

# Development, International Organizations and Fairness as Justice: Normative Perspectives on the WTO

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## 1. Introduction

Making the WTO more supportive of development is perhaps the most serious challenge confronting the organization, given the huge differences in the level of development among WTO members. The objective of my paper is to assess the WTO from a normative perspective in the context of discussions about development, arguing in favor of greater procedural *and* substantive justice.

While disagreements about the fairness or justice or development dimension of the WTO or other international organizations like the World Bank or the IMF can be purely empirical, concerning only the best means to achieve shared ethical objectives, the debate is often underlined by divergent views on more fundamental questions of principle. In such cases, advocates of opposing positions may agree on all the relevant facts but disagree about whether the arrangements in question are fair or just.<sup>1</sup> Even when it seems that fundamental disagreements of principle are at stake, their precise nature often remains unclear. As a result, there is great need for reasoned debate about the principles that might be deemed relevant for evaluating potential reforms of the WTO and modifications of the trading system that a plausible conception of fairness would demand and what they mean in more operational terms. However, there seems to be a large gap between discussions by WTO scholars and practitioners and political theorists who are working on theories of international socioeconomic justice and global governance. With few exceptions, theorists of global justice have failed to address difficult and urgent normative questions concerning the design and conduct of such existing organizations as the WTO. I would like to contribute to closing these gaps by integrating thinking about principles of justice into discussions of practical dilemmas concerning the WTO in ways that can enrich each.

First, I make the case that it is not possible to judge the voluntariness or procedural fairness of a bargain or a transaction independently from substantive moral criteria regarding fair or morally just outcomes. Second, I argue that the WTO can be perceived as a subject of substantive duties of distributive justice. Recent and current reform recommendations made by lawyers, economists and practitioners – in the context of the so-called Sutherland Report<sup>2</sup> and the debate it spurred<sup>3</sup> – focus almost exclusively on *procedural* aspects of justice (that is, if they address justice questions at all) and thereby differ considerably from and stop short of the *substantive* duties of justice that seem required from the point of view of normative political theory. Accordingly, I will assess how both the justice-oriented development relevance of the WTO could be improved both from a procedural and a

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<sup>1</sup> It is often very difficult in practice to determine what kind of disagreements are really at issue. Consider, for example, two statements on the outcome from Hong Kong. Oxfam's spokesman Phil Bloomer commented: "Rich country interests have prevailed yet again and poor countries have had to fight a rearguard action simply to keep some of their issues on the table." In contrast, WTO's director-general, Pascal Lamy, described the WTO as a "healthy and democratic common institution" in which decision-making is "burdensome and cumbersome" yet "remains the best way to take decisions that impact directly the lives of billions of people." Lamy's refusal to denounce the Hong Kong meeting may be due either to the fact that he feels that rich country interests did not indeed prevail, or because their having prevailed is part and parcel of a healthy democratic institution, and therefore cannot be viewed as a serious ethical problem.

<sup>2</sup> Peter Sutherland and et al., *The Future of the WTO. Addressing Institutional Challenges in the New Millennium* (Geneva: 2005).

<sup>3</sup> See, for instance, the following articles: Armin von Bogdandy and Markus Wagner, "The 'Sutherland Report' on WTO Reform - a Critical Appraisal," *World Trade Review* 4, no. 3 (2005). Richard Blackhurst, "The Future of the WTO: Some Comments on the Sutherland Report," *World Trade Review* (2005). Steve Charnovitz, "A Close Look at a Few Points," *Journal of International Economic Law* (2005). Patrick Messerlin, "Three Variations on 'Future of the WTO'," *Journal of International Economic Law* (2005). More Negative: Joost Pauwelyn, "The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO," *Journal of International Economic Law* (2005). Peter Van den Bossche, "Radical Overhaul or Pragmatic Change? The Need and Scope for Reform of Decision-Making in the World Trade Organization," *The Maastricht Faculty of Law Working Paper series*, no. 1 (2006). Peter Van den Bossche and Iveta Alexovicová, "Effective Global Governance by the World Trade Organization," *Journal of International Economic Law* (2005).

substantive perspective by discussing options that have been proposed to increase the development relevance of the WTO and analyzing them from a normative perspective. I will argue that differential treatment for developing countries should not be regarded as charity but rather as a moral obligation and that it should include three components: [1] taking actions to generate an ambitious market access outcome to be realized in the Doha Round; [2] changing WTO rules so as to make them more supportive of development; and [3] enhancing overall benefits for developing countries by improving the distribution of gains associated with an ambitious outcome through additional AfT.

The paper is structured as follows. First, I outline a taxonomy for different normative conceptions regarding the WTO. Second, I set out three distinct perspectives on the WTO and its links with normative question in the context of development. I will challenge both the *Instrumental* and the *Procedural Perspective* and argue in favor of what I characterize as the *Fairness Perspective*. Second, I apply my normative assessment to the WTO with a focus on favorable treatment of developing countries, including Aid for Trade (AfT) measures, and a WTO parliamentary dimension. Moreover, I will set out some of the implications of my normative assessment for the WTO.

## 2. Normative Conceptions and the WTO – State of the Art

In this section, I will set out how different normative conceptions regarding the WTO and the international economic order more generally and theories of international socioeconomic enable us to normatively assess the WTO. More specifically, I attempt to deal with the lack of systematic order in this field by locating existing approaches in a framework with regard to two central dimensions namely [i] the scope of normative principles and [ii] the procedural or substantive nature of normative principles of application. If these two dimensions are combined, we obtain a framework with various possible normative positions with respect to the international and global order, which the various scholars from different disciplines can be assigned to.<sup>4</sup>

### 2.1 The Scope of Distributive Justice – Statism and Nationalism versus Cosmopolