive to social and economic welfare and that Members may adopt measures necessary to protect public interests such as health and nutrition and other interests important to their socio-economic and technological development. However any such measures must be consistent with other TRIPS provisions and the proper balance between patent rights and other important national interests has allegedly already been struck in the Agreement itself, so Articles 7 and 8 do not offer any additional policy space to Member countries. This was made clear by the Panel in *Canada-Pharmaceutical Patents*. Based on the Objectives and Principles of TRIPS, Canada sought a liberal interpretation of the conditions stated in Art. 30 of the Agreement, to have the necessary flexibility to adjust patent rights to maintain the desired balance with other important national policies.<sup>61</sup> The Panel however confirmed the position of the EC, which claimed that Articles 7 and 8 reflect the balance already achieved in the Agreement and the limiting conditions of Art. 30 ‘testify strongly that the negotiators of the Agreement did not intend Art. 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement.’<sup>62</sup>

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<sup>58</sup> *Ibid.*

<sup>59</sup> P. K. Yu, ‘Intellectual Property, Economic Development, and the China Puzzle’ in Gervais, *supra note 9*, p. 208.

<sup>60</sup> D. L. Burk and M. A. Lemley, ‘Policy Levers in Patent Law’, 89 *Virginia Law Review*, (2003) p. 1577; M. W. Carroll, ‘One for All: The Problem of Uniformity Cost in Intellectual Property Law’, 55 *American University Law Review*, (2006) p. 845; G. S. Lunney Jr., ‘Patent Law, the Federal Circuit and the Supreme Court: A Quiet Revolution’, 11 *Supreme Court Economic Review*, (2004) in Yu, *ibid*, p. 209.

<sup>61</sup> *Canada-Patent Protection of Pharmaceutical Products*, WT/DS114/R, Panel Report, para. 7.24.

<sup>62</sup> *Ibid*, para. 7.26.

#### 4. History of Intellectual Property Protection – A History of Controversy

History shows that the industrialized countries of today did not adopt strong IP protection when they were at early stages of industrialisation, especially not for foreign inventors.<sup>63</sup> Statutory intellectual property rights evolved out of the medieval system of privileges that existed across Europe and which sovereigns used to entice foreign skilled workers to defect from their guilds and relocate to another territory, thus providing the sovereign with skills and techniques needed in the competition for a commercial and military upper hand.<sup>64</sup>

Whereas the internationalisation of IPRs did not start until the 1883 Paris Convention for the Protection of Industrial Property,<sup>65</sup> triggered by the refusal of American firms to participate at the Global Exposition of Vienna held in 1873, unless their displayed inventions were protected with the same standards as they enjoyed in America.<sup>66</sup>

Furthermore the development of IP protection was never a stranger to controversy. Two hundred years after the enactment of the Statute of Monopoly in 1623 in England, various groups demanded an even more favourable law for inventors which provoked a counter attack by those who wished to see the patent system completely abolished, including the London Economist, the Vice President of the Board of Trade, some outstanding inventors of the time, members of Parliament, and representatives of manufacturing districts such as Manchester and Liverpool.<sup>67</sup> In Germany there was a strong movement against the patent of invention which economists using free-trade arguments almost unanimously condemned. The main advocates of patent protection on the other hand were graduates of technical schools organized in technical associations, the most active of which was the Association of German Engineers representing civil engineers mostly also active as entrepreneurs.<sup>68</sup> They gained importance after the Congress of German Economists passed a resolution in 1863 suggesting the abolition of all patent laws.<sup>69</sup> A leading patent advocate was Werner Siemens, however it is essential to mention that he recognized the importance of timing when it came to patent

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<sup>63</sup> E. Schiff, *Industrialization Without National Patents – The Netherlands, 1869-1912, Switzerland, 1850-1907* (Princeton University Press, 1971); D. Brenner-Beck, 'Do as I say, Not as I did' (1999), 11 *UCLA PAB Asian Law Journal*, in I. Mgbeoji, 'TRIPS and TRIPS Plus, Impacts in Africa', in Gervais, *supra note 9*, p. 264.

<sup>64</sup> Drahos, *supra note 43*, pp. 202-203.

<sup>65</sup> M. Wörsdörfer, 'Walter Eucken on Patent Laws: Are Patents Just 'Nonsense upon Stilts'', 1 *Economic Thought*, (2012), p. 37.

<sup>66</sup> M. Seckelmann, 'From The Paris Convention (1883) to the TRIPS Agreement (1994): the history of the International Patent Agreements as a History of Propertisation?' 14 *Journal der Juristischen Zeitgeschichte*, (2013), p. 48.

<sup>67</sup> Machlup, *supra note 38*, p. 3.

<sup>68</sup> M. Lang, 'The Anti-Patent Movement Revisited: Institutional Change and Cognitive Frames in Nineteenth-Country Germany', Paper prepared for the 3<sup>rd</sup> Free Culture Research Conference (revisited version), (2010), p. 8.

<sup>69</sup> *Ibid.*

legislation. He argued that the German economy had grown so fast exactly because of a lack of a patent system and the possibility of simply imitating foreign inventions without having to invest in R&D.<sup>70</sup> However to develop not only quality products based on foreign inventions but also completely new products of a higher quality than the products of foreign competitors it was necessary to make sure that the value of technical work would be socially recognized, which he believed could best be accomplished by a new patent system.<sup>71</sup> The turnaround in public opinion for the pro-patent movement happened at the International Congress for the Protection of Patents in Vienna<sup>72</sup> following elaborate propaganda.<sup>73</sup> In a similar fashion, in the 1980s, the pharmaceutical industry engaged in aggressive lobbying coupled with funding of academic studies aimed at proclaiming the merits of patent protection, when it began its campaign of securing US IPR protection abroad.<sup>74</sup>

On the other hand, Holland and Switzerland industrialized without a patent system.<sup>75</sup> Unsurprisingly however, the Swiss themselves were enthusiastic patentees in other countries.<sup>76</sup> The government kept rejecting proposals to adopt one on the basis of a statement issued by faculty members of the Zurich Institute of Technology, however it finally gave in at a referendum in 1887, after the lack of a patent system was externally given the stigma of 'piracy' and the 'pirate nation' was threatened with discrimination in commercial policy.<sup>77</sup> This left Holland as 'the last bastion of free trade in inventions' until 1912.<sup>78</sup>

When still a net importer of technology between 1790 and 1836, the US restricted the issue of patents to its own citizens and residents and furthermore kept highly discriminatory patent fees until 1861, where foreigners were charged ten times the rate of US citizens and two

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<sup>70</sup> *Ibid*, p. 13.

<sup>71</sup> A. Heggen, *Erfindungsschutz und Industrialisierung in Preußen 1793-1877*, (Vandenhoeck & Rupprecht, 1975), p. 128 in Lang, *supra note* 68, p. 13.

<sup>72</sup> Lang, *supra note* 68.

<sup>73</sup> The shift was described by distinguished economists Machlup and Penrose as a result of well-organized propaganda, the formation of societies for patent protection, drafting of resolutions and their distribution to the daily press, delegating speakers to professional and trade association meetings, releasing floods of pamphlets and leaflets, planting articles in trade journals, which were reproduced in daily papers, announcing public competitions with prizes for the best papers in defence of the patent system, submitting petitions to governments and legislatures, arranging international meetings and making compromises with groups inclined to endorse liberal patent reforms. Machlup, *supra note* 38, pp. 5-6; the economic crisis was also used to shift public opinion against 'failed' free trade views and the 'intellectual communism' of the free trade school in favour of protectionism. Lang, *supra note* 68, p. 14.

<sup>74</sup> R. Weissman, 'A Long Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries', 14 *University of Pennsylvania Journal of International Economic Law*, (1996), p. 1076.

<sup>75</sup> Drahos, *supra note* 43, p. 198.

<sup>76</sup> Commission on Intellectual Property Rights, *supra note* 3, p. 19.

<sup>77</sup> Bolley and J. H. Kronauer, *Gutachten über den Einfluss des Mangels eines Patentgesetzes auf die schweizerische Industrie* (Zurich, 1862), in Machlup, *supra note* 38, pp. 5-6.

<sup>78</sup> Machlup, *ibid*, p. 2.

thirds as much again if they were British. In terms of copyright protection, it was restricted to citizens until 1891 but the US continued even after that with several discriminatory restrictions on foreign copyrights, which was the reason for its late entry to the Berne Convention in 1989.<sup>79</sup>

As for Japan, '[f]or a large part of the 20<sup>th</sup> century, [it] designed and used a patent system that placed emphasis on the diffusion of knowledge, rather than on the right to appropriate knowledge.'<sup>80</sup> Japan has benefited greatly from IP generated in other developed countries in the early stages of its development.<sup>81</sup> The patent system utilized by Japan has been recognized as 'a mechanism for promoting technological catch-up and diffusion through incremental innovation.'<sup>82</sup> Although its patent system was established quite early in 1885, it excluded from protection food, beverage, pharmaceuticals and chemical compounds until 1975 when its firms developed their technological capability enough to require protection for their own innovative activity.<sup>83</sup> Japan further allowed its firms to receive protection on technologies that were 'only slightly modified from the original invention.'<sup>84</sup> Through its Utility Model Law enacted in 1905 it provided protection for adaptations and improvements over the imported machinery or equipment by domestic investors and granted 99.9% of all utility models between 1905-79 to its own nationals.<sup>85</sup> In 1980 it granted 49,000 utility models to Japanese nationals and only 533 to foreigners.<sup>86</sup> Similarly the Japanese Patent System allowed for the protection of industrial design on mere novelty, without the need for inventiveness, granting 31,000 patents to nationals compared to only 600 to foreigners in 1980.<sup>87</sup> Not surprisingly, there have been complaints of discrimination and claims that foreign applicants faced longer pendency periods than domestic applicants.<sup>88</sup>

During the transformation of Taiwanese and Korean economies between 1960 and 1980, both countries 'emphasised the importance of reverse engineering as an important element in

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<sup>79</sup> *Ibid.*

<sup>80</sup> J. A. Ordoover: 'A Patent System for Both Diffusion and Exclusion', 5 *Journal of Economic Perspectives*, (1991), p. 43.

<sup>81</sup> Kumar, *supra* note 24, p. 214.

<sup>82</sup> Abbott, *supra* note 19, p. 74.

<sup>83</sup> Kumar, *supra* note 24, p. 214.

<sup>84</sup> K. E. Maskus, and C. McDaniel 'Impacts of the Japanese Patent System on Productivity Growth', 11 *Japan and the World Economy* (2000), p. 560.

<sup>85</sup> S. Watanabe, 'The Patent System and Indigenous Technology Development' in the Third World' in J. James and S. Watanabe, eds., *Technology, Institutions and Government Policies*, Macmillan series of ILO studies, (Macmillan Press, 1985), p. 237.

<sup>86</sup> M. Kotabe, 'A Comparative Study of US and Japanese Patent Systems' 23 *Journal of International Business Studies*, (1992), pp. 147-168.

<sup>87</sup> R. E. Evenson, 'Intellectual Property Rights, R and D, Inventions, Technology Purchase, and Piracy in Economic Development: An International Comparative Study', (Yale University, 1991).

<sup>88</sup> Kotabe, *supra* note 86.

developing their indigenous technological and innovative capacity.<sup>89</sup> Both had weak IPR protection during their development. South Korea adopted its patent law only in 1961 and amended it in 1981 to conform with the Paris Convention, but still excluded food, chemical substances and pharmaceuticals from protection until 1987 when it finally caved into US pressure with its threats of trade sanctions and strengthened the law.<sup>90</sup> The duration of protection rose from 12 to 15 years<sup>91</sup> and there was a further strengthening of the law in 1995 again due to US pressure.<sup>92</sup> Apart from the law itself, however, it was the lacking enforcement and discrimination in favour of nationals in granting utility models (approximately 92-95% of all utility models were granted to nationals) which made the IP system work in favour of South Korean technological development and which also kept the country on the US watch list for a long time.<sup>93</sup> Similarly lack of enforcement was the main strategy of Taiwan which openly encouraged counterfeiting to develop local industries.<sup>94</sup> Again, like South Korea it eventually strengthened its law in 1994 and prolonged the protection from 15 to 20 years, due to US pressure.<sup>95</sup>

Looking at the history of IP protection and the debates surrounding its theory, it is obvious that countries changed their regimes at different stages of development to further their economic interests, and not to honour some abstract ‘human right’ of intellectual property. According to the evidence the ‘intensity of patents first falls with rising incomes, as countries slacken patents to build local capabilities by copying, then rises as they engage in more innovative effort.’<sup>96</sup>

Also important to note is that the idea of IPR protection is contrary to many traditional non-western philosophies. For example, Confucianism, which has had a large influence on Chinese culture, emphasizes sharing and community commitment rather than individual profit, which explains why in China a patent system did not emerge the way it did in Europe, even though China has a remarkable history of technological and creative enterprise<sup>97</sup> and ‘the Chinese invented a number of items prior to their invention or use in the West’ such as papermaking, typography, the compass, and gunpowder, all of profound influence on the

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<sup>89</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 20.

<sup>90</sup> Kumar, *supra note 24*, p. 214.

<sup>91</sup> S. J. La Croix and A. Kawaura, ‘Product Patent Reform and its Impact on Korea’s Pharmaceutical Industry’, 10 *International Economic Journal* (1996), pp. 109-124.

<sup>92</sup> Kumar, *supra note 24*, p. 215.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> Lall, *supra note 2*, p. 1.

<sup>97</sup> J. R. Allison and L. Lin, ‘The Evolution of Chinese Attitudes toward Property Rights in Invention and Discovery’, 20 *University of Pennsylvania Journal of International Economic Law*, (1999), p. 742.



world's economy and the human culture.<sup>98</sup> In the 19<sup>th</sup> century the industrial powers introduced IPRs into their colonies and dominions, in conflict with the majority of traditional and indigenous approaches to knowledge and innovation hitherto prevalent in these societies.<sup>99</sup>

### **5. The Birth of TRIPS and Developing Countries' Resistance**

Developing countries have been fed the narrative that in order to get rid of poverty by stimulating invention, and thereby production, they need to adopt strong IPRs. Although it is undisputed that invention is necessary for development, unlike the pro IP lobby in developed countries, there is a strong lobby in developing countries that believes IPR do little to stimulate invention, and instead only harm the local population benefiting none but the developed world.<sup>100</sup> Developing countries have tried to reform treaties such as the Berne Convention and the Paris Convention in a way that would take into consideration their socioeconomic circumstances already in the 1960s and 1970s, however this was without much success and their efforts eventually faded.<sup>101</sup> In the 1980s the debate between developing and developed countries on IPR reached its most contentious form as developed countries 'sought to pry open large, untapped consumer markets in the developing world', but when trade and investment increased they were concerned about imitation of their products in these new markets and contended that foreign piracy had cost them billions of dollars and eliminated millions of jobs in their home countries: 'Ideas had become the new economic battleground between developed and developing countries.'<sup>102</sup> Exporting corporations sought an artificial monopoly that would block domestic producers from entering the market to

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<sup>98</sup> W. Shi, *Intellectual Property in the Global Trading System: EU-China Perspective*, (Springer, 2008), p. 25.

<sup>99</sup> C. Deere, *The Implementation Game: The Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, 2009), p. 36; see also Sundaram, *supra* note 26, pp. 130-133: 'these laws were primarily designed to protect and serve the interests of colonial administrators, and purely aimed at extracting wealth from the colonies rather than seeking to educate or promote knowledge in the colonies... A number of countries that emerged from colonial rule in the twentieth century promulgated IP laws that still closely resembled earlier colonial laws or those of the erstwhile colonial powers. A few former colonies like India moved towards a product patent regime during the 1970s, and as a result also emerged as a key player the generic drugs market. In the Americas, countries like Brazil, Mexico, and Argentina lowered standards of patent protection to stimulate local production of generic medicines. Similarly, the Andean Community, comprising former South American colonies of Chile, Colombia, Bolivia, Ecuador, and Peru followed a reformist agenda, in pursuit of a vision for industrial development and regional integration, and adopted common rules on FDI, IP rights, and technology transfer... [A] number of larger developing countries were able to delay their accession to international IP conventions. A majority of developing countries in the Americas postponed adherence to the Paris Convention until the 1990s, as they were sceptical of the merits of IP Conventions.'

<sup>100</sup> Commission on Intellectual Property Rights, *supra* note 3, foreword.

<sup>101</sup> S. K. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* (University of New York Press, 1998); C. May and S. K. Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner Publishers, 2006).

<sup>102</sup> Ostergard, *supra* note 9, p. 142.

produce the same products, while investors wanted their investments guaranteed.<sup>103</sup> Eventually the failure to revise the Paris Convention pushed those who were looking for a more internationally uniform and effective system to start linking the IP regime with the world trade regime, which they achieved at the Punta del Este Conference, where trade related aspects of the protection of IP were added to the GATT agenda.<sup>104</sup> The wide Membership of GATT and its dispute resolution procedures would mean greater enforceability against a greater number of states.<sup>105</sup> Despite vehemently opposing the idea at first, many developing countries later unfortunately accepted the substantially strengthened IP rules at the TRIPS negotiations. However this was not because they necessarily bought into the accompanying narrative which promised that this would foster their domestic innovation and increase FDI and technological transfer (TT), but was rather in order to gain concessions elsewhere or to receive greater aid.<sup>106</sup> Whether they actually did, remains a mystery.<sup>107</sup>

It has been said that the negotiations involving TRIPS were an ‘international story driven primarily by American corporate interests,’ which is clear even from the way in which IPR were brought onto the WTO negotiating table.<sup>108</sup> In the 1980s the idea that IPR could be addressed in a trade policy framework was far from commonly accepted and it was essentially Edmund Pratt, Pfizer CEO and John Opel, IBM Chair that firstly shifted US government perception while serving on the US President’s Advisory Committee on Trade Negotiations and later established the Intellectual Property Committee in an effort to convince European and Japanese trade officials which appeared uninterested to include IPR in the GATT negotiations.<sup>109</sup> The pharmaceutical lobby and the software industry were greatly supported by the music and motion picture industry.<sup>110</sup> After much dialogue they successfully persuaded their colleagues in Europe, including representatives from the Union of Industrial and Employer’s Confederations of Europe and the Japan Federation of

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<sup>103</sup> *Ibid*, p. 146.

<sup>104</sup> H. D. Assmann, P. Buck, ‘Trade Related Aspects of Intellectual Property Rights: Limitation of the Mandate or Point of Reference for the Further Development of GATT?’ in T. Oppermann, J. Molsberger (eds.), *The New GATT for the Nineties and Europe '92*, (Nomos, 1991), p. 261.

<sup>105</sup> Drahos, *supra note* 43, p. 206.

<sup>106</sup> World Bank, ‘Intellectual Property: Balancing Incentives with Competitive Access’, in *Global Economic Prospects*, (World Bank, 2001), pp. 129-150.

<sup>107</sup> Lall, *supra note* 2, p. 8.

<sup>108</sup> Crump, *supra note* 14, p. 13; for a full account of the origins and negotiating of the TRIPS Agreement see D. Matthews, *Globalising Intellectual Property Rights*, (Routledge, 2001), ch. II and III.

<sup>109</sup> Crump, *Ibid*.

<sup>110</sup> Sundaram, *supra note* 26, p. 124.

Economic Organizations (Keidanren) to pressure their governments to include IPR on the GATT agenda.<sup>111</sup>

US, EC and Japan proceeded to seek an expansive IPR agenda within GATT, which motivated their private-sector Trilateral Industrial Group (US, EC and Japan) to develop a detailed consensus position.<sup>112</sup> When developing countries joined the debate it brought:

the talks to a standstill until April 1989 in Geneva. Adoption of a GATT IPR framework at that meeting was an abrupt departure precipitated by a crisis at the Uruguay round mid-term review a few months earlier in Montreal... Developing countries finally accepted the legitimacy of GATT as a venue to negotiate IPR, with India as the last to accept... This breakthrough led to a more intense phase of the talks.<sup>113</sup>

According to the analysis of Drahos, developing countries caved in as a result of threats of continued unilateral action, decreased trade aid and exclusion from increased market access granted by the Generalised System of Preferences (GSP) and they accepted the inclusion of IP in the negotiations in exchange for promised concessions in other areas such as agriculture and textiles.<sup>114</sup> Stiglitz describes how this ‘Great Bargain’ was going to reduce developing countries’ access to knowledge and extract from them billions in royalties in return for greater access in agriculture and reduced agricultural subsidies by developed countries, however the latter did not keep their side of the bargain.<sup>115</sup> As per usual, therefore, negotiations at the WTO in this instance were completely initiated by developed countries, more particularly the US while developing countries were more pressured than persuaded into accepting to negotiate on the matter. The promise of the levelling out of the playing field in agriculture was once again used to lure developing countries into a bad deal in another area and the withdrawal of the US and EU from GATT 1947 also played a decisive role in ‘convincing’ them to accept GATT 1994 with all the attached agreements such as TRIPS (see chapter IV). In the words of Professor Rodrik:

I think bringing TRIPS into the WTO framework was just a lousy idea, and I think most economists will agree to that. I think this was largely driven by the interest of pharmaceutical companies in the United States, and I wish we had never come down that path.<sup>116</sup>

In 1883 the Paris Convention aimed at harmonizing patent protection between developed and still developing countries of that time which were seeking to participate in world trade,

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<sup>111</sup> *Ibid.*

<sup>112</sup> Crump, *supra note* 14, pp. 21-22.

<sup>113</sup> *Ibid.*, p. 22.

<sup>114</sup> P. Drahos, ‘Negotiating Intellectual Property Rights: Between Coercion and Dialogue’ in P. Drahos and R. Maybe (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan, 2002), pp. 163-72.

<sup>115</sup> Stiglitz, *supra note* 27, p. 311, n. 7.

<sup>116</sup> D. Rodrik, interview, available at: [https://www.sss.ias.edu/files/pdfs/Rodrik/Commentary/interview-Prof\\_Dani\\_Rodrik.pdf](https://www.sss.ias.edu/files/pdfs/Rodrik/Commentary/interview-Prof_Dani_Rodrik.pdf), (last accessed, 22.8.2016), p.4.

namely Germany, Austria and Switzerland, and thus diminished their autonomy in regulating technical information.<sup>117</sup> With TRIPS it was the African and Asian states which traded their autonomy in this field for the participation in world trade, however the less developed countries in 1883 ‘had more opportunities with which to influence the regulations’ and the German Empire did not even join the Paris Convention until 1903.<sup>118</sup> Stiglitz describes how during his time with the Council of Economic Advisors under the Clinton Administrations, he observed that it was ‘clear that there was more interest in pleasing the pharmaceutical and entertainment industries than in ensuring an IP regime that was good for science, let alone for developing countries,’ whereas the negotiators who framed the TRIPS Agreement were ‘either unaware of all this, or more likely, uninterested.’<sup>119</sup> Despite all this, developing countries did manage to positively influence the negotiations and prevent the inclusion of at least some of the strictest and most egregious restrictions on national policy by exploiting the differences between the US, EU and Japan.<sup>120</sup> Furthermore, global corporate actors played an important role in ensuring the subsequent effective implementation of TRIPS into each Member through surveillance carried out by their local branches and agents.<sup>121</sup>

## **6. Claims of Benefit for Development**

Arguably, the demand for ever stronger IP protection in developing countries does not come from wanting to provide innovation incentives in said countries, but to create new export markets and lower-cost production centres, while maintaining the technological superiority of the West (where R&D is based).<sup>122</sup> Whereas IPRs may indeed stimulate invention when a country possesses the necessary human and technical capacity, the same does not hold for countries which have not yet achieved the sufficient level of development. The IP system may provide the incentive, however without a sufficient capacity, incentives are of little use. Furthermore, even in countries with large markets and considerable industrial development the claim has not been supported by evidence. In the case of Mexico for example, a study found a drastic decline in domestic patent application after 10 years of stronger patent protection.<sup>123</sup> Also ‘when technologies are developed, firms in developing countries can

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<sup>117</sup> Seckelmann, *supra note* 66, p. 47.

<sup>118</sup> *Ibid.*

<sup>119</sup> J. E. Stiglitz, ‘Intellectual-Property Rights and Wrongs’ *Daily Times* (5 August 2005).

<sup>120</sup> Shadlen, *supra note* 15, p. 117.

<sup>121</sup> See D. Matthews, *Globalising Intellectual Property Rights*, (Routledge, 2001), ch. 4.

<sup>122</sup> Gervais, *supra note* 22, p. 37.

<sup>123</sup> J. Aboites, ‘Innovación, patentes y globalización’ in J. Aboites and G. Dutrénit (eds.) *Innovación, aprendizaje y creación de capacidades tecnológicas* (Mexico, UAM, 2003) pp. 136-206; for opposing economic positions and theories see A. Gutterman, ‘Innovation and Competition Policy: A Comparative Study

seldom bear the costs of acquisition and maintenance of rights and, above all, of litigation if disputes arise.<sup>124</sup> More importantly, strengthening IPRs increases imports, whether that be high technology machinery imports or low technology consumer items, which merely drive out indigenous industries that are based on imitation<sup>125</sup> and replace their ‘pirate’ goods with more expensive ‘genuine’ ones.<sup>126</sup> Although increased trade flows may lead to new jobs, these are usually low-skilled, low-paying positions (distributorship or retail sector).<sup>127</sup> Probably the most problematic impact of IPRs however is that they limit the possibility of technological advancement through imitative production and learning, which are essential to the technological advancement of developing countries, as these methods require less capital.<sup>128</sup> It seems then that IPRs are here no longer a way to encourage domestic innovation [but an] instrument to affect profit flows among nations. To affect profit flows favourably, each country wants the strongest possible protections in foreign countries and the weakest possible protections for foreigners in its own domestic market.<sup>129</sup> Still the proponents of strong IPR claim they are beneficial to developing countries as they attract FDI and with it technological transfer. However FDI is not always straightforward in this regard, neither is a strong IP regime always necessary to attract it. This is examined below.

## 7. TRIPS and Technological Transfer

Art. 7 of TRIPS contains the alleged objectives of the agreement. It states:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The word ‘should’ merely suggest that this is what we are hoping for if the mainstream economic theory is correct. Art. 8.2 envisages situations of abuse of IP or the resort to practices which unreasonably restrain trade or adversely affect the ITT, and permits countries to adopt policies to combat it, of course in a TRIPS consistent manner. One of the biggest debates surrounding TRIPS has been, whether the ‘objective’ of technology transfer, especially in terms of developing countries is actually achievable through TRIPS or do other provisions of the agreement preclude it.

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of Regulation of Patent Licensing and Collaborative Research and Development in the United States and the European Communities, (1999, Kluwer Law International, pp. 36-70.

<sup>124</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 15.

<sup>125</sup> Maskus, *supra note 37*, pp. 73-79.

<sup>126</sup> Gervais, *supra note 22*, p. 33.

<sup>127</sup> *Ibid.*

<sup>128</sup> Drahos, *supra note 43*, p. 199.

<sup>129</sup> S. Scotchmer, *Innovation and Incentives* (MIT Press, 2004), p. 329, cited in Gervais, *supra note 22*, p. 37’

Technology transfer is ‘any process by which one party gains access to a second party’s information and successfully learns and absorbs it into her production function.’<sup>130</sup> This can occur through market and non-market channels. There are essentially two main market channels for TT:

- trade in technological inputs, such as high technology imports, industrial chemicals, hardened metals, fertilizers and software; countries with stronger IPRs usually have more capital goods imports, however this may be from other variables that tend to accompany increased IPR protection, such as higher levels of income, stronger technological capabilities, greater ability to pay, etc.<sup>131</sup> Also looking at Korea and Taiwan, they did not have a problem buying advanced capital goods in their most intense period of industrialisation despite weak IPRs protection.<sup>132</sup>
- foreign direct investment (FDI) including the deployment of newer and more productive technologies to subsidiaries and licensing, which is the purchase of production or distribution rights and the technical information and know-how required to make effective use of them.<sup>133</sup> This arrangement can be between unrelated firms or as a part of a joint venture, i.e. contractual arrangement between two or more firms, where each one provides some advantage that should reduce the cost of joint operations, where the contribution of the multinational enterprise (MNE) is to provide technically superior production information through licensing.<sup>134</sup> Terms may include non-disclosure mandates, ‘no-compete’ clauses for personnel, and grant back provisions on adaptive innovations.<sup>135</sup>

The quantity and impact of these outflows have been very diverse. Between the years 1970 and 2000, low-income countries only had a small and declining share in these outflows, upper middle-income nations had the fastest-growing market for technology-intensive exports, while licensing and other types of arm’s length trade in technology have been largely the domain of OECD countries.<sup>136</sup>

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<sup>130</sup> K. E. Maskus, ‘Encouraging International Technology Transfer’, UNCTAD-ICTSD Project on IPRs and Sustainable Development, (UNCTAD-ICTSD, 2004), p. 9.

<sup>131</sup> Lall, *supra note 2*, p. 12.

<sup>132</sup> *Ibid.*

<sup>133</sup> Maskus, *supra note 130*, pp.1, 10.

<sup>134</sup> *Ibid.*, p. 9.

<sup>135</sup> *Ibid.*, p. 20.

<sup>136</sup> *Ibid.*, p. 11-12.

## 8. Foreign Direct Investment and Technology Transfer

Strong IP protection is largely considered to attract FDI. Although there is some evidence to this effect, other factors may be more important, such as the size of the market, expected growth in demand and monetary and fiscal stability,<sup>137</sup> investment costs, local labour prices and labour productivity. Even those who claim that the most decisive factor in attracting FDI is IPR protection, admit the role of other factors.<sup>138</sup> Some studies on the other hand found no relationship between IPRs and FDI flows at all,<sup>139</sup> while other studies have found significantly lower levels of FDI in Africa and Eastern Europe than in Brazil, India and China, despite the former having higher levels of IP protection.<sup>140</sup> What is more is that firms intending to establish plants in another country, mainly need the protection in terms of non-disclosure of technologies (i.e. trade secrets and contractual protection), not strong copyright, patent and trademark protection, which is more important for firms seeking to use the country only as a market for finished products.<sup>141</sup> Furthermore IPRs are only a relevant factor in investment decisions when it concerns sophisticated technologies which are easy to copy and the recipient country possesses the necessary scientific capacity to copy and a sufficiently large market to justify the costs of patenting and enforcement.<sup>142</sup>

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<sup>137</sup> D. Wheeler and M. Ashoka, 'International Investment Location Decisions: The Case of U.S. Firms' 33 *Journal of International Economics* (1992), pp. 57-76, R. Barrell and P. Nigel, 'An Econometric Analysis of U.S. Foreign Direct Investment' 78 *Review of Economics and Statistics* (1996), pp. 200-207; L. S. Goldberg, and K. D. Kolstad 'Foreign Direct Investment, Exchange-Rate Variability and Demand Uncertainty' 36 *International Economic Review* (1995), pp. 855-873.

<sup>138</sup> For example, in examining the significant relocation of US and European companies in previously unthought-of amounts to India, Strauss claims that this was due mainly to patent legislation corresponding to TRIPS standards along with privatization and liberalization of the market through the WTO regime, but he also acknowledges that companies such as Texas Instruments and Motorola invested in Bangalore as early as the 1980s due to a further incentive, which was the especially high qualification of Indian scientists and engineers in information technology. Strauss, *supra* note 20, p. 52.

<sup>139</sup> E. K. Kondo 'The Effect of Patent Protection on Foreign Direct Investment,' 29 *Journal of World Trade* (1995), pp. 97-122 failed to find a link in a study of FDI in 33 countries over a 15-year span.; C. A. Primo Braga, and C. Fink 'The Relationship between Intellectual Property Rights and Foreign Direct Investment,' 9 *Duke Journal of Comparative and International Law* (1998), pp. 163-188 likewise failed to find a significant link.

<sup>140</sup> S. Ragavan, 'The Jekyll and Hyde Story of International Trade: The Supreme Court in *PhRMA v Walsh* and the TRIPS Agreement', 38 *University of Richmond Law Review*, (2004), p. 789; R. M. Sherwood, 'Global Prospects for the Role of Intellectual Property in Technology Transfer', 42 *IDEA – The Journal of Law and Technology*, (2002) 33-34; As Mgbeoji explains, looking at Africa in general, some states have experienced noticeable impacts of such protection on the price of drugs and medicines (for example Egypt or South Africa) while it has failed to bring foreign investment; it has also brought significant costs for implementation, while there are virtually no positives to point at. Mgbeoji, *supra* note 63, p. 295.

<sup>141</sup> Yu, *supra* note 59, p. 177, referring to research by P.H. Head, 'Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game' (2003) 88 *Minnesota Law Review* 249, 266; K. Maskus 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer' in C. Fink and K. Maskus (eds.), *Intellectual Property and Development - Lessons from Recent Economic Research* (World Bank, Oxford University Press, 2005), p. 119-128.

<sup>142</sup> Commission on Intellectual Property Rights, *supra* note 3, p. 24; Maskus, *supra* note 37; K. E. Maskus, 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer', 9

This brings us to the fact that without the ability to absorb the foreign technology from the MNEs, FDI cannot lead to successful TT in the first place. Such an ability depends on whether the country has:

- at least simple R&D capacity;
- an adequate supply of engineering and management skills and;
- an adequate amount of competitive suppliers so that MNEs can increase their productivity and standards in backward spillovers, i.e. by increasing the demand for their products and improving the technologies and standards which they use by offering engineer visits and by sharing blue-prints, know-how and comments with them;
- geographical proximity to input suppliers and consumers<sup>143</sup>

Furthermore as Ostergard has noted, when ‘investment and technology transfer does occur, there is no basis for believing that local knowledge may be increased. In fact, transnational corporations may be reluctant to allow certain types of technology to be adapted for fear of losing their competitive advantage in these markets. Hence, often the promise of increased local knowledge bases is hollow.’<sup>144</sup> As seen in the case of the Thai and Malaysian automotive industry, even in joint ventures foreign companies may refuse to share latest technologies with domestic producers (example of Proton) whereas if possible foreign companies will use the market and its benefits without even involving domestic producers instead bringing with them foreign suppliers. Of course from the point of view of the orthodox theory FDI is also good because the injection of capital and technology stimulates competition in the local market: on the one hand, the entry of MNEs into a foreign market forces the domestic firms to adopt newer and more advanced technologies because of the increased risk of a loss of market share; on the other hand, it increases average productivity of local plants, since only the best firms can survive the competition so-called ‘selection effect.’<sup>145</sup>

From the point of view of development however it is problematic when foreign firms merely drive out domestic competition by obtaining patent protection and supply the market through

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*Duke Journal of Comparative and International Law*, (1998), pp. 130-131; Primo Braga, *supra note* 139, pp. 163-164.

<sup>143</sup> Maskus, *supra note* 130, pp. 17-18.

<sup>144</sup> Ostergard, *supra note* 9, p. 130.

<sup>145</sup> F. Reganati and E. Sica, ‘Do Domestic Firms benefit from the presence of MNEs? The case of the Italian manufacturing sector’, *Quaderno n. 23/2005 Dipartimento di Scienze Economiche, Matematiche e Statistiche*, (2005), p. 2.



imports, rather than domestic manufacture.<sup>146</sup> Therefore FDI is not intrinsically a good thing and it furthermore does not automatically bring TT, especially not in terms of allowing MNEs' cutting edge technologies to be absorbed into the local knowledge base.

Whereas whether domestic firms can make productivity gains from transnational corporations operating in their country is profoundly affected by the rules that govern imitative production and to what degree reverse engineering is permitted.<sup>147</sup>

Strong IP protection will therefore, at least in theory, contribute to attracting FDI and licensing (with or without FDI) when complex but easily copied technologies are at stake, whereas other factors will be more important in attracting FDI in sectors that have old products and standardized, labour-intensive technologies. Still the fact that even in IPR-sensitive industries such as pharmaceuticals transnational corporations have not refrained from investing large sums in countries like Brazil or India which have large capabilities in producing generic drugs, again points out to the fact that other factors are more important than IPRs in attracting FDI.<sup>148</sup> Furthermore MNEs have been opening R&D centres and R&D joint-ventures and contracting research in India in the field of chemicals and pharmaceuticals.<sup>149</sup> Indeed some studies show that while the link with FDI is less significant, stronger IPRs still increase arm's length licensing and arm's length trade.<sup>150</sup>

Furthermore higher levels of IP protection attract FDI and licensing precisely because of the efforts of MNEs to keep their technologies as much as possible to themselves or at best their subsidiaries and local suppliers, instead of other producers in the domestic market, however so-called technology spillovers into the rest of the economy may still happen. An example would be the departure of local personnel after they had been employed and trained by the MNEs, the potential for which is large.<sup>151</sup> Again the legality of this depends on trade secret law and the contractual terms agreed to, such as 'no-compete' clauses in licensing agreements. Another possible spillover is the imitation of easily observable technologies such as management, accounting, marketing techniques or re-organization of product lines after they have been 'demonstrated' to be effective in the local economy by the MNEs.<sup>152</sup> The

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<sup>146</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 1; Abbott, *supra note 19*, p. 73.

<sup>147</sup> Drahos, *supra note 43*, p. 199.

<sup>148</sup> Lall, *supra note 2*, p. 12.

<sup>149</sup> N. Kumar, 'Multinational Enterprises, Overseas R and D Activity and the Global Technological Order', RIS Occasional Paper No 56, RIS: New Delhi. (1999).

<sup>150</sup> P. J. Smith, 'How Do Foreign Patent Rights Affect US Exports, Affiliate Sales, and Licenses?', 55 *Journal of International Economics*, (2001): pp. 411-439., G. Yang and K. E. Maskus: 'Intellectual Property Rights and Licensing: An Econometric Investigation', 137 *Weltwirtschaftliches Archiv*, (2001).

<sup>151</sup> Maskus, *supra note 130*, p.13.

<sup>152</sup> *Ibid*, p. 14.

likelihood of such spillovers may be expected to be accounted for by the MNEs when setting contractual terms, and if it is high they ‘may choose not to transact at all, to offer older-generation technologies keep the information within the firm by dealing only with subsidiaries, or offer to licensees a large share of rents (i.e., lower licensing fees) to induce them not to defect with the information.’<sup>153</sup> Not surprisingly, in the long run spillovers then discourage FDI and licensing. Bottom line – spillovers into the rest of the economy, which would be the most desirable outcome in terms of development is at best an unintended byproduct of FDI, and certainly preferably avoided by the MNEs.

The quality of TT from FDI depends in great part on how technologically advanced domestic firms already are and how advanced are the multinational firms investing. For example until the mid-1990s China, a great beneficiary from FDI, remained dependent on the import of advanced technology from abroad, even though it had narrowed its gap with developed economies in the low and intermediate technology areas mainly due to the fact that larger joint ventures often found that the latest technology was not suitable for China’s firms who used low technologies and that early-generation equipment was more appropriate.<sup>154</sup> Furthermore the main sources of FDI were Hong Kong and Taiwan which mainly transferred low or standardised technology as they were not major sources of advanced technology.<sup>155</sup> The leap from US\$ 16.3 billion in high-tech exports in 1997 to US\$ 165.4 billion in 2004 only happened after further reforms, such as tax incentives, VAT exemptions, subsidized credit for high-tech exports, a partial tax deduction for R&D expenditures, a tax exemption for all income from the transfer or development of new technologies; a preferential 6% value-added tax rate for software products developed and produced in China and the listing of new high-technology companies on the Shanghai and Shenzhen stock exchanges.<sup>156</sup> Furthermore the government not only strengthened efforts to attract FDI, but issued systematic guidelines to encourage FDI accompanying advanced technology transfers to China.<sup>157</sup>

In other words several factors come in play when it comes to TT through FDI and licensing that may help or prevent the absorption of technologies into domestic economies. Indeed the determinants of effective TT are ‘many and various’.<sup>158</sup> It must be looked at from a

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<sup>153</sup> *Ibid*, p. 22.

<sup>154</sup> R. Pomfret, ‘Growth and Transition: Why has China’s Performance Been so Different?’ 25 *Journal of Comparative Economics*, (1997), p. 430.

<sup>155</sup> C. L. Chen and Y. Zhang, ‘The Role of Foreign Direct Investment in China’s Post-1978 Economic Development’, 23 *World Development*, (1995), p.700.

<sup>156</sup> A. Segal, *Digital Dragon: High-Technology Enterprises in China* (Cornell University Press, 2003), p. 38

<sup>157</sup> W. Tseng and H. Zebregs, ‘Foreign Direct Investment in China: Some Lessons for Other Countries’ Washington, DC: International Monetary Fund, IMF Policy Discussion Paper (PDP/02/3), p. 13

<sup>158</sup> Commission on Intellectual Property Rights, *supra note 3*, p. 24.

sustainability point of view. If the domestic economy is not able or allowed to absorb the latest foreign technology brought by FDI and licensing, and further innovate on the basis of that, then there is little benefit of such TT in terms of development.

Apart from market channels TT happens also through non-market channels such as:

- imitation through product inspection, reverse engineering or decompilation of software. The legality of this form of ITT depends on the level of IP and trade secrets protection.<sup>159</sup> Even though there is no compensation to the original developer of the technology, the process itself may still incur high costs.<sup>160</sup>
- by technical and managerial personnel leaving a firm and starting a rival firm. Here again there is no compensation while the legality depends on labour mobility, ‘non-compete’ clauses and the like. Usually trade secret law prohibits the use of information without making any improvements to it to produce competing goods, while adopting the information and improving it into something new is ‘the basis for much information diffusion and competition in industries for which cross-fertilization of ideas and techniques is common.’<sup>161</sup>

Thus from all the possible channels, IPRs can be beneficial to some forms of ITT while they are detrimental to others. Considering the costs brought by a stronger IP protection, such as the costs of administration and enforcement, adjustment costs due to labour displacement, social costs, monopoly pricing, resulting from the abuse of IPRs and last but not least higher imitation and innovation costs,<sup>162</sup> some countries prefer to use weak IP regimes as a means of gaining access to foreign technologies and developing them using reverse engineering, thereby enhancing indigenous technological capacity, yet TRIPS now restricts this option for them.<sup>163</sup>

## **9. The Importance of Reverse Engineering for Development**

Countries have been preferring low-cost imitation until they move into a middle-income range with domestic innovative and absorptive capabilities.<sup>164</sup> There is an effort to dismiss imitation as a method of a bygone era, suggesting that FDI and the TT it brings act as

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<sup>159</sup> Maskus, *supra note* 37.

<sup>160</sup> Maskus, *supra note* 130, p. 12.

<sup>161</sup> *Ibid*, p. 13.

<sup>162</sup> K. E. Maskus, S. M. Dougherty and A. Mertha, ‘Intellectual Property Rights and Economic Development in China’ in C. Fink, *supra note* 141 pp. 133, 295, 302-306.

<sup>163</sup> Commission on Intellectual Property Rights, *supra note* 3, p. 24.

<sup>164</sup> World Bank, *supra note* 99, p. 7.

substitutes for internally generated local development.<sup>165</sup> However empirical analysis shows the opposite, with China being the latest in a series of countries that leap-frogged up the development curve with a weak patent system that encouraged local imitation of foreign-generated technology.<sup>166</sup> Indeed, reverse engineering has been one of the most important factors in giving developing countries the ability to catch up with the more technically advanced nations.<sup>167</sup> Reverse engineering is not however always the most cost efficient method of acquiring foreign technology as some products, such as complex machinery and financial services, are not easy to reverse engineer. On the other hand, some other products, such as software and pharmaceuticals have been said to ‘wear their technologies on their face’.<sup>168</sup> Several empirical studies have shown that weaker IPRs stimulate domestic innovative activity in developing countries.

For large and middle income developing countries with a domestic competence in imitation, the costs of royalty payments brought by stronger IPRs may just outweigh the benefits of attracting TT through FDI and licensing.

[E]ven mature technologies, available for simple imitation at low investment cost prior to TRIPS, could command significant license fees in the future. With the bottom range of the technology ladder thus raised, especially for the poorest countries with a skill basis that is too limited to manage the initial jump, the scope for imitation is narrowed. More broadly TRIPS affords technology developers greater leeway to refuse to license a protected technology or product, to demand markedly higher licensing fees and prices, and to impose restrictive conditions on licensing contracts.<sup>169</sup>

On the other hand developing countries which lack the market conditions to attract FDI and licensing have little use of trying to attract it with high IPR protection and even if they managed to attract it, they could not absorb it, due to lack of such capacity.

Professor Sanjaya Lall classified countries based on national technological activity and analysed the benefits and costs of a strengthened IP system concluding that countries with moderate technological activity, (i.e. they conduct some R&D and have medium levels of industrial development; for example Russia, Poland, Hungary, Brazil, Argentina, Chile, Mexico) are likely on balance to benefit from stronger patents, whereas for countries with low technological activity (for example China, India, Egypt, Thailand and Indonesia) it depends whether they are building their innovation systems based on copying foreign technology and importing technologies at arm’s length or on a strong transnational

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<sup>165</sup> Abbott, *supra note* 19, p. 11.

<sup>166</sup> *Ibid.*

<sup>167</sup> R. Nelson, ‘The Changing Institutional Requirements for Technological and Economic Catch Up’, Paper for the DRUID Summer Conference 2004 on Industrial Dynamics, Innovation and Development, (14-16. June 2004).

<sup>168</sup> Maskus, *supra note* 130, p. 9.

<sup>169</sup> Lall, *supra note* 2, p. 31.

corporation presence, with the later on balance gaining more than the former, who are more likely to benefit from slack IPRs in some aspects and from strong IPRs in other aspects.<sup>170</sup> Countries with no significant technological activity on the other hand incur far more cost than benefit from a strong IPR regime.<sup>171</sup> In other words, whether a country can benefit from high IPRs depends on its ability to purchase, absorb and deploy new technologies. If they lack this ability, the IPRs will not bring TT, whereas if they have this ability, the benefit of IPRs depend on ‘the extent to which [they] raise buying technologies, and whether the alternatives of copying and reverse engineering would have been feasible, cheaper and more rewarding in building up local technological capabilities.’<sup>172</sup> There is a trend among emerging market countries (BRICs) in deployment of financial and other incentives to induce local production of technologically sophisticated products.<sup>173</sup> Their ‘policymakers seem to have concluded that passive reliance on patents to induce technology transfer and local production is not working, and that a more direct approach is required.’<sup>174</sup>

a) India

For example a study of the way Indian enterprises absorbed foreign R&D found that weak IPRs allow spillovers simultaneously to promote domestic R&D and to have a positive direct effect on productivity, while stronger IPRs are not optimal in this respect, not even in the long run.<sup>175</sup> In this sense, the absence of patents on pharmaceutical products enabled the development of a highly successful adoptive R&D domestic effort aimed at discovering new ways of producing known drugs which were not protected by IPRs.<sup>176</sup> Before 1970, India followed an IP regime which was comparable to those of developed countries but then changed its policy and adopted a weaker patent regime after a number of cases in which foreign patent owners were neither using their patents for domestic manufacture nor allowing them to be used by local firms.<sup>177</sup> The Patents Act from 1970 ‘reduced the scope of patentability in food, chemicals and pharmaceuticals to only processes and not products’ and ‘the term of process patents was reduced to seven years in food, drugs and chemicals and to

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<sup>170</sup> The technological activity was derived from two variables: research and development financed by productive enterprises and the number of patents taken out in the US; *ibid*, pp. 2-3.

<sup>171</sup> *Ibid*.

<sup>172</sup> *Ibid*, p. 10.

<sup>173</sup> Abbott, *supra note* 19, p. 11

<sup>174</sup> *Ibid*.

<sup>175</sup> B. Fikkert ‘An Open or Closed Technology Policy? The Effects of Technology Licensing, Foreign Direct Investment, and Technology Spillovers on R and D in Indian Industrial Sector Firms’ PhD Dissertation, Yale University, p. 56.

<sup>176</sup> V. Heksar, ‘Externalities, Growth and Technology Transfer: Application to the Indian Manufacturing Sector, 1975-90’, (IMF, 1995).

<sup>177</sup> Kumar, *supra note* 24, p. 217, fn 5.

14 years for other products.’<sup>178</sup> ‘In 1970 much of the country’s pharmaceutical consumption was met by imports and the bulk of domestic production of formulations was dominated by MNE subsidiaries. Of the top 10 firms by retail sales in 1970 only two were domestic firms and the others were MNE subsidiaries.’<sup>179</sup> By 1996, however six of the top firms were Indian.<sup>180</sup> However, in the engineering and other industries India’s performance was not that high, which may be due to the fact that its system lacked an encouragement of the adaptive and minor inventive activity of domestic enterprises such as the utility model systems analysed below.<sup>181</sup>

a) China

China is generally speaking an important case to study in the search for a formula to rapid economic growth through upgrading technological capabilities, however one must keep in mind its unique features, i.e. its gigantic market and human resources, which make any conclusions of such an analysis of limited applicability to many other developing countries. As mentioned above, a patent system did not fit well with China’s traditions and philosophies, nor with the approach of a centrally planned economy followed by the Chinese government, therefore in the first three decades after the founding of the People’s Republic of China in 1949 all inventions were considered as state property.<sup>182</sup> External pressure from the US and the desire to contribute to the national modernization goals were the main drivers behind early IP reforms, while ‘the development of local stakeholders who benefited from stronger protection, the determination to develop a knowledge-based economy, the economic and reputational gains of China’s WTO accession, and the country’s increasing shift toward an export-driven economy were primary drivers for later reforms.’<sup>183</sup> China’s first patent law was only enacted in 1984, in the hope that it would be a factor in attracting FDI.<sup>184</sup> It was weak and contained merely the essentials for an effective patent scheme.<sup>185</sup> It excluded foods, beverages and condiments and pharmaceutical products from patentability; the scope for compulsory licenses was quite broad; it obliged the patent holder to work the patents in China and the mere importation of patented products did not constitute ‘working’; the term of

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<sup>178</sup> *Ibid*, pp. 217-218.

<sup>179</sup> *Ibid*, p. 219.

<sup>180</sup> *Ibid*.

<sup>181</sup> *Ibid*, p. 217.

<sup>182</sup> W. Zhuang, ‘Evolution of the Patent System in China’, in Abbott, *supra note* 19, p. 159.

<sup>183</sup> Yu, *supra note* 59, p. 185.

<sup>184</sup> Zhuang, *supra note* 182, p. 159.

<sup>185</sup> R. M. Gabriel, ‘The Patent Revolution: Proposed Reforms in Chinese Intellectual Property Law, Policy, and Practice Are The Latest Step to Bolster Patent Protection in China’, Comment, 9 *Asian-Pacific Law and Policy Journal*, (2008), pp. 326-27.

protection of patents was maximum 15 years and utility models and designs were protected for maximum 5 years; innocent infringement was excluded from any liability; and enforcement was merely a matter of administrative prosecution at the local level.<sup>186</sup> It was only under threats of trade sanctions by the US and intense negotiations between the two countries, that China gave into US demands and in 1992 included protection for all chemical inventions, including pharmaceuticals and agricultural chemicals, whether products or processes; extended the scope of protection to 20 years for patents and 10 years for utility models and designs; prohibited unauthorized importation of products which infringe on patents; removed the sufficient local working requirement and restricted the use of compulsory licences to exceptional circumstances such as refusal to deal, national emergency, public interest, or dependent patents; a compulsory license is neither exclusive nor transferable; other restrictions on the conditions included a reasonable exploitation fee and the possibility of judicial review.<sup>187</sup>

In the process of joining the WTO, China was again pressured in strengthening its IP law to comply with a number of TRIPS-plus obligations, such as providing effective enforcement and new substantive rights for patent holders (ex. rights of ‘offering for sale’); narrowing the scope of exceptions to infringement; improving enforcement; and further limiting the grounds for compulsory licences.<sup>188</sup> It is important to note that during the negotiating process, the IP rights reforms kept pace with the negotiations themselves; ‘[w]hen the negotiations encountered obstacles, the IPRs reform slowed down; when the negotiations reached agreements to promote the accession process, the IPRs reform accelerated noticeably.’<sup>189</sup>

The Chinese Science and Technology Minister Xu Guanhua reported in 2006 that as a consequence of joining the WTO in 2001, China lost a total of US\$ 1 billion in disputes over intellectual property rights since it joined which had struck a ‘devastating blow’ to parts of its economy.<sup>190</sup> This cost led to the ‘government’s first attempt to publicly encourage companies

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<sup>186</sup> Zhuang, *supra note* 182, p. 161.

<sup>187</sup> Memorandum of Understanding between the Government of the People’s Republic of China and the Government of the United States of America on the Protection of Intellectual Property (MOU), 1992, [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005362.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005362.asp) (accessed 19 October 2012), Art. 1, para (1) (a); Patent Law of the People’s Republic of China (1992 amendment), adopted on 4 September 1992, Standing Committee of the National People’s Congress, Industrial Property, June 1993, Articles 45, 11, 51-53, 56-58 in Zhuang, *supra note* 182, p. 162-163.

<sup>188</sup> Patent Law of the People’s Republic of China (2000 amendment) Standing Committee of the National Peoples’ Congress, 25 August 2000, Article 11, [http://wipo.int/wipolex/en/text.jsp?file\\_id=125983](http://wipo.int/wipolex/en/text.jsp?file_id=125983), Articles 11; 60-63; 50 in Zhuang, *ibid*, p. 163-164.

<sup>189</sup> H. Xue and C. Zheng, *Chinese Intellectual Property Law in the 21<sup>st</sup> Century* (Sweet and Maxwell Asia, 2002) xxxix in Yu, *supra note* 59, p. 196.

<sup>190</sup> S. Schwankert, ‘Official Says Patents Are Losing China Money’, *Computerworld, News* (8 May 2006).

to develop products that aren't dependent on technologies from other countries'.<sup>191</sup> The Chinese government's plan is now to transform the country from a global manufacturing hub, based on cheap labour, low-cost resources and extensive environmental pollution into an innovation engine by 2020.<sup>192</sup> In this context a further strengthening of IP law came with the reform in 2009 which was enacted out of China's own incentive to bolster domestic innovation.<sup>193</sup> This in fact proved a strong encouragement for the growth of domestic patent applications, however some doubt the existence of a link with genuine innovation since even though the volume of applications is dramatically rising, the majority are not for invention patents but for utility model and design patents.<sup>194</sup> Furthermore there is a low rate of renewal and the percentage of Chinese-owned patents at the United States Patent and Trademark Office and EPO remains low in comparison with the main countries of origin.<sup>195</sup> From the year 2000 to 2006 out of 248057 patents granted 92867 were domestic and 155190 foreign, while out of 493119 utility models, 488276 were domestic and only 4843 foreign.<sup>196</sup> However statistics from 2010 show a substantially larger number of patents granted for domestic inventions (79767), than those for foreign applications (55343), while on the other hand there are 342258 domestic and 2214 foreign utility models.<sup>197</sup> Still there are almost twice as many utility models as there are invention patents and the average life span of invention patents awarded to domestic entities (around 6.9 years) is significantly lower than for foreign-owned invention patents in China (around 10.3 years).<sup>198</sup>

Despite the recent development of indigenous technologies, foreign invested enterprises still account for a significant proportion of high-tech products in China.<sup>199</sup> Chinese entities still hold mostly patents in traditional sectors, including food, chemicals, civil engineering and medicine, whereas 'foreign investors still hold the advantage in high-tech industries,

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<sup>191</sup> *Ibid.*

<sup>192</sup> Zhuang, *supra note* 182, p. 155.

<sup>193</sup> J. H. Reichman, 'Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?', 46 *Houston Law Review*, (2009), pp. 1117-8.

<sup>194</sup> Zhuang, *supra note* 182.

<sup>195</sup> Abbott, *supra note* 19, p. 16.

<sup>196</sup> State Intellectual Property Office of the PRC, Three Kinds of Patent Granted for Home and Abroad, 2000-2006, available at [english.sipo.gov.cn/statistics/200804/t20080416-380392.html](http://english.sipo.gov.cn/statistics/200804/t20080416-380392.html), (last accessed, 22.8.2016)

<sup>197</sup> State Intellectual Property Office of the PRC available at: [english.sipo.gov.cn/statistics/gnwsqnb/201101/t20110125-570600.html](http://english.sipo.gov.cn/statistics/gnwsqnb/201101/t20110125-570600.html), (last accessed, 22.8.2016)

<sup>198</sup> State Intellectual Property Office of the PRC, 'Annual Report of China Valid Patent 2011' (Excerpt); The average life cycle of utility models owned by Chinese patentees is 4.1 years, with that of designs being 3.2 years, whereas the average life cycle of utility models filed by foreign entities is 5.9 years with that of designs being 6.3 years

<sup>199</sup> Ministry of Commerce, 'Investment Statistics', Beijing, [http://www.fdi.gov.cn/pub/FDI\\_En/Statistics/default.htm](http://www.fdi.gov.cn/pub/FDI_En/Statistics/default.htm) (downloaded 25 January 2007) in M.-J. Kim and J. S. Mah, 'China's R &D Policies and Technology-Intensive Industries,' 39 *Journal of Contemporary Asia* (2009), p. 271.



especially in optics, transportation, audio-visual technology, medical technology, semiconductors and engines'.<sup>200</sup> Still further investments in R&D will no doubt lead to an increase in technological accomplishments as the government is devoting very substantial financial resources to high technology fields. Even if it is still lagging behind at the moment, China will eventually become more internationally competitive in high technology fields, however not because of stronger IP protection, but because of devoting substantial financial resources to this endeavour and it is important to 'distinguish the cart and the horse' when this happens.<sup>201</sup> Furthermore China has already moved into high-end technology markets, such as cars and regional jets<sup>202</sup> and more importantly is driving the world innovation on renewables on green energy and solar manufacturing, technologies that are not as sexy as the latest iPhone, but perhaps technologies that will be much more important to the world than what Apple computers bring for the rest of us.<sup>203</sup>

It is thus quite clear that the Chinese government does not seem to be relying only on the strengthening of the patent system to create a high technology environment even at this stage of its development. In terms of successfully attracting FDI and using it for its technological development, some claim that this is due to China's open access to global markets which it got through the WTO and the development of its IPR protection through TRIPS.<sup>204</sup> Others however see as a more important factor in attracting FDI the access to its huge market, lower production costs, and its human resources which China exchanged for FDI and the transfer of advanced technology from abroad.<sup>205</sup> Chang claims that in the case of the Chinese automobile industry it was actually the fact that the market was protected which in the beginning allowed the Chinese government to get a lot of TT from the 'Volkswagens of this world' by using its bargaining power and only allowing them to come and build their cars in China in joint-ventures with Chinese producers, with lots of conditions attached.<sup>206</sup> China has been further creating a 'business friendly environment' with preferential tax rates and tax exemptions for potential investors as well as providing them with financial support.<sup>207</sup>

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<sup>200</sup> X. Wang, 'Created in China, the Power of Invention Patents', *China Daily*, 29 February 2012, [http://www.chinadaily.com.cn/cndy/2012-02/29/cpntent\\_14716851](http://www.chinadaily.com.cn/cndy/2012-02/29/cpntent_14716851) in Zhuang, *supra note* 182, p. 158.

<sup>201</sup> Abbott, *supra note* 19, p. 17.

<sup>202</sup> Yu, *supra note* 59, p. 198.

<sup>203</sup> D. Quah, 'Does Market-led Development have a Future?', discussion R. Wade, D. Quah and H. J. Chang, (London School of Economics, 15 May 2013).

<sup>204</sup> Strauss, *supra note* 20, p. 51, 52.

<sup>205</sup> Kim, *supra note* 199, p. 262.

<sup>206</sup> Chang, *supra note* 203.

<sup>207</sup> Kim, *supra note* 199, pp. 271-272.

Like other emerging markets, China is not only relying on TT from FDI and is using vast financial and other incentives to induce local production of technologically sophisticated products and industrial policy to promote local production, which is an essential component for technological advancement. This challenges ‘one of the tenets of the multinational business community’s patent lobbying premises, that is, that granting local patents will result in increased licensing opportunities, transfer of technology and local production’ on its own, as it does not even apply when economies have already achieved such a substantial level of income as China.<sup>208</sup>

Furthermore, its revision of the IP law in 2009 represents a balanced approach to patent reform. It kept the controversial ‘utility model’ which brings advantages for Chinese companies over foreign companies. The utility model enhances access to patent protection to small domestic innovators<sup>209</sup> for various reasons. Firstly, unlike the invention patent, which is granted for new technical solutions proposed for a product, a process or the improvement thereof, a utility model applies to technical solutions proposed for the shape and structure of a product, or the combination thereof which is fit for practical use.<sup>210</sup> Secondly the application fee is about one seventh of that for an invention patent and it is granted on average in less than 8 months. Most importantly, however, the requirements of novelty and inventiveness are lower. Formally, since the law introduced in 2009, a utility model must meet the same absolute novelty requirement as an invention patent, however in practice ‘the cursory examination procedure often turns the absolute novelty requirement into a mere formality’.<sup>211</sup> Before the reform, absolute novelty was not even formally a requirement, which meant that sale or use outside China was not considered prior art,<sup>212</sup> thus allowing for situations such as in the case of Chint.<sup>213</sup> Due to the loose examination of applications, more than 60% of all Chinese utility model patents are later invalidated, leading to prosecution and litigation

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<sup>208</sup> Abbott, *supra note* 19, p. 12.

<sup>209</sup> M. D. Janis, ‘Second Tier Patent Protection’, 40 *Harvard International Law Journal*, (1999), pp. 177-78; S. A. Pager, ‘Patents on a Shoestring; Making Patent Protection Work for Developing Countries’, 23 *Georgia State University Law Review*, (2007), p. 803,

<sup>210</sup> Chinese Patent Law (2009), Art. 2

<sup>211</sup> P. A. Cummings, Note, ‘From Germany to Australia: Opportunity for a Second Tier Patent System in the United States’, 18 *Michigan State Journal of International Law*, (2010), p. 302.

<sup>212</sup> ‘Real and Present Danger: Patent Litigation in China’, LAW360 (10. June 2009), available at: [http://ip.law360.com/print\\_article/105112](http://ip.law360.com/print_article/105112), (last accessed, 22.8.2016).

<sup>213</sup> The SIPO did not consider over 15 years of prior sales or use of an improved circuit breaker technology when upholding the validity of a utility model patent on it obtained by Chint Electric, which enabled the victory of Chint over Schneider Electric in the Wenzhou Intermediate People’s Court where Chint was awarded \$45 million in damages for infringement of Chint’s utility model. M. S. Zhai, ‘The Chinese Utility Model Patent is Destroying Innovation in China’, 39 *AIPLA Quarterly Journal*, (2011), pp. 423-424.

uncertainty.<sup>214</sup> Furthermore the lower standard of inventiveness means that obvious improvements on basic technology, which would have remained in the public domain, are now eligible for patent protection.<sup>215</sup> Although a subject of criticism, the use of the utility model has been shown to have contributed to Japan's rise in productivity and to have successfully promoted innovation in Brazil and the Philippines.<sup>216</sup> The utility model, allowed under TRIPS, can therefore play an important role in countries where domestic innovation cannot compete yet with the level of the leading world innovators.

Chinese patent policies have generally been criticized as being unfairly biased against foreign companies<sup>217</sup> and MNCs complain of having to deal with economic protectionism on a large scale.<sup>218</sup> Furthermore, instead of waiting for technology spillovers induced by IP protection, Chinese enterprises are using modern methods of reverse engineering and imitation by penetrating US and European industry computers and databases to 'appropriate' technological information, including the latest technologies.<sup>219</sup> The advancement of technology has generally enabled the rapid dissemination of information across the globe and thus compromised the monopoly market conditions created by IP protection.<sup>220</sup> Also some Chinese enterprises are actively reviewing pending US patent application publications and filing duplicate utility model patents in China to save their backs in any future counterfeiting.<sup>221</sup> The enforcement of IPRs generally remains weak and US and other foreign industries lose billions of dollars annually due to piracy and counterfeiting.<sup>222</sup> A telling example of weak enforcement is when Dyson sued in China a Chinese firm manufacturing a copy of its bladeless electronic fan. Sir Dyson claimed that his company had spent more than 3 million dollars on legal fees and subsequently won the case however the infringing company was only fined \$7,500 and did not even pay that amount but was still allowed to

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<sup>214</sup> Cummings, *supra* note 211, p. 302.

<sup>215</sup> Janis, *supra* note 209, p. 202.

<sup>216</sup> K. E. Maskus, 'The Economics of Global Intellectual Property and Economic Development: A Survey' in P. K. Yu (ed.), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Praeger, 2007), pp. 159, 164.

<sup>217</sup> D. A. Fazzolare, 'Wielding the Double-Edged Sword: Creating the Perception of a Chinese Enterprise to Obtain and Enforce Patent Protection in China', 5 *Brigham Young University International Law & Management Review* (2009), p. 207.

<sup>218</sup> 'U.S. Business Warns of Chinese Protectionism', *Bloomberg Businessweek*, (29. April 2009) [http://www.businessweek.com/globalbiz/content/apr2009/gb20090429\\_366619.htm](http://www.businessweek.com/globalbiz/content/apr2009/gb20090429_366619.htm) (last accessed, 22.8.2016).

<sup>219</sup> R. A. Clarke and R. K. Knake, *Cyber War*, (Harper Collings Publishers, 2010).

<sup>220</sup> Ostergard, *supra* note 9, p. 155.

<sup>221</sup> X. Wang, 'Protection of IP in China: A Work in Process', *The Metropolitan Corporate Counsel* (Dec. 2005) <http://www.metrocpcounsel.com/pdf/2005/December/45.pdf>, p. 45 (last accessed, 22.8.2016).

<sup>222</sup> Yu, *supra* note 59, p. 175; Intellectual Property Alliance, 2007 Special 301: Peoples' Republic of China – Amended (2007), p. 96.

continue the production.<sup>223</sup> The concept of promoting ‘indigenous innovation’ has also been used to discriminate in favour of domestic companies when giving access to tens of billions of dollars in government contracts.<sup>224</sup> Executives from Siemens, General Electric, and Microsoft further assert that China’s IP policies force foreign companies to share their trade secrets with Chinese companies.<sup>225</sup>

It is clear that although China may now formally comply with international IP standards, such as the TRIPS Agreement, its policies and practice still resemble more those that Japan, Korea and Taiwan used in their early industrialisation stage. US and other developed countries had pressured Taiwan, Japan, Korea as well as Thailand, Phillipines and numerous other countries to change their IPR protection practices, however China has experienced the most pressure out of all of them.<sup>226</sup> Strong enforcement of IPRs is only expected to happen when the benefits of such protection start outweighing its overall cost, and the current weak enforcement suggests that China is not at that point yet.<sup>227</sup> China however can afford the luxury of weak IP enforcement, as despite paying a price for it, it is economically powerful and significant enough to resist much of the pressure. Weaker countries on the other hand cannot be expected to be able to do the same in carving out their policy space. Sir Dyson has however threatened China that it risks being expelled from the WTO over IP breaches, such as those of copying his inventions.<sup>228</sup>

## **10. The Role of Other Policy Tools for Technological Development**

In order to be able to absorb foreign technology, local firms need to be engaged in R&D.<sup>229</sup> The inventive activity of enterprises is determined by ‘firm size, market structure, national innovation system, technological opportunities’ etc.<sup>230</sup> IPRs on the other hand have little proven effect and can in fact even choke the absorption of knowledge spillovers.<sup>231</sup> One must also not lose sight of the fact that FDI can decline the productivity of domestic firms because

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<sup>223</sup> D. Milmo, ‘Dyson Seeks to Block Copycat Manufacturers in China’, *The Guardian*, (4 Dec. 2011), available at: <https://www.theguardian.com/business/2011/dec/04/dyson-intellectual-property-rights-china>, (last accessed, 22.8.2016).

<sup>224</sup> L. Chao, ‘Patents in China Hit a Record’, *Wall Street Journal* (4. Feb. 2010) at a12.

<sup>225</sup> A. Browne and J. Dean, ‘Business Sours on China’, *Wall Street Journal*, (17 March 2010) at A1.

<sup>226</sup> Kumar, *supra note* 24, p. 215; Ostergard, *supra note* 9, p. 144.

<sup>227</sup> Yu, *supra note* 59, p. 202.

<sup>228</sup> Milmo, *supra note* 223.

<sup>229</sup> Lall, *supra note* 2, p. 17.

<sup>230</sup> Kumar, *supra note* 24, p. 212.

<sup>231</sup> *Ibid.*

of premature exposure to competition.<sup>232</sup> To allow firms to reach the appropriate size and competitiveness, industrial policy thus also plays a role in encouraging inventive activity. Part of the Korea and Taiwan strategy was considerable industrial policy: import protection, export subsidies, credit targeting and FDI restrictions.<sup>233</sup> It is important to stress that scientists, engineers and R&D laboratories are not enough to foster the necessary innovations which will restructure the economies of low-income countries.<sup>234</sup> There has to be a demand for innovation by the entrepreneurs. This demand however is low because of the uncertainty of the profitability of new activities.<sup>235</sup> As discussed in chapter III, industrial policy and governmental subsidization are necessary to overcome this lack of demand, but is seriously curtailed by WTO rules.<sup>236</sup>

### **11. TRIPS – Remaining Policy Space**

TRIPS does provide some bases for exclusion from patentability or for limitations to be put on the enjoyment of exclusive rights, however they have proven to be of limited usefulness for developing countries even in the context of health, let alone for the pursuit of the technological development.

Article 27.1 of the TRIPS Agreement states that ‘patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application’ and it prohibits discrimination between imported and locally produced products: ‘patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.’ However, TRIPS does incorporate some exceptions to the absolutist nature of IPRs. During the negotiations of the TRIPS Agreement many countries, especially developing, expressed concern over potential anti-competitive abuse of the rights guaranteed therein. They managed to include into the Agreement provisions allowing for the use of competition law to tackle anti-competitive licensing practices and conditions.

Five provisions of the TRIPS Agreement allow for the option of either preventing the granting of or limiting the enjoyment of the exclusive rights.

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<sup>232</sup> B. Aitken and A. E. Harrison, ‘Do Domestic Firms Benefit from Direct Foreign Investment?’ 89 *American Economic Review*, (1999), pp. 605-618.

<sup>233</sup> Lall, *supra note 2*.

<sup>234</sup> D. Rodrik, ‘Industrial Policy for the Twenty-First Century’, paper prepared for UNIDO, (2004), p. 4.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

Art. 27.2, allows Members to exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

Art. 27.3, allows Members also to ‘exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.’

Most important exception is found in Art. 30 on compulsory licences, which allows ‘limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.’

Art. 31 then lists the bases and limitations for such exceptions when compulsory licenses (i.e. involuntary contracts authorized by the national authorities between patent holders and third parties which are seeking a license to use the patent) can be granted, whereas Art. 32 gives the right holder the opportunity for judicial review of any decision of revocation or forfeiture of patents.

Therefore public interest considerations, as well as abuse of patent rights, can be a basis for limiting the exercise of IPRs under TRIPS, however these provisions are legally highly complex and have strict conditions attached to them.<sup>237</sup> They cannot be applied generally, or without any criticism or objection.<sup>238</sup> There is a growing trend among developing countries such as Thailand, Malaysia, Indonesia, India and Brazil of enacting and utilizing statutory powers to grant, or to compel a patentee to grant patent licenses to third parties in the interests of public health.<sup>239</sup> Amongst emerging markets, China is an exception in that it hasn’t issued a compulsory license in over two decades, however it has signalled its willingness to do so including through UN-sponsored drug access workshops where

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<sup>237</sup> Shadlen, *supra note* 15, p. 119.

<sup>238</sup> H. M. Haugen, ‘Human Rights and TRIPS Exclusion and Exception Provisions’, 11 *The Journal of World Intellectual Property* 5/6, (2009), p. 347.

<sup>239</sup> G. Bloch and G. A. Milner, ‘Compulsory patent licensing in China’, *Lexology* (16. Jan. 2013) <http://www.lexology.com/library/detail.aspx?g=3d04e562-16df-49b8-b88c-6cd535adffc9>, (last accessed, 26.8.2016).

compulsory licensing was the key topic of discussion as well as indirectly through adopting healthcare goals.<sup>240</sup> Although TRIPS explicitly allows compulsory licenses, albeit in a very limited manner, developing countries have had to subsequently fight for the re-affirmation that the right actually exists. This was because developing countries using compulsory licences were put on the US ‘Watch list’ and subjected to punishments such as for example the removal of GSP preferences (ex. South Africa) as if they had done something wrong.<sup>241</sup> Developing countries thus conditioned the launching of multilateral trade negotiations in 1999 in Seattle at the third Ministerial on the clarification that they had the right to compulsory licences and the freedom to determine the grounds upon which such licences are granted.<sup>242</sup> They eventually got this clarification with the Doha Declaration on the TRIPS Agreement and Public Health<sup>243</sup> which obviously did not in any way change the law but merely stated the obvious in the face of US pressure aimed at annulling the rights contained in TRIPS.<sup>244</sup>

Since TRIPS Art. 31(f) restricts the use of the subject matter of a patent authorised under compulsory licensing predominantly to the supply of the domestic market, this meant that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing when needed. Ministers in Doha thus instructed the Council for TRIPS to find an expeditious solution to this problem.<sup>245</sup> In this respect, it was a question of actually changing the law, and unsurprisingly developing countries were far less successful here, eventually settling for an unsatisfactory resolution.<sup>246</sup> In 2003 the General Council of the WTO adopted the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, which is essentially a waiver of the restriction set out in Art. 31(f) with respect to pharmaceutical products in exceptional circumstances.<sup>247</sup> Several problems exist with the use of this waiver which is reflected in the fact that to date the only notification of its use came in 2008 when a Canadian generic pharmaceutical firm, Apotex Inc. shipped 7 million

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<sup>240</sup> *Ibid.*

<sup>241</sup> Shadlen, *supra note 15*, p. 119.

<sup>242</sup> *Ibid.*

<sup>243</sup> WTO, *Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc. WT/MIN(01)/DEC/W/2 (14 November 2001)

<sup>244</sup> Shadlen, *supra note 15*, p. 119.

<sup>245</sup> WTO, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (20 November 2001)

<sup>246</sup> Shadlen, *supra note 15*, p. 122.

<sup>247</sup> WTO, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (2 September 2003)

doses of antiretroviral drugs to Rwanda for the treatment of HIV/AIDS.<sup>248</sup> It has even been predicted that the waiver will never be used again based on how many factors had to come together in this one and only time that it was successfully used. Since public health is not the subject of the present discussion further analysis will not be conducted here on this topic.

It is evident, however, that apart from urgent health matters such as epidemics, compulsory licensing under Art. 31 is not really useful. The conditions are quite restrictive and they eliminate nearly all prospects for effective TT.<sup>249</sup> One of the further deficiencies of compulsory licenses is that they fail to acquire the essential know-how that goes with the patented information.

## **Conclusion**

Even though strong international IP protection can bring benefits in terms of attracting FDI, its influence is limited and other factors arguably play a more important role in this respect, while the quality and quantity of TT from such investment is by no means necessarily great and depends on several factors. On the other hand strong IP protection drastically limits the possibilities of TT through reverse engineering and copying, it poses great costs in acquiring licenses and is a financial burden in terms of the implementation itself. It is thus fair to conclude that TRIPS obstructs development and brings more cost than benefit for technologically less advanced countries while taking away necessary policy space by preventing discrimination between fields of technology, by imposing a 20 year period of protection, by strengthening the enforcement mechanism etc. Evidence shows that it is countries which had weak patent regimes in the past and those that are poorly implementing their international obligations in this area that are managing to upgrade their capabilities. This is however not a luxury all developing countries can afford especially not with the political pressure placed on developing countries even in cases of using measures which are clearly allowed under TRIPS.

Similarly to the free trade agenda, the IP agenda is also accompanied by effective propaganda. This propaganda against imitation may be nothing more than a desire to discourage the emergence of another China to challenge the existing organization of

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<sup>248</sup> WTO, TRIPS and Public Health 'Paragraph 6' System, notifications, available at: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(%20@Symbol=%20ip/n/10/\\*%20\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20ip/n/10/*%20)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#), (last accessed 26.8.2016).

<sup>249</sup> C. M. Correa, 'Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?', manuscript, Duke University (2003).



multinational business.<sup>250</sup> A look at the history of countries such as Taiwan, South Korea, Japan or China more recently, shows how much these countries benefited from reverse engineering at a scale which they would not have been able to do if TRIPS had applied to them at the time.<sup>251</sup> This ‘does not mean that developing countries ought not to have patent rules, or should not have IPR protection. It just says that this is an area where it would have been very valuable for developing countries to maintain autonomy to figure out what would be the best system for that.’<sup>252</sup> It is essential to acknowledge that developmental economics must strive to be more like clinical medicine in its approach to problems, meaning countries must have the freedom to design their policies according to the diagnosis of their particular economic situation, rather than prescribing the same medicine for everyone.<sup>253</sup> Developing countries need flexibility in trying to upgrade their technological base and it is unacceptable that the protection of IP under the WTO threatens this flexibility. While it needs to be acknowledged that TRIPS is a simplistic set of rules which still allows countries to define patents in terms of their breadth and interpretation, their policy space is undoubtedly more restricted than before. The fact that this restriction is dictated through an organisation which claims to promote free trade is additionally absurd. This chapter thus concludes that despite the fact that the propaganda promoting intellectual property protection provides perceived legitimacy to the fight against ‘piracy’, the TRIPS Agreement in fact adds substantially to the legitimacy gap of the WTO and events surrounding its birth furthermore reveal a large democracy deficiency.

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<sup>250</sup> Abbott, *supra note* 19, p. 11.

<sup>251</sup> Rodrik, *supra note* 116, pp. 4-5.

<sup>252</sup> *Ibid.*

<sup>253</sup> J. Sachs, *The End of Poverty*, (Penguin Press, 2005), p. 75.

*'so as the great may have no greater hope of impunity when they do violence, dishonour, or any injury to the meaner sort than when one of these does the like to one of them. For in this consisteth equity'*<sup>1</sup>

## Chapter VI

### THE DISPUTE SETTLEMENT MECHANISM – A STRONG WEAPON IN REBALANCING POWER INEQUALITIES AND CARVING OUT NECESSARY POLICY SPACE FOR DEVELOPMENT?

#### Introduction

While the GATT/WTO system has brought disproportionate economic benefits mostly to a small group of industrial states for reasons such as the before mentioned principal-supplier rule and the low influence of developing countries in bargaining over the rules, there may be another important reason for unequally distributed benefits, namely the weak enforcement of WTO rules when developing countries (successfully) challenge violations against their interests.<sup>2</sup> A well-functioning dispute settlement mechanism, equally accessible and equally effective in its enforcement for all Members is thus crucial in preventing further disadvantage to developing countries in a system which is already tilted to the other side.

The WTO dispute settlement mechanism gives a unique opportunity to developing countries, which otherwise lack the political or economic power to be able to challenge developed countries and bring cases against them. As one study clearly illustrates, in disputes being dealt with outside the WTO framework, developing countries face much greater challenges in bringing a case against a larger trading partner, such as 'a refusal to negotiate..., arbitrary standards, limited interest from third countries in their trade problem, and lack of leverage to bargain for concessions... Simply getting a trade partner to agree to talk about its protectionist trade barriers is difficult for a developing country'.<sup>3</sup> The WTO dispute settlement mechanism (DSM) is therefore a substantial improvement to bilateral dispute settlement, especially in light of several studies<sup>4</sup> showing that economic imbalances between

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<sup>1</sup> Thomas Hobbes, *Leviathan*

<sup>2</sup> J. Gowa and S. Y. Kim, 'An Exclusive Country Club: The Effects of GATT 1950–94', 57 *World Politics*, (2005) p. 473.

<sup>3</sup> C. L. Davis, *Why Adjudicate?, Enforcing Trade Rules in the WTO*, (Princeton University Press, 2012), p 258.

<sup>4</sup> H. Horn, P. C. Mavroidis and H. Nordström. *Is The GATT Dispute Settlement System Biased?* CEPR Discussion Paper Series (1999); J. Goldstein and L. L. Martin, 'Legalization, Trade Liberalization, and

the parties do not seem to be affecting the conduct and results of WTO dispute settlements.<sup>5</sup> However the system still allows for the imbalance of power to affect developing countries' very access to the dispute settlement as well as their ability to see the rulings in their favour being successfully enforced. The biggest problems that developing countries face and which feed off each other are costs, lack of experience, lack of institutions and the uncertainty of whether a decided issue will actually be implemented. The fact that they have participated less actively in the DSM than developed countries has been attributed to these factors. This contributes to the procedural or democratic legitimacy gap of the organisation. However there has been positive development on all the mentioned issues and a continuous increase in developing countries' active participation.

This chapter looks at whether the DSM can act as a strong weapon in rebalancing the power inequalities of the WTO system. The first part considers capabilities of developing countries in terms of sufficient legal strength to bring disputes against more powerful players. It looks at challenges posed in terms of the costs involved which they have to surmount as well as the built up of necessary institutions. It examines the statistics of the dispute settlement and highlights successful strategies of a substantial number of developing countries in overcoming their capacity constraints. The chapter also delves into the question of enforcement against economically stronger parties and whether it can be successful. The second part of this chapter then looks at substantive hurdles in terms of rebalancing the system through the DSM in a way that would give more weight to development. It thus analyses the effectiveness of recourse by developing countries to 'development' or 'sustainable development' as found in the WTO Preamble or other international as well as domestic laws and policies, the use of arguments based on sovereignty or a right to economic diversification, in order to justify developmental policies strictly speaking in breach of WTO. Similarly it looks at the possibility of recourse to the objects and purposes of the TRIPS Agreement in this context. On the other hand it considers the (im)possibility of challenging market restrictions placed on goods of importance to developing countries. The main argument is that the barriers in accessing the DSM, which developing countries face, can be overcome and the DSM can give valuable power to essentially less powerful states. The problem however lies in the biased law itself and an expansion of the mandate to include the consideration of the right to development (RTD) at the DSM could rectify this problem. This

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Domestic Politics: A Cautionary Note',<sup>54</sup> *International Organization*, (2000), pp. 603-632; A. Guzman and B. A. Simmons, 'To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization', 31 *Journal of Legal Studies* (2002), p. S205-S236.

<sup>5</sup> With the exception of the consultations phase, when the parties are more or less on their own.

implies that the procedural legitimacy gap is not as great (albeit it does exist) as is the legitimacy gap of the rules applied and the fact that the purported goals give no space to panels and the Appellate Body for more flexibility in interpreting the law towards more development friendly decisions.

### **1. Statistics on Dispute Settlement**

Looking at the number of disputes initiated it is evident that the DSM has been extremely active, especially since the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) with the establishment of the WTO. In just over 20 years, the system has received 507 requests for consultations, much more than the 300 disputes GATT dealt with in 47 years. Compared to the International Court of Justice which has received only 162 cases in 68 years or compared to most other international courts, this is 'a remarkable level of activity' covering in the first 16 years around US\$ 1 trillion of trade flows.<sup>6</sup> Such high levels of activity also cannot be found in dispute settlement mechanisms of RTAs which are in turn rarely used. According to the Director-General the number of disputes and their increasing complexity has even lead to severe problems such as the overburdening of the Appellate Body (AB) as the rate of appeal, which on average is approximately two-thirds, is much higher than was anticipated when the negotiators created a body of 7 part time Members.<sup>7</sup> The rate of appeal however is not exactly a sign of success but can be, in many instances, rather a reflection of Members wishing to keep in place an 'effective breach' for as long as possible and thus intentionally prolonging the procedure by appealing the dispute settlement body (DSB) decisions.

Still, generally speaking, the high levels of activity are a sign of a relatively successful international dispute settlement mechanism. To see how developing countries have participated in this activity, it is useful to look at some statistics. By far the most frequent users of the dispute settlement have been the United States and the European Union (formerly European Community). This is hardly surprising considering the theory that the more trading partners a country has and the larger its exports to them are the more likely it is for a dispute to arise.<sup>8</sup> The United States have thus far initiated 107 disputes which is more than three

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<sup>6</sup> WTO, 'Azevêdo says success of WTO dispute settlement brings urgent challenges', Roberto Azevêdo, 26 September 2014, available at: '[http://www.wto.org/english/news\\_e/spra\\_e/spra32\\_e.htm](http://www.wto.org/english/news_e/spra_e/spra32_e.htm), (last accessed, 27.8.2016).

<sup>7</sup> *Ibid.*

<sup>8</sup> P. Holmes, J. Rollo, and A. R. Young, Policy Research Working Paper, 3133 (World Bank, 2003), p. 6.; M. I. Busch, and E. Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute

times as many as the third most active complainant (Canada) and it has had 123 complaints brought against it, which is almost four times the number of complaints faced by the third most active respondent (China).<sup>9</sup> However on the list of countries which have initiated more than 20 disputes, after USA, EU and Canada, one finds four developing countries, namely Brazil (27), Mexico (23), India (21) and Argentina. Furthermore many other developing countries namely Thailand, Chile, Republic of Korea, Guatemala, Indonesia and of course China have each initiated at least 9 disputes. Considering China's significance in international trade, it is also not surprising that in the last 100 disputes, much of the 'great power' litigation, previously fought between the US and EU has now moved to US-China and EU-China relations.<sup>10</sup>

In the first years after the Uruguay Round, dispute-settlement was used frequently, with an average of 41 disputes<sup>11</sup> initiated per year, whereas there was a decline to just over one half of that number in the period between 2001-08 and a slight further decline since to only 17 disputes on average per year.<sup>12</sup> Out of this the decline has been much steeper for the US/EC and other industrialized complainants, whereas for developing countries it has only been a drop from 13 disputes initiated per year between 1995-2000 to 10 per year between 2001-2008, while in the period from 2009 until present they have been initiating around 9 disputes per year.

Furthermore, it is important to see who is filing against whom. In around 39% of disputes initiated by the US or EC in the early period after the Uruguay round (1995-2000), the two were simply challenging each other. In the period between 2009-2014, however, only a total of 3 disputes fell into this category, whereas 29 (88%) of the disputes initiated by the US or EC were against developing countries. Other developed countries further initiated 9 disputes against developing countries. Unsurprisingly the most targeted country by developed countries during this period has been China with 16 disputes brought against it. In this regard it is not hard to sympathise with China's own proposal of putting a quantitative limitation on

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Settlement,' in D. L. M. Kennedy and J. D. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, (Cambridge University Press, 2002); 457-81.

<sup>9</sup> WTO, Dispute Settlement, The Disputes, Disputes by Country/Territory, available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm), (statistics done: 28.1.2015), (last accessed 27.8.2016).

<sup>10</sup> G. Vidigal, 'WTO – The First 500 Disputes and the last 100 Disputes', *European Journal of International Law: Talk!*, (11. Nov. 2015); accessible at: <http://www.ejiltalk.org/wto-the-first-500-disputes-and-the-last-100-disputes/> (last accessed, 22.8.2016).

<sup>11</sup> WTO, Disputes by Country, *supra note 9*, Bilateral pairs counted separately for each complainant.

<sup>12</sup> WTO, Dispute Settlement, The Disputes, Chronological List of Disputes, available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm), (statistics done: 28.1.2015), (last accessed 27.8.2016).

the number of complaints per year that countries can bring against a particular developing country.<sup>13</sup>

Developing countries on the other hand consistently through the years target the US or EU in about half of all cases and increasingly also other developed countries (9% between 2009-14), while the number of disputes initiated against other developing countries which was rising for a while, has quite diminished in the last five years to only 34%.

This also means that in the last 5 years, the EU and USA have again become the biggest initiators of disputes against developing countries as was the case in the initial period after the Uruguay round, whereas in between these periods, fellow developing countries initiated the majority, i.e. 60% of such disputes. Thus importantly, together with other developed countries in the last 5 years, the EU and USA have brought a total of 38 disputes against developing countries compared to only 20 brought by fellow developing countries. This is a quite concerning statistic, especially considering that developing countries have lost too much of necessary policy space for development and in light of the fact that reliance on sustainable development as a justification for certain policy measures does not provide a meaningful legal tool for developing countries (see below for further discussion).

Looking at the disputes by sectors, developing and developed countries both file most of their complaints and in about equal measure in the agriculture, beverages and seafood industry. Not surprisingly, however, in other sectors one finds great discrepancies between the two categories of states. For example in R&D intensive categories such as pharmaceuticals and IT, as well as in capital intensive industries such as aircraft, shipbuilding and the automotive industry the dominant complainants are developed countries and complaints by developing countries are rare, whereas the apparel and textiles industry is dominated by developing country complaints and to a lesser extent also other manufacturing which is not R&D or capital intensive. The steel industry is another frequent matter of dispute in which complaints are filed to an approximately equal extent by developing and developed countries.<sup>14</sup>

Least developed countries, however, are basically completely absent from any dispute settlement activity, be it challenging others or being challenged by others. In fact, looking at the last 100 disputes reveals that the total number of litigating Members of the WTO is merely 21% of the whole Membership, with 7.5% alternating as complainants and

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<sup>13</sup> Improving the Special and Differential Provisions in the Dispute Settlement Understanding,” Communication of the Permanent Mission of the People’s Republic of China, Proposals from China: TN/DS/W/29, No. 122 (January 2003); TN/DS/W/57, No. 1.

<sup>14</sup> C. P. Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement*, (Brookings Institution Press, 2009), pp. 73-74.

respondents in over 80% of litigation.<sup>15</sup> Most notably absent from any litigation are African countries, with Egypt and South Africa being the only African countries to have ever participated as parties in the DSM. In the words of Dapo Akande, '[t]his would not be a problem if it were a result of a lack of trade disputes, but this is unlikely to be the case... In their relations with large WTO Members,..., African countries simply do not resort to dispute settlement at all. This may mean that disputes are being settled politically, without reference to the WTO's rules.'<sup>16</sup> Considering how weak these countries are generally in negotiations, one can only expect that the outcomes of such behind-the-scenes settlements are biased against their interests. However developing countries face major hurdles in trying to access the more desirable DSM therefore it is not surprising if so many states are reluctant to overcome them. Below is an analysis of the issues most important in this regard and how they can be tackled.

## 2. Legal Strength

The successful participation of Members in the dispute settlement mechanism is still dependent on their economic strength, especially when it comes to enforcement, however their legal strength is of equal importance, especially in identifying and bringing disputes to the DSM as well as being able to keep up with the proceedings once in front of a panel. It is not hard to see why most developing countries are at a disadvantage in terms of both strengths.

### a) Costs

The ability to cover the costs of the proceedings is the first determinant of a country's legal strength. The lack of resources prevents smaller developing countries from bringing cases to the DSM and having adequate legal representation before the panels. 'Typically, a case that goes through the Appeals process may take 18 months to complete. Enforcement, however, may take years. Consequently, the present value of economic losses associated with a dispute that proceeds to the end is enormous.'<sup>17</sup> All in all costs of cases vary, but generally speaking

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<sup>15</sup> Vidigal, *supra note* 10.

<sup>16</sup> *Ibid.*

<sup>17</sup> J. Pelzman and A. Shoham, 'WTO DSU – Enforcement Issues', in J. C. Hartigan, (ed.), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment*, in H. Beladi and K. Choi, series eds., *Frontiers of Economics and Globalization*, Vol. 6 (Emerald Group Publishing Limited), (2009), p. 374.

they are in the range of several million dollars over three years.<sup>18</sup> The short deadlines dictate a rhythm of work which is far more intense than in normal court litigation and demands staff more or less dedicated full time to the process, which only very few countries can afford.<sup>19</sup> Other essential expenses include administrative support costs, supervision by senior officials and Ministers, data collection from business, statistical sources and foreign sources, consultations with Agencies and Ministries in the Capital which are affected by the decisions in a case, representation in Geneva throughout the various phases of the case and the help of external legal firms.<sup>20</sup> The latter especially is vulnerable to being cut if a country does not have a sufficient budget.

The US and EU each have between twenty and thirty specialized lawyers hired on an ongoing basis, and the possibility to draw on a large number of other 'in-house' WTO specialists, whereas on the other side about a quarter of the WTO Member countries do not even have a single WTO mission, while others may have a mission but they still lack staff with proper training on international trade.<sup>21</sup> Because US and EU lawyers are hired on an ongoing basis, their costs of participating in a WTO dispute are fixed, which makes it easier to decide to start a case or defend one, rather than settle immediately, or even to throw up as many obstacles as possible for the other party during litigation.<sup>22</sup> On the other hand many developing countries are forced to rely on outside lawyers (costing at least USD 250.000 per case (or double that if the US/EU is on the other side) thus the cost of starting a case will be the first question they have to confront.<sup>23</sup>

Still Mexico claimed in its proposal presented to the WTO Dispute Settlement Body, that financial aspects of engaging in a WTO dispute were not the 'core of the problem' as they are not impossible to cover by most arguments, especially as low-cost legal assistance can be obtained from the Advisory Centre on WTO Law (ACWL).<sup>24</sup> It is true that given a sufficient trade interest most developing countries could afford the legal fees for a typical WTO case.<sup>25</sup> However the situation would have been easier if there was a possibility of monetary

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<sup>18</sup> P. Gallagher, *Guide to Dispute Settlement* (Kluwer Law International, 2002), p.63.

<sup>19</sup> G. N. Horlick, K. Fennell, 'WTO Dispute Settlement from the Perspective of Developing Countries' in Y.-S. Lee et al., eds. *Law and Development Perspective on International Trade Law*, (New York: Cambridge University Press), p. 166.

<sup>20</sup> Gallagher, *supra* note 18, pp. 63-64.

<sup>21</sup> Horlick, *supra* note 19, p. 164, 165.

<sup>22</sup> *Ibid*, p. 166.

<sup>23</sup> *Ibid*.

<sup>24</sup> 'Diagnosis of the Problems Facing the Dispute Settlement Mechanism: Some Ideas by Mexico,' proposal presented to the WTO DSU Body, Geneva, November 2003, pp.5-7.

<sup>25</sup> C. L. Davis, and S. B. Bermeo, 'Who Files? Developing Country Participation in GATT/WTO Adjudication', 71 *The Journal of Politics*, (2009), p. 1039.



compensation in cases where the complainant is a developing country, which would attract outside counsel, however that option is not available at the moment.<sup>26</sup>

An important factor is the financial support from the affected industry which can even ‘reverse the imbalance in favour of the developing country’ as was the case with Brazil versus the US (*Cotton Subsidies*) and the EU (*Sugar*).<sup>27</sup> Other cases where the domestic industry was strong and active enough to be able to defend its interests before the WTO by hiring an external legal counsel include Ecuador’s complaint in *Bananas*, Guatemala’s defence in *Cement* and Antigua and Barbuda’s representation in *Online Gambling*.<sup>28</sup>

#### b) Institutions

Governmental institutions also play an important role in the matter of legal strength. Brazil’s successes in the DSM are to a large extent due to the Brazilian government’s organization with respect to international trade matters. Its Ministry of Foreign Affairs is professionalized and meritocratic and it prioritizes international trade.<sup>29</sup> Brazil’s institutional legal infrastructure ‘includes a trade team in the Foreign Affairs Ministry, a variety of intra-ministerial trade groups, and established coordination mechanisms between the government and the private sector and civil society. The Foreign Ministry Lawyers have been sent for training to Brazil’s permanent mission in the WTO and to trade litigation firms in Washington, D.C. and elsewhere.’<sup>30</sup> It has thus been able to create a cadre of lawyers who are able to represent the government in the WTO dispute settlement system, while still occasionally hiring outside counsel, particularly from the US.<sup>31</sup>

Therefore although generally speaking, all developing countries face certain difficulties in accessing the benefits of the DSM, due to lack of institutions and resources, unsurprisingly, these are substantially lesser for countries such as Brazil, Russia, India and China (so-called BRICs), the larger and far more economically powerful countries than the rest of the

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<sup>26</sup> *Ibid.*

<sup>27</sup> *United States – Subsidies on Upland Cotton*, DS267; Horlick, *supra note* 19, p. 167; G. Shaffer, M. R. Sanchez and B. Rosenberg, ‘The Trials of Winning at the WTO: What Lies behind Brazil’s Success’ (2008) 41 *Cornell International Law Journal*, pp. 456-464.

<sup>28</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, DS27; *Guatemala – Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico*, DS60.

<sup>29</sup> Shaffer, *supra note* 27, p. 388.

<sup>30</sup> A. Santos, ‘Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico’, 52 *Virginia Journal of International Law*, (2012), p. 609.

<sup>31</sup> M. R. Sanchez Badin, ‘Developmental Responses to the International Trade Game: Examples of Intellectual Property and Export Credit Law Reforms in Brazil’, 14-15 (on file with the Virginia Journal of International Law Association) (2011) in Santos, *supra note* 30, p. 609.

developing group.<sup>32</sup> Brazil has even been seen as the greatest and one of the most successful users of the DSM, India is becoming an increasingly prominent player and China, although reluctant at first, filed several important cases against the US and the EU since 2007.<sup>33</sup>

### c) Economies of Scale

However it is important not to overlook the fact that it is not merely large developing countries such as Brazil, Argentina, Mexico and India who are filing cases, but increasingly also small states. For example Chile has been a complainant in already 12 cases, Indonesia in 9 and the Philippines in 5. Only 30 Members so far, have filed more than one case and of these thirty 22 are developing Members.<sup>34</sup> Analysis shows that weaker countries which overcome initial capacity constraints progressively benefit from the mechanism as past experience in trade adjudication, in either the role of complainant or defendant, enhances the likelihood of a developing country initiating further disputes.<sup>35</sup> In other words economies of scale are just as important in the context of dispute settlement as anywhere else. There are initial substantive but relatively fixed costs related to developing institutional capacity and knowledge in the first five or six cases a country is involved in and if it surmounts these costs, subsequent litigations will be less costly and alien to it.<sup>36</sup>

When Pakistan requested consultations with the US in 2000 regarding a transitional safeguard measure applied by the US on combed cotton yarn from Pakistan<sup>37</sup> it had no institutional framework to deal with WTO-related dispute settlement cases, but during the proceedings it established WTO sections in both its permanent mission in Geneva and in its Ministry of Commerce, as well as a 13-member high-level WTO Council chaired by the Minister of Commerce.<sup>38</sup> To manage the costs it was agreed that these would be shared between the affected industry and the Export Promotion Board.<sup>39</sup> The Government also became an initial

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<sup>32</sup> A. D. Mitchell and J. Wallis, 'Pacific Countries in the WTO: Accession and Accommodation, The Reality of WTO Accession' in Yong Shik-Lee et al., eds. *Law and Development Perspective on International Trade Law*, (New York: Cambridge University Press), chapter 8; and P. Kleen and S. Page, *Special and Differential Treatment of Developing Countries in the World Trade Organization*, Report of the Swedish Ministry of Foreign Affairs Global Development Studies 2, (2005), pp. 79-95.

<sup>33</sup> Horlick, *supra note* 19, p. 164.

<sup>34</sup> WTO, Disputes by Country *supra note* 9, (statistics done: 28.1.2015).

<sup>35</sup> Davis, *supra note* 25, pp. 1033-1049.

<sup>36</sup> *Ibid*, pp. 1034.

<sup>37</sup> *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, DS192.

<sup>38</sup> Davis, *supra note* 25, p. 1036.

<sup>39</sup> *Ibid*.

member of the ACWL.<sup>40</sup> These and other initial investments into the capacity building and knowledge acquiring turned Pakistan into a confident player in the system.

#### d) Joining In

Joining a complaint initiated by another country is also a good way of increasing experience, examples being China, shortly after its accession to the WTO joining eight other countries in the case against US safeguards on steel imports,<sup>41</sup> or Ecuador joining the dispute regarding the EU banana regime.<sup>42</sup> China furthermore participated as a third party in 114 disputes so far similar to India which participated in that capacity in 102 cases. Of course developed countries are also making full use of this possibility however it is arguably most important for Members with very limited resources which may find that being a complainant or even a co-complainant would not be viable and may thus limit their involvement to participation as a third party.<sup>43</sup> It has thus been suggested that the role of third parties be strengthened. One of the proposals is that they ‘should not only be allowed to attend all substantive panel meetings and receive copies of the parties’ submissions to the panel prior to the issuance of the interim reports<sup>44</sup> but also issues addressed by third parties in their submissions should be reflected in the rulings and recommendations of the panel and/or AB.’<sup>45</sup> Although many Members (not just developing countries) support this idea, it might bring more complexity to the dispute process and it would not be in the interest of judicial economy that the panel and/or AB would be bound to take into consideration all the arguments presented by third parties, thus a limitation to only the arguments relevant to resolving the matter at issue in the dispute seems a more reasonable option.<sup>46</sup>

Members have further proposed that it would no longer be necessary to prove a substantial interest in order to participate as a third party and that showing a generic interest in the procedure would be sufficient. Since the development of rule interpretation can be as

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<sup>40</sup> *Ibid.*

<sup>41</sup> *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, DS252.

<sup>42</sup> Davis, *supra* note 25, p. 1038.

<sup>43</sup> Y. N. Hodu, *Theories and Practices of Compliance with WTO Law*, (Kluwer Law International, 2012), at §4.02[C].

<sup>44</sup> Chairman’s Text as of 28 May, Dispute Settlement Body Special Session, TN/DS/9, 5-7 (6 June 2003). Members in this respect have also made proposals relating to expanded third-party rights in the appeal stage, where third parties should also be allowed participation, even when they do not participate at the panel stage as they may only realise the importance of the issue at stake after a panel report has already been issued; in Hodu, *ibid.*, §4.02[C] fn 185/186; Special Session of the Dispute Settlement Body, Report by the Chairman, Ambassador Ronald Saborio Soto to the Trade Negotiations Committee, doc. TN/DS/25 (21 April 2011).

<sup>45</sup> Hodu, *ibid.*, §4.02[C].

<sup>46</sup> N. Boschiero et al, (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, (Asser Press, 2013), p. 703.

important as the rules themselves, denying Members the option to weigh in on a particular legal matter would not be justified, not to mention the value of experience they are gaining by participating as third parties, as mentioned above.

e) ACWL – Collective Experience

Another important player not just in cutting costs for developing countries but in enabling an environment for accumulating and sharing experience and knowledge is the ACWL. Two thirds of the developing countries that have previously participated in the DSM - 32 in total – have become members of the ACWL which means they can use its services in exchange for a membership fee, while the 43 leased developed countries (LDC) who are WTO Members or soon-to-be Members are entitled to its services without having to become members of the ACWL. Developed countries can also be members but they are not entitled to the services.<sup>47</sup> The ACWL yearly provides over 200 legal opinions on any procedural or substantive issue arising from WTO law to its developing country Members and the LDCs free of charge and it further organises annual courses, occasional seminars and training sessions on topical issues of interest and a series of workshops designed to build capacity in WTO dispute settlement proceedings in developing countries.<sup>48</sup> How highly appreciated the legal opinions are by their users can be seen from surveys carried out by the ACWL themselves, where in the recent one 98 % of the respondents found them to be either "highly" or "very" satisfactory while no respondents found them to be merely “somewhat satisfactory” or “unsatisfactory”.<sup>49</sup> One respondent described the ACWL as a "panacea for the legal capacity constraints [of] many developing countries".<sup>50</sup>

In 2013, the ACWL provided country specific training seminars on topics including: (i) the rules and procedures governing WTO disputes; (ii) legal aspects of the Bali negotiations; and (iii) various issues relating to rules governing the conduct of trade remedy investigations. The ACWL welcomes requests from its developing country members and the LDCs for training on specific issues of WTO law identified by the members and the LDCs themselves.<sup>51</sup> The first part consisted of a two and a half day workshop focused on the practical aspects of managing WTO dispute settlement proceedings, such as pre-dispute preparation,

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<sup>47</sup> Advisory Centre on WTO Law, Members, available at: <http://www.acwl.ch/e/members/Introduction.html>, (last accessed, 7.2.2015).

<sup>48</sup> Advisory Centre on WTO Law, *Report of Operations 2013*, available at: [http://www.acwl.ch/e/documents/reports/Oper\\_2013.pdf](http://www.acwl.ch/e/documents/reports/Oper_2013.pdf), (last accessed, 7.2.2015), p. 32.

<sup>49</sup> *Ibid.*

<sup>50</sup> Advisory Centre on WTO Law, (hereinafter, ACWL), News, <http://www.acwl.ch/e/news/news-00085.html>, (last accessed, 7.2.2015).

<sup>51</sup> ACWL, *supra note* 48, p. 25.

consultations, panel establishment and composition, as well as Appellate Body procedures. The participants in the workshop included 37 trade officials from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.<sup>52</sup> All these activities are clearly helping the members build up their legal capacity, most importantly however the ACWL offers direct help in dispute settlement.

i. ACWL – Membership and Finances

The membership of the ACWL is comprised of 32 developing and 11 developed countries.<sup>53</sup> Developing countries contribute to the ACWL Endowment Fund based on their share of world trade and income per capita, while the LDCs do not need to contribute to the Fund at all. Developed country members on the other hand, contribute the larger share of the Centre's finances, contributing at least US\$ 1,000,000 each to the Endowment Fund or to the annual budgets of the ACWL or to both. These members are Canada, Denmark, Finland, Ireland Italy, Netherlands, Norway, Sweden, United Kingdom, Switzerland and Australia. Notably absent however are both the US and EU as a whole. Apart from the member countries non-governmental contributions are also accepted however this is strictly for 'specific purposes that are not related to dispute settlement cases, such as training and the traineeship programme'<sup>54</sup> which insures that there is no influence on dispute settlement by private funders. Apart from the notable absentees, it is highly commendable that several developed countries voluntarily contribute to these efforts, especially since they really make a difference in terms of the legal strength of developing countries.

ii. ACWL – Direct Help in Litigation

Although not gratis when it comes to litigation, the ACWL fees are based on the income of the member.<sup>55</sup> Thus for example in the *European Communities-Trade Description of*

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<sup>52</sup> *Ibid*, p. 26.

<sup>53</sup> Among the developing countries category A Members are Hong Kong, China and Chinese Taipei; category B Members are Bolivian Republic of Venezuela, Colombia, Egypt, India, Pakistan, Philippines, Thailand, Uruguay, Oman, Mauritius, Turkey, Indonesia, Vietnam, Seychelles; and category C Members are: Bolivia, Dominican Republic, Ecuador, Guatemala, Honduras, Kenya, Nicaragua, Panama, Paraguay, Peru, Tunisia, Jordan, El Salvador, Sri Lanka, Costa Rica, Cuba.

<sup>54</sup> ACWL, Organizational Structure, Financial matters: available at: [http://www.acwl.ch/e/about/org\\_structure.html](http://www.acwl.ch/e/about/org_structure.html), (last accessed, 7.2.2015).

<sup>55</sup> The ACWL divides its developing country Members into categories A, B, and C, according to their GNP per capita and share of world trade, with category A Members having the highest GNP per capita and the largest share of world trade. Membership fees and litigation fees correspond to these categories.

*Sardines* dispute Peru was charged only \$100 an hour for legal services.<sup>56</sup> The prices are fixed in Swiss francs and according to the current exchange rate would now equal closer to \$174 per hour for Category C members, in which Peru is classified, \$260 per hour for Category B members, and \$348 per hour for Category A members, while LDCs would have to pay \$43 per hour.<sup>57</sup> This is not a small change and the ACWL may need to reconsider the pricing especially in light of the recent dramatic rise of the Swiss franc. Most importantly, there is a maximum number of billable hours, which is also set correspondingly to the different categories of members. With a case going all the way to the appellate stage, for LDCs for example, the maximum price can only reach 34,160 Swiss francs, whereas on the other end for category A countries it can reach a maximum of 276,696 Swiss francs.<sup>58</sup> This is very important, since it may positively encourage developing countries to refrain from settling on less favourable outcomes from fear of accumulating unsurmountable cost in pursuing the matter further.

Since its inception in 2001 the ACWL has provided direct support in 44 separate WTO dispute settlement proceedings,<sup>59</sup> which equals 1/5 of all new WTO complaints, and has thus acquired the legal experience compared to that of other frequent users, such as the US and EU.<sup>60</sup> Out of the first 10 disputes in which the ACWL gave its assistance, only two were disputes between developing countries. Out of the 10 most recent disputes, on the other hand, eight are between developing countries. When parties pursuing incompatible objectives in a dispute request the support of the ACWL, the help to the party that requested it later is provided through external counsel, however this does not entail additional costs for the party, as the ACWL finances the difference in fees.<sup>61</sup>

Furthermore '[w]hen litigating a case ACWL staff work closely with officials from the home government in a conscious effort to create a learning process....While few individual

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<sup>56</sup> Davis, *supra note* 3, p. 265.

<sup>57</sup> Advisory Centre on WTO Law, Decision 2007/7 Adopted by the Management Board (19 Nov. 2007), Billing Policy and Time Budget (CWL/MB/D/2007/7), available at: <http://www.acwl.ch/e/documents/ACWL-MB-D-2007-7.pdf>; <http://www.acwl.ch/e/disputes/Fees.html>, (last accessed, 7.2.2015); The ACWL shall charge for its support in dispute settlement proceedings hourly fees at the rates stipulated in Annex IV of the Agreement Establishing the Advisory Centre on WTO Law ("the Agreement") converted into Swiss francs (CHF) in accordance with the General Assembly's Decision on Currency Conversion adopted on 25 April 2002 (ACWL/GA/D/2002/2). The Decision on Currency Conversion provides that the fees for services denominated in United States Dollars (US\$) under Annex IV of the Agreement are converted into Swiss francs at the United Nations Operational Rate of Exchange applicable in May 2002, that is the rate of CHF1.62:US\$1.00.

<sup>58</sup> ACWL, Fees, available at: <http://www.acwl.ch/e/disputes/Fees.html>, (last accessed, 7.2.2015).

<sup>59</sup> And in a further six through external counsel.

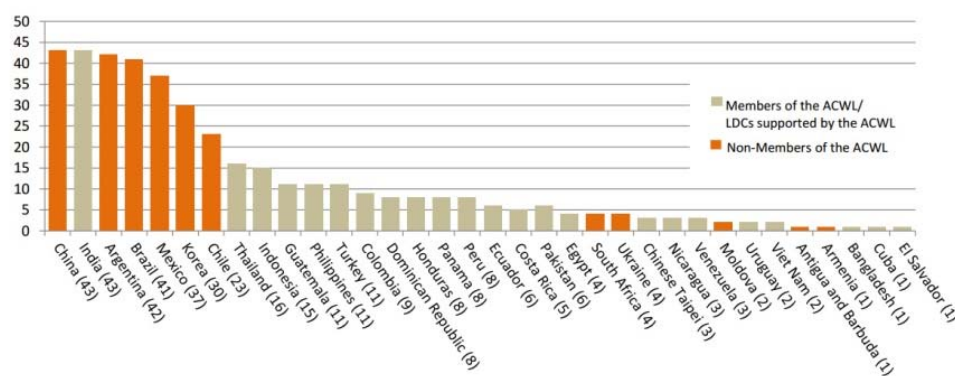
<sup>60</sup> ACWL, *supra note* 48, 2013, p. 14.

<sup>61</sup> *Ibid*, p. 16.

developing countries will ever participate in more than a handful of WTO disputes, the Centre is quickly building experience as a repeat player to rival that of the US or EU trade ministries.<sup>62</sup>

In 49% of the cases, assistance in DSP was provided to category B countries and 48% to category C countries. The remaining 3% was provided to LDCs.<sup>63</sup> The graph below shows the 33 countries which have participated either as complainant or respondent in the DSM since 2001 when the ACWL was established. Argentina, Brazil, Chile, China, Korea, and Mexico have significant experience in WTO dispute settlement proceedings and have not acceded to the ACWL. Of the remaining 27 developing countries that have participated as complainant or defendant in dispute settlement proceedings since 2001, only five have not joined the ACWL: Antigua and Barbuda, Armenia, Moldova, South Africa, and Ukraine. The other 22 developing countries have all joined the ACWL. Thus, the ACWL has attracted as developing countries that have become actively involved in WTO legal matters but lack legal capacity or experience in these matters. Since, these are the very countries that the ACWL was intended to benefit, the institution is clearly bringing important improvement against the restraints in developing countries' legal strength.

**ACWL Membership and Participation in Dispute Settlement Proceedings**



Arguably, however, the progress in encouraging LDCs to seek redress through the DSM is still too limited. It is also important to note that, only in the case of Nicaragua,<sup>64</sup> Bangladesh<sup>65</sup> and El Salvador,<sup>66</sup> their first complaints were brought with the help of the ACWL. Furthermore, while Bangladesh only participated as a third party in one case before, El Salvador participated in such capacity many times prior, and apart from being a third party,

<sup>62</sup> Davis, *supra note* 25, p. 1039.

<sup>63</sup> ACWL, *supra note* 48, p. 15.

<sup>64</sup> *Mexico – Certain Measures Preventing the Importation of Beans from Nicaragua*, DS 284.

<sup>65</sup> *India – Anti-Dumping Measures on Batteries from Bangladesh*, DS 306.

<sup>66</sup> *Dominican Republic - Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, DS 418.

Nicaragua had previously been also a respondent in two cases. This indicates that ACWL fails to play an important role in encouraging new players to enter the DSM and help them overcome their initial reluctance. This is perhaps not surprising, since the ACWL provides legal advice or assistance in WTO dispute settlement proceedings only at the request of a developing country member or an LDC: the ACWL may not develop or propose dispute settlement proceedings to its developing country members or LDCs on its own initiative (the no "ambulance chasing rule").<sup>67</sup> At the request of a developing country member, however, the ACWL may – and frequently does – evaluate a potential dispute and assist in developing the legal aspects of the case. From the point of view of assuring impartiality it is understandable that the ACWL can only step in after a request from a government had been made, however this ‘creates gaps and a demand for other groups to step in’ in the crucial stages before that request is made.<sup>68</sup> In other words, ACWL cannot independently and proactively gather information at the pre-litigation stage about possible violations of WTO commitments to alert a developing country that their market access might be at risk.<sup>69</sup> This is problematic since it represents costs on the firms and other private entities most in need of the legal assistance that have to take on the task alone. The ACWL cannot subsidize the cost of acquiring the economic, legal and political information that a lawyer of a firm will need in order to convince his/her firm and his/her government that a foreign market access complaint is worth pursuing.<sup>70</sup> Looking at it from this point of view, the ACWL is a tool only useful to those who already have enough knowledge about the WTO and the dispute process as well as knowledge about other relevant data and the resources to access it. Generally speaking the WTO approach where certain measures must be notified and others not, creates the problem of identifying breaches when the country affected does not have the expertise and resources to discover the breach. In terms of subsidies, Members are required to make regular notifications to the WTO as to their use. Interestingly many developing countries, including India and Brazil, have started out by making such notifications in the first few years of the WTO, but have since stopped, perhaps out of a ‘reluctance to disclose politically sensitive information and expose themselves to litigation.’<sup>71</sup> This is a form of rebellion against the system in which notified measures are more easily targeted for litigation or pressure to discontinue them, such as was the case for balance of payments duties.

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<sup>67</sup> ACWL, *supra note* 48, p. 13.

<sup>68</sup> Bown, *supra note* 14, p. 153.

<sup>69</sup> *Ibid*, p. 157.

<sup>70</sup> *Ibid*, p. 146.

<sup>71</sup> S. E. Rolland, *Development at the World Trade Organization*, (Oxford University Press: 2012), p. 133.



### 3. Different Phases of the Proceedings and the Vulnerability of Developing Countries

As mentioned before, no bias has thus far been found in favour of either developed or developing countries in the outcomes of panel or Appellate Body proceedings. However the dispute settlement process includes also stages which are outside the control of these bodies, i.e. the consultations and the enforcement. Here the weaker party is again left to the power politics and developing countries have done notably less well at these stages in cases where the other party has been a developed country.

#### a) Consultations

Before being able to request the establishment of a panel, according to Art. 4.2 '[e]ach Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation'. Outside the WTO framework it is hard for a developing country to even enter into negotiations with a larger trade partner.<sup>72</sup> For example when Vietnam sought negotiations with the US on its unilateral change of labelling policy which was preventing Vietnam from selling its catfish on the US market under the label 'catfish' it was met by a simple refusal to negotiate any compromise.<sup>73</sup> The US-Vietnam Bilateral Trade Agreement (BTA), modelled closely on the WTO Agreements, does not provide for the adjudication of disputes, but establishes merely a joint committee that is given the mandate to serve as a forum for consultations.<sup>74</sup> Despite the patent nature of the US violation of the BTA between the two countries and despite the fact that in the *Peru-EC* sardine dispute at the WTO the US had opposed a similar labelling restriction imposed by the EU when this was harming US producers, Vietnam had no leverage to urge a reconsideration of the policy and eventually had to accept to label its catfish as basa and tra when exported to the US market.<sup>75</sup> At the WTO however, a party cannot simply refuse to enter consultations.

However consultations may be problematic in the sense that they do not offer the same protection from power-inequalities yielding unfair results as do the panels. If the consultations fail, the complaining party can make a request for the creation of a panel and a rigorous procedure is followed to ensure an unbiased panel, where developing countries further have the right to a minimum of one panellist from another developing country when

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<sup>72</sup> Davis, *supra note* 3, p. 279.

<sup>73</sup> *Ibid*, p. 269.

<sup>74</sup> *Ibid*, p. 268,269.

<sup>75</sup> *Ibid*, p. 271, 272.

they are in a dispute with a developed country.<sup>76</sup> The responsible division of the Secretariat and the *Legal Affairs Division* provide the parties with the names of potential panellists from the indicative list of governmental and non-governmental individuals.<sup>77</sup> Negotiations on the panellists are often highly contentious with multiple slates of candidates considered and discarded based on several indicators which may convince the parties that a candidate may be or may not be sympathetic to their case. For example a party may prefer candidates with professional credentials in economics over candidates with legal credentials; or capital-based diplomats over Geneva-based diplomats, as the former may be more sensitive to the complexities that Members face in complying with WTO rules; or they may prefer candidates from particular countries/regions where there is a similar economic situation; or candidates from countries where the measures at issue are also maintained, etc.<sup>78</sup> If there is no agreement within 20 days, the Director General composes the panel, keeping in mind the selection criteria of the parties provided to him and aiming for a composition of the panel which will appear balanced to both sides.<sup>79</sup> While in more than half of all cases the panels have been composed by the Director-General it has often been only to complete the panel composition after the parties already agreed on one or two candidates.<sup>80</sup> This procedure has thus been characterized as guaranteeing an *at least* unbiased panel if not even ‘more’ than that.

The Panel in *Korean Liquor Taxes* stated that the ‘conduct of consultations is not the concern of a panel but that the panel need only concern itself with the question whether consultations took place... The only requirement under the DSU is that consultations were in fact held’.<sup>81</sup> Indeed, in their study Busch and Reinhardt show that the reason why developed countries tend to gain more full or partial concessions from the dispute settlement proceedings for their complaints (72%) than developing countries (63%), is due to the vulnerability of developing countries in the consultation period, rather than after a panel has been established.<sup>82</sup> ‘Early settlement’ actually offers the greatest likelihood of securing full concessions from a defendant, as the threat of legal condemnation<sup>83</sup> or the costs of the proceedings<sup>84</sup>, rather than

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<sup>76</sup> Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, (hereinafter DSU), Art. 8.10.

<sup>77</sup> DSU, Art. 8.6, 8.4.

<sup>78</sup> A. W. Shoyer, ‘Panel Selection in WTO Dispute Settlement Proceedings’, 6 *Journal of International Economic Law*, (2003), p. 205

<sup>79</sup> DSU, Art. 8.7.

<sup>80</sup> Shoyer, *supra* note 78, p. 208.

<sup>81</sup> *EC-Bananas III*, Report of the Panel, WT/DS27/R; *European Communities – Measures Affecting the Importation of Certain Poultry Products*, Report of the Appellate Body, WT/DS69/AB/R.

<sup>82</sup> M. L. Busch, and E. Reinhardt, ‘Developing Countries and GATT/WTO Dispute Settlement’, 37 *Journal of World Trade*, (2003), p. 725.

<sup>83</sup> *Ibid*, p. 720.

a ruling *per se* is what induces settlement. As the representative of Antigua and Barbuda stated, “many small developing countries had made... informal settlements that were beneficial to United States economic interests after being told their laws were in violation of WTO law.”<sup>85</sup> Rich countries thus gain more concessions because developing countries are less able to negotiate concessions in the early stage of the dispute process due to their limited legal capacity and inability to meaningfully threaten retaliation whereas they do not want to proceed to a panel to avoid further costs.<sup>86</sup>

It is thus understandable that power considerations seem to be less important than capacity constraints, as when countries with low income choose to initiate a dispute, it is more likely to be against a wealthy trade partner.<sup>87</sup> However there still exist substantiated or unsubstantiated fears of repercussions outside the frame of the WTO. For instance Costa Rica was reluctant to challenge the US from fear of harming relations with them, however after filing the complaint against their transitional safeguard provisions for cotton underwear, the US complied with the ruling and there were none of the anticipated negative diplomatic repercussions.<sup>88</sup> It has been further observed that the less dependent a country is on aid from another country, the more cases the former raises against the latter.<sup>89</sup> Being in a preferential trade agreement with the other country also reduces the likelihood of engaging in a dispute with them.<sup>90</sup> Countries may also simply lack the confidence to challenge a much larger trading partner, so they do not even try. The fact that the DSU wants Members to be judicious and only consider invoking the DSM when they feel their actions ‘would be fruitful’ and ‘secure a positive resolution to a dispute’, may not be helpful in this regard.<sup>91</sup>

The following discussion now turns to another element where power inequalities play a detrimental role in terms of developing countries seeking redress through the DSM, i.e. the enforcement of rulings by weaker countries against bigger players.

#### b) Enforcement

According to the legal positivism of John Austin, a rule should be accompanied by enforcement through sanctions administered by a legitimate central authority in order to

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<sup>84</sup> Horlick, *supra note* 19, p. 166.

<sup>85</sup> *Ibid.*

<sup>86</sup> Busch, *supra note* 82, p. 721.

<sup>87</sup> Guzman, *supra note* 4.

<sup>88</sup> Guzman, *supra note* 4.

<sup>89</sup> J. Francois, H. Horn and N. Kaunitz, *Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System*, (ICTSD, 2008)

<sup>90</sup> Bown, *supra note* 14, p. 97.

<sup>91</sup> DSU, Art. 3.7.

amount to law.<sup>92</sup> When it comes to WTO law and the WTO dispute settlement mechanism arguably the biggest problem of developing countries, which furthermore has a negative impact on the costs of the procedures, is enforcement, or lack thereof. There is no mechanism at the WTO level for enforcement. The WTO has no economic powers to enforce dispute settlement decisions, it does not issue fines and it cannot tell sovereign Members what precise policy decisions they must take.<sup>93</sup> A panel merely tells the ‘losing’ party to bring its measures into conformity with the Agreements *somehow or another* and it is only when the respondent does not take any steps towards conformity or if the complainant or the DSB do not find such steps to be satisfactory, that the dispute settlement can be re-activated with a second panel established to develop a recommendation on implementing measures.<sup>94</sup> In the words of some observers ‘compliance remains substantially an elective choice’ while ‘the issue of mandatory enforcement is still open to interpretation.’<sup>95</sup> The parties can either voluntarily comply with a ruling, agree on compensation or it is on the complainants to enforce it by themselves via WTO-sanctioned retaliation. Since compensation can only be due from the time of the expiry of the ‘reasonable period of time for implementation’ and not from the time that the measure in breach was enacted, it provides an incentive for resorting to litigation and prolonging it in order to gain time to maintain the domestic measure in question instead of conforming it to WTO rules. For example bringing the matter through the appeals process allows for an additional period of time during which WTO-inconsistent measures can remain in place.<sup>96</sup> Similarly such an incentive is provided by the fact that when it comes to litigation fees, each party pays only for its own, and there is no additional risk of paying for the other party’s litigation fees in the event of losing the case. Thus WTO rules do not reach the threshold of what Austin describes as law and perhaps the realist view is more easily applicable since the latter describes the international system as one void of any authority to enforce existing rules, where abiding by obligations is guided merely by strategic interests and perceived cost-benefits or payoffs.<sup>97</sup> In this view it is not surprising that studies have shown countries are more likely to impose new trade restrictions on partners that are less able to retaliate against them or enforce their commitments.<sup>98</sup> On the same note studies have found

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<sup>92</sup> J. Austin, *The Province of Jurisprudence Determined*, Cambridge Texts in the History of Political Thought W. E. Rumble (ed.), (Cambridge University Press, 1995), p. 25.

<sup>93</sup> Gallagher, *supra note* 18, p.47.

<sup>94</sup> DSU, Art. 21.5.

<sup>95</sup> Pelzman, *supra note* 17, p. 370.

<sup>96</sup> Bown, *supra note* 14, p. 90.

<sup>97</sup> Hodu, *supra note* 43, §2.02[A].

<sup>98</sup> T. J. Prusa and S. Skeath, ‘Modern Commercial Policy: Managed Trade or Retaliation’, Wellesley College Working Paper 2002-05, (NBER, 2002); R. M. Feinberg and K. M. Reynolds, *The Spread of Antidumping*

that trading partners with greater capacity to retaliate against US exporting firms are both less likely to be named in antidumping investigations and are less likely to have antidumping measures imposed against them after an investigation.<sup>99</sup>

i) Enforcement from the GATT Years to the situation under the WTO

All the above being said, still enforcement (or self-enforcement) at the GATT/WTO has come a long way, especially considering its beginnings. Under the 1947 GATT the dispute settlement system was far less elaborate than the one which came into existence with the DSU. The parties had more flexibility and greater control over their disputes and understandably the weight of each party was a relatively influential factor in the end result.<sup>100</sup> However according to Hudec, efficiency and enforcement was not much of an issue, since in his words, the nuanced diplomatic style of adjudication which was practiced was effective, because the GATT was ‘essentially a small “club” of like-minded trade policy officials [who] did not need a very elaborate decision-making procedure to generate an effective consensus about what particular governments were expected to do’ and ‘[u]ltimately... [the] rather delicate procedure worked because GATT’s member governments wanted it to work.’<sup>101</sup> Looking at developing countries’ participation in the initial period, it fit well into this system. Four out of the first 8 cases involved developing countries and ‘the nature of their complaints was identical to those of the other founding countries: they addressed concerns of balancing tariff concessions rather than attempting to enforce legal obligations.’<sup>102</sup> Soon however, when five out of eight complaints brought by developing countries failed to result in a formal decision, they began to perceive the dispute settlement process as a useless exercise which provided them with no effective enforcement when the larger losing party refused to comply with the outcome.<sup>103</sup>

Not surprisingly things got worse when the number of developing country Members drastically increased in the 1960s and suddenly there was an unwillingness to adjudicate ‘the

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Regimes and the Role of Retaliation Filings, American University Working Paper, *Southern Economic Journal*, (2006); L. M. Busch, R. Raciborski, and E. Reinhardt, ‘Does the Rule of Law Matter? The WTO and US Antidumping Investigations.’ Typescript, Emory University, (2008); Francois, *supra note 89* in Bown, *supra note 14*, pp. 93-94.

<sup>99</sup> B. A. Blonigen and C. P. Bown, ‘Antidumping and Retaliation Threats’, 60 *Journal of International Economics*, (2003), p. 260.

<sup>100</sup> Hodu, *supra note 43*, §2.02[A].

<sup>101</sup> R. E. Hudec, ‘The New WTO Dispute Settlement Procedure: An Overview of the First Three Years’, 8 *Minnesota Journal of Global Trade*, (1999), p. 6.

<sup>102</sup> B. Clayton, ‘Dispute Settlement under GATT/WTO: The Experience of Developing Nations’ in J. Cameron and K. Campbell, (eds.), *Dispute Resolution in the WTO*, (Cameron May, 1998), pp. 252-253.

<sup>103</sup> ‘Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements’, United States International Trade Commission, (1985) at 70.

long agenda of legal claims being put forward by an increasingly aggressive Group of 77.<sup>104</sup> Developing countries sought to address the discrepancies with basic GATT policy in sectors such as agriculture, with two cases particularly standing out: a complaint by Uruguay against the entire developed-country Membership, accusing them of preventing developing countries from receiving the overall level of benefits contemplated by GATT (see last part of this chapter) and a complaint by Brazil against a UK tariff increase on bananas.<sup>105</sup> When the Uruguayan complaint failed many developing countries rightly saw it as a sign that the dispute settlement system was not designed to tackle the problems they faced or to protect their interests.<sup>106</sup> Furthermore even though the UK withdrew its tariff increase it was joined by the US in condemning the 'new' strict legalistic approach in what they saw was a system that still required time for adjustment.<sup>107</sup> This caused any legal claim to be perceived as an unfriendly act of aggression effectively incapacitating the DSM for over six years.<sup>108</sup> From the 1970s onward there was a revival of the system, but a much more contentious Membership than the 'club' of the 1950s forced the GATT Secretariat to recognize that 'the dispute settlement procedure would need to rely more heavily on the authority of "law" itself' rather than semi-diplomatic procedures.<sup>109</sup> There were essentially two differing views in the GATT on what kind of dispute settlement system was desirable. One group wanted a 'power-oriented approach' where negotiations and diplomacy would be key and the dispute settlement procedures would only provide assistance to negotiators to resolve their differences; while the other group preferred an impartial panel which would make objective rulings.<sup>110</sup> Despite the benefits of the former approach the latter is no doubt better for predictability and certainty, which is essential for entrepreneurs to be able to make appropriate efficient investment and market development decision.<sup>111</sup> Especially criticized by analysts and legal scholars of GATT was the fatal flaw of its dispute-resolution procedures in that Member states could essentially undermine the creation of dispute-resolution panels as well as any decision that went against them by simply not agreeing to it, as all decisions

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<sup>104</sup> Hudec, *supra note* 101.

<sup>105</sup> Clayton, *supra note* 102, pp. 255- 256.

<sup>106</sup> M. M. Ching, 'Evaluating the Effectiveness of the GATT Dispute Settlement System for Developing Countries' 16 *World Competition* (1992-93), p. 102.

<sup>107</sup> Clayton, *supra note* 102, p. 256.

<sup>108</sup> Clayton, *supra note* 102, p. 256.

<sup>109</sup> Hudec, *supra note* 101, p. 7.

<sup>110</sup> J. H. Jackson, *The Jurisprudence of the GATT and the WTO; Insights on treaty Law and Economic Relations*, (Cambridge University Press, 2000), pp.120-121.

<sup>111</sup> *Ibid*, p.121.

required consensus.<sup>112</sup> This was done in a number of significant cases, particularly relating to subsidies.<sup>113</sup> Another concern linked with the lack of a strong enforcement mechanism was the powerlessness of the system in preventing unilateralism and a general evasion of GATT rules by the powerful states when it suited them. The US for example ‘increasingly turned to unilateral remedies for perceived trade infractions’.<sup>114</sup>

After the DSM was partially strengthened in the Tokyo Round there was an increased participation by the developing countries, however they nevertheless remained powerless about a number of quantitative restrictions operating outside GATT rules which were placed on textiles and electronics and for which there was no remedy through the DSM, while their attempts at opening up agricultural trade still faced panels more eager to avoid confrontation and seek compromise than making legally sound decisions.<sup>115</sup>

## ii) Enforcement Under the WTO

According to the realist theory, the efficiency of an international legal regime depends on the political will of the players and not on how strict the dispute settlement rules are, therefore it is not surprising that a more stringent legal regime brought about by the DSU did not eradicate enforcement issues. Yet the reforms brought important improvement in taming power through the establishment of an impartial judicial review of complaints and its introduction of the ‘right’ to a panel and the automatic adoption of panel reports. Under what is known as the ‘reverse consensus’ set out in Art. 6.1 of the DSU, a panel will be established unless there is a consensus against it and panel reports must be adopted within 60 days of the ruling unless there is a consensus against it or a party to the dispute appeals it.<sup>116</sup> It is this which has typically been seen as the cause for greater confidence and participation of developing countries in the dispute settlement, with commentators attributing to the reverse consensus the ability to temper the power politics.<sup>117</sup>

In terms of implementation of the rulings, Article 22 of the DSU clearly states that full conformity with rulings is the preferred of all options:

neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.

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<sup>112</sup> J. Goldstein, et al., (eds.), *Legalization and World Politics*, (MIT Press, 2001), p. 293.

<sup>113</sup> Jackson, *supra note* 109, p.123.

<sup>114</sup> Goldstein, *supra note* 112.

<sup>115</sup> Clayton, *supra note* 102, pp. 259-261.

<sup>116</sup> DSU, Art. 16.4

<sup>117</sup> Busch, *supra note* 82, p. 719; Clayton, *supra note* 102, p. 251.

However Art. 3.7 the DSU sets out the aim of the dispute settlement mechanism as follows:

to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

It is clear from both provisions that even though full conformity with rulings is ‘preferred’ the system still strives to appease all parties involved, even the party whose measures are in violation of WTO law and to not force it into anything it does not want to do. The fact that compliance is not induced by penalties or other aggressive measures has often been seen as a positive feature of the system as it keeps the balance between the WTO’s institutional legitimacy and the national sovereignty of its Members.<sup>118</sup> As Palmeter explains on the case of the US, the Congress and the public accepted the WTO based on statements of the Executive Branch such as:

[N]either the WTO nor its dispute settlement panels have any power to compel the United States to change its laws and regulations. Only the United States can decide how it will respond to WTO dispute settlement reports; and only the Congress can change US law.<sup>119</sup>

[O]ur government was careful to structure the WTO dispute settlement rules to preserve our rights. The findings of a WTO dispute settlement panel *cannot* force us to change our laws. Only the United States determines exactly how it will respond to the recommendations of a WTO panel it at all. If a US measure is ever found to be in violation of a WTO provision, the United States may on its own decide to change the law; compensate a foreign country by lowering trade barriers of equivalent amount in another sector; or doing nothing and possibly undergo retaliation by the affected country in the form of increased barriers to US exports of an equivalent amount. But America retains full sovereignty in its decision of whether or not to implement a panel recommendation.<sup>120</sup>

The United States maintains that it has the right not to comply with WTO rulings.<sup>121</sup>

Toughening of the regime to induce the US to comply and arm-twisting would therefore justifiably upset them. As shown in the preceding chapters, the institutional legitimacy of WTO rules is weak in terms of development and indeed sovereignty would be welcome in order for developing countries to be able to protect their economies and carve out their policy space when necessary.<sup>122</sup> The existing sovereignty however works in the other direction. It is

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<sup>118</sup> D. Palmeter, *The WTO as a Legal System: Essays on International Trade Law and Policy* (Cameron May, 2003), pp. 357-359.

<sup>119</sup> United States Trade Representative, 2000 Trade Policy Agenda and 1999 Annual Report of the President of the United States on the Trade Agreements Program 30, in Palmeter, *ibid*, p. 359.

<sup>120</sup> United States Trade Representative, America and the World Trade Organization 13, (emphasis in the original) in *ibid*.

<sup>121</sup> United States General Accounting Office, Report to the Chairman, Committee on Ways and Means, House of Representatives, World Trade Organization: Issues in Dispute Settlement, at 16 (August 2000), in *ibid*.

<sup>122</sup> Santos, *supra note* 30.



only useful for those who can afford it, and they are usually the powerful states against which smaller states cannot retaliate effectively. Such selective sovereignty would then be worse than no sovereignty.

a) Compensation

Where a Member fails to implement the recommendations and rulings of the DSB within the ‘reasonable period of time’, the DSB may authorise compensation whereby the Member must enter into negotiations with the other party, with a view to developing mutually acceptable compensation.<sup>123</sup> Such compensation usually entails liberalising a different sector from that which was subject to the dispute. The rationale behind this is questionable, since ‘[f]rom the injured State’s perspective, [it] does no good to the private sectors suffering from the WTO-inconsistent measures’ whereas in the non-complying Member private sectors which are not the focus of the proceedings are essentially paying for the governmental failure to respect international obligations.<sup>124</sup> Still it provides some valuable policy space for developing countries which are able to afford such compensation in one sector to protect another. The problem lies rather in the fact that compensation has to happen on a MFN basis, meaning it has to be offered to all the trading partners, which makes it less useful or attractive.<sup>125</sup> It does however reflect the fact that beyond individual private entities the overall economy of a country is more important to governments, which is understandable. Compensation in this sense allows for policy space in choosing which vital sectors need more protection. However it is clear that compensation is meant as a temporary measure and not as a substitute for bringing measures into conformity with the Agreements precisely to discourage Members from ‘buying their way out’ of their obligations.<sup>126</sup> In terms of monetary compensation, it has been agreed to only once so far, in the amount of € 1,219,900 per year for a three-year period between the US and the EC in *US-Copyright Act*.<sup>127</sup>

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, Art. 21.5 provides that such dispute shall be decided through recourse to these dispute settlement procedures, including

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<sup>123</sup> DSU, Art. 22.2.

<sup>124</sup> *Hodu*, *supra note* 43, at §2.02[B], fn 55, DSU Article 22.1 (Compensation is voluntary and, if granted, shall be consistent with the covered agreements).

<sup>125</sup> J. H. Jackson, W. J. Davey and A. O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text*, (West Group, 1995), p. 470.

<sup>126</sup> DSU Art. 22.1, Gallagher, *supra note* 18, p. 48.

<sup>127</sup> Notification of a Mutually Satisfactory Temporary Arrangement, *United States – Section 110(5) of the US Copyright Act*, DS160/23 (June 26, 2003).

wherever possible resort to the original panel. As of 30 November 2012, 36 disputes had ended up in this procedure.<sup>128</sup>

#### b) Retaliation

If a Member does not voluntarily comply with a WTO ruling, and there is no satisfactory compensation agreed to within 20 days after the expiry of the 'reasonable period of time' the burden of enforcement falls on the complainant, which has the right to raise its tariffs or otherwise suspend WTO obligations against the products of a noncomplying Member.<sup>129</sup> Art. 22.4 of the DSU provides that '[t]he level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment'. How to determine such equivalence is of course another question. Art. 22.6 states that 'if the Member concerned objects to the level of suspension proposed..., the matter shall be referred to arbitration', however the DSU does not provide any further explanation on how this equivalence might be established.

Between 1995 and 2007 only 17 disputes reached the stage at which respondent countries (a mix of developing and developed countries) sought and were granted the right to retaliate, however not all retaliations were actually carried out.<sup>130</sup> This is not surprising however, considering that a greater capacity to retaliate increases the likelihood of the respondent increasing the foreign market access extended to the complainant at the conclusion of the dispute, whereas a lesser retaliation capacity will discourage the potential complainant from even fighting the matter at the dispute settlement system.<sup>131</sup>

A further irony of the right to retaliate is that it turns the whole philosophy of the WTO on its head since that philosophy claims that for example raising tariffs would be just as harmful to the 'victim' as it would be to the noncomplying Member. As is argued in this thesis protectionism and such retaliation can have very beneficial effects on development, especially when it is done in the context of a country's industrial plan. However this is not the free trade mantra. Thus the free trade proponent Friedman commented that 'competition in masochism and sadism is hardly a prescription for sensible international economic policy!'<sup>132</sup> Indeed such retaliation can have a negative effect on the victim, in cases when they are a

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<sup>128</sup> WTO, Dispute Settlement Body, Annual Report (2012): Overview of the State of Play of WTO Disputes, WT/DSB/58/Add.1, 30 November 2012, p. 143.

<sup>129</sup> DSU Art. 22.2-9.

<sup>130</sup> Bown, *supra note* 14, p. 90.

<sup>131</sup> *Ibid*, p. 97.

<sup>132</sup> M. Friedman and R. D. Friedman, 'The Case for Free Trade', *Hoover Digest* 4 (1979).

smaller economy dependent on imports from the noncomplying Member which tend to be either necessities such as food or medicine, or fuel and inputs for local manufacturers.<sup>133</sup> Retaliation has thus even been accused of being inconsistent with both its own objectives, i.e. to provide an effective safeguard for compliance, as well as the underlying principles of the WTO, i.e. increasing global welfare through a liberalised global market.<sup>134</sup> When retaliation is detrimental to the victim, it may simply choose not to retaliate. For example in *US – Byrd Amendment* eight complainants got authorization to retaliate, however only the EC, Canada and Mexico actually did, while Chile, India, Korea and Brazil chose not to retaliate.<sup>135</sup>

Worse still it is often the case that when a small economy is retaliating against a large economy, the latter is hardly affected. The size of the respondent's exports to the complainant is an important factor in determining its retaliation capacity, as the larger they are, the more flexibility the complainant has to choose sufficiently credible retaliation targets, which in turn usually guarantees a favourable outcome from the dispute in the first place.<sup>136</sup> Other reasons for a reluctance to retaliate unsurprisingly include the unwillingness of developing countries to upset the system.<sup>137</sup>

Regardless of these difficulties however it has been shown that when the conditions are met, developing countries have a strong weapon for ensuring effectiveness of their retaliation in Art. 22.3 (c) of the DSU which allows for the suspension of concessions under another agreement than that of the initial violation.

#### c) Suspension under the Same Agreement or Alternative Suspensions

Art. 22.3 of the DSU sets out that in considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as ... [the] violation or other nullification or impairment;

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<sup>133</sup> Horlick, *supra note* 19, p. 168.

<sup>134</sup> Hodu, *supra note* 43, at §2.02; DSU Article 22.8, et al. state the objective of retaliation. See also Article 22.6 Arbitration Decision, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Arbitration by the European Communities, para. 6.3 (Authorisation to Suspend Concessions: 19 April 1999); Article 22.6/4.11 Arbitration Decision, *United States – Tax Treatment for 'Foreign Sales Corporations'*, Recourse to Arbitration by the United States under DSU Article 22.6/SCM Agreement Article 4.11, paras. 5.5-5.6 (Authorisation to Suspend Concessions: 7 May 2003).

<sup>135</sup> Decision of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000*, Recourse to Arbitration by the United States under Article 22.6 of the DSU, para. 4.11, WT/DS217/ARB/BRA (Aug. 31, 2004).

<sup>136</sup> Bown, *supra note* 14, p. 97.

<sup>137</sup> Horlick, *supra note* 19, pp. 167-168.

(b) if that party considers that [this] is not *practicable or effective*..., it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that [this] is not *practicable or effective*..., and that the *circumstances are serious enough*, it may seek to suspend concessions or other obligations under another covered agreement.

In applying these principles the party is further required to take into account the *trade in the sector* or *under the agreement* which was violated and its importance to that party, the broader *economic elements and consequences* of a suspension, and if it chooses option (b) or (c) it has to clarify its reasons for such a request.<sup>138</sup>

This list of certain qualitative and quantitative economic factors that must be weighed is not exclusive, however due to strong disagreements during the drafting of the DSU the Understanding did not specify a standard of review which should be used to examine countries' trade measures, or their determination that they could not suspend concessions under similar provisions of The General Agreement on Trade in Services (GATS).<sup>139</sup> Such determinations were left for panels to subsequently determine.<sup>140</sup> A number of noteworthy disputes have already taken place regarding the type and level of retaliation to be authorized, however this number is still small and there is no consistency in arguments or in the way they influence arbitrators.<sup>141</sup>

#### d) Suspension under TRIPS

Arguably the most effective means of retaliation is the possibility of suspension of TRIPS obligations. In three cases so far,<sup>142</sup> such retaliation has been authorized, however it has never been actually implemented. Still it has served as a threat. In the words of one commentator such retaliation 'constitutes a grave threat to developed economies while imposing minimal unpleasant effects on the inflicting country'.<sup>143</sup>

When Brazil was allowed \$800 million in retaliation in the *Cotton* dispute, it asked to suspend intellectual property rights on certain products. While it only identified categories of

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<sup>138</sup> DSU Art. 22.6 provides that in cases where the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in 22.3 have not been followed in requesting options (b) or (c), the matter is referred to arbitration.

<sup>139</sup> M. Oesch, *Standards of Review in WTO Dispute Resolution*, (Oxford University Press, 2003), p. 77-78.

<sup>140</sup> *Ibid.*

<sup>141</sup> Rolland, *supra note* 71, p. 172.

<sup>142</sup> Ecuador in *EC-Bananas III* (2000), Antigua in *US – Gambling* (2007) and Brazil in *US – Cotton Subsidies* (2009).

<sup>143</sup> G. Hamann, 'Replacing Slingshots with Swords: Implications of the Antigua-Gambling 22.6 Panel Report for Developing Countries and the World Trading System', 24 *Vanderbilt Journal of Transnational Law* (2009), p. 998.

intellectual property rights it was considering for retaliation and was days away from imposing this kind of retaliation in 2010, ‘officials from the US Trade Representative’s office flew down to hurriedly negotiate a compromise. The agreement was that Brazil would postpone retaliation and the US would pay Brazil \$147.3 million annually until a new Farm Bill was enacted.’<sup>144</sup> Similarly in the *EC - Bananas* case, after threatening retaliation under TRIPS, Ecuador entered into successful negotiations with the EC.<sup>145</sup>

e) Antigua-Gambling and suspension under TRIPS

An illustration of why retaliation under TRIPS is important in cases where an economically more powerful opponent has no intention of implementing the panel’s recommendations is *US – Gambling*. In this case Antigua was awarded the right to suspend TRIPS obligations at a value of \$21 million. Even though the amount authorized was a mere fraction of the amount requested, which was \$3.443 billion, and by the account of the separate opinion of one of the arbitrators, a mere fraction of the amount that Antigua deserved,<sup>146</sup> the decision was still far more positive than if retaliation had only been allowed in the same sector or under the same agreement as the violation.

Antigua alleged that the US was in breach of its commitments under the GATS Art. XIV, by passing laws which restricted credit card company involvement in payments related to Internet Gambling, a service Antigua’s economy still largely depends on despite attempts at its economy’s diversification.<sup>147</sup> The US, on the other hand, claimed that its statutes were necessary to protect public morals and to maintain public order, which was accepted by the Appellate Body as a valid argument, however the US failed to show that the prohibitions in one of these acts, i.e. the Interstate Horseracing Act applied to both domestic and foreign suppliers and was therefore found to be discriminatory.<sup>148</sup>

The US took no action to bring its laws into conformity with the recommendations of the Appellate Body and the matter eventually reached a Compliance Panel under Art. 21.5.

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<sup>144</sup> G. Kripke, ‘How to Twist a Giant’s Arm? Brazil, USA, the WTO, and Cotton Subsidies’, *The Politics of Poverty: Ideas and analysis from Oxfam America’s Policy Experts*, (Oxfam, 2012) available at: <http://politicsofpoverty.oxfamamerica.org/2012/09/18/brazil-usa-the-wto-and-cotton-subsidies/>, (last accessed, 27.8.2016).

<sup>145</sup> J. M. Smith, ‘Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute’, in J. S. Odell, (ed.), *Negotiating Trade: Developing Countries in the WTO and NAFTA*, (Cambridge University Press, 2006), pp. 268-273.

<sup>146</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Recourse to Arbitration by the United States Under Article 22.6 of the DSU; Decision by the Arbitrator, WT/DS285/ARB 21.

<sup>147</sup> Hamann, *supra note* 142, p. 998.

<sup>148</sup> *Ibid*, p. 1004.

Ignoring the nature of this Panel, the US continued with the same arguments as before basically claiming that the laws were never a breach of the agreements and therefore the inaction of the US was actually ‘conformity’.<sup>149</sup> In other words, the US showed a complete disregard of the Appellate Body’s ruling and authority and showed no intent of compliance. The Panel rejected the US reasoning and declared that for conformity to exist ‘some change must come about’.<sup>150</sup> Antigua therefore requested authorization to suspend certain GATS privileges and TRIPS concessions.

Antigua’s arguments for a TRIPS suspension included the fact that it was the smallest WTO Member ‘by far’ to have made a request for the suspension of concessions and that it was an import-dependent economy where 48.9 per cent of its imports came from the US, and thus to retaliate in the goods or service sectors would essentially mean hurting its own population by making services more expensive for them, while there would be ‘virtually no impact’ on the US.<sup>151</sup> Furthermore it proved that the ‘circumstances were serious enough’ with the fact that its economy was completely dependent on tourism and financial services.<sup>152</sup> This was also sufficient for the requirements and Antigua was granted the right to suspend TRIPS obligations. The arbitrators concluded that based on the low volume of imports in the sector where the violation was found and based on the effect on Antigua’s consumers, it would not be *practicable or effective* for Antigua to retaliate in the same sector<sup>153</sup> and that the *circumstances were serious enough* due to the extreme inequality of trade between the two countries and Antigua’s heavy reliance on tourism and services.<sup>154</sup>

In the same way as in the 22.6 arbitration decision in *EC-Bananas III*, the arbitration decision in *US – Gambling* indicated that a country requesting the third option under Art. 22.3 is entitled to a ‘margin of appreciation’:

‘We agree with the arbitration in *EC-Bananas III (Ecuador)* that this includes a determination ‘whether the complaining party in question has considered the necessary facts objectively’ and also ‘whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same

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<sup>149</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*: Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Panel Report, WT/DS285/RW, para. 6.4.

<sup>150</sup> *Ibid.*, paras. 6.12-6.14.

<sup>151</sup> *US-Gambling*, *supra note* 145, paras. 4.2, 4.89, 4.92-4.94, 4.97-4.99.

<sup>152</sup> *Ibid.*, para. 4.3.

<sup>153</sup> *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*: Recourse to Arbitration by the United States under Article 22.6 of the DSU; WT/DS285/ARB, para. 4.60

<sup>154</sup> *Ibid.*, paras 4.110-1, 4.113.

agreements, or only under another agreement provided that the circumstances were serious enough.<sup>155</sup> In the words of one commentator,

[a]ffirming the standard for an Article 22.3 suspension along these lines indicates a significant amount of flexibility for the complaining country. For developing countries seeking an asymmetrical remedy, a flexible ‘reasonableness’ standard represents a significant benefit. What this means for Antigua, and other developing countries, is that the WTO has chosen to defer to such countries’ determinations that they cannot effectively retaliate against developed economies using traditional means.<sup>156</sup>

Even though Antigua’s argument that it was ‘not practicable or effective’ to suspend services or goods under GATS, was largely based on its claim of a \$3 billion loss, ‘the 22.6 arbitration decision still found authorization for the 22.3 action, even where the amount at issue was reduced to roughly \$20 million. Such a finding strengthens the conclusion that the suspension of TRIPS could become a frequent recourse for smaller economies.’<sup>157</sup>

To convince the Panel in *EC-Bananas III*, Ecuador in turn submitted numbers to the arbitrators showing the vast inequality between them and the EC as well as how their whole economy depended on the banana trade (calling it the ‘lifeboat’ of its economy) and how their exports to the EC only made up a negligible portion of EC’s trade in those areas.<sup>158</sup> The arbitrators were convinced that it was not ‘realistic or possible’ for Ecuador to implement normal retaliation against the EC and authorized retaliation under a different agreement, namely TRIPS.<sup>159</sup> In contrast to these successful arguments the right for cross-retaliation was not granted in cases where a country’s trade in the disputed sector was considered sufficient for retaliation, even if the country was a developing one. For example in *US – Upland Cotton* Brazil argued that to suspend trade in the goods sector with the US would be against its objectives as a developing country and thus ‘costly and impracticable by definition’, however this argument was rejected as the arbitrator did not find it sufficiently explained why it would not be ‘practical or effective’ to retaliate in such a manner if the total goods imports from the US greatly exceeded the level of permissible countermeasures.<sup>160</sup>

Not surprisingly India wants an automatic right to retaliate under another agreement for developing countries, which would be a positive step even though retaliation capacity is not related to a country’s level of development and it varies considerably across nations.<sup>161</sup>

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<sup>155</sup> *US-Gambling*, *supra note* 148, para. 4.18.

<sup>156</sup> Hamann, *supra note* 142, p. 1014.

<sup>157</sup> *Ibid*, pp. 1016-1017.

<sup>158</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, paras. 95, 129.

<sup>159</sup> *EC-Bananas Art. 22.6 – EC* ¶ 177

<sup>160</sup> *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1 (Aug. 31, 2009) ¶ 5.139.

<sup>161</sup> S. J. Evenett, *Sticking to the Rules*, online publication (2010) in Bown, *supra note* 14, p. 97.

f) The benefit of TRIPS Suspension as Retaliation

So what are the advantages and limitations of retaliation under TRIPS? Its first advantage is that it does not harm the local consumers by making services or goods more expensive for them. On the contrary it rather lowers the cost of payments for intellectual property, essentially only harming the holders of IP rights. In this sense suspending copyright would make goods more available to the consumers in the domestic market while suspending patents would make endeavours such as imitation and reverse technologies more feasible, thus enhancing the technological advancement of a retaliating developing country.<sup>162</sup> These arguments further prove the fact that TRIPS has a solely negative effect on development. Furthermore in instances such as the production of generic drugs, the suspension of patent rights could mean an increased availability of life saving drugs for those who can otherwise not afford them.

Also, because having less IP protection is usually beneficial to small developing countries and because the suspension of TRIPS as a form of retaliation can be tailored to maximize its beneficial impact, it is easier to convince the targeted Member, that it will actually be implemented, thus constituting a credible, more effective threat.<sup>163</sup>

The owners of intellectual property in developed countries are a powerful political constituency and if targeted have sufficient political influence to lobby their government for compliance.<sup>164</sup>

However it is important to realize that retaliation under the TRIPS Agreement is still not a magic wand that works in any situation. The protection of other interests may still override the concern from the targeted Member about IP rights holders' losses. Townsend for example does not attribute the efforts at compliance with the WTO ruling by the US in *US – Cotton* to any threat of retaliation or cross-retaliation by Brazil.<sup>165</sup> On the contrary, in as much as the US did seek to comply it was merely due to its *desire* to comply.<sup>166</sup> However it only made changes to those of its four farm programs found to be in violation of the SCM Agreement that were easier for it to reform but it did not change those policies that were the 'pillars of

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<sup>162</sup> A. Subramanian & J. Watal, 'Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO', 3 *Journal of International Economic Law*, (2000), p. 407.

<sup>163</sup> K. Won Lee, 'Suspending TRIPS Obligations as a Viable Option for Developing Countries to Enforce WTO Rulings', 9 *Asian Journal of WTO and International Health Law and Policy*, (2014), p. 227.

<sup>164</sup> W. Zdouc, 'Cross-retaliation and Suspension under the GATS and TRIPS Agreements', in C. P. Bown and J. Pauwelyn, (eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, (Cambridge University Press, 2010), pp. 515, 525.

<sup>165</sup> D. J. Townsend, 'Stretching the Dispute Settlement Understanding', *Annual Survey on the Law of the WTO*, 9 *Richmond Journal of Global Law and Business*, (2010), pp. 152-159.

<sup>166</sup> *Ibid*, p. 152.



US farm policy',<sup>167</sup> namely the so-called ML payments regulating sales of commodities, helping stabilize the price farmers receive for cotton and discouraging slumps in market prices immediately following harvest and the CC (counter-cyclical) payments compensating farmers if market prices fall below a specified trigger.<sup>168</sup> Both of these encourage over-production and were proven to be actionable subsidies which caused serious prejudice to Brazil, however regardless of an existence or non-existence of an imminent threat of a TRIPS retaliation, it would have been too costly to US interests to scrap these policies or even acknowledge their illegality as doing so would have called into question much of the US farm support system.<sup>169</sup> In the words of Palmeter: 'Probably the only Members of the WTO presently able to impose a cost that would induce the United States, the EC or Japan to comply with their WTO obligations are the United States, the EC and Japan.'<sup>170</sup> In all other cases if these countries bring their measures into compliance it is because they choose to. Not because they would be forced to by any adverse consequences.

#### **4. The Law Itself as the Ultimate Limitation of the Dispute Settlement Mechanism**

In the words of Koskenniemi, '[w]hile the way international law is spoken, and thus applied, reflects the profoundly inequitable constellation of power today, it also offers avenues of resistance and experimentation. It may be used to support and to challenge hegemony. Though it often empowers the 'wrong' people and justifies the 'bad' decision, this is by no means necessarily the case.'<sup>171</sup> This statement rings true for the WTO DSM. As discussed above, developing countries face many challenges in their access to redress via the dispute settlement and more importantly in trying to enforce rulings in their favour. Many of these challenges however can be surmounted as practice has shown and weaker countries can use the DSM as a weapon against much stronger players. However, as long as the law applied is fundamentally unjust and in many ways anti-developmental, there can only be so much scope for a true rebalancing of the system. The goal of development has been characterised as a 'constitutional and legislative tenet of the WTO'<sup>172</sup>, however despite its prominent place in the Preamble, sustainable development is not included in any of the binding agreements

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<sup>167</sup> *Ibid*, p. 158.

<sup>168</sup> M. J. Shumaker, 'Comment: Tearing the Fabric of the World Trade Organization: United States - Subsidies on Upland Cotton', 32 *North Carolina Journal of International Law and Commercial Regulation* (2007) pp. 552-60.

<sup>169</sup> Townsend, *supra note* 164, p. 158.

<sup>170</sup> Palmeter, *supra note* 118, p. 361.

<sup>171</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new Epilogue, (Cambridge University Press, 2005), preface to the reissue xiv.

<sup>172</sup> ICTSD, 'Towards A Development-Supportive Dispute Settlement System in the WTO, Sustainable Development Trade Issues', Resource Paper, No.5, (ICTSD, 2003), p. 100.

establishing rights and obligations aimed at achieving it. Thus according to the *nulla poena sine lege* principle, it seems that a *de iure* or *de facto* protection of sustainable development under the WTO is not actually possible in the current framework.<sup>173</sup>

## **5. The Limitations of Taking into Account the Objects and Purposes of WTO Agreements in Treaty Interpretation**

The following section looks at the limitations of the possibility of developing countries to rely on exceptions to general rules and the objects and purposes found in the WTO Agreements to carve out policy space needed for development.

Some people claim treaty interpretation is an art, while others claim that when the meaning sought after is ‘inferred from sound premises according to the accepted rules of inference’ then it is clearly a science and the rules limit the scope of creative lawmaking.<sup>174</sup> The introduction of the Appellate Body to the GATT/WTO system with the Marrakesh Agreement in 1995 has brought a more strictly legal approach to the interpretation of WTO rules than previously, relying heavily on public international law rules of interpretation found mainly in the Vienna Convention on the Law of Treaties (VCLT). According to the VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>175</sup> The context includes the preamble and annexes and several other indicators,<sup>176</sup> while supplementary means of interpretation include the *travaux préparatoires* and the circumstances of the conclusion of a treaty.<sup>177</sup> While some claim there is no hierarchy between the means of interpretation, others see the recourse to the object and purpose of a treaty only possible when the text itself is not determinative. In the words of Howse, the object and purpose of a treaty cannot be a basis for reading into the text a diminution of a right or an increased obligation, unless the words themselves at least point to the application of such extrinsic interpretative materials.<sup>178</sup> Interpretation in light of the object and purpose of a treaty is part of the principle of *pacta sunt servanda*, which is an essential part of WTO

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<sup>173</sup> L. M. Costa, ‘Desenvolvimento Sustentável no Órgão de Solução de Controvérsias da Organização Mundial do Comércio: Demolindo Mitos e Barreiras’, 49 *Revista de Administração Pública* 6, (2015).

<sup>174</sup> U. Linderfalk, ‘Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making’, 26 *European Journal of International Law*, (2015), p. 171.

<sup>175</sup> Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Arts. 31-33.

<sup>176</sup> *Ibid*, Art. 31(2)(a-c).

<sup>177</sup> *Ibid*, Art. 32.

<sup>178</sup> R. Howse, ‘The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate’, 27 *Columbia Journal of Environmental Law*, (2002), p. 516.

jurisprudence<sup>179</sup> and requires Member states to put into effect the rules and principles arising under the treaty. This means that the treaty needs to be implemented in ‘good faith’, i.e. in a way that pays due respect to the purpose of the treaty so that the intentions of the Parties can be realized.<sup>180</sup> Consequently Member states must refrain from any action which would defeat a treaty’s object or purpose.<sup>181</sup> Yet, adjudicators at the DSM have been relying far more on the dictionary meaning of the agreements (i.e. the literal approach) than looking at their object and purpose. This ‘judicial conservatism’ has been justified by Ehlermann as providing protection to the AB from criticism that it is ‘adding to or diminishing the rights provided in the covered agreements’, while it has been criticised by developing countries who claim that the hierarchy between text and context is not supported by the VCLT.<sup>182</sup> Perhaps the crux of the matter is that the ultimate aim of the treaty interpretation process is to establish the legally correct meaning of a treaty, which lawyers naturally understand to be the communicative intention of the treaty parties, i.e. what the parties intended the treaty to express. When the object and purpose is only there to provide perceived legitimacy to the substantive rules and does not really reflect the desire of the state parties, it cannot be given equal weight in the interpretation process.

The preamble is the commonly used source and, according to the International Law Commission, the main guidance on the object and purpose of a treaty.<sup>183</sup> Some treaties have provisions among their substantive articles specifically listing the treaty’s objective and purpose. Such an example would be the TRIPS agreement. In terms of where the object and purpose is specified, i.e. in the preamble or the substantive articles, it practically makes no difference. Furthermore, practice shows that courts and tribunals tend to find it difficult to

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<sup>179</sup> *United States: Continued Dumping and Subsidy Offset Act of 2000*, Report of the Appellate Body, WT/DS217/AB/R; VCLT, Art. 26; VCLT Art. 31.

<sup>180</sup> ICJ, *Gabčíkovo-Nagymaros Project, Hungary v Slovakia*, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25th September 1997, International Court of Justice [ICJ], pp. 78-9.

<sup>181</sup> ILC, ‘Yearbook of the International Law Commission 1966, Volume II’ (1966) UN Doc A/CN.4/SER.A/1966/Add.1, 221[4].

<sup>182</sup> Dispute Settlement Body - Special Session - Negotiations on the Dispute Settlement Understanding - Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/18, (7. Oct. 2002) ‘Though there was no hierarchy between ‘ordinary meaning’, i.e. ‘text’ and ‘context’, ‘object and purpose’, the practice of the Appellate Body and the panels to date has been to begin their clarifications with textual interpretation by referring to the dictionary meaning of the provisions of the covered agreements’; see also D. Shanker, ‘The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPs Agreement’, 36 *Journal of World Trade*, (2002), pp. 721-772.

<sup>183</sup> ILC, ‘Yearbook of the International Law Commission 1968, vol. II’ (1966) UN Doc A/CN.4/SER.A/1968/Add.1, p. 41.

establish a reasoned distinction between the object and purpose of a treaty and that of particular provisions.

In the *Oil Platforms* case, the International Court of Justice (ICJ) took into consideration the terms of the preamble which were the ‘encouraging [of] mutually beneficial trade and investments and closer economic intercourse generally’ as well as ‘regulating consular relations’ between the two states, to interpret the treaty’s Art. 1 stating that ‘[t]here shall be firm and enduring peace and sincere friendship between the two states.’<sup>184</sup> The provision in question was itself of a general formulation which was why the Court considered that it could not be interpreted in isolation from the object and purpose of the treaty itself.<sup>185</sup> The ICJ further made substantial use of the preamble in the case concerning *Rights of Nationals of the United States of America in Morocco* and the *Asylum (Colombia/Peru)* case.<sup>186</sup> Important international arbitrators have likewise resorted to preambles as guides to their interpretations.<sup>187</sup> Both the VCLT and practice make it clear, however, that the substantive provisions of the treaty provide a fuller indication of the object and purpose.<sup>188</sup> In other words, the object and purpose of the preamble cannot be used to counter clear substantive provisions. As the Iran-US Claims Tribunal put it: ‘[t]he object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text [and] is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.’<sup>189</sup> Thus the object and purpose of a treaty can play a great role but only when it is not in direct contradiction with the text of specific provisions or other objects and purposes of a treaty.

After the Marrakesh Agreement came into force its Preamble had become an important reference point in legal discourse.<sup>190</sup> Yet as the analysis of this thesis shows the Preambular object and purpose of development and the raising of standards of living is many times in direct conflict with substantive provisions of the WTO Agreements and the liberalisation

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<sup>184</sup> *Oil Platforms, Iran v United States, Judgment, merits, ICJ GL No 90, [2003] ICJ Rep 161, ICGJ 74 (ICJ 2003), 6th November 2003, International Court of Justice [ICJ].*

<sup>185</sup> *Ibid*, paras. 27, 28, 31, 36 and 52. The Court found that the object and purpose of the treaty was not to regulate peaceful and friendly relations between the two states in a general sense (in contrast with more general treaties of friendship and peace) but rather that the states intended to stress in Art. 1 that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations.

<sup>186</sup> ICJ Reports 1952, pp. 176, 196.

<sup>187</sup> *Beagle Channel Arbitration 1977 paras. 19 and 20, J. G. Wetter, The International Arbitration Process, Vol 1, (Oceana Publications, 1979), p. 276.*

<sup>188</sup> R. Gardiner, *Treaty Interpretation*, (Oxford University Press, 2008) p. 197.

<sup>189</sup> USA, Federal Reserve Bank v Iran, Bank Markazi Case A28 (2000-02) 36 Iran-US Claims Tribunal Reports 5, p. 22, para. 58 (footnotes omitted).

<sup>190</sup> I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, (Oxford: Oxford University Press), p. 168.

mandate of the Preamble itself. Considerations of the object and purpose of economic development could play a greater role at least in interpretations of special and differential treatment (SDT) since here it cannot really be seen as being in conflict with the substantive provisions or the Preambular acknowledgement of developing countries' special needs. Such an approach could ensure a meaningful application of SDT. Yet as shown in chapter IV, adjudicators at the DSM have nevertheless looked at SDT provisions mainly very conservatively, taking great care not to afford any rights to developing countries or impose obligations on developed countries which are not strictly specified as mandatory in the text to the point where it seems in practice many hortatory SDT provisions become completely useless. In terms of SDT providing additional policy space for developing countries, the Panel referred in *Brazil — Aircraft (Article 21.5 — Canada)* to the Preambular 'need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'. It stated that:

[t]his overarching concern of the WTO Agreement finds ample reflection in the SCM Agreement. Article 27 of that Agreement recognizes that "subsidies may play an important role in economic development programmes of developing country Members" and provides substantial special and differential treatment for developing countries, including in respect of export subsidies.<sup>191</sup>

The Panel further referred to the object and purpose of the SCM Agreement.<sup>192</sup> Importantly the Panel agreed with Brazil that:

the SCM Agreement should not be *interpreted* in a manner that provides special and *less* favourable treatment for developing country Members in the field of export credit terms *if the text of the Agreement permits of an alternative interpretation*. In particular, an *interpretation* of the SCM Agreement that allowed developed country Members to consistently offer export credit terms more favourable than those that could in practice be offered by developing country Members – at least as of the date the export subsidy prohibition applies to any given developing country Member – would be at odds with one of the objects and purposes of the WTO Agreement generally and the SCM Agreement specifically.<sup>193</sup>

Thus the Panel used the Preamble for little more than an affirmation and praise of the text of the SCM Agreement (which is in reality far from perfect in this regard) and clearly stated that even if it considered a specific provision to be in conflict with said object and purpose it would only interpret it differently, *if the text of the Agreement* allowed it to do so.

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<sup>191</sup> *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, Report of the Panel, DS64, fn 49.

<sup>192</sup> Note that the SCM Agreement does not contain any express statement of its object and purpose.

<sup>193</sup> *Ibid*, para. 6.47, emphasis added. The Panel consider however that the broad reading of footnote 5 urged by Brazil is not necessary in order to ensure equitable treatment for developing country Members. To the contrary, they feared that a broad interpretation of footnote 5 would have the opposite effect, and considered that the natural reading of the footnote was more in keeping with this important object and purpose of the WTO Agreement. (*Ibid*, para. 6.48).

## 6. US-Shrimp as a False Sign of Judicial Activism

The dispute settlement has been accused of a ‘structural bias in favour of trade liberalization at the expense of members’ regulatory discretion in promoting other national interests’.<sup>194</sup> This is reflected in the asymmetrical pattern in the outcomes of the disputes, which reveals that complainants enjoy much higher success rates than defendants.<sup>195</sup> This bias has undermined the perceived legitimacy of the DSM<sup>196</sup> yet it is most likely rooted in the law itself which drastically curtails policy space to an anti-intuitive extent. Articles 3.2 and 19.2 of the DSU require that both the panels and the AB ‘must not add to or diminish rights and obligations provided in the WTO Agreement’. The adjudicators are furthermore not permitted to adopt readings of the law ‘that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility’.<sup>197</sup> Revolutionary interpretations in light of goals and purposes not specifically reflected in substantive provisions are thus highly unlikely and indeed rarely happen.

The *US-Shrimp*<sup>198</sup> case has been seen by many as an exception in this regard and thus criticised for so-called ‘judicial activism’. The case involved trade restrictive measures against shrimp which was caught in a manner that was harmful to turtles. Citing evidence from the Preamble, the Uruguay negotiations and the Decision on Trade and Environment the AB noted that neither Art. XX nor WTO law in general can be read so as to give effect to overarching trade objectives brushing aside all other considerations.<sup>199</sup> It took the position that trade restrictive measures were allowed not merely on the basis of the final product but also on production methods and it further considered turtles to fall under the category of ‘exhaustible natural resources’.<sup>200</sup> Bhagwati stated that he was astounded that the AB in *US-*

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<sup>194</sup> S. Shlomo-Agon and Y. Shany, ‘The WTO Dispute Settlement System’ in Y. Shany, *Assessing the Effectiveness of International Courts*, (Oxford University Press, 2014), p. 208.

<sup>195</sup> *Ibid.*

<sup>196</sup> J. F. Colares, ‘A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development’, 42 *Vanderbilt Journal of Transnational Law* (2009), p. 383.

<sup>197</sup> This is the so-called principle of effectiveness; see *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, DS2, p. 21.

<sup>198</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, DS58.

<sup>199</sup> *Ibid.*, Appellate Body Report, paras. 152-154.

<sup>200</sup> *Ibid.*, ‘The words of Article XX(g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement — which informs not only the GATT 1994, but also the other covered agreements — explicitly acknowledges ‘the objective of sustainable development’... From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’... Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral

*Shrimp* reversed what he characterised as long-standing jurisprudence on process and production methods and that he had little doubt that the jurists were reflecting the political pressures brought by the rich-country environmental non-governmental organisations and essentially made law that affected the developing countries adversely.<sup>201</sup> Gardiner in turn criticised the decision for in effect taking a one-sided view of the object and purpose of the WTO Agreement when it fashioned ‘a new test not found in the text of the Agreement.’<sup>202</sup> Thus *US-Shrimp* has been seen as one of the rare example of the DSM showing willingness to broadly interpret reasons for trade-restrictive measures and since the decision was in favour of the US, it has been speculated that this willingness depends mainly on who benefits from it, believing that dispute settlement panels are not immune to US pressure.<sup>203</sup> In other words, the flexibility in the law is seen to already exist even for the allowance of protectionist measures with the goal of economic development, if panels merely chose to use it for developing countries, the same way they used it for the US.<sup>204</sup> The present author does not share this impression. In *US-Shrimp* the AB specified that:

A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.<sup>205</sup>

The AB further alluded to the potential conflict between the objects and purposes of the WTO Agreement by stating that:<sup>206</sup>

most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the WTO Agreement. Thus, while the first clause of the preamble to the WTO Agreement calls for the expansion of trade in goods and services, this same clause also recognizes that international trade and economic relations under the WTO Agreement should allow for ‘optimal use of the world’s resources in accordance with the objective of sustainable development’ and should seek to ‘protect and preserve the environment.’

The AB reverted to the Preamble to establish that the meaning of ‘exhaustible natural resources’ had to be understood in evolutionary terms, in light of the development of international environmental law, science, and policy. Importantly, the AB acknowledged that the Preamble which was written nearly 40 years after the original GATT was the new

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action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.”

<sup>201</sup> J. Bhagwati, ‘After Seattle: Free Trade and the WTO’, in R. B. Porter et al., (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, pp. 60-61 (Brookings Institution Press, 2001).

<sup>202</sup> Gardiner, *supra* note 188, p. 197.

<sup>203</sup> M. Martin, chair at the SLSA Annual Conference, International Economic Law Stream, 5 April 2017.

<sup>204</sup> *Ibid.*

<sup>205</sup> *US-Shrimp*, Appellate Body Report.

<sup>206</sup> *Ibid.*, para. 17.

framework for its interpretation – ‘that the creation of the WTO represented a fundamental moment, one that in this case placed the relevant provisions of GATT within a broader universe of international law and policy relevant to environment and development, as well as general public international law.’<sup>207</sup> Yet in this sense it would be hard to claim that the Panel or AB really departed from standard principles of treaty interpretation and the perception that they went beyond the substantive provisions of the Agreement is exaggerated. Equally misleading are conclusions that there exists general flexibility in the law, which is only used when it benefits the US. Furthermore as to disregarding the distinction in treatment between final product and process, the only ‘jurisprudence’ establishing a principle to the contrary had been two unadopted *Tuna/Dolphin* Panel reports, whereas there is no such principle specified in the text of the Agreement.<sup>208</sup>

The fact that the Panel and AB were able to use more flexibility in *US-Shrimp* than they would have been in a situation of protectionist measures for the sake of economic development, is hardly surprising considering the wording of the articles on general exceptions. Art. XX allows for trade restricting measures if these are necessary for the protection of the listed legitimate interests:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;...

Economic development is clearly not specifically listed as one of the legitimate interests which can be protected, while the conservation of exhaustible natural resources is. A question relevant for the present discussion would then be, whether economic development could fall under any of the listed interests. In terms of the public morals exception, all major WTO agreements include it, however they do not define it. The AB defined it in the 2005 case of *US-Gambling* as ‘standards of right and wrong conduct maintained by or on behalf of a

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<sup>207</sup> Howse, *supra note* 178, p. 519.

<sup>208</sup> *Ibid.*, p. 514; while unadopted GATT reports may offer ‘guidance,’ there is no legal requirement to take them into account when deciding cases within the dispute settlement framework of the WTO (*European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R).



community or nation'.<sup>209</sup> One could convincingly argue that protecting the economic development of poorer countries, forms the common morals and values of the community and especially the nations of developing countries, and thus a developing country could claim that its measures imposing restrictions on trade are necessary for the protection of public morals. Similarly, and perhaps even more convincingly, one could argue that development is a precondition for the sustainable guarantee of human health and thus justifies measures for its protection under paragraph b). Furthermore paragraph d) seemingly offers unlimited possibilities for justifying exceptions, as long as a country's own laws or regulations necessitate it, and why should development not simply be added to a Member state's national legal system (see below an analysis of India's recent failed attempt to justify domestic content requirements in this regard)? Theoretically and with a more open interpretation, this could all be successfully argued. However, as discussed, economic development is almost equated with liberalisation at the WTO and thus the only equilibrium which is being sought at the DSM is between free trade (as far as it has been agreed in the separate agreements) and the protection of the environment or human rights. There is no recognition that economic development may necessitate protectionist or discriminatory measures and if it does this is already perfectly reflected in the Agreements without need for allowing more exceptions.<sup>210</sup> Thus developing countries cannot invoke the goal of sustainable development to successfully defend their industrial policies aimed at economic development. Furthermore protectionist measures are forbidden *ab initio* in the chapeau of Art. XX. It is exactly this part of the two-fold test of Art. XX that has been most rigidly interpreted by the WTO/GATT jurisprudence. This is understandable as it goes to the core principles of GATT/WTO which are MFN and national treatment. For example in *Herring and Salmon*, Canada claimed that its prohibition on the exportation of certain unprocessed salmon and unprocessed herring was put in place to enable a precise catch control indispensable for managing the stock, however the Panel found Canada's primary aim<sup>211</sup> to 'have been the protection of employment within the fish processing industry by increasing the amount of processing done in Canada, rather than the

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<sup>209</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, para. 296.

<sup>210</sup> See for example *Brazil – Aircraft*, *supra* note 191.

<sup>211</sup> In this case the panel introduced the interpretation of treaty words from Art. XX (g), 'relating to' to mean 'primarily aimed at'. The Appellate Body has since found this interpretation to be in violation of the VCLT as it is not treaty language (*United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, pp. 16-17). The test according to the AB should rather consist of examining whether the measure falls into the purview of one of the paragraphs (a) to (j) and second a further appraisal of whether the same measure is applied in a manner which does not amount to an abuse, i.e. conform to the requirements of the chapeau. This makes the exceptions under Art. XX generally easier to justify, however for the purposes of pushing for protectionist measures under the right to development, it does not change much.

conservation of exhaustible natural resources.<sup>212</sup> Unsurprisingly this ‘hidden protectionism’ caused Canada to lose its case. Canada is not a developing country and it further did not claim its measures to be justified under protecting their economic development, but a developing country would equally lose a case under similar circumstances. The avoidance of protectionist measures is at the core of Art. XX and its interpretations. In the pre-WTO era, even if alternative measures of protecting a legitimate interest under Art. XX would be at a great expense to the country in question, the country was still expected to choose those alternative measures, before it should consider restrictions on trade under Art. XX.<sup>213</sup> In other words, the idea is to allow for space for the pursuit of legitimate environmental and other policy goals, ‘while keeping protectionism firmly in check’ as Deputy Director General, Mr Bauer recently noted:

The case law has confirmed that members may be permitted to apply trade-restrictive environmental measures as long as they are not applied arbitrarily or used as disguised protectionism. The outcome has been often more coherent and consistent environmental policies.<sup>214</sup>

Direct or indirect references to sustainable development are used mostly to deepen the exceptions of Art. XX of GATT, XIV of GATS and Art. 27 of TRIPS regarding exclusions from patentability necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.<sup>215</sup> Not surprisingly however, the individual arguments raised mainly apply to a concern with the protection of human rights or the environment. Rarely can one find an openly expressed preoccupation with economic development or poverty as such. One example would be *India-Quantitative Restrictions on Imports*, where India tried to justify the restrictions based on its concern about the impact on wages and employment especially in the context of cheap agricultural imports entering the market.<sup>216</sup> As expected, however, this did not prevent the Panel from finding the restrictions to be in violation of WTO law. Much more common therefore is the use of protectionist measures with the aim of economic development, which are not presented as such at the DSM. Instead, the country employing the measures tries to

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<sup>212</sup> GATT, *Canada- Measures Affecting Exports of Unprocessed Herring and Salmon*, Panel report, L/6268, adopted 22 March 1988, BISD 35S/95. Paras 3.11, 4.7.

<sup>213</sup> GATT, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, Panel Report, DS10/R, adopted 7 Nov. 1990, BISD 37S/200, para. 22.

<sup>214</sup> WTO, ‘DDG Brauner Urges Trade Community to build on COP21 momentum and support climate action’, (9 December 2015), available at: [https://www.wto.org/english/news\\_e/news15\\_e/ddgra\\_09dec15\\_e.htm](https://www.wto.org/english/news_e/news15_e/ddgra_09dec15_e.htm), (last accessed: 12.7.2017).

<sup>215</sup> and to a more limited extent in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade, Costa, *supra note* 173.

<sup>216</sup> *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R.

justify them by claiming for example solely the protection of the environment, exhaustible natural resources or human rights. This is analysed in detail in the next section.

Some flexibility beyond what the practice has shown is nevertheless implied by the wording of Art. XX in the sense that the discrimination must be ‘justifiable’, not ‘arbitrary’ and that the measures must be ‘necessary’. In this regard, a study by the International Centre for Trade and Sustainable Development suggested that the ‘developing condition’ could inform what is ‘necessary’ in terms of Art. XX GATT, XIV GATS or 27 of TRIPS and that the ‘development condition’ could even provide justification in terms of ‘unjustifiable discrimination’ under Art. XX GATT.<sup>217</sup> Especially the latter option would be highly useful, as it could potentially allow for protectionism and other discriminatory measures by developing countries to protect their economic development if the panels ever displayed a willingness to allow for such a flexibility. In *Brazil – Retreaded Tyres*, the AB noted that analysing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination.<sup>218</sup> It further noted that ‘discrimination can result from a rational decision or behaviour and still be ‘arbitrary or unjustifiable’, because it is explained by a rationale that bears no relationship to the objective of the measure provisionally justified under one of the paragraphs of Art. XX, or goes against that objective.’<sup>219</sup> Theoretically thus, a country could claim its trade restricting policies were necessary to protect its economic development - a legitimate interest forming part of public morals or the countries’ laws and regulations. In practice, these arguments would not go far.

### **7. The Goal of Development and other Developmental Arguments as Weak Shields at the Dispute Settlement Mechanism**

Below is an analysis of case law involving situations where developing countries tried to justify their trade restrictive measures either by reference to sustainable development or directly to economic development. The analysis uncovers the limitations of this in the current practice.

One important policy space for development is the ability to regulate trade in one’s natural resources. As Members of the WTO, countries take on liberalisation commitments in this regard, it is thus essential to ask whether they can carve out additional policy space at the DSM, beyond what they have secured in the WTO agreements or their individual accession

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<sup>217</sup> ICTSD, *supra* note 172, p. 97.

<sup>218</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, paras. 225 and 227; referring to its analyses in *US-Gasoline*, *US-Shrimp* and *US-Shrimp (Art.21.5-Malaysia)*, para. 225.

<sup>219</sup> *Ibid*, para. 232.

protocols, by reference to their development needs. In this regard the case of *China-Raw Materials*<sup>220</sup> is examined, concerning China's export restrictions and export taxes on several raw materials (i.e. bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc). At the DSM China sought to defend these measures by claiming that as a developing country and as a matter of its sovereignty it could limit exports to foster economic development based on these resources.<sup>221</sup>

Initially problematic was the finding that China could not even rely on GATT exceptions with respect to some of its accession commitments, regardless of whether its measures would have met the conditions of Art. XX. China argued that the text of Paragraph 11.3 of its Accession Protocol shows that WTO Members, in imposing an obligation on China to forego export duties in certain circumstances, did not exclude the right to regulate trade, which was 'an inherent power enjoyed by a Member government' and a sovereign right found in the text of the covered agreements *read as a whole*.<sup>222</sup> Despite agreeing with China, that Members have an inherent and sovereign right to regulate trade, the Panel nevertheless concluded that China exercised that right when negotiating and agreeing with the provisions of its Accession Protocol, thus the text of this Protocol is now 'the ultimate expression of China's sovereignty' and the wording and context of Paragraph 11.3 determines its scope.<sup>223</sup> Since the respective paragraph does not explicitly provide China with the possibility of invoking Art. XX of the GATT, the Panel concluded that allowing such invocations would 'change the content and alter the careful balance achieved in the negotiation of China's Accession Protocol. It would thus undermine the predictability and legal security of the international trading system.'<sup>224</sup> Therefore it is clear that bargaining takes precedence over the values contained in Art. XX or the objects and purposes purported in the various WTO Agreements. At the AB, China referred to the language contained in the preambles of the WTO Agreement, the GATT 1994, Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade, the Import Licensing Agreement, the GATS and TRIPS, to argue that the Panel distorted the balance of rights and

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<sup>220</sup> *China-Measures Related to the Exportation of Various Raw Materials*, DS394/DS395/DS398.

<sup>221</sup> *China-Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, paras. 7.155-7.157 (China arguing that its inherent right to regulate trade stems from the WTO agreements read as a whole. The Panel and AB responded that China had exercised this right by ratifying its Accession Protocol.); WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R paras. 1, 38-39, 49, 80-82, 300.

<sup>222</sup> *Ibid*, Panel Report, paras. 7.155- 7.156 emphasis added; see also *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R: 'an inherent power enjoyed by a Member government'.

<sup>223</sup> *Ibid*, paras. 7.156-7.157.

<sup>224</sup> *Ibid*, para. 7.159.

obligations established in China's Accession Protocol by assuming that China had abandoned its right to import export duties to promote fundamental non-trade interests.<sup>225</sup> The AB however simply stated that it understands the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns, whereas the lack of any textual reference to Art. XX of the GATT in Paragraph 11.3 of China's Accession Protocol gives no basis for the applicability of this article.<sup>226</sup> Here again, it is reaffirmed that the preambles give no extra rights or values to be protected beyond the strict readings of the texts of the various Agreements. Thus one can rightly conclude that these preambles and their boastful proclamations add nothing of practical value. They only serve as a legitimising tool for agreements which severely lack legitimacy due to their bargaining nature which secures the interests of the more powerful over the rest, regardless of essential values and rights which countries should have the ability to protect.

Based on what it claimed was its right to economic diversification, China sought to justify the discriminatory nature of its measures. It argued that GATT Art. XXXVI:5 can be used as legal context in the interpretation of Art. XX(g) and that Art. XXXVI:5 confirms that it is entitled to use and conserve its natural resources for itself with a view to diversifying its *own* economy. Supporting its steel industry would help it to diversify due to its positive influence on the infrastructure sector, which in turn, would spur China's overall economic development, industrialisation and diversification.<sup>227</sup>

The Panel was however less than impressed with this argumentation and expressed:

a certain difficulty in seeing how a reference to the right to diversification set out in Article XXXVI:5 can assist it in its interpretation of Article XX(g). Even assuming that China has properly identified an interpretative ambiguity in Article XX(g), and that Article XXXVI:5 includes a right to economic diversification – which we are not suggesting it does – we cannot agree with China that such a right could undermine or even contradict the terms of paragraph (g) that require even-handed domestic restrictions on production or consumption.<sup>228</sup>

This is a clear example of the inability of developing countries to claim economic development as a justification for restrictive measures on trade and it goes to the core of the problem highlighted in this thesis. China furthermore tried to justify its measures with Part IV of the GATT, in relation to Art. XI:2(a). It argued that Art. XXXVI:5 and its Ad Note support the view that Art. XI:2(a) may be applied to address a product that is important to domestic processing industries. It submitted that the essential nature of a 'primary product' for a developing country may derive from the product's role in securing economic diversification

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<sup>225</sup> *China-Raw Materials*, Appellate Body Report, para. 305.

<sup>226</sup> *Ibid*, para. 306.

<sup>227</sup> Panel Report, para. 7.399.

<sup>228</sup> *Ibid*, para. 7.400.

through the development of domestic processing industries claiming it provided context to justify a broad understanding of Art. XI:2(a) when applied to developing countries.<sup>229</sup> The Panel found that China did not meet the conditions of Art. XI and rejected the possibility of a broader interpretation of Art. XI for developing countries, concluding that the conditions of the article apply equally to all Members. Thus China's efforts of justifying restrictive measures with the goal of its economic development again hit a wall. The Panel and AB further found the same non-availability of exceptions under XI:2 in terms of China's Accession Protocol as they did for Art. XX exceptions with regards to some products.

There was a similar result of the legal analysis in *China – Rare Earths*.<sup>230</sup> The dispute concerned China's restrictions on the export of various forms of rare earths, tungsten and molybdenum which included export duties, export quotas and other measures. The materials in question are essential in the production of various kinds of electronic goods and the main argument from Japan, the EU and Canada, which were the complainants, was that these restrictions were designed to provide Chinese industries that produce downstream goods with protected access to the subject materials, whereas China claimed its export duties were designed to reduce pollution caused by mining and to conserve its natural resources. China thus sought again to rely on Art. XX under paragraph (b) which envisions the protection of human life or health and paragraph (g) which envisions the conservation of natural resources. Unfortunately, as in *China - Raw Materials*, it was again established at the Panel and confirmed at the Appellate Body that China could not invoke the general exceptions contained in Art. XX with regards to obligations undertaken in its Accession Protocol.<sup>231</sup> Regardless, the Panel engaged with the question of whether China met the requirements under the mentioned paragraphs of Art. XX on an *arguendo* basis and concluded that it failed to meet said requirements.

Most important for the present discussion is how the Panel considered the relationship between Art. XX exceptions and sustainable development. Firstly, it clearly stated that Member's sustainable economic development needs are not a standalone justification for the imposition of WTO-inconsistent measures.<sup>232</sup> However it considered such needs as a legitimate consideration that may be taken into account when deciding whether and how to

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<sup>229</sup> *Ibid*, para. 7.265.

<sup>230</sup> *China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, DS431, 432, 433.

<sup>231</sup> One panellist disagreed and concluded in a separate dissenting opinion that the "General Exceptions" in Article XX of the GATT 1994 are available to justify all WTO obligations related to trade in goods unless an obligation explicitly provides otherwise, and the relevant obligation in China's Accession Protocol does not explicitly provide otherwise.

<sup>232</sup> *China-Rare Earths*, Report of the Panel, WT/DS431/R, WT/DS432/R, WT/DS433/R, para. 7.451.

design and administer a conservation policy. Despite this purported acceptance of development needs, the actual reasoning of the Panel report shows that any development goals or policies were considered as problematic. This is described below.

China argued that a conservation policy is not limited to preserving natural resources in their current state, but also covers use and management of these resources in line with a Member's sustainable economic development.<sup>233</sup> The Panel explained that the conservation objective embodied in Art. XX(g) 'allows Members to take their sustainable development needs into account in deciding whether to adopt a conservation policy, how to design that policy, and what instruments will be used to implement that policy'.<sup>234</sup> At the same time it stated that measures the objective of which is to promote economic development are not 'measures relating to conservation' but measures relating to industrial policy.<sup>235</sup> Thus the Panel seems to suggest that one excludes the other.

The Panel exposed as problematic the below enumerated goals and effects of the measures at dispute which show a connection to economic development goals.

Firstly, the Panel noted that several Chinese laws and regulations alluded to goals such as establishing or accelerating the establishment of specific domestic industries; preventing the illegal mining and thus the illegal exploitation of China's comparative advantage (which the Panel considered to be primarily an industrial policy goal); strengthening the industrial scale of rare earths new materials (which the Panel understood to be clearly a reference to industrial rather than conservation policy); encouraging growth for the rare earth industry in certain provinces; and vigorously developing rare earth new materials and industry applications and development of new products and acceleration of new technology.<sup>236</sup> The Panel found such industrial development goals to 'sit in tension' with the objective of reducing domestic consumption for the purpose of conserving exhaustible natural resources.<sup>237</sup>

Secondly, the Panel took issue with the fact that the measures may lower domestic prices which in turn stimulates domestic demand.<sup>238</sup> Ensuring lower prices for Chinese processing industries is clearly an industrial policy tool, beneficial for China's economic development, however it is not surprising that the Panel could not find this compatible with the requirements of Art. XX(g).

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<sup>233</sup> *Ibid*, para. 7.457.

<sup>234</sup> *Ibid*, para. 7.459.

<sup>235</sup> *Ibid*, para. 7.496.

<sup>236</sup> *Ibid*, para. 7.398-7.403.

<sup>237</sup> *Ibid*, para. 7.403.

<sup>238</sup> *Ibid*, para. 7.448.

Thirdly the Panel found China's desire to moderate speculative demand surges that could upset the market balance and certainty sought by China, again to be an aspect of its industrial policy and thus an indicator against the purported conservation goal.<sup>239</sup> Even though the Panel found such industrial policy concerns to be legitimate and possible to address under GATT Art. XI.2 (a), they were nevertheless unacceptable under Art. XX(g).<sup>240</sup>

The Panel also found China's desire to manage uncertainty and volatility in the market as an industrial and thus not conservation policy.<sup>241</sup> The Panel found that generally speaking, 'managing an international resources market cannot be considered to fall within the meaning of 'conservation' since it relates instead to industrial policy.

In the same vein, the Panel took issue with China's calculations of the quotas, as they seemed to focus on industrial policy concerns, including prior export performance and overall value of exports from China. As already established in *China-Raw Materials*, measures that would increase the cost of a raw material to foreign consumers, but decrease its costs for domestic users, were considered incompatible with the goal of conservation.

The Panel also pointed out the fact that China puts no restrictions on the export of the materials at stake when in the form of finished products, which it interpreted as showing China's lack of a real concern with conserving these resources.<sup>242</sup> This last finding is particularly absurd, since it is normal that China is not conserving these materials out of principle, but to provide its industries with the necessary inputs for their production. Once the materials have been processed, it is clear that restrictions on their exports no longer make sense. Indeed this is an industrial policy aimed at encouraging the processing of raw materials before exporting them. A welcome industrial policy for developing countries, yet unsurprisingly considered problematic by the Panel.

China thus 'lost points' trying to prove a conservation policy whenever any industrial policy goals were found in its policies. Unsurprisingly China on the other hand denied altogether that its 'supply management' was intended to protect or promote the domestic industry.<sup>243</sup>

The Panel considered China's measures to encourage domestic extraction and secure preferential use of the materials by Chinese manufacturers. The Panel found that Chinese export and domestic restrictions worked together to secure the supply of rare earths to downstream domestic users and thus not for the goal of conserving exhaustible natural

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<sup>239</sup> *Ibid*, para. 7.452.

<sup>240</sup> *Ibid*, para. 7.453.

<sup>241</sup> *Ibid*, para. 7.471.

<sup>242</sup> *Ibid*, para. 7.589.

<sup>243</sup> *Ibid*, para. 7.461.



resources.<sup>244</sup> In other words, it found China not to be concerned with conservation *but* with other considerations, possibly a desire to respond to domestic industrial needs.<sup>245</sup>

The conclusion was thus that the quotas were designed to achieve industrial policy goals, *rather than* conservation, whereas a better finding in principle would have been at least that they were designed *only* to achieve industrial policy goals without conservation, if this was indeed the case. Otherwise it is hard to see how economic development goals could actually be taken into account, since industrial policy goals are not permitted.

The Panel stated that it ‘acknowledges that there is nothing objectionable about Members accounting for their own and other countries’ development needs when adopting, designing and implementing a conservation policy’, but that it nevertheless ‘does not believe that export quotas that delimit a maximum amount of products available for export from already limited rare earth product supply are ‘closely’ or ‘substantially related’ to conservation.’<sup>246</sup>

Considering all the above, it is thus fair to say, that despite a declaratory acceptance of the incorporation of development needs into one’s conservation measures, the Panel could not reconcile any industrial policy measures with the text and previous interpretation of Art. XX(g). This is not surprising since the wording of Art. XX(g) itself demands that restrictions also be placed on domestic production or consumption, albeit not necessarily to the same extent, and thus *ab initio* excludes the possibility of conservation *only* at the expense of foreign users, or conservation for the sake of domestic users. The latter must also carry some of the burden, thus an industrial policy promoting domestic processing is in principle incompatible with Art. XX(g). Also the fact that WTO-consistent alternatives need to be considered before any discriminatory measures, similarly excludes any industrial policy approach.

In terms of the chapeau of Art. XX, China tried to argue that the export quota system was not applied in a manner that arbitrarily or unjustifiably discriminates against users of rare earths in the complaining countries, whereas the latter argued that the discrimination was arbitrary and unjustifiable since it did not serve a conservation-related purpose.<sup>247</sup> In the context of the chapeau, the Panel exposed another effect of the measures as problematic, i.e. the rise in foreign direct investment (FDI) in China as a result of foreign companies trying to avoid uncertainty and ensure a stable supply of rare earth inputs by relocating to China.<sup>248</sup> The fact

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<sup>244</sup> *Ibid*, para. 7.579.

<sup>245</sup> *Ibid*, para. 7.580.

<sup>246</sup> *Ibid*, para. 7.463.

<sup>247</sup> *Ibid*, para. 7.618.

<sup>248</sup> *Ibid*, para. 7.622.

that measures attracting FDI are vilified here is quite ironic, considering how for example, one of the main arguments of the propaganda for strong IP protection is that it may attract FDI which is good for development. In the context of export quotas, however, the effect of attracting such investment was deemed a disproportionate cost for foreign enterprises and a distortion of international trade and investment.<sup>249</sup> The Panel further took issue with China providing competitive advantage to its producers by creating potential price differences for domestic and foreign producers and was concerned with this creating advantage for the Chinese.<sup>250</sup> In sum, whether measures were justifiably discriminatory or not, was again judged solely based on whether the discrimination was linked to conservation.<sup>251</sup>

It is thus quite clear, that this or indeed any other WTO panel, would not accept discriminatory measures based on a Member's economic development needs as justifiable under the chapeau of Art. XX.

Perhaps even more interesting and morally questionable from the perspective of the verdicts reached are cases involving renewable energy programmes. Current rules regulating the subsidisation of energy provide a good example of how development, if properly taken into account, would drastically change the *status quo*. As has been described, the current system allows for enormous fossil fuel subsidies (about \$10 million a minute) whereas the subsidizing of green technology companies in developing countries has been vastly persecuted due to the breach of the national treatment and MFN rules. Below is an analysis of the latest dispute brought to the WTO concerning the Indian National Solar Mission, *India - Solar Cells*, and show how India tried in vain to justify its measures based on a reliance on sustainable development.<sup>252</sup> Not surprisingly, India was reluctant to claim a right to economic development, attempting to rely only on arguments that its measures were essential for the protection of the environment in that they would allow for a stable and continuous production of solar panels.

The measures at issue were domestic content requirements (DCR measures) under Phase I and Phase II of the National Solar Mission inconsistent with Art. 2.1 of TRIMs and Art. III:4 of GATT 1994. They were found both by the Panel and AB not to be covered under the government procurement derogation in GATT Art. III:8(a) because India's government

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<sup>249</sup> *Ibid*, para. 7.633-7.634.

<sup>250</sup> *Ibid*, para. 7.639.

<sup>251</sup> *Ibid*, para. 7.663.

<sup>252</sup> *India – Certain Measures Relating to Solar Cells and Solar Modules*, DS456.

purchased electricity, while the discrimination related to solar cells and modules.<sup>253</sup> The next question was then whether the DCR measures could be justified under the general exceptions found in Art. XX(j) or Art. XX(d). The first is provided for measures 'essential to the acquisition or distribution of products in general or local short supply', while the latter is for measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT Agreement. India argued that the DCR measures were necessary to increase the domestic manufacturing capacity and thereby reduce the risk of disruption in access to a continuous and affordable supply of solar cells and modules needed to generate solar power. It furthermore claimed this would increase skilled human resources that can understand and use the technology associated.<sup>254</sup> All this would prevent the vulnerability to supply and market fluctuations associated with the current dependence on imports.

Most importantly for the present discussion, India claimed that the measures were ultimately essential for attaining the objectives of energy security and sustainable development and it relied on several international obligations as well as domestic law to back the legitimacy of these objectives. In terms of international law obligations it relied on the Preamble of the WTO Agreement and its objective of sustainable development, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development and the United Nations General Assembly Resolution adopting the Rio+20 Document 'The Future We Want' (see chapter II for details about these documents in terms of their understanding of 'sustainable development'), while in their domestic law, India relied on its Electricity Act, its National Electricity Policy, its National Electricity Plan and its National Action Plan on Climate Change. These national instruments contain obligations to ensure ecologically sustainable growth while addressing energy security and compliance with obligations relating to climate change. They refer to sustainable development as their 'ultimate goal',<sup>255</sup> they recognise 'that the poor are the most vulnerable to climate change, and that rapid economic growth is an essential prerequisite to reduce poverty'<sup>256</sup> thus they identify measures to promote development objectives, while also yielding co-benefits for addressing climate change.

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<sup>253</sup> Citing earlier jurisprudence (*Canada-Renewable Energy/Canada-Feed-in-Tariff Program*, DS426) the Panel stated that for a measure to fall under GATT III:8(a), it had to be in a competitive relationship with the product being discriminated against. Since the government procured electricity, while the discrimination was against solar panels, the test of competitive relationship is not satisfied.

<sup>254</sup> *India-Solar Cells*, WT/DS456/R, para. 7.283.

<sup>255</sup> India, 'National Electricity Plan', subsection 5.2.1.

<sup>256</sup> India, 'National Action Plan on Climate Change', p. 22.

The Panel however found the international legal obligations to be irrelevant for the exception under Art. XX as in its determination they do not form part of the domestic legal system of the WTO Member in question.<sup>257</sup> India claimed the opposite stressing the fact that rules of international law are accommodated into its domestic law without express legislative sanction, provided they do not run into conflict with laws enacted by the Parliament.<sup>258</sup> It based its claim on the fact that the law of India permits acts of government to implement international obligations without any legislation of the Parliament to this effect. Furthermore its Supreme Court has found principles of international environmental law and the concept of sustainable development to be fundamental to the environmental and developmental governance in India and 'has also noted that the concept of sustainable development is part of customary international law.'<sup>259</sup>

The Panel however proclaimed the findings of the Supreme Court to be irrelevant in terms of proving 'direct effect' of international obligations in Indian domestic law and furthermore that the mandate given to the government shows that international law obligations 'may possibly be acted upon' rather than them having such 'direct effect'.<sup>260</sup> The AB added to this that 'while these Decisions and Observations by the Supreme Court may serve to highlight the relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law, as well as for guiding the exercise of the decision-making power of the executive branch of the Central government, we do not consider that this is sufficient to demonstrate that the international instruments' are rules that form part of India's domestic legal system.<sup>261</sup> India was furthermore not able to rely on most of the domestic instruments in their references to (sustainable) development and other goals, as the US and the Panel dismissed such general objectives as inapplicable and not to be understood as 'law' for the purpose of XX(d). This is because they are not legally binding or enforceable<sup>262</sup> but are rather just guidelines<sup>263</sup> full of hortatory, aspirational, declaratory and at times solely descriptive language and there are no sanctions for failure to achieve these objectives.<sup>264</sup> The AB disagreed with the Panel in that 'laws and regulations for the purpose of Art. XX(d) are limited to those legally enforceable under the domestic legal system,

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<sup>257</sup> *India – Solar Cells*, Panel Report, para. 7.298 see also *Mexico-Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, para. 69.

<sup>258</sup> *India – Solar Cells*, Panel Report, para. 7.294.

<sup>259</sup> *Ibid.*, para. 7.294; India's first written submission, para. 256.

<sup>260</sup> *Ibid.*, para. 7.298.

<sup>261</sup> *India – Solar Cells*, Appellate Body Report para. 5.148.

<sup>262</sup> *India – Solar Cells*, Panel Report, para. 7.314.

<sup>263</sup> *Ibid.*, para. 7.315.

<sup>264</sup> *Ibid.*, para. 7.313; see also paras. 7.304-7.305 for the arguments of the US.

however it found enforceability an important factor to consider in determining whether the rules, obligations or requirements in question operate with a sufficiently high degree of normativity and specificity as to set out a rule of conduct or course of action.<sup>265</sup> Thus, as the Panel before it, the AB found the hortatory, aspirational, declaratory and at times solely descriptive texts in question not to set out with a sufficient degree of normativity and specificity a 'rule' to ensure ecologically sustainable growth, as India alleged.<sup>266</sup> The Panel found section 3 of the Electricity Act to be the only 'law' for the purpose of Art. XX(d) in that it gives the mandate for the preparation of the National Electricity Policy and the National Electricity Plan.<sup>267</sup> However it cannot be said that the DCR measures prevent the government from acting inconsistently with their obligations to prepare such plans and policies.<sup>268</sup> In the words of the Panel, 'it is well established in GATT/WTO jurisprudence that the phrase 'to secure compliance with laws and regulations' in Art. XX(g) means measures 'to enforce obligations under laws and regulations' and not measures 'to ensure the attainment of the objectives of the laws and regulations.'<sup>269</sup>

This is a very disappointing interpretation as norms involving hortatory language are not given any weight, and this is the only language in which one could phrase the RTD in one's own domestic legal. Even more problematic, international agreements stating and re-stating the objective of sustainable development are simply dismissed.

The same ultimate objectives were not considered relevant for Art. XX(j) either, where the only relevant question was whether there was an imminent or present shortage, which the Panel did not find to exist.

What is also clear from this case is that despite alluding to economic development as being an essential part of sustainable development in its various references to international environmental agreements and its domestic principles, laws and regulations, essentially India did not try to justify its DCR measures on the grounds that they might bring economic/social development with the increase of domestic manufacturing capacity. The ultimate goal was

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<sup>265</sup> *India – Solar Cells*, Appellate Body Report para. 5.121.

<sup>266</sup> *Ibid*, 5.130-5.133; referring to National Electricity Policy para. 5.12.1, National Electricity Plan subsection 5.2.1. and the National Plan on Climate Change.

<sup>267</sup> *India – Solar Cells*, Panel Report, para. 7.327.

<sup>268</sup> *Ibid*, para. 7.329.

<sup>269</sup> *Ibid*, para. 7.330; See: GATT, *Panel report, ECC-Regulation on Imports of Parts and Components*, L/66567, adopted 16 May 1990, BISD 37S/132, para. 5.17; *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, para. 5.9; *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, para. 6.248; *Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R, WT/DS290/R, para. 7.447; *Mexico-Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, para. 8.175; *Colombia-Ports of Entry, Colombia – Indicative Prices and Restrictions on Ports of Entry*, DS366, para. 7.538.

presented throughout as ensuring the continuous supply of solar cells and modules for the production of solar power.<sup>270</sup> Thus it can be claimed that developing countries find it easier to claim that they are merely trying to protect the environment instead of 'admitting' that they are trying to support their domestic industries for the purpose of economic development itself.

Unsurprisingly, the DCR measures would have probably also failed the threshold of not being 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail' if the Panel had found it necessary to examine the measures under the chapeau of Art. XX. As the EU pointed out that 'if discriminating against imports with the express aim of favouring domestic industry were acceptable under the specific exceptions and the chapeau of Art. XX, then the notion of preventing 'arbitrary or unjustifiable discrimination'... would be devoid of content, as protectionism of that nature 'is precisely what the *chapeau* is meant to control.'<sup>271</sup> This reflects the above mentioned conclusion of the present author in terms of the usefulness of Art. XX in providing a tool for carving out necessary policy space for the pursuit of developmental programs of particular Members. Since it is not a stand-alone right, Members try to bring in developmental needs through provisions such as Art. XX, however a closer reading of this article and its applications at the DSM soon show the very meagre possibility of consolidating it with developmental goals. General exceptions in fact cannot be read with sustainable development in mind, except for the 'sustainable' part. Furthermore they are essentially handicapped as *general* principles since they do not automatically apply to accession protocols. The above analysed case law shows that despite being somewhat reluctant to do so, developing countries are nevertheless testing whether arguments relating to their economic development could open up more policy space for them at the DSM, however both the law and its application have proven too rigid for this possibility while taking into account the needs of economic development remains but an empty promise.

Friends of the Earth have observed that '[t]he WTO ruling against the National Solar Mission shows how arcane trade rules can be used to undermine governments that support clean energy and local jobs. The ink is barely dry on the Paris Climate Agreement but clearly trade

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<sup>270</sup> And indeed the Panel did consider this objective to be 'important' enough to pass the necessity test of Art. XX(j) and (d), *India –Solar Cells*, Panel Report, para. 7.351.

<sup>271</sup> *Ibid*, para. 7.387.

still trumps real action on climate change.<sup>272</sup> The UN Independent Expert on the promotion of a democratic and equitable international order referred to Wade in his conviction that this is paradigmatic of what is wrong with the so-called ‘Washington consensus’ that consistently opposes industrial policy-making by states.<sup>273</sup> The Expert further accused the DSM of being incapable of showing flexibility in accommodating the new priorities imposed by climate change in the sense that there is still unwillingness to interpret broadly the general exceptions provided under GATT.<sup>274</sup> He called the National Solar Mission of India a ‘reasonable plan’ consistent with Sustainable Development Goal 7 and the goals of the Framework Convention on Climate Change.<sup>275</sup>

In a sense, yes, the panels and the AB could show more flexibility. Arguably they have most leeway to do this in the context of interpreting SDT provisions. Elsewhere, however, WTO law and the law on treaty interpretation do not really let them ‘improvise’ to an extent which would significantly address the injustices of the current system. There is a general sense that something went wrong when decisions such as that on the Indian Solar Mission come about, yet it is mostly the underlying legal framework that is the problem and not the panels/AB which apply it.

## **8. Reference to Developmental Goals under TRIPS**

Parallels from the above analysis can be drawn in terms of the TRIPS Agreement. The Agreement sets out its own objectives and principles in the following manner:

### Article 7

#### Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

### Article 8

#### Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

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<sup>272</sup> Friends of the Earth, ‘WTO Rules Against Renewable Energy and Jobs in India – Friends of the Earth Reaction’, citing S. Cossar-Gilbert, (24 February 2016), available at: <http://www.foei.org/news/wto-rules-renewable-energy-jobs-india-friends-earth-reaction>, (last accessed: 12.7.2017).

<sup>273</sup> R. Wade, ‘The Role of Industrial Policy in Developing Countries’ in UNCTAD, *Rethinking Development Strategies After the Global Financial Crisis*, vol. I, (UNCTAD, 2015), pp. 67-80; J. Salazar-Xirinachs, I. Nüber and R. Kozul-Wright, (eds.), *Transforming Economies: Making Industrial Policy Work for Growth, Jobs and Development*, (Geneva ILO, 2014).

<sup>274</sup> UN, Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, Human Rights Council, Thirty-third session, A/HRC/33/40, 2016, p. 16, para. 70.

<sup>275</sup> *Ibid.*

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Thus, much like sustainable development in the WTO Preamble, technological development is undeniably set out as an objective of the system: IP rights should contribute to technological innovation and technology transfer (TT) and in a manner conducive to social and economic welfare and Members are seemingly allowed to formulate their laws with a view of promoting their socio-economic and technological development. However already in the respective articles themselves, it is clear that any measures taken need to be consistent with the TRIPS Agreement, which drastically limits available policy space (see chapter V). Thus whereas the first part of Art. 8 might suggest that countries could exclude certain fields of technology from patentability or at least shorten the duration of patents based on their developmental needs, the second part of the same article clearly defeats this option.

In terms of the Objectives the wording is even more peculiar. It states that IP protection *should* contribute to innovation and TT. It is unclear whether this indicates that we are not necessarily sure about such an effect of IP protection, but it certainly does not indicate an option for testing and adjusting the system. Therefore the two articles *ab initio* seem to offer little in terms of carving out policy space for development by reference to them. Furthermore, based on the driving force behind the introduction of TRIPS, it is clear that the primary objective of the Agreement was to secure the rights of IP owners to exploit their protected assets in the jurisdiction of all parties to the GATT, purportedly to encourage innovation.<sup>276</sup> The reference to access to, and transfer of, technology to developing countries as found in Art. 7 is the result of a compromise with developing countries who feared that a strengthened protection of IPRs would limit such access and transfer.<sup>277</sup> In the opinion of Correa, the use of the word ‘should’ seems to indicate that IPRs do not necessarily promote innovation and the dissemination of TT, but that they should do so to satisfy the overall objective of the TRIPS Agreement.<sup>278</sup> It thus resembles reference to sustainable development in the WTO Preamble, something which can be read as a merely hortatory provision and in part in contradiction with the other provisions of the Agreement. Correa has suggested that the inclusion of objects and purposes not in the preamble but Part I of the Agreement, gives it

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<sup>276</sup> C. M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, *Oxford Commentaries on the GATT/WTO Agreements* (Oxford University Press, 2007), p. 91.

<sup>277</sup> *Ibid.*, see proposal submitted by developing countries: Multilateral Trade Negotiations, the Uruguay Round, MTN.GNG/NG11/W/71, 19 May 1990.

<sup>278</sup> Correa, *supra note* 276, p. 97.



more weight.<sup>279</sup> This is however unlikely as it is in practice more important whether a stated object and purpose is in line with the rest of the agreement or at least not in contradiction to it, than whether it is written in the preamble or an article of the agreement.

The two articles generally seem to have little legal relevance and there is reluctance by the adjudicators to grant them recognition. In *Canada-Pharmaceutical Patents* Art. 7 and Art. 8 have thus been declared to be mere expressions of the inherent characteristics of the international IP system.<sup>280</sup> In other words there is no seeking any additional balance between the guaranteed IP rights and other policy concerns through the DSM, apart from the one already set out in the TRIPS Agreement. The decision has been widely criticized for what has been perceived to be an inadequate application of the principles of treaty interpretation.<sup>281</sup> In interpreting the exception claimed under Art. 30, the Panel only considered its impact on the rights holder, whereas a proper analysis should have also considered the application of the objects and purposes within Art. 7 and Art. 8.<sup>282</sup> It furthermore took recourse to the negotiating history of TRIPS and even the Berne Convention for interpretative guidance, rather than consider the purported object and purpose of the Agreement.<sup>283</sup>

A statistical analysis<sup>284</sup> of TRIPS disputes showed that in 60 instances of interpretations of TRIPS provisions, the adjudicators relied on the ‘object and purpose’ of TRIPS only 14 times, while resorting to either the ‘ordinary meaning’ or the ‘context’ 79 times. Articles 7 and 8 were applied in only two instances, while being merely acknowledged in another three, whereas other objectives of TRIPS or its provisions were applied in the remaining instances. There is generally speaking a ‘quantitatively limited, and qualitatively rather arbitrary use of

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<sup>279</sup> *Ibid*, p. 93; see also D. Gervais, *The TRIPS Agreement, Drafting History and Analysis*, 2<sup>nd</sup> edn., (Sweet and Maxwell, 2003), p. 116.

<sup>280</sup> *Canada: Patent Protection of Pharmaceutical Products*, WT/DS114/R.

<sup>281</sup> D. Shanker, *supra* note 182; R. Howse, ‘The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times’, 3 *The Journal of World Intellectual Property*, (2005), p. 493; S. Frankel, ‘WTO Application of "the Customary Rules of Interpretation of Public International Law" to Intellectual Property’, 46 *Vanderbilt Journal of International Law*, (2005), p. 365; H. Yamane, *Interpreting TRIPS: Globalisation of Intellectual Property, Rights and Access to Medicine*, (Hart Publishing, 2011).

<sup>282</sup> R. L. Okediji, ‘Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement’, 17 *Emory International Law Review*, (2003), pp. 914–15.; D. Barbosa, M. Chon and A. Moncayo von Hase, ‘Slouching Towards Development in International Intellectual Property’, 71 *Michigan State Law Review*, (2007), pp. 108–9; H. G. Ruse-Khan, ‘The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO’ in *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992–2012*, (Cambridge University Press, 2012) pp. 20–5; A. Slade, ‘Good Faith and the TRIPS Agreement: Putting Flesh on the Bones of the TRIPS ‘Objectives’’, 63 *International and Comparative Law Quarterly*, (2014), p. 367.

<sup>283</sup> *Canada: Term of Patent Protection*, Panel Report, para. 7.29.

<sup>284</sup> H. G. Ruse-Khan, ‘The (Non)use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO’, Research Paper No. 11-15, Max Planck Institute for Intellectual Property and Competition Law, (2011).

TRIPS object and purpose in the interpretation exercise.<sup>285</sup> Perhaps it is due to the substantive ambiguity of Articles 7 and 8, or a number of TRIPS disputes being more technical in nature with less obvious balancing of societal objectives, but parties have rarely used them as (interpretative) arguments.<sup>286</sup> However even where parties have relied heavily on said articles, as in the mentioned *Canada- Pharmaceutical Patents* dispute, the Panel essentially only paid lip service to its commitment of taking them into account in the analysis of the law.<sup>287</sup> The AB decision reflects exactly how easily the purported objectives can be discarded when the ‘real’ reasons behind patent protection are given priority. The AB clearly defined the ‘normal practice of exploitation by patent owners’ to be exclusion of ‘all forms of competition that could detract significantly from the economic returns anticipated from a patent’s grant of market exclusivity.’<sup>288</sup> The AB went on to state that [p]atent laws establish carefully defined period of market exclusivity as an inducement to innovation, and the policy of those laws cannot be achieved unless patent owners are permitted to take effective advantage of that inducement once it has been defined.<sup>289</sup> While the Panel’s view emphasises stimulation to innovation, it fails to consider other (purportedly) equally essential objectives of the patent grants, i.e. the diffusion of knowledge and its continuous improvement.<sup>290</sup>

Slade nevertheless finds an encouraging development in *Canada–Term of Patent Protection* and even more so in the *US - Section 211* case.<sup>291</sup> In the former, the AB stated that:

[O]ur findings in this appeal do not in any way prejudice the applicability of Article 7 or Article 8 of the TRIPS Agreement in possible future cases with respect to measures to promote the policy objectives of the WTO Members that are set out in those Articles. Those Articles still await appropriate interpretation.<sup>292</sup>

Thus the door was open for further applications of the objects and principles in a more constructive manner. In *US - Section 211* the Panel went further and found Art. 7 to impose good faith obligations and thus should be taken into account both in implementing and

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<sup>285</sup> *Ibid.* p. 33.

<sup>286</sup> *Ibid.* p. 34.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*, Appellate Body Report, para. 7.55.

<sup>289</sup> *Ibid.*

<sup>290</sup> Correa, *supra note* 276, p. 94; see also P. Welfens, J. Addison, D. Andretsch, T. Gries, and H. Grupp, *Globalization, Economic Growth and Innovation Dynamics*, (Springer, 1999), p. 138.

<sup>291</sup> Slade, *supra note* 282, p. 355.

<sup>292</sup> *Canada: Term of Patent Protection*, WT/DS170/AB/R.

interpreting the TRIPS Agreement.<sup>293</sup> In the particular case the Panel was referring to *abus de droit* as part of the good faith principle.<sup>294</sup>

Even with these slightly broader applications of the objectives and principles as contained in Articles 7 and 8, it is however highly doubtful that they should ever go as far as permitting large scale departures from obligations as contained in the Agreement based on the development needs of Member states. In terms of additional policy space, it seems these Articles can only function as aids in evaluating whether conditions have been met for the application of Art. 30 (or Art. 17 in the case of trademarks) in exceptional circumstances probably involving the protection of the right to health. Ruse-Khan criticizes the shyness of adjudicators in using Articles 7 and 8 and wants them to realise that said articles are not only relevant for public health issues but should inform the interpretation of *each provision* of the TRIPS Agreement as was envisioned in the Doha Declaration on TRIPS and Public Health, para. 5(a).<sup>295</sup> This is however highly unlikely, considering the phobia of judicial activism. Furthermore as in the case of the WTO Preamble, the object and purpose from Articles 7 and 8 of TRIPS could never alone form the basis of a WTO dispute. They can only bolster the argument where a Member is accused of failing to implement correctly other provisions of the Agreement.<sup>296</sup> Furthermore, in the context of *abus de droit*, legitimate expectations or other corollaries of the good faith principle, Art. 7 would not give more policy space for the pursuit of technological development, but if anything would additionally restrain it.

Therefore, the objectives and principles of TRIPS as set out in Articles 7 and 8 cannot act as a tool to rebalance the Agreement itself in terms of developing countries demanding the rights to either exclude fields of technology from patentability or shorten the length of protection when this would help their technological development.

## **9. Forcing Market Access through the Goal of Development**

Ironically, however, despite the pro-liberalisation bias, much like prohibited policy space, in terms of market access the adjudicators cannot 'add to or diminish rights and obligations provided in the WTO Agreement' either.<sup>297</sup> Thus the DSM cannot be used to force developed countries into removing restrictions on market access for exports of interest to developing countries, regardless of the 'unfairness' of such restrictions or their incompatibility with the

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<sup>293</sup> *United States: Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R.

<sup>294</sup> *Ibid*, para. 8.57.

<sup>295</sup> Ruse-Khan, *supra note* 284, p. 35; Ministerial Conference, 'Doha Declaration on the TRIPS Agreement and Public Health' (WT/MIN(01)/DEC/2), 20 November 2001.

<sup>296</sup> Slade, *supra note* 282, p. 380.

<sup>297</sup> DSU, Art. 3.2 and 19.2.

free trade theory or any goal purported in the GATT or WTO Preambles, as long as such restrictions are permitted by the rules of the separate agreements.

This became apparent already in 1961, when Uruguay famously filed a complaint against the entire developed country Membership for the 576 market restrictions they were imposing on exports of interest to Uruguay. The restrictions were not necessarily illegal in the strict sense, neither did Uruguay claim them to be, however they were seriously reducing Uruguay's exports and thus preventing the country from receiving the overall level of benefits as contemplated by the GATT. Uruguay relied on Art. XXIII, which makes it technically possible for complaints to be raised based on an overall imbalance of benefits and obligations. However the Panel made it clear that it would only examine individual trade restrictions and Uruguay would have to demonstrate how each constituted a 'non-violation impairment' of GATT benefits. The broader claim of 'nullification and impairment' due to an overall imbalance, however, was ignored. Despite Art. XXIII theoretically allowing for complaints on the basis of such an imbalance, Hudec described how it was actually meant for claiming 'legal adjustments in the case of something like a catastrophic 1930s-type world depression' so not generally.<sup>298</sup> In his view the whole complaint was not even meant as a normal lawsuit but rather 'an effort to dramatize a larger problem by framing it as a lawsuit,'<sup>299</sup> which would imply that Uruguay never even expected a significant outcome in terms of the ruling.

### **10. Perceived Inability of Panels to Adjudicate on Development**

In *Brazil — Export Financing Programme for Aircraft* the Panel declared that to examine a Member country's development needs was 'an inquiry of a peculiarly economic and political nature, and notably ill-suited to review by a panel whose function is fundamentally legal'.<sup>300</sup> It is the view of this author that judicial bodies at the WTO will nevertheless have to engage with such inquiries, not only to be able to apply already existing law which demands such analysis,<sup>301</sup> but also if an enforceable RTD is ever to be successfully included in the system.

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<sup>298</sup> R. E. Hudec, *Developing Countries in the GATT Legal System*, (Cambridge University Press, 2010), p. 57.

<sup>299</sup> *Ibid.*

<sup>300</sup> *Brazil-Export Financing Programme for Aircraft*, WT/DS46/R, para. 7.89.

<sup>301</sup> In the mentioned case, the Panel had to review whether Brazil's export subsidies were 'inconsistent with its development needs' as part of the analysis set out in SCM Agreement, Art. 27.4. The Panel declared its unsuitability to review this question based on its legal nature and on any lack of guidance in the Agreement with respect to the criteria to be applied in performing this examination. The Panel thus considered that the developing Member itself is best positioned to identify its development needs and whether its export subsidies are consistent with those needs. The Panel rejected Canada's assertion that the lack of domestic content requirements in relation to the provided subsidies proved inconsistency with Brazil's development needs and noted that there may be any number of other reasons why the provision of export subsidies might be consistent

It is no doubt easier to just stick to the black letter law, pretending a ‘delicate balance’ of obligations and rights has already been established at the negotiations and to refrain from any judicial activism. The considerations necessary for deliberations on matters of concern to development are similar to any other non-legal considerations, which at times need to be taken into account in the context of reaching a legal judgment.

### **Conclusion**

Mainly to the benefit of developing countries the world trade system has seen a significant strengthening of its dispute resolution mechanism with the adoption of the DSU. Furthermore problems faced by smaller countries in accessing the system, such as the question of overcoming the costs of the proceedings, lack of experience or fear of retribution, which have prevented their active participation in the past, are being successfully overcome. Effective enforcement against more powerful players is still problematic, however options exist here also, at least to an extent. For example retaliation under a different agreement than the one where the violation occurred is a more successful method of inducing the losing party into bringing its measures into conformity with WTO rules. However this option is not automatically available to developing countries and it would be desirable to reform the DSU in this regard. Furthermore when the violating measure in the developed country concerns an interest which is too politically sensitive, not even retaliation under a different agreement can provide incentive enough for bringing it into conformity. The participational legitimacy gap seems thus to be narrowing, yet a democratic legitimacy gap remains due to the unequal enforcement. It is clear that although struggling with its own problems, the dispute settlement at the WTO is continuously improving developing countries’ access to legal redress and giving them the tools to take on much more powerful players. This being said, the dispute settlement also can be and *is* used against developing countries in applying an essentially unfair law which excessively restricting developing countries’ policy space and inhibits their potential for industrialisation and technological catch-up. Thus it has been suggested that developing countries carve out this policy space through active lawyering. Galanter describes as examples strategies undertaken by what he calls ‘repeat players’ – countries which are frequently engaged in similar disputes over an extended period of time and who can rely on

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with a Member’s development needs. It gave as examples, that the country might be interested in possible *technological spin-off effects* from the development and production of the product in question, or the need to establish a *strong market presence and reputation* in foreign markets as a stepping stone to introducing products with greater national value-added. In these observations it gave valuable meaning to what development needs might be and proved that a Panel is capable of recognising and evaluating such needs. *Ibid*, paras. 7.89-7.92.

experience, expertise and economies of scale.<sup>302</sup> Firstly these countries seek to maximize gain over time, even at the risk of incurring maximum loss in some cases, strategizing about rule-making, even if it means trading-off tangible gain in a particular case.<sup>303</sup> They further use the fact that before an actual enforcement of a ruling there is plenty of time and opportunity for testing the boundaries of the rule, by only slightly adjusting the measures in breach of the rule and doing only what is strictly needed instead of overcompensating.<sup>304</sup> A third strategic possibility is an ‘efficient breach’ where a party, even though it has lost a case, continues with the violation, because the benefits of non-compliance are greater than any sanctions resulting therefrom.<sup>305</sup> In other words trying to steer interpretation in a desirable path, ignoring the law, postponing its implementation or manipulating the rulings of the dispute settlement bodies are here presented as legitimate strategies to pursue, due to the fact that the law itself is over restrictive. Indeed the current legal framework and dispute settlement practice offers little in terms of legally valid excuses for policy measures for economic development which discriminate beyond what has been explicitly agreed to between Member countries, despite possible benefits to a development strategy.

Generally speaking the panels and the AB could show more flexibility. Arguably they have most leeway to do this in the context of interpreting SDT provisions. Elsewhere, however, WTO law and the law on treaty interpretation do not really let them ‘improvise’ to an extent which would significantly address the injustices of the current system. There is a general sense that something went wrong when decisions such as that on the Indian Solar Mission come about, yet it is mostly the underlying legal framework that is the problem and not the panels/AB which apply them.-Since it is not a stand-alone right at the moment, Members try to bring in their economic developmental needs by reference to the ‘sustainable development’ mentioned in the Preamble and combining this goal with provisions such as Art. XX, however a closer reading of the latter article and its applications at the DSM soon show the impossibility of consolidating it with developmental goals. General exceptions cannot be read with sustainable development in mind, except for the ‘sustainable’ part. Furthermore they are essentially handicapped as *general* principles since they do not automatically apply to accession protocols. The objectives and principles of TRIPS similarly prove equally useless in claiming policy space for the pursuit technological development.

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<sup>302</sup> Santos, *supra note* 30, pp. 572-573.

<sup>303</sup> M. Galanter, Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change, 9 *Law and Society Review*, (1999), pp. 99, 103.

<sup>304</sup> Referring to implementation panels and arbitration on retaliatory measure; Santos, *supra note* 30, p.575.

<sup>305</sup> *Ibid*, p.575, 576.

The above analysed case law shows that despite being somewhat reluctant to do so, developing countries are nevertheless testing whether arguments relating to their economic development, economic diversification and sovereignty could open up more policy space for them at the DSM, however both the law and its application have proven too rigid for this possibility while taking into account the needs of economic development remains but an empty promise. Thus while the participational legitimacy gap at the dispute settlement mechanism is successfully narrowing, the application of an unjust law and of the lack of options for creative interpretations contribute most to the legitimacy gap of the system combined with the democratic legitimacy gap due to unequal enforcement.

*'to a shoemaker there is nothing like leather,  
to a lawyer there is nothing like a court'<sup>1</sup>*

## **Chapter VII**

### **CONCLUSION AND RECOMMENDATIONS FOR REFORM**

#### **1. Conclusions of Analysis**

This thesis analyses the world trade regime from several different perspectives and finds support for the hypothesis that it suffers from a legitimacy gap due to its agenda being mainly driven by and for the benefit of certain groups in developed countries negatively impacting the potential for economic development of its poorer Members. This fact negatively affects its democratic/procedural as well as substantive legitimacy as explained in chapter II which are intrinsically linked as demonstrated in chapters IV and V. Despite providing developing countries with predictability in a rules-oriented system which to an extent tames pure power politics, the organisation is nevertheless overly tilted against their right to development (RTD) from its underlying economic theory to its particular rules and the way the rules are agreed to and enforced. All the while, the WTO maintains that it works towards the ultimate goals of sustainable development and enhanced welfare, thus chapter III analyses the stated means of achieving these goals as set out by the organisation's main mandate, i.e. mutual liberalisation of markets with a very limited regard for the principle of special and differential treatment. The analysis shows that the rhetoric of achieving development through free trade is in essence dishonest and that the theory of comparative advantage is incompatible with development, since it does not take into account the question of context and timing and supposes benefits for everyone regardless of their circumstances, level of development and how technologically primitive or advanced is the production in which they have comparative advantage at the moment of liberalisation. Historical analysis shows that from its inception, the theory served to justify relations between countries in which one party gained at the expense of the economic development of the other while claiming mutual benefits. Despite mounting empirical evidence against the infallibility of the theory and its modern reinterpretations, the latter is still represented as science or fact and hailed as the best insight

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<sup>1</sup> Oscar Schachter



into economics. The inevitable conclusion here is that it serves as propaganda to distract from the negative impacts of early liberalisation on the ability of poorer countries to develop and thus makes any objections on their part seem illegitimate, misplaced or unnecessary. The propaganda plays in this sense an important part in setting the agenda of the organisation and of the individual negotiations and provides it with perceived legitimacy. Most ironically, the theory demonises mercantilism, yet looking at GATT/WTO negotiations they function exactly based on mercantilist principles and despite preaching about the benefits of (even unilateral) opening up, developed countries refuse to do so without reciprocity and furthermore keep disproportionate protectionist measures on large areas of their economies.<sup>2</sup> The vastly superior economic power, monopoly over said propaganda, resources allowing for numerous WTO missions and a secretariat biased towards their agenda create an insurmountable imbalance between their influence on law-making and that of developing countries. This thesis shows the numerous tactics used throughout the various rounds with ever the same result in terms of developed countries and their agenda prevailing over that of developing countries, increasingly limiting the latter's policy space needed for development while failing to liberalise and provide unhindered market access in areas of interest to them. Developed countries' tactics for achieving their goals range from drafting and hiding the agenda until the last minute, *divide et impera* approaches, shaming and blackmail all the way to simple persuasion using soft power. All this makes the consensus rule of reaching agreements lose its potential role of ensuring the democratic legitimacy of the organisation. Furthermore regardless of the format of the discussions at the negotiations, the imbalance remains and is reflected in the resulting rules and agreements. The legitimate concerns and demands of developing countries are taken into account only to the extent necessary to create the illusion of special and differential treatment granted and thus avoid substantial reform. A closer look however reveals overwhelming limitations of the so-called special and differential treatment, which render most of it useless, failing the test of legitimacy of international rules both in terms of certainty as well as coherence.

The thesis devotes special attention to the question of the protection of IP under the WTO due to the upgrade of technological capabilities being an essential component of economic development. A separate analysis of TRIPS is also warranted due to the misfit of intellectual property protection with the general free trade philosophy of the WTO which is another testimony to the way developed countries cherry pick liberalisation in areas which suit them

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<sup>2</sup> C. Thomas, 'The Death of Doha? Forensics of Democratic Governance, Distributive Justice, and Development in the WTO', Research Paper no. 12-18, Cornell Legal Studies, (2012), p. 199.

and uphold protectionism where it does not. The analysis here focuses mainly on the implications for the possibility of successfully pursuing technological and thus economic development under a regime of extensive patent protection considering historical and empirical evidence on this matter. It reaches the conclusion that the TRIPS Agreement retains a substantial degree of flexibility, especially in terms of the breadth of patentability. Yet it nevertheless makes it more difficult for developing countries to use essential policy space needed in their pursuit of technological advancement, especially with the extension of the duration of protection and by prohibiting discrimination in patentability as to the field of technology, while offering basically nothing in return. The study further shows a similar pattern of propaganda in terms of a certain economic theory being accepted as dogma and an ideology elevating IP to the status of a human right, again limiting *ab initio* the possibilities of discourse and exerting soft power over countries reluctant to test the limits of the remaining flexibilities.

The thesis then considers whether the imbalance in the negotiations and the resulting rules can be ‘corrected’ by the dispute settlement mechanism. Despite providing developing countries with an invaluable and relatively powerful tool against developed countries, quite unlike any options available to them in bilateral relations, the analysis nevertheless concludes that the mechanism should not be perceived as a magic wand correcting all the imbalances and thus addressing the legitimacy gap of the institution. Firstly, access to the dispute settlement mechanism is severely affected for developing countries due to their lacking legal strength including less resources to deal with the high costs of the proceedings, the absence of necessary institutions and fear of upsetting a more powerful party or even merely fear of the unknown due to lack of experience. Despite being substantial, however, these obstacles can nevertheless be surmounted by adopting several strategies such as learning by participating as third parties, using the help of the Advisory Centre on WTO Law *et cetera*. Still the problem of developing countries failing to discover non-obvious violations by developed countries in the first place remains unsolvable at the moment. Secondly, there is the question of enforcement which essentially remains voluntary and dependent on how powerful the potential retaliation can be. Here developing countries can add to the weight of their retaliation by enacting it under a separate agreement from the one under which the violation occurred, or threatening to do so. However, it has been observed that even then, when the affected interest in the developed country is strong enough, no retaliation or threat thereof by a developing country can suffice to induce compliance. Thirdly and most importantly, the dispute settlement mechanism unsurprisingly does not create law – and is constantly kept in

check not to do so – but merely applies the essentially unbalanced and in several aspects anti-developmental law of the WTO. In this sense, developing countries themselves are frequently brought before the dispute settlement mechanism for using policy tools necessary for their economic development but which are not in line with WTO law.

This study conducts an in-depth analysis of some of the cases in which developing countries tried carving out necessary policy space for their economic development at the dispute settlement mechanism. The analysis shows that they sought broad interpretations of general exceptions by relying on purported goals and purposes of WTO Agreement, on other international as well as domestic laws and goals, as well as using sovereignty arguments, a right to economic diversification etc. The study reveals how all these arguments failed to carve out any additional policy space beyond what is already strictly allowed under the substantive provisions. Despite the goal of sustainable development being sometimes characterised as a ‘constitutional and legislative tenet of the WTO’ this is little more than wishful thinking as it proves that beyond the question of sustainability, i.e. allowing for exceptions based on the protection of the environment, concerns for the protection of economic development have no basis in any of the binding agreements and cannot form part of the interpretative process since they are many times directly in conflict with the substantive provisions. The Panels and Appellate Body have been criticised for selectively using flexibilities based on whose interests they are protecting, however a closer look at the law reveals that there is no basis given for allowing exceptions based on developmental concerns. Thus it is the proposal of this study that the dispute settlement mechanism is indeed provided with such a basis with the inclusion of the right to development as an actual constitutional principle of the organisation and specifically including economic developmental concerns in the substantive binding agreements as a legitimate value for which exceptions to general rules can be made. Furthermore the analysis shows that despite the liberalisation mandate the dispute settlement mechanism cannot be used to instruct developed countries to remove restrictions on market access for exports of interest to developing countries, regardless of the unfairness of such restrictions, their incompatibility with the free trade theory or any goal purported in the GATT or WTO Preambles. The proposed inclusion of the right to development into the WTO would give Panels the power to adjudicate based on an overall imbalance of benefits and obligations between Member States such as was the case raised by Uruguay in 1961.

## 2. Call for Reform

This analysis shows how impossible it is to talk about the global trade rules without understanding the power politics and propaganda which have brought them into existence. However this is typical of international law, which is so intertwined with politics that many times ‘one struggles to locate the boundary between the political and the legal’.<sup>3</sup> Rules are created through bargaining, where every state tries to maximize its profit and once such rules are in place they are again used and misused based on the power of particular states and their agendas or they are outright ignored, if the state can afford reputational cost.<sup>4</sup> The whole process is many times wrapped in propaganda which tries to present the stances and decisions of the actors as fuelled by some altruistic motives or a struggle for the common good of the whole of humanity, while the reality is usually far less rosy.<sup>5</sup> One does not have to look far to identify biases echoing those found in the WTO or even worse. Perhaps the most famous is the veto power of the permanent members of the Security Council granted solely on the basis of power at the time of the creation of the UN Charter and forced on everyone else under the threat that otherwise there would be no UN. The only alternative to the acceptance of a Charter with the veto was no Charter at all.<sup>6</sup> A representative of the US even demonstrated this by tearing up a copy of the Charter in front of the representatives of small states and told them they could go home and declare that they had defeated the veto but that they would be at a loss for words when asked about where the Charter was.<sup>7</sup>

The veto has since been successfully used to protect interests of the permanent members or their political allies at the expense of people suffering in various conflicts around the world, perhaps most infamously Palestine. In the area of international criminal law, the exclusive focus on African states by the International Criminal Court (ICC) has caused outrage, while specific tribunals can be set up through the Security Council for the trial of individuals from less powerful states even against the consent of these states. On the other hand the hegemon, US, remains untouchable, choosing not to sign up to the Rome Statute of the ICC (despite having influenced heavily its drafting) and concluding bilateral treaties with states that are its

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<sup>3</sup> C. Reus-Smith, (ed.), *The Politics of International Law*, Cambridge Studies in international Relations (Cambridge University Press, 2004), introduction, p. 2.

<sup>4</sup> *Ibid*, xiii, referring to the decision by the US to invade Iraq, its treatment of prisoners of war and the use of torture.

<sup>5</sup> For a discussion on different theories of international relations from the liberal and the ‘benevolent hegemon’ theories to dependency theories see M. P. Karns and K. A. Mingst, *International Organizations: The Politics and Processes of Global Governance*, 2<sup>nd</sup> edn., (Lynne Rienner Publishers, 2010), p. 49.

<sup>6</sup> F. O. Wilcox, ‘The Yalta Voting Formula’, 39 *The American Political Science Review*, pp. 943-956.

<sup>7</sup> *Ibid*.

members, so that they renounce their right to bring any US crimes to the ICC. Similarly to the situation at the WTO, where an increased influence on the rule making process by actors other than the richest countries has meant that the whole process has more or less come to a standstill, the United States are backing out of all aspects of international law where developing countries and non-governmental organisations are gaining a voice and where the agenda no longer strictly follows the US interests.<sup>8</sup> What was once mainly a Western project, international law now stands without the support of the most powerful country in the world in important areas where it is not strictly in its interest to join, for example in the case of the ICC and regarding international commitments on reducing CO2 emissions, such as the Kyoto Protocol and now the Paris Agreement. The US furthermore already rejected membership in the League of Nations in 1921, the UN Convention on the Law of the Sea in 1982, the Comprehensive Test Ban Treaty in 1998 and of course as described in chapter III the ITO in 1948. It also withdrew from the Anti-Ballistic Missile Treaty in 2002.

John Austin, considered that international law was controlled by powerful states to such an extent that this law is fundamentally different from national law, and thus could not even be jurisprudentially analysed.<sup>9</sup> His positivism is also reflected in the famous observation that international law is nothing more than ‘an attorney’s mantle artfully displayed on the shoulders of arbitrary power’ and ‘a decorous name for a convenience of the chancelleries.’<sup>10</sup> In his treatise on the nature of international law, Koskenniemi finds it to lie somewhere between state behaviour, will or interest (the concrete aspect) and a system which binds a state regardless of its behaviour, will or interest (the normative aspect). In other words, he finds law and its justification in the behaviour, will or interests of the state, but it then the law (at least temporarily) binds the state regardless of its behaviour, will or interests.<sup>11</sup> For Koskenniemi there is no divine or natural law or justice against which we could measure the norms of international law as it is a purely artificial creation, based on the concrete behaviour, will and interest of states.<sup>12</sup> On the other end of the spectrum one finds thinkers such as Professor Allott, a self-proclaimed utopian, who calls for a revolution and a complete reconceptualization of the *status quo*. He has no trouble finding the standard *against which*

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<sup>8</sup> P. Sands, *Lawless World: America and the Making and Breaking of Global Rules*, (Allen Lane, 2005), p. 324.

<sup>9</sup> J. Austin, *The Province of Jurisprudence Determined*, Cambridge Texts in the History of Political Thought W. E. Rumble (ed.), (Cambridge University Press, 1995); see also M. W. Janis, ‘Jeremy Bentham and the Fashioning of ‘International Law’’, 78 *The American Journal of International Law*, (1984), p. 410.

<sup>10</sup> J. Brierly, *The Outlook for International Law*, (Clarendon Press, 1944) (quoting Sir Alfred Zimmern), p. 13.

<sup>11</sup> M. Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument*, Reissue with new Epilogue, (Cambridge University Press, 2005), p. 18.

<sup>12</sup> *Ibid.*

*we could measure the norms of international law* and for this purpose reaches quite simply for our most fundamental values and ideals. Unfortunately, due to a number of historical circumstances and events, an international legal system has been imagined by the holders of public power, which enacts and enforces a perverted, anti-social, anti-human worldview which treats social injustice and human suffering on a global scale as if it were beyond human responsibility and beyond the judgment of our most fundamental values and ideals while the people and the peoples of the world have simply had to acquiesce in and to live with the consequences of this disgraceful perversion of theory and practice.<sup>13</sup> Allott finds the root cause of all evil to be the idea that international society is not a society. In this way it has avoided both the democratic revolution and socialisation which took place in state societies.<sup>14</sup> Several other commentators, including Wolff and Kant have written on the existence of a human family in a desire to instil a sense of common responsibility for the common welfare.<sup>15</sup> In this sense Falk speaks of a ‘planetary community’ as he advocates an alternative model for the existing system in what he perceives to be the second Grotian moment in history; according to the new model ordinary men and women would take precedence over both great power stateism and global capitalism in a ‘global solidarity’.<sup>16</sup>

In the discussion about stateism versus solidarity, however we must not lose sight of the fact that either system can be harmful or beneficial depending on its use. If it is only the stronger states which determine what is considered a common good, than strict sovereignty would be a better option. To the extent that international law has moved away from states so far, it has become *lex mercatoria*, where transnational corporations actors are the principal moving force in decentralised law making.<sup>17</sup> The neo-liberal agenda enforced by the international financial and trade institution is displacing national legal systems, where it does not make any difference anymore, who is in power as they are all compelled to pursue the same economic policies.<sup>18</sup> Activists for the right to development (RTD) have thus long been fighting against the loss of domestic autonomy and policy space brought about by what neo-liberalism has portrayed as the ‘common good’, i.e. opening up of markets regardless of different stages of

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<sup>13</sup> P. Allott, *The Health of Nations: Society and Law beyond the State*, (Cambridge University Press, 2002), pp. 399-416.

<sup>14</sup> *Ibid*, p. 407, emphasis in original.

<sup>15</sup> C. W. Jenks, *The World Beyond the Charter*, (George Allen and Unwin Ltd, 1969), p. 137.

<sup>16</sup> R. Falk, ‘A New Paradigm for International Legal Studies: Prospects and Proposals,’ in R. Falk, F. Kratochwil and S. H. Mendlovitz, (eds.), *International Law: A Contemporary Perspective*, (Westview Press, 1985), pp. 657, 673; R. Jackson, *Classical and Modern Thought on International Relations, From Anarchy to Cosmopolis*, (Pelgrave Macmillan, 2005), p. 130.

<sup>17</sup> B.S. Chimni, ‘Third World Approaches to International Law: a Manifesto’, 8 *International Community Law Review*, (2006), p. 13.

<sup>18</sup> *Ibid*.

development.<sup>19</sup> The implication that governments by default abuse their sovereignty at the expense of their peoples' suffering and should thus see their powers diminished in a global society is not necessarily correct. Furthermore sometimes dictatorships can look inhumane on the outside but bringing them down would mean more misery and more chances for foreign abuse and exploitation. Human rights, and democracy, as common goods have been used as excuses for military interventions often times bringing more destruction and eventually less human rights, not to mention regression of the current of development, to the regions affected. However it is nevertheless important to establish a theoretical appreciation of a natural law in terms of justice and a common good that should be strived for with international law – not so much in terms of fixating methods, but merely as aims to be achieved. Methods then need to be defined and determined separately from state influence in a judicial setting and with a scientific method. It is to play such a role, that the present author suggests the inclusion of the RTD at the WTO.

Due to a fundamental shift in the scope and reach of international law (see below under discussion on illegitimacy of international norms), Pogge places the responsibility for changing the rules which perpetuate poverty in developing countries on the shoulders of ordinary citizens of affluent countries. Since we have better resources of information as well as means of communication and of political organization at our disposal and are also much better protected through a set of civil and political rights that are enforced effectively by an independent judiciary, Pogge places on us even more responsibility to act to prevent global injustice than he would have placed on Germans during Nazi rule to act to prevent the regime's atrocities.<sup>20</sup> Similarly Allott emphasises how ordinary people around the world must express to their rulers their moral outrage at the present state of the human world. In his words:

It is an outrage made almost unbearable by the complacency of those who operate the international system and the conniving of those who rationalise it, as commentators in public discussion or analysts in an academic context.<sup>21</sup>

Arguably it is not the nature of the vast majority of peoples but their misinformation and the sense of hopelessness, which prevents them from expressing such outrage and exerting enough pressure on their governments. In this sense Sanson does not share the impression of Hobbes, Spinoza, Pufendorf and Locke about the selfishness and greed of the human nature

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<sup>19</sup> M. Salomon, 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development', in S. Marks, (ed.), *Implementing the Right to Development – The Role of International Law*, (Friedrich Ebert Stiftung, 2008), p. 19.

<sup>20</sup> *Ibid*, p. 7.

<sup>21</sup> Allott, *supra note* 28, p. 398.

and instead believes in an evolving humanity and a desire by the people for their government to act in the common interests of the whole world. Indeed, we as citizens of developed countries bare the moral responsibility and are the only ones who can make a difference in the behaviour of our governments in the international arena, however one cannot disregard the effectiveness of extensive propaganda in place which not only prevents the majority of us from understanding facts about the global regime but even prevents us from using our democracies in our own favour, let alone the favour of developing countries. The example of the Iraq invasion (and several other invasions since) shows us, how with the proper propaganda, anything (or nearly anything) can look legal or legitimate to ordinary citizens of the hegemon. The scholarship on international trade rules and administration by the ‘insiders’ in the trade policy community or the elite has also lacked a critical approach and has been mostly apologetic.<sup>22</sup> Howse speaks of how the idea of such scholarship reminded him of the corruption of the life and of the mind under circumstances of oppression which he witnessed in the Soviet Union.<sup>23</sup> As mentioned above, counter-propaganda in the area of international economic law once already existed at substantially high levels. It was the establishment of the United Nations Conference on Trade and Development (UNCTAD) and actions by the G-77 within the UN system which provided the first fundamental and sustained challenge to the dominant liberal view.<sup>24</sup> However the momentum was lost after the New International Economic Order (NIEO) project failed to achieve its goals on almost all grounds apart from the adoption of the (Generalised System of Preferences (GSP) by GATT in 1971, itself riddled with problems and limitations (see chapter IV). UNCTAD eventually became less active and its focus narrowed to capacity building<sup>25</sup> thereby losing its revolutionary nature. Hegel’s observation on the transformative potential of new theories replacing entrenched ones, highlights how the existing model needs to be portrayed as something purely negative before reality can start moving towards the concretization of the idea of justice.<sup>26</sup> It is thus important to highlight and condemn without apology highly problematic aspects of the GATT/WTO system in terms of their anti-developmental character and to unveil the selfish nature with which states and lobbies approach rule making, in a bid to prove the urgency of drastic reform.

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<sup>22</sup> R. Howse, *The WTO System: Law, Politics and Legitimacy*, (Cameron May, 2007), Preface, p. 7.

<sup>23</sup> *Ibid.*

<sup>24</sup> Karns, *supra note 5*, p. 394.

<sup>25</sup> *Ibid.*

<sup>26</sup> G. W. F. Hegel, ‘Freiheit und Schicksal’ in G. Lasson (ed.) *Schriften zur Politik und Rechtsphilosophie* (1923), 138 et seq. in J. von Bernstorff, ‘International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization’, 26 *The European Journal of International Law*, (2015), p. 292.



Intrinsically linked is the necessary reform of outdated limitations placed on the right to self-determination which prevents it from assuming a meaningful role in the world of today. This is described below and inspiration for a new perspective is again found in the African Charter.

### **3. An Application of the Right to Self-Determination and Right to Resist Economic Oppression for the Modern Times**

Concepts such as the right to self-determination and the right to resist should form part of the discussion when it comes to demanding a fairer international trading system. The concepts however need to be considered through evolutionary interpretations, so that they correspond to the challenges of today's world.

The right to resist, has been a part of many different philosophies, cultures and religions for millennia; it can be found in one form or another in Solon's Law and the Athenian Decrees of Demophantus and Eucrates, the philosophies of Cicero, Seneca and Plutarch,<sup>27</sup> the Confucian twin concepts of *tianming* (mandate of heaven) and *geming* (removal of the mandate),<sup>28</sup> the Islamic concept of *jihad* (struggle against oppression), the war theories of Grotius<sup>29</sup> and de Vattel,<sup>30</sup> the social contract theory of Locke,<sup>31</sup> or in Marxist thought as a right to struggle specifically against capitalism and colonialism.<sup>32</sup> In pre-colonial Africa, popular uprisings and overthrows of tyrants were not uncommon. The idea can further be found in Art. 35 of the 'Declaration of the Rights of Man and the Citizen', incorporated into the French Constitution of year I (24 June 1793):

When a government violates the rights of the people, insurrection is the most sacred of rights and the most indispensable of duties.

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<sup>27</sup> J. F. McGlew, *Tyranny and Political Culture in Ancient Greece*, (Cornell University Press, 1993) pp. 88, 185-187; O. Jászi and J. D. Lewis, *Against the Tyrant: The Tradition and Theory of Tyrannicide* (The Free Press, 1957); S. Murphy, 'The Right to Resist Reconsidered' in D. Keane and Y. McDermott, *The Challenge of Human Rights: Past, Present and Future*, (Edward Elgar, 2012), p. 91.

<sup>28</sup> *Menicus*, trans. D.C. Lau, rev. edn., (Chinese University Press, 2003) for example book I part B:8, book II part B:14, book VII part A:31; Chung-Shu Lo, 'Human Rights in the Chinese Tradition', in UNESCO, *Human Rights: Comments and Interpretations*, (July 1948) UNESCO Doc. PHS/3(rev.) 25, pp. 185-6; Murphy, *ibid*.

<sup>29</sup> 'Jus belli dari posse in principem populi liberi' ('the right to make war may be conceded against him who has the chief authority among a free people') H. Grotius, *The Law of War and Peace: Selections From De Jure Belli ac Pacis*, trans. W.S.M. Knight, (Peace Book Co., 1939) book I chapter IV i3, vii4, viii4; book II chapter XXV viii2; Murphy, *ibid*.

<sup>30</sup> Subjects have a legal right to resist their sovereign 'if by his insupportable tyranny he brings on a national revolt against him' de Vattel, *supra note 35*, book I chapter IV 54; Murphy, *ibid*.

<sup>31</sup> See J. Locke's 'Doctrine of the Lawfulness of Resisting all Unlawful Exercises of Power', J. Locke, *Two Treatises of Government*, P Haslett ed., (Cambridge University Press, 1988) especially the Second Treatise chapter XVIII 'Of Tyranny' and chapter XIX 'Of the Dissolution of Government'; chapter XIX [226] 415; chapter XIX [243] 427-428; chapter XVIII [206] 402; chapter XVIII [207] 403; Murphy, *ibid*, p. 92.

<sup>32</sup> Murphy, *ibid*.

This provided the inspiration for the Universal Declaration of Human Rights of 1948, where the preamble states:

Whereas it is essential, if a man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Therefore there is a long tradition of recognising this right. However these concepts envision the oppression as coming from the state and therefore provide justification for rebellion against the state. If transported into a context of colonialism or the modern neo-colonialist international structures they would have to translate into a right of rebellion against the coloniser or the unfair international regime to serve the modern fight against oppression.

The right to self-determination has been recognized in international law primarily for peoples 'under colonial domination' or those 'subjected to alien subjugation, domination and exploitation' and has attained treaty law, customary law and *ius cogens* status.<sup>33</sup> Unfortunately this is understood to limit the right to self-determination in scope to situations, which have virtually disappeared from the modern world.<sup>34</sup> For example since the end of apartheid in South Africa and the Namibian independence, the unfailing support of African states for the cause of peoples dominated by a racist minority, as reaffirmed in the Preamble of the African Charter, no longer corresponds to any reality.<sup>35</sup> Yet neo-colonialism continues to negatively affect meaningful self-determination and the rhetoric of promoting development has been playing the role of disguising a colonial project in the language of helping and guiding the less developed since the concept of 'tutelage' for developing countries was created as far back as the Mandate System of the League of Nations.<sup>36</sup> The British representative and prominent actor at the League of Nations' Permanent Mandates Commission, Lord Frederick Lugard, declared that the 'races of Africa are not yet able to stand alone' and that it was

the genius of our race to colonise, to trade, and to govern. The task in which England is engaged in the tropics - alike in Africa and in the East - has become part of her tradition, and she has ever given of her best in the cause of liberty and civilisation. There will always be those who cry aloud that the task is being badly done, that it does not need doing, that we can get more profit by leaving others to do it, that it brings evil to subject races and breeds profiteers at home. These were not the principles which prompted

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<sup>33</sup> A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal*, (Cambridge University Press, 1995), p. 120; see 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (UNGA Res. 1514 (XV) of 14 December 1960); 'Declaration on Principles on International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', (UNGA Res. 2625 (XXV) of 24 October 1970).

<sup>34</sup> F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, (Martinus Nijhoff Publishers, 2003).

<sup>35</sup> *Ibid*, p. 263.

<sup>36</sup> A. Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', 32 *New York University Journal of International Law and Politics*, (1999-2000), p. 276.

our forefathers, and secured for us the place we hold in the world today in trust for those who shall come after us.<sup>37</sup>

In the same book, ironically, Lugard talked frankly about the impossibility of satisfying the right to work in the ‘democracies of today... without the raw materials of the tropics on the one hand and their markets on the other’.<sup>38</sup> It is this same goal of getting raw materials from the poor countries of the world and opening up their markets for the finished products from developed countries which continued to drive much of the aims of the world trade regime until today.

The vision of such ‘guidance’ of the less developed was repeated with respect to the mandate territories. Thus Art. 22 (1) of the League of Nations Covenant, which dealt with mandate territories, stated:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.<sup>39</sup>

It was soon clear to third world lawyers, that third world struggles to win political independence achieved only a partial victory as colonial relations were furthered through continuing economic control and a ‘transition took place, from a formal system of colonialism based on political control to a more elusive but nonetheless powerful system of neo-colonialism based on economic control’.<sup>40</sup>

From then on and all through the IMF, World Bank, and the GATT/WTO imperial powers continued to shape and reshape the 'science of development' in a way that allows a re-articulation of the imperial project that followed the demise of colonialism.<sup>41</sup> International law is now the principal language in which domination is coming to be expressed in the era of globalisation.<sup>42</sup> The postwar development thinking established the idea that 'development was a necessary, as well as an inevitable, historic process to be facilitated by the 'expertise' of those countries regarded as 'developed'.<sup>43</sup> On the other hand, dependency theory and its main proponents from 1950s Latin America saw international organizations as the agents of

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<sup>37</sup> F. Lugard, *The Dual Mandate in British Tropical Africa*, (William Blackwood, 1929), p. 619.

<sup>38</sup> F. Lugard, *The Dual Mandate in British Tropical Africa*, (1922) (Archon Books, 1965), p. 61, quoted in Anghie, *supra* note 36, p. 278.

<sup>39</sup> League of Nations Covenant, Art. 22, para 1. Yale Law School, Lillian Goldman Law Library, The Avalon Project, Documents in Law, History and Diplomacy available at: [http://avalon.law.yale.edu/20th\\_century/leagcov.asp#art22](http://avalon.law.yale.edu/20th_century/leagcov.asp#art22), (last accessed, 22.8.2016).

<sup>40</sup> Anghie, *supra* note 36, p. 277.

<sup>41</sup> D. Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*, (Hart Publishers, 2010), p. 206.

<sup>42</sup> Chimni, *supra* note 17.

<sup>43</sup> Karns, *supra* note 5, p. 8.

penetration and the creators and enablers of dependency relations.<sup>44</sup> In this aspect they concur with Marxist theories in perceiving international organisations as tools of capitalist classes and states.<sup>45</sup> The conviction that the adoption of liberal economic strategies by developing countries would translate into their eternal dependency was expressed by the UN's Economic Commission for Latin America in 1950s which became the basis for the creation of the UN Conference on Trade and Development (UNCTAD) and the New International Economic Order (NIEO).<sup>46</sup> With the failure of the NIEO project however, dependency theories lost popularity.<sup>47</sup> This failure has been ascribed to many reasons. Hipold for example attributed it to the radical language chosen by its proponents, which 'left next to no margin for compromise'.<sup>48</sup> In the words of Bertrand, Western countries in international institutions became alienated by the way developing countries incessantly condemned them and by what was, in his words, developing countries' accusatory, demanding, anti-liberal and ideological propaganda.<sup>49</sup> More likely, those dictating the *status quo* simply did not like the critique, regardless of how it was conveyed while those criticising lacked the economic power to implement their ideas.<sup>50</sup> The failure in achieving a reorientation of the GATT is not surprising considering that UNCTAD resolutions and declarations were non-binding and the fact that UNCTAD was never a part of the GATT/WTO system but functions from the outside and is only able to put pressure on the organisation. As for the radical talk, if anything, it would be desirable to keep it alive, despite it being used as an excuse to shut down conversation by the vexed hegemon. The pro-Western, pro free trade theory talk is no less radical and far more deceitful in its claim of working for the benefit of everyone, thus a radical response is adequate and necessary to highlight the injustice and to fight for the right to development. As Chimni describes,

[d]omination can coexist with varying degrees of autonomy for dominated States. In the era of globalisation, the reality of dominance is best conceptualised as a more stealthy, complex and cumulative process. A growing assemblage of international laws, institutions and practices coalesce to erode the independence of third world countries in favour of transnational capital and powerful States. The ruling elite of the third world, on the other hand, has been unable and/or unwilling to devise, deploy and sustain effective political and legal strategies to protect the interests of third world peoples.<sup>51</sup>

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<sup>44</sup> *Ibid*, p. 55.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*, p. 393.

<sup>47</sup> *Ibid*, p. 55.

<sup>48</sup> P. Hilpold, 'WTO Law and Human Rights: Bringing Together Two Autopoietic Orders', 10 *Chinese Journal of International Law*, (2011) para. 10, fn 13, see in particular the Declaration for the Establishment of a New International Economic Order (UNGA Res. A/RES/S-6/3201 of 1 May 1974) as well as the Charter of Economic Rights and Duties of States (UNGA Res. A/RES/3281 of 12 December 1974).

<sup>49</sup> See M. Bertrand, 'A New North/South Dialogue', 9 *International Relations* (1987/1989), p. 244.

<sup>50</sup> M. Bedjaoui, *Towards a New Economic Order*, (Holmes and Meier, 1979), p. 112.

<sup>51</sup> Chimni, *supra note* 17, p. 26.

Commendably, the African Charter contains a broad understanding of self-determination as a ‘universal, unquestionable and inalienable’ right, which applies to all peoples, and not just those colonized.<sup>52</sup> It further states that all people ‘shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.’<sup>53</sup> Within the context of the right to self-determination the right to resist is expressly recognized in both the African and the Arab Charter.<sup>54</sup> The African Charter asserts the right to resist in that ‘[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community’ and ‘[a]ll peoples shall have the right to the assistance of the States Parties... in their liberation struggle against foreign domination, be it political, economic or cultural.’<sup>55</sup> The Arab Charter encourages condemnation and endeavour to eliminate foreign domination which constitutes an impediment to human dignity and a major barrier to the exercise of fundamental rights.<sup>56</sup> The recognition of a right to resist oppression and the recognition of a duty to assist each-other in the struggle against foreign domination would imply that members of the mentioned Charter should struggle together against international rules which are against their economic development and thus enable foreign economic domination and neo-colonialism. The eradication of neo-colonialism is further stated as a goal of the African Charter which establishes the equality of peoples and condemns domination of one people over another.<sup>57</sup> The call for ‘condemnation and endeavour to eliminate foreign domination’ and the idea of Members co-operating as found in the Arab Charter would also fit well with a joint call by developing countries for the introduction of the right to development into the WTO system.

There is a need to make the story of resistance an integral part of the narration of international law and to study and suggest concrete changes in existing international legal regimes.<sup>58</sup> The articulation of demands would assist the old and new human rights and civil society movements to frame their call for reform in a way that would not fall into the old traps and would be truly beneficial to struggle for development.<sup>59</sup> We must recognise that the ideological domination of Northern academic institutions, limits

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<sup>52</sup> Art. 20 (1).

<sup>53</sup> Art. 20 (1).

<sup>54</sup> Murphy, *supra note 27*.

<sup>55</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (hereinafter, African Charter), Art. 20 (2),(3).

<sup>56</sup> *Ibid*, 2(1), (3).

<sup>57</sup> Art. 19.

<sup>58</sup> Chimni, *supra note 17*, p.22.

<sup>59</sup> *Ibid*.

the discourse and it is thus imperative that third world approaches to international law find ways and means to globalise the sources of critical knowledge.<sup>60</sup> Ironically, in academia, which should provide and indeed necessitates the freedom to drastically criticise the status quo and suggest fundamental reforms, this freedom is severely constrained by the protocols of what are acceptable goals and what is deemed good academic work.<sup>61</sup> As Chimni describes:

It compels the academia to playing a self-fulfilling role as the protocols, in a manner of speaking, shame individual academics into imagining only certain kind of social arrangements. For those who accept the protocols are held up as models of clear thinking. On the other hand, a variety of social and peer pressures are brought to bear on dissenting academics to neutralize their critical energies. Even eminent personalities are unable to be bold and courageous in evaluating contemporary trends and imagining alternative futures... we would [therefore] urge critical third world scholars to willingly court 'irresponsibility' if that is what it takes to boldly critique the present globalization process and project just alternative futures. The commitment to ushering in a just world order has of course to be translated into a concrete research agenda in the world of international law.<sup>62</sup>

As chapter I has shown, economic development of poorer countries is a fundamental value of humanity. The present author thus calls for WTO Member states to include the right to development as a constitutional norm in the organisation and thus bring it in line also with the UN Charter. One of the main objectives of the present author is to bring an apolitical element to the highly politicised negotiations of the WTO where power always prevails and developmental concerns are pushed aside. In the hope that the dispute settlement mechanism can bring this apolitical aspect, the present author wants to provide it with the tool which would allow it to take developmental considerations into account beyond what is currently envisioned.

#### **4. Call for the Inclusion of the Right to Development into the WTO Legal System**

Professor Hart has been one of the main critics of the international system and what he saw as its lack of a 'unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules.'<sup>63</sup> He wished to see something equivalent to a constitution which would be the ultimate set of rules against which the validity of all other rules would be tested. As mentioned in chapter II, others find the UN Charter to already provide such a constitutional basis. The UN Independent Expert on the promotion of a democratic and equitable international order, de Zayas has expressed that he would like to see the WTO incorporated into the UN subordinated to articles 57 and 63 of the UN Charter

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<sup>60</sup> *Ibid*, (p. 4).

<sup>61</sup> Chimni, *supra note* 17, p. 22.

<sup>62</sup> *Ibid*.

<sup>63</sup> H. L. A. Hart, *The Concept of Law*, (Clarendon Press, 1961), p. 209.

which would make human rights and development part of WTO's constitutional law.<sup>64</sup> He would therefore like to see trade rules recast in a human rights friendly framework.<sup>65</sup> He would like to see the WTO 'mainstream human rights into all of its activities and issue directives to the dispute settlement panels so that human rights treaty violations are not adversely affected.'<sup>66</sup> In his view the WTO dispute panels should interpret the exceptions in the GATT to support initiatives on food security, health and the environment and to facilitate solutions to climate change.<sup>67</sup> Since he strongly criticised the decision in *India – Solar Cells*, this implies that he would expect the allowance for economic development consideration in the context of 'facilitating solutions to climate change' and perhaps even beyond. The question of whether the WTO is a 'separate regime' outside of normal concepts of international law has been resolved by the Appellate Body which explicitly stated in *US - Restrictions on Imports of Tuna* that the WTO is part of broader international law with most significant implications for treaty interpretation.<sup>68</sup> Thus the UN Charter should arguably already be its 'constitution'. The analysis of this study however, shows clearly that it does not *de facto* play this role. The present author welcomes Mr de Zayas' proposal, however with reservations on transporting the human rights generally into the WTO framework. Rather this author calls for the inclusion of the right to development into the WTO, first and foremost which would inevitably include also human rights concerns, yet would not allow for human right talk to be used as a weapon against developing countries (see further discussion in next section).

The present author further agrees with Mr deZayas that the issues concerning the WTO and its impact on development and human rights are so complex and the consequences so serious, that they require continuous monitoring.<sup>69</sup> The UN Independent Expert on the promotion of a democratic and equitable international order urges countries to test the legality of the agreements for compatibility with their own constitutions and human rights treaty obligations, including from regional human rights instruments, such as the Banjul Charter and its right to development.<sup>70</sup> However, apart from suggesting referendums after human rights assessments of the impact of such treaties, it is unclear what the Expert thinks countries could

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<sup>64</sup> UN, Human Rights Council, *Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas*, (Thirty-third session, A/HRC/33/40, 2016), p. 14.

<sup>65</sup> *Ibid*, p. 2.

<sup>66</sup> *Ibid*, p. 22, para. 99.

<sup>67</sup> *Ibid*, p. 22, para. 100.

<sup>68</sup> J. H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economics*, (Cambridge University Press, 2000), pp. 8-9.

<sup>69</sup> de Zayas, *supra note* 64, p. 2.

<sup>70</sup> *Ibid*, p. 21, paras 88-90.

do when a contradiction with such obligations is established. The only power he sees in the hands of developing countries at the moment is to withhold the ratifications of the Trade Facilitation Agreement until the Doha Development Agenda is implemented.<sup>71</sup> The present author finds it thus essential to provide a mechanism inside the WTO system which would allow the existing agreements to be challenged at the dispute settlement mechanism, when problems are identified by the above mentioned continuous monitoring.

The WTO and development are intrinsically linked. Everything the WTO does effects the potential of its Member states for economic development. The merger with the right to development is thus both logical and necessary, if the organisation is to address its legitimacy gap as discussed in chapter II. This would further give an important enforceability element to the external element of the right to development which has thus far been its most neglected part, especially in terms of trade.

As Arts and Tamo note, ‘to advance the right to development structurally, a new international order has to be pursued which would redress the current injustices in international economic and trade law, and allow for more forceful action on global challenges such as climate change and concerning financing development. This has been the elephant in too many relevant rooms for too long, though, both at international and national levels.’<sup>72</sup> While UN Developmental goals provide something to work with, it is worth noting that Millennium Development Goal 8 relating to trade has been the most neglected of all<sup>73</sup> and furthermore these goals provide an overwhelmingly neoliberal perspective on trade.

The right to development introduced into the WTO system could essentially act as the new *Grundnorm*, i.e. rule of recognition of the WTO with which all its other rules would have to comply, in a process of a constitutitonalization of the institution.<sup>74</sup> Apart from that it should be explicitly included as a legitimate value to be protected under general exceptions of Arts. XX GATT and XIV GATTS. It could thus provide the means for challenging unbalanced agreements or an unjustifiable lack of market openings in developed countries’ markets for goods of export interests to developing countries; a means for challenging agreements with vastly negative effects for climate change; and as a tool for carving out essential policy space for development. The right to development should furthermore be included in Art. 27 (2) of

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<sup>71</sup> *Ibid.*

<sup>72</sup> K. Arts, and A. Tamo, ‘The Right to Development in International Law: New Momentum Thirty Years Down the Line?’, 63 *Netherlands International Law Review*, (2016), pp. 238-9.

<sup>73</sup> S. Razavi, ‘The 2030 Agenda: Challenges of Implementation to Attain Gender Equality and Women’s Rights’, 24 *Gender Development* (2016), p. 27; M. Turshen ‘A Global Partnership for Development and Other Unfulfilled Promises of the Millennium Project’, 35 *Third World Quarterly*, (2014), pp. 345–357.

<sup>74</sup> H. Kelsen, *General Theory of Law and State*, trans. by A. Wedberg, (Harvard University Press, 1945), p. 115.



the TRIPS Agreement to allow for exclusions from patentability based on developmental concerns.

As described in chapter IV a strong push for developmental concerns at the WTO has resulted in ‘business’ being taken elsewhere, i.e. a recourse to bilateral and regional agreements instead. If the right to development is to have true value within the system, it therefore needs to apply to any trade agreement conducted between the Members of the WTO even if on a bilateral or regional basis. Based on the primacy of the WTO in this regard, any inclusion of the right to development among its objectives would already automatically apply to bilateral and regional trade agreements.<sup>75</sup>

It is important that the right to development, when included into the WTO legal system, is phrased in a way that would prevent it from necessarily falling victim to the manipulation it has received generally in international law and international developmental projects (see chapters II and III) in terms of the means of achieving development, any particular targets or even what economic development is or who would be the bearer of such a right. In this sense it has to be clearly acknowledged that industrialisation and the transformation of the productive structure into higher technology production are inevitable components of development. Furthermore such a right should not be confined to trade liberalisation as a means of achieving it. The formulation of the right should thus not show any bias towards a particular economic theory or school of thought, to determine what is beneficial for development. As explained in this thesis, protectionism forms the basis of developmental economics and despite being officially vilified its benefits are clearly understood by everyone involved as can be inferred from the bargaining at the negotiations, from the asymmetrical demands of accessing Members and the reluctance to practice unilateral opening up, from protectionism being essentially a ‘compensation’ when a Member wins a dispute, from Members using protectionism at the expense of being brought to the dispute settlement and from Members practicing so-called ‘effective breaches.’ Thus Member states should have the ability to freely present evidence in respect of any policy measures, even if protectionist, in terms of their benefit for the developmental plan of the country and the growth of its technological or other capabilities. Apart from economic development generally, reasonable grounds for such protectionism should include the protection of infant industry; retaining

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<sup>75</sup> The Singapore Ministerial Declaration has already reaffirmed the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, thus they need to be consistent with WTO rules. See also *Turkey — Restrictions on Imports of Textile and Clothing Products*, DS34, Panel Report, paras. 9.161–9.163.: the objectives of regional trade agreements and those of the GATT and the WTO have always been complementary, and therefore should be interpreted consistently with one another.

employment (especially in high skilled industries and thus preventing a loss to the economy); diversification etc. An inclusion of the right to development among the legitimate values which can be protected under the general exceptions of Arts. XX GATT and XIV GATS would also address the currently prohibited discrimination under the chapeaux of the relevant provisions, since discriminations are ‘justifiable’ as long as they relate to the objective of the measure provisionally justified under one of the paragraphs.

One of the main criticisms of trade barriers for the sake of protecting local industry is that they do not necessarily remedy the problems that caused the producers to be uncompetitive.<sup>76</sup> This could rather easily be addressed by specifying in the relevant provision that protectionist measures must be accompanied by a governmental monitoring of the industry in question and its plans at addressing the issues which are rendering it uncompetitive. A long term plan of doing so could thus be specified as a precondition for allowing the restriction on trade. This would encourage industries to not lay back and enjoy their protected status without any improvements to their production, but to use this chance in order to invest into research and development and a better production organisation. At the same time, the provision should not include a fixed date by which the country would be required to remove the restriction, rather it could remain as long as the country and the industry in question could logically present a case for the benefit of such restrictions.

A general criticism of protectionism, which would also imply here, is that its success crucially depends on a correct diagnosis of which industries could become competitive over time and it is suggested that this is often very difficult for governments to identify.<sup>77</sup> Yet history has shown, time and again, that despite numerous failures there have been also countless examples of success in this regard, therefore to say that it is merely ‘difficult’ cannot be an argument that takes away such a possibility. As Stiglitz has noted, ‘the risk of government failure can be managed in countries as they develop’<sup>78</sup> and that ‘it is inappropriate for the world trading system to be implementing rules which circumscribe the ability of developing countries to use both trade and industry policies to promote industrialisation.’<sup>79</sup> This being said, protectionism should not be allowed across the board. Rather the developing country in question would have to clearly demonstrate that its policies are part of a long term economic plan for the promotion of certain industries which it

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<sup>76</sup> P. Van den Bossche, V. Zdouc, *The Law and Policy of the World Trading System*, 3<sup>rd</sup> edn., (Cambridge University Press, 2013), p. 24.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, p. 38.

<sup>79</sup> J. E. Stiglitz, A. Charlton, *Fair Trade for All, How Trade Can Promote Development*, (Oxford University Press, 2007), p. 17.

considers would most benefit its economic development and diversification. Thus the possibility of carving out policy space by claiming the protection of economic development would encourage governments in developing countries to devise well thought out economic plans.

It should furthermore be made clear that conservation policy *is* compatible with industrial policy, especially in instances where developing countries are trying to transform their economies into a reliance on green energy in accordance with their commitments to reducing climate change and incurring significant costs doing so. This kind of understanding is more in line with the general notion of sustainable development than the current WTO approach at the dispute settlements where any industrial policy is seen as proof of an absence of conservation policy.

In terms of sustainable development, the importance of economic growth is mainly only recognised for developing countries, in order to enable them to meet the basic needs of their population.<sup>80</sup> The right to development here proposed would also be essentially asymmetrical in that it could only be claimed by developing countries against those more developed. This bias however can be easily justified in light of decades of the system working mostly in favour of developed countries, in light of past injustices and essentially in light of economic development of poorer countries being a core value and thus a core responsibility of humanity.

In chapter IV we have described the current subsidy rules which absolutely fail to take into account the commitment to sustainable development as they encourage fossil fuel consumption and discourage a move into green energy production by prohibiting developing countries to discriminate in favour of local firms when they subsidise such programmes. Stiglitz once suggested that countries impose tariffs and bans on imports from the US, for not paying the cost of damage to the environment, which he considers to be the same as not paying workers' full cost or in other words, a subsidy to local firms.<sup>81</sup> He based this statement on the fact that the US failed to ratify the Kyoto Agreement. Since it just pulled out of the Paris Agreement as well, at the very least, domestic content requirements for developing countries' green energy programmes should not be allowed to be challenged by the US at the dispute settlement. Yet technically neither of these options is possible in the current framework. As described in chapter IV, bringing into the equation the right to development,

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<sup>80</sup> M. Fitzmaurice, *International Protection of the Environment*, 293 *Recueil des Cours*, (2001), p. 4; The Rio Declaration on Environment and Development has been criticised for extending the recognition of the importance of economic growth for all countries, including developed.

<sup>81</sup> J. Stiglitz, 'A New Agenda for Global Warming', 13 *The Economist's Voice*, (2006), p. 2.

the current system of allowable and prohibited subsidies could be successfully challenged at the dispute settlement. The level of development attained by most developed countries is to a large extent thanks to a vast degradation of the environment globally, not just in said countries. On the other hand, all the models of climate change suggest that developing countries in the equatorial regions of the world will be hit the hardest by its devastating effects, greatly affecting not just their possibilities for development, but their bare livelihoods. Incorporating a constitutional right to development at the WTO would allow for evaluating current rules while taking all these issues into the equation. As Uvin says, currently in the development debate ‘Northern over-consumption, a history of colonialism, lopsided environmental degradation, protectionism, the dumping of arms in the Third World, the history of shoring up past dictators, the wisdom of structural adjustment, and globalization – all are off the discussion table.’<sup>82</sup> A constitutional right to development at the WTO would bring back the relevance of these facts and provide a tool to condemn the current subsidy rules, requiring Members to renegotiate them. In this context it could function similarly to the standard of *ex aequo et bono* and consider issues from a broader perspective and not in a narrow minded manner as is the current practice at the dispute settlement.<sup>83</sup> Furthermore in the context of TRIPS, the right to development could permit the exclusion of foreign green technologies from patentability in developing countries in light of the severity of the climate change threat and in light of their economic development aspirations in this field.

The inclusion of the RTD would also be helpful for the interpretation of special and differential treatment (SDT) provisions. The WTO system formally recognises the need for such treatment however as demonstrated in chapter IV it is implemented wholly inadequately most of the time. The inclusion of the RTD could play an important role in making said provisions more operational and binding, especially when they are written in hortatory language. Even in the existing framework these provisions could be read as such if they were considered in light of an overall objective of the agreements and if dispute settlement bodies would follow the example of evolutions in treaty interpretation in the field of human rights

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<sup>82</sup> P. Uvin, ‘From the Right to Development to the Rights-Based Approach: How ‘Human Rights’ Entered Development’, 17 *Development in Practice*, (2007), p. 601.

<sup>83</sup> Notions of equality associated with *ex aequo et bono* are deemed to reside in the moral, social or political realm that is external to the law and is ideally suited to resolving disputes between parties who are engaged in complex and long-term relationships or in fields where law is unsuitable to resolve complex disputes, see: L. Trakman, ‘Ex Aequo et Bono: Demystifying an Ancient Concept’, 8 *Chicago Journal of International Law*, (2008), pp. 621, 267.

and environmental law.<sup>84</sup> However the fact that the above mentioned bodies have been reluctant to do so, suggests that a more clear expansion of their mandate to include the enforcement of the right to development could improve the *status quo* and force them into a less timid and bolder approach. The same goes for above mentioned general exceptions.

Relevant to our proposed reform is the crucial question posed by von Bernstorff who asks whether ‘international lawyers as scholars can productively engage at all with moral, social and economic issues, such as extreme poverty, structural exploitation and the effects of climate change.’<sup>85</sup> If the answer to his question is no, because we lack the necessary expertise, we essentially declare ourselves incompetent in the struggle for global justice, equality and progressive enjoyment of human rights. This is an unacceptable *status quo* as we limit ourselves to knowledge about the application of the law, but not about its merits. However we do find ourselves in a more than usually uncomfortable situation when it comes to international economic law, since any legal analysis must essentially rely on a field of expertise which is not scientific and its experts are many times merely the propagandists for their nation’s interests or are biased towards a theory which brings them more academic acclaim. Trachtman criticizes those condemning the global economic order if they seem to fail to consult economists, however in the same breath he recognizes that economists fail to reach a consensus on essential issues such as for example the implications of the TRIPS Agreement.<sup>86</sup> Von Bernstorff is quite spot on when he asks whether it is ‘necessary to defend the influence of economists on the global economic order after the experience of 25 years of the reign of a particular and now increasingly contested economic theory in international economic institutions?’<sup>87</sup> On the other hand he encapsulates the limitations of lawyers in that ‘having expressed the moral argument through the medium of existing legal structures, morality will lose its revolutionary potential. The conservative function of the law demands its tribute even in the most progressive interpretation.’<sup>88</sup>

The reform we are proposing would provide a system of evaluating existing rules against the backdrop of the right to development, where each party to the dispute can present its evidence backed with statistics and the research of economic experts, including those with unorthodox

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<sup>84</sup> S. E. Rolland, *Development at the World Trade Organization*, (Oxford University Press, 2012), pp. 126-130.

<sup>85</sup> Bernstorff, *supra note 26*, p. 280.

<sup>86</sup> P. Trachtman, ‘Doing Justice: The Economics and Politics of International Distributive Justice’ in C. Carmody, F.J. Garcia, and J. Linarelli, (eds.), *Global Justice and International Economic Law*, (Cambridge University Press, 2012), pp. 281, 184.

<sup>87</sup> Bernstorff, *supra note 26*, p. 290.

<sup>88</sup> *Ibid*, p. 291.

views, thus bringing an element of objectivity into a system highly and unjustifiably tilted towards one economic theory.

### **5. Why the Right to Economic Development and not all Human Rights**

Being concerned with the weak enforcement of human rights instruments, activists and academics have been looking towards WTO to 'lend' its enforcement mechanism in this regard. In other words, there have been ideas of merging the two systems together. This can be highly problematic however, if human rights concerns and arguments are not used to provide a shield against neoliberal policies that perpetuate poverty and underdevelopment, but are instead used to push for exactly said policies. The present author therefore cautions against a simplistic merger of human rights and the WTO and advocates rather for only the inclusion of the right to development in the latter system.

There are ways in which the regulation of trade can be used to prevent human rights abuses. The two fields came into touch long before the existence of modern international economic law or international human rights law.<sup>89</sup> This was the case with the outlawing of piracy,<sup>90</sup> and of the trade of women, children<sup>91</sup> and slaves.<sup>92</sup> Outlawing piracy was an attempt to fight an insidious threat to human life on the High Seas as well as to protect the safety of international trade on what was then the main international channel of transfer for goods. The trade element was essential as slavery continued to be legal in many countries and there was no mechanism for so-called humanitarian intervention.<sup>93</sup>

For such grave violations against humanity one would wish to retain the option of using trade agreements to prevent them. However this does not mean that the WTO should become the main platform for the fight for human rights. Mainly because human rights talk can be used, and has been used for less than noble reasons before. A claim for particular human rights can be used as a weapon against those that cannot provide for them because of their low level of development instead of helping such countries reach that necessary level. Without downplaying the importance of individual human rights, it is this author's belief that the WTO needs to provide for the 'enabling condition' i.e. development, whereas existing human rights bodies can continue their work on individual rights in parallel. Of course the weakness

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<sup>89</sup> Hilpold, *supra note* 48, para. 5.

<sup>90</sup> A. Rubin, *Piracy*, (III Encyclopedia of Public International Law, 1997), p. 1036 in Hilpold, *ibid*.

<sup>91</sup> See L.-J. Constantinesco, *Rechtsvergleichung, Die rechtsvergleichende Methode* (1971), p. 335; K. H. Neumayer, 'Grundriss der Rechtsvergleichung', in: R. David and G. Grasmann (eds.), *Einführung in die großen Rechtssysteme der Gegenwart* (1988), 1 (35); M. Rheinstein, *Einführung in die Rechtsvergleichung* (1987), p. 14; P. Hilpold, *Modernes Minderheitenrecht* (2001), p. 15 in Hilpold, *ibid*.

<sup>92</sup> A specific declaration 'sur l'abolition de la traite des nègres' was issued on 8 February 1815 at the Congress of Vienna. See A. Verdross and B. Simma, *Universelles Völkerrecht*, (1984), p. 797, in Hilpold, *ibid*.

<sup>93</sup> Hilpold, *ibid*, para. 6.

of these bodies and their enforcement mechanism is an issue on its own, however bringing human rights into the WTO is not the solution, especially since the weight of its enforcement is largely tilted against weaker states as has been demonstrated in this study. The language of human rights is not always innocent and has become a principal means of legitimizing less than noble political and social agendas. Thus scholars need to avoid blindly following the linear progressivism underlying contemporary human rights scholarship and begin questioning the use of human rights language for legitimizing, opposing and negotiating power.<sup>94</sup>

Human rights have been used as a tool for putting pressure on developing countries not to stand together and thus remain easier to manipulate into accepting more anti-development deals. An example is the announcement made by the US on 23 March 2004 that it would sponsor a UN resolution criticizing China's human rights record. It had not done so a year before but in the aftermath of China standing together with the G21 at Cancun, the US lost no time. It took revenge with as many trade related attacks as possible but went also beyond the trade arena into the realm of human rights protection to achieve its goal.<sup>95</sup>

One should furthermore keep in mind the neoliberal circumstances of human rights which have permanently defined their trajectory. A rather important aspect of the contexts of the birth of the movement for human rights is the rise in that period of the neo-liberal version of 'private' capitalism, with its now familiar policy prescription of privatisation, deregulation, free markets and state retreat from social provision; in other words the history of human rights cannot be told in isolation from developments in the history of capitalism.<sup>96</sup>

The mainstream international human rights lawyers generally envision a large zone of compatibility between their norms and standard market arrangements and use human rights separately to keep globalization in check if and when it goes wrong and offer legal and other standards to guide, tame and 'civilize' an era of transnational market liberalization that in their view has in general improved the human condition.<sup>97</sup> While the effects of capitalism and

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<sup>94</sup> B. Ibhawoh, 'The Right to Development: The Politics and Polemics of Power and Resistance', 33 *Human Rights Quarterly*, (2011) p. 80.

<sup>95</sup> Dinmore and Dickie, 'US to Sponsor Resolution Criticising China', *Financial Times*, 23 March (2004) in F. Jawara and A. Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations: The Lesson of Cancun*, (Zed Books, 2004), ix-ixi.

<sup>96</sup> S. Marks, 'Four Human Rights Myths' in D. Kinley et al., (eds.), *Human Rights: Old Problems, New Possibilities*, (Edward Elgar Publishing, 2013), p. 226.

<sup>97</sup> P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *European Journal of International Law*, (2002), pp. 815-816: Alston alleges that Petersmann's goal was 'to hijack, or more appropriately to Hayek, international human rights'; See also R. E. Howard-Hassmann, *Can Globalization Promote Human Rights?*, (Penn State University Press, 2010); D. Kinley, *Civilising Globalisation: Human Rights and the Global Economy*, (Cambridge University Press, 2009), pp. 1-3.

the world trading regime on the enjoyment of basic human rights have been highly mixed, its biggest victim has been equality both of resources and opportunities in the national as well as global context.<sup>98</sup> The human rights doctrine was never set out to protect said equality and by focusing only on a minimum floor of human rights protection it is thus wholly inadequate for addressing neoliberalism's obliteration of the ceiling on inequality.<sup>99</sup> Moyn thus suggests that human rights 'stick to their minimalist tasks outside the socioeconomic domain.'<sup>100</sup> The same criticism does not apply to the right to development, at least not in how it was initially envisioned and how its external component calling for a more equitable international economic order. The right to development is further unconventional concerning the classical individualistic paradigm of human rights, since was originally meant primarily as a collective people's right of an *erga omnes* nature.<sup>101</sup> It is thus not surprising that developed countries have been trying to sabotage the right to development while supporting at least in principle, the idea of other human rights. Its nature does not fit well with the neoliberal agenda and as described in chapter II and III there has already been an effort at diluting its meaning to fit better the general human rights narrative and forsake its revolutionary potential. It is important when seeking reform, not to slip into the ideological frameworks of general human rights and neoliberal theories where the freedoms of individuals matter more than collectivist efforts at raising the well-being of the population generally.<sup>102</sup> Furthermore by focusing on a minimum floor of human protection, human rights norms prove inadequate in facing the reality that neoliberalism has damaged equality locally and globally much more than it has basic human rights outcomes (which, in some cases, it may indeed have advanced).<sup>103</sup>

In the words of Teubner 'human rights could be seen as one of the most globalized political values of our time.'<sup>104</sup> However, in their name, states are pushed to take on obligations in the fields of investment, trade, technology, currency, environment etc.<sup>105</sup> It is this paradox that sees human rights actually being used against-their own promise of long term betterment of the human condition, liberty and democracy for all peoples. This needs to be resolved for a

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<sup>98</sup> S. Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' 77 *Law and Contemporary Problems*, p. 149; S. Joseph, *Blame it on the WTO: A Human Rights Critique*, (Oxford University Press, 2011), p. 169.

<sup>99</sup> Moyn, *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> N.G. Villaroman, 'The Right to Development: exploring the Legal Basis of a Supernorm', 22 *Florida Journal of International Law*, (2010), p. 300.

<sup>102</sup> *Ibid.*, p. 156.

<sup>103</sup> *Ibid.*, p. 151.

<sup>104</sup> G. Teubner, *The King's Many Bodies: The Self-Destruction of Law's Hierarchy*, 31 *Law and Society Review*, (1997), p. 770.

<sup>105</sup> Chimni, *supra note* 17, p. 8.



genuine pursuit of the raising of the standards of living of peoples around the world and the progressive realisation of their human rights. Human rights need to be reclaimed from the political tool they have become in the forcing of neo-liberal policies, especially when that is done with the help of the crime of aggression and regime change, and become the ideal that many people perceive it to be, that is, the ideal of human dignity, equality and opportunity for development of everyone. The post-colonial era has witnessed the massive violation of human rights of ordinary peoples in the name of development, which has contributed to some viewing development as a trojan horse.<sup>106</sup> However it is 'development' through structural adjustment programs or neo-liberal policies that needs to be indicted, rather than the aspirations of the people to be able to exercise greater choices and a higher standard of life.<sup>107</sup> The language of human rights needs to be effectively used to defend the interests of the poor and marginal groups, which includes exposing the hypocrisy of the developed world with respect to the observance of international human rights law and international humanitarian law.<sup>108</sup> In this sense, it is not the UN itself, which is plagued by power politics and recently also by the influence of corporate actors financing it, reducing the possibility of the organisation being at the centre of collective action by developing countries,<sup>109</sup> but rather individual independent UN experts and special rapporteurs which have been most commendable. The Special Rapporteur on the Right to Food, Mr de Schutter, has strongly challenged the WTO beyond the neoliberal narrative on the right to food (see chapter IV) and more recently Mr Alfred de Zayas, the UN Independent Expert on the promotion of a democratic and equitable international order has voiced his strong critique of the WTO, its latest negotiations and dispute settlement decisions calling for the stop of their vilification of industrial policy. Together with Special Rapporteur Mr Idriss Jazairy,<sup>110</sup> Mr de Zayas called for international action on social justice as they spoke of the lack of a broad-based international awareness of the impact on human rights of the actions of foreign entities, be it states, international organizations or transnational corporations, which can have a severely negative impact on human rights in many countries, particularly in developing economies condemned by poverty.<sup>111</sup> The United Nations Conference on Trade and Development has

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<sup>106</sup> *Ibid*, p. 18.

<sup>107</sup> Chimni, *supra note* 17, p. 18.

<sup>108</sup> *Ibid*, p. 24.

<sup>109</sup> *Ibid*, p. 14.

<sup>110</sup> Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights.

<sup>111</sup> UN, '2017 Statement by Alfred de Zayas, Independent Expert on the promotion of a democratic and equitable international order, and Idriss Jazairy, Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights, available at:

already documented many of these problems in numerous reports, but international action to advance social justice has been lacking.<sup>112</sup> The experts noted that ‘[w]hile regional human rights courts can consider injustices that arise as a result of ill-advised national legislation, there is no similar monitoring or corrective procedure with universal jurisdiction to consider issues created by the actions of external actors.’<sup>113</sup> This speaks pointedly to the arguments raised by the present study regarding the inability of regional human rights instruments to provide protection of the right to development in its external dimension and gives support to the call for incorporating the right to development within the WTO system to address this deficiency. It is *within* the right to development that other human rights concerns should then be raised. For example labour rights may be important when a Member state argues that its protectionist measures aimed at a particular industry would prevent unemployment or underemployment which in turn would prevent the loss of investment into this factor of production, i.e. a loss to the economy. The protection of the right to health may join concerns for economic development in the context of exceptions from the general rules of TRIPS or in the context of limiting exports of materials the mining of which is necessary for domestic production but harmful to human health. The right to food has already been playing a major role in arguments for the need to protect local farming and allow stockpiling. In other words, what is crucial is that human rights would not be used against developmental needs of developing countries but could form part of their arguments.

Human rights language has also been abused in the case of intellectual property. How intellectual property rights are labelled has a bearing on how the public views them. In the nineteenth-century, when the opposition movement against privilege and monopoly and for free international trade was very strong, the fact that patent protectionism was linked with tariff protectionism and patent monopoly was linked with monopoly privileges in general tended to boost the support for their opposition.<sup>114</sup> On the other hand the IP lobby ‘in deliberate insincerity’ construed the artificial theory of the property rights of the inventor ‘as part of the rights of man’ to fit the spirit of the time which was so much for liberty and

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<http://www.un.org/en/events/socialjusticeday/2017/sgmessage.shtml>, (last accessed: 21.7.2017).

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> F. Machlup, and E. Penrose, ‘The Patent Controversy in the Nineteenth Century’, 10 *The Journal of Economic History*, (1950), p. 9.

equality, substituting the unpleasant ring of ‘privilege’ with a respectable connotation, ‘property’.<sup>115</sup> As Susan Sell describes:

The language of rights weighs in favour of the person claiming the right. The language of privilege weighs in favour of the person granting the privilege. By wrapping themselves in the mantle of ‘property rights,’ they suggested that the rights they were claiming were somehow natural, unassailable and automatically deserved. They were able to deploy ‘rights talk’ effectively because they were operating in a context in which property rights are revered. In that regard ‘rights talk’ resonated with broader American culture... Advocates of highly protectionist IP norms expressed indignation at those violating these ‘rights’ and claimed that so-called violators were ‘pirates.’<sup>116</sup>

This is also the position taken by the Commission on Intellectual Property Rights which considers IPRs as ‘instruments of public policy which confer economic *privileges* on individuals or institutions solely for the purposes of contributing to the greater public good. The *privilege* is therefore a means to an end, not an end in itself.’<sup>117</sup> The Commission further suggests that IPR should be looked at as taxation – ‘taxation might be desirable if it delivers public services that society values more than the direct and indirect cost of taxation. But less can also be beneficial, for instance if excessive taxation is harming economic growth.’<sup>118</sup>

The way IPRs are considered today has been harshly criticized for preventing us from seeing our acts of creation in terms of the relational world that they occupy, and instead creating a false idea about them as being abstract from social relations.<sup>119</sup> In this sense they have even been compared to a neurological condition which completely alters our abilities to see and to relate to the phenomenological world.<sup>120</sup> These rights are presented as universal truths even though they are in reality based on very particularized ideas of property and personhood, stemming from the classical liberal political theory in which every individual is the proprietor of one’s own person according the philosophy of John Locke who linked the theories of identity and property in his *Two treaties of Government and An Essay Concerning Human Understanding*. The patent protection legislations of Great Britain, France and America found their philosophical justification in this theory which declared everything one could form with one’s hands or mind to be the property of the one who formed it.<sup>121</sup> Critics suggest

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<sup>115</sup> H. Rentzsch ‘Geistiges Eigentum,’ *Handwörterbuch der Volkswirtschaft*, p. 335, specifically referencing DeBouffler, a French politician working for the adoption of a patent law in the French Constitutional Assembly, in Machlup, *ibid*, p.16.

<sup>116</sup> S. Sell, ‘TRIPS and the Access to Medicines Campaign’, 20 *Wisconsin International Law Journal*, (2002), pp. 489-90.

<sup>117</sup> Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights*, (2002), p. 2.

<sup>118</sup> *Ibid*, p. 2.

<sup>119</sup> L. Liang, ‘The Man who Mistook His Wife for a Book’ in G. Krikorian and A. Kapczynski, (eds.), *Access to Knowledge in the Age of Intellectual Property*, (Zone Books, 2010), p. 284.

<sup>120</sup> *Ibid*.

<sup>121</sup> J. Locke, ‘The Second Treaties of Government, An Essay Concerning the True Original Extent and End of Civil Government’, in *Two Treaties of Government*, (Cambridge, [1698] 1988).

that thinking instead of our relation to the world of knowledge and culture via the trope of proximity ‘enables us to rethink our relations to our work, to ourselves and to each other, not as distinct sets of legal relations bound together by the idea of rights, but as a continuum that blurs the boundaries between rights, obligations and relationalities.’<sup>122</sup>

Furthermore in the words of John Lewis Ricardo ‘nearly all useful inventions depend less on any individual than on the progress of society.’<sup>123</sup> Or as another commentator puts it: ‘individual achievements [are] not as much important as societal achievements and in particular the general framework conditions: without politico-economic and legal parameters invention would hardly be possible’ rendering individual privately owned property rights a *contradictio in adiecto*, as ‘[e]ach inventor is standing on the shoulders of his predecessors, profiting from the overall institutional framework.’<sup>124</sup> Furthermore most inventors today do not own the patents for their inventions. Rather these are owned by their employers, who provided the investment, which basically means that inventors indeed only get only a certain reward for their inventions, sometimes merely for a ‘pittance’.<sup>125</sup> Even more ironically, the owner of the patent can also simply be a buyer, who has nothing to do with the initial investment, but merely perceives the purchase of the patent as an opportunity for profit by raising its price.

Considering the vast discrepancies between the research and development funding in developed and developing countries as well as their existing industrial and educational structures it is therefore essential to recognise the inherent inequality of opportunity for competitive innovation to take place in the former compared to the latter. Accordingly the human rights theory needs to recognise the inappropriateness of intellectual property ‘rights’ as human rights as well as the unfairness of the ‘piracy’ label when it comes to copying or reverse engineering of technologies originating from developed countries by those in developing countries. Similarly to free trade, it is only when countries achieve a comparable level of technological development that it could be legitimately asked of all countries to protect intellectual property ‘rights’ of foreigners to the degree demanded by TRIPS or TRIPS plus. Until then, the investment into research by companies from developed countries (when

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<sup>122</sup> Liang, *supra* note 119, p. 282.

<sup>123</sup> J. L. Ricardo, author of *History and Anatomy of Navigation Laws*, nephew of David Ricardo, president of a London bank and an MP. According to Macfie, he was the ‘principal advocate of reform or abolition of the patent system’ in the House of Commons, Machlup, *supra* note 114, p. 18, fn 65.

<sup>124</sup> M. Wörsdörfer, ‘Walter Eucken on Patent Laws: Are Patents Just ‘Nonsense upon Stilts’, 1 *Economic Thought*, (2012), p. 37.

<sup>125</sup> Machlup, *supra* note 114, p. 24.

this indeed happens and it is not merely a public subsidy) should be considered to be sufficiently compensated by their advantage of being first on the market.

## **6. Why Revolutionary Pro-development Interpretations are Unlikely in the Current System**

As mentioned previously, some believe the necessary flexibilities are already there and that the dispute settlement Panels and Appellate Body could simply interpret rules in a more pro-development manner. However, states did their best to try to prevent any judicial creativity by stating not once, but twice in the Agreement that recommendations and ruling of the DSB ‘cannot add to or diminish the rights and obligations provided in the covered agreements.’<sup>126</sup> It is true that judicial lawmaking nevertheless occurs to an extent,<sup>127</sup> yet when it does, concerns are quickly raised about the ‘overstepping’ of the boundaries assigned by the law. The AB has already been accused of ‘making law’, instead of merely interpreting it and the possibility of ‘checks and balances’ operating within the WTO, has been proposed, so that when the AB makes a ‘mistake’ in its interpretations, the General Council or the Ministerial Conference could overturn its decision by adopting an interpretation of a WTO Agreement by two-thirds or a simple majority of the Membership.<sup>128</sup> This would imply that developing countries, which hold the majority, could have the last say and perhaps strike down future decisions such as *US-Shrimp*. Yet it is not the decision in *US-Shrimp* which is the real problem but rather a lack of flexibility provided by the law in giving weight to arguments based on a concern for economic development, as discussed at length in chapter VI. This is not to say that judicial creativity is not possible beyond what is envisioned in the law. One need only to look at the example of the International Court for the Former Yugoslavia which disregarded the war nexus required by the Statute in the context of crimes against humanity making an important and necessary step forward beyond what politics had laid out.<sup>129</sup> Panels at the WTO could show courage by adopting more ‘daring’ reports yet they are to expect

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<sup>126</sup> DSU, Art. 3 (2), DSU, Art. 19 (2).

<sup>127</sup> I. Venzke, *How Interpretation Makes International Law’ On Semantic Change and Normative Twists*, (Oxford University Press, 2012), p. 147.

<sup>128</sup> C. E. Barfield, *Free Trade, Sovereignty, Democracy, The Future of the WTO*, (American Enterprise Institute, 2001), p. 44; M. Metsushitu, T. J. Schoenbaum and P. C. Mavroidis, *WTO Law Practice and Policy* (Oxford University Press, 2015), p. 109.

<sup>129</sup> In terms of crimes against humanity which under the Statute required a war nexus for obviously political reasons, the Appeals Chamber found that no nexus with war crimes or with an armed conflict of any character was required by modern international law and the Statute was, in fact, more restrictive than was necessary in requiring that a crime against humanity had to have been committed in the course of an armed conflict, whether international or internal, in order to come within the jurisdiction of the Tribunal. ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72; 35 ILM (1996), Appeals Chamber Decision, paras. 138-42.

harsh criticism as already proposals such as a creation of a ‘peer-review’ group at the WTO have been suggested with the task of publishing criticisms of ‘problematic reports’.<sup>130</sup> Apart from further intimidating the Panels from thinking outside the box this is rather redundant as academic peer review always exists anyway, without a need for a special group at the WTO. Significant tensions can also be observed between the DSM and the negotiation forum at the WTO in terms of treaty interpretation when this goes beyond US interests. For example, the practice of ‘zeroing’ has been consistently found to be WTO-inconsistent at the dispute settlement mechanism, yet the 2007 ‘Consolidated Texts on Anti-dumping and Subsidies and Countervailing Measures circulated by the Chair of the Negotiating Group on Rules’ allows the utilization of zeroing under certain circumstances.<sup>131</sup> This was in line with the US criticism of the Panels and the AB’s interpretative approach in zeroing cases and their insistence that zeroing is ‘allowable under current global trade rules, penned in the 1994 Uruguay Round Accord’, and thus any agreement emerging from talks must recognize its validity.<sup>132</sup> This clearly shows how the negotiating forum, or in other words its most powerful players, keeps the judicial branch in check when it interprets law against their wishes. The proposal of this thesis wishes to avoid such scenarios by clearly giving a mandate to the Panels and Appellate Body to adjudicate based on a consistency with the right to development as a constitutional right and not something which can be easily adjusted at the negotiations according to US wishes.

## **7. How Realistic is the Inclusion of a Right to Development in the WTO System**

This however brings us to the unfortunate fact that, speaking realistically, there is also almost zero likelihood that the US or any other developed country would be enthusiastic about accepting the right to development into the system in the first place. Still, with a consistent push from developing Member states and civil society, this goal is not impossible. Development is already purportedly the goal of the organisation as well as of the international community generally, therefore it would be hard to mount a principled resistance to the inclusion of such a right as long as its formulation would not go into detail about how it should be protected or enforced. Perhaps this should be the strategy of pushing for such reform, i.e. presenting it as a limited concept at the start with little contentious issues. The

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<sup>130</sup> Metsushitu, *supra note* 128, p. 109.

<sup>131</sup> *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213, 30 Nov. 2007 in Y. Luo, *Anti-dumping in the WTO, the EU, and China: The Rise of Legalization in the Trade Regime and its Consequences (European Monographs)*, (Kluwer Law International, 2010), p. 21.

<sup>132</sup> BNA International Trade Reporter ‘WTO Members Discuss Services Conference; Doha Rules Chair Promises New Revised Text’, 20 Mar. 2008, in Luo, *ibid.*

Declaration on the Right to Development itself is quite abstract and vague.<sup>133</sup> Unlike the ideal formulation described and proposed by the present author in the sections above, a more modestly defined concept of a right to development can more easily overcome initial hurdles for its acceptance which would be posed by those who do not wish to see any concrete implementation obligations or even by developing countries themselves due to the different interests between them. For example not specifying that it may work against the free trade mantra, can make it easier to pass through the negotiations. It would then be for the Panels and Appellate Body to fill in the gaps and interpret it in a way that would bring out its full potential. As many other concepts in national as well as international law, which evolve through time, a vaguely defined right to development at the WTO would provide a humble seed with the potential to grow into the enforceability tool necessary for re-shaping the international trade law into a more just system, as envisioned by the conceptual architects of the right to development. Judicial lawmaking has proved essential in the past when politics erect a wall in front of progress. The situation could become similar to that found in the context of terrorism, where political considerations have long been preventing a workable international definition of the crime from being created. Thus Judge Baragwanath from the Special Tribunal for Lebanon has called for a judicial decision to fill the vacuum, preferably by the International Court of Justice or failing that, by domestic or international courts seized of a relevant issue in exercise of their responsibility to contribute to the creation of international law.<sup>134</sup> He maintains that the creation and development of international law is the responsibility of every court, both domestic and international and that judges need to furthermore be able to demonstrate they and the rule of law serve the whole of community.<sup>135</sup> Of course any kind of drastic reform, such as the one proposed is unlikely to happen without peoples' struggles to engage in collective action.<sup>136</sup> Adequate collective action, however, needs to take place not only in developing countries but more importantly in developed countries, which ultimately hold the power to change the *status quo*. In this regard, countering the neo-liberal propaganda and spreading genuine knowledge is essential. It was thus part of the methodology of this research to present as exhaustively and systematically the issues we should be focusing on in terms of reforming the WTO into a more developmentally friendly model. By proposing the inclusion of a right to development into the WTO, the

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<sup>133</sup> Arts, *supra note* 72, p.232.

<sup>134</sup> D. Baragwanath, 'Challenges in Prosecuting Terrorism and Religiously Motivated Violence', paper presented at Northumbria Summer Academy in Contemporary Challenges to International Criminal Justice, 14 June 2017.

<sup>135</sup> *Ibid.*

<sup>136</sup> Chimni, *supra note* 17, p. 7.

thesis furthermore provides a goal which the civil society could comfortably rally behind, without necessarily understanding the intricate details and economics behind the WTO agreements or proposing concrete changes to them. This would then happen at a later stage, once such a right would become a legal tool for developing countries to use at the dispute panels as mentioned. Peoples' struggles have engaged before in collective action behind the right to development. Furthermore we are currently witnessing a growing awareness of the American public about the impacts of their foreign policies. If the trend continues, which seems to be the case, we can expect the American public to demand of their politicians a higher level of sensitivity towards developing countries, something almost entirely lacking in their current political discourse surrounding elections. It is also encouraging to know that alternative news outlets, which reach a considerable amount of people on social media, have reported on the WTO dispute settlement decisions in the *India - Solar Cells* case thus bringing to the general public an idea of what the problems are. De Zayas has called for a greater engagement of the general public in the form of holding referendums based on impact assessments of trade agreements.<sup>137</sup> The Expert's idea may not be ideal in terms of such referendums potentially going for all or nothing, however it does stress the importance of the public in participating. A better solution would be the kind of involvement which could provide tools for a constant improvement and re-evaluation of existing agreements such as this thesis proposes. It has to be said however that ultimately, how realistic the inclusion of the right to development into the WTO system is, cannot be a measure of the merit of this call and it should not discourage us from trying to push for it. At the moment saving our ecosystem from imminent destruction seems equally as unrealistic. Yet hopefully this should not stop us from trying to prevent it.

One could undoubtedly also raise the point that even with a formal recognition of the right to development within the WTO, developed countries would never respect or implement rulings which would substantially depart from the rules as they stand at the moment. A disregard for such rulings could have a negative effect on the reputation of said states, however it is questionable whether they really need to take this into account in order to protect their interests. As much as reputation for complying with international law may be beneficial to some states, it may be quite unnecessary for others. States which are strong enough can

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<sup>137</sup> de Zayas, *supra* note 64, p. 22, para. 22.



achieve their objectives through a reputation for toughness,<sup>138</sup> rather than a reputation for being ‘good’ obedient partners, which is what weaker states must uphold to avoid costs such as the ‘exclusion from future opportunities to cooperate or tougher terms of cooperation’.<sup>139</sup> However it is the proposition of this author that such rulings, even if not respected, could nevertheless play an important role, that is, in being an authoritative and respectable source of law that could counter the current propaganda machine, diminish the soft power and bring change in the long run. Furthermore even the US has started showing signs of a concern for its failing propaganda. The election of Trump has brought to the surface all kinds of dodgy politics pursued by the US around the globe and the people are slowly but surely waking up and demanding more accountability from the hegemon.

### **8. Negative Effect on Predictability**

Regardless of the fairness or unfairness of the international trade law system, one of its undisputed merits is the predictability it offers to Member states. Predictability is furthermore important for development as it is an essential element of any economic planning. Art. 3(2) The Dispute Settlement Understanding emphasises how the ‘dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system.’ Introducing the right to development in the system which might disturb the *status quo* and thus at least temporarily disturb the predictability, may thus be seen as problematic. However, in the long run, one cannot just keep a system unjust, because of short term predictability concerns. Eventually as mentioned above the desire to avoid challengeable rules may incentivise states to come up with fair and pro-development rules and conditions already at the negotiations thus avoiding uncertainty in the future. In a sense, the DSM already positively influences negotiations in this regard. For example in March 2005, the Appellate Body upheld Panel findings against the US on various cotton subsidies in response to a complaint brought by Brazil.<sup>140</sup> It was thanks to this complaint being brought to the dispute settlement mechanism that the Cotton four managed to achieve their goals at the Hong Kong Ministerial, even though only two of these countries joined the dispute as third

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<sup>138</sup> J. L. Goldsmith and E. A. Posner, *The Limits of International Law*, (Oxford University Press, 2006), pp. 102-103; R. O. Keohane, ‘International Relations and International Law: Two Optics’, 38 *Harvard International Law Journal*, (1997), p. 497.

<sup>139</sup> R. Brewster, ‘Unpacking the State’s Reputation’, 50 *Harvard International Law Journal*, (2009), pp. 231-232, 248, 257-258.

<sup>140</sup> *United States – Subsidies on Upland Cotton*, DS267, Argentina, Benin, Chad, China, India, Pakistan, Paraguay, Venezuela and Thailand joined as third parties.

parties.<sup>141</sup> In short, short term negative effects on predictability may be overcome in the long run.

### **Concluding Remarks**

The power politics which shape rules at the WTO are shaping international law and policies generally. This is not surprising considering how the international society and lawmaking had been set out from the beginning and considering the persistent lack of a sense that we live in a world *community* which just as any other community should uphold constitutional values for the benefit of everyone, beyond the outcomes of bargaining.

Cass finds that what one considers to be legitimate, depends on what one is interested in achieving; thus those interested in welfare enhancement consider a system legitimate if more countries achieve greater growth, whereas those promoting the so-called Washington consensus consider a system legitimate if it encourages states to adjust their policies to the demands of said consensus.<sup>142</sup> However legitimacy cannot be relative to such an extent, unless it is to become meaningless. The WTO and the Washington consensus claim that their ultimate goal is achieving welfare enhancement therefore it is not implied anywhere that liberalisation is the alpha and omega of legitimacy, a goal in itself. It may be so in reality, however the reluctance to admit this fact attests to the recognition that true legitimacy lies elsewhere. The development of poorer countries is undisputedly one of the core values of the general public as we have discussed in chapter II and it is furthermore a fundamental goal of the international community, found also in the UN Charter.<sup>143</sup> It is the proposition of this author that a move away from pure power politics at WTO negotiations into a more objective mechanism that would ensure the respect of the right to development in the organisation through judicial means would thus address its legitimacy gap. In the past couple of decades, international litigation has grown substantially in size and importance and it now occupies a prominent place in international relations. In the words of HE Judge Sir Christopher Greenwood, 'there is no doubt that the effective and impartial adjudication of international disputes makes the world a safer place and one in which justice plays a greater role.'<sup>144</sup> Impartial adjudication on the rules themselves against constitutional norms of the international community whether this be based on the UN Charter or the common values of

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<sup>141</sup> Rolland, *supra note* 84, p. 98.

<sup>142</sup> D. Z. Cass, *The Constitutionalisation of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System*, (Oxford University Press, 2005), p. 47.

<sup>143</sup> S. Cho, 'A Quest for WTO's Legitimacy', 4 *World Trade Review*, (2005),

<sup>144</sup> C. Greenwood, 'Some Challenges of International Litigation', 1 *Cambridge Journal of International and Comparative Law*, p. 9.

humanity is no less important and mechanisms need to be set up to provide for such a possibility. Domestically, constitutional courts play the role of evaluating regulations against the higher norms embodied in the constitution of a state. Parallel mechanisms need to exist internationally and it is this what the present author is proposing with the inclusion of the right to development as a constitutional norm in the WTO system.

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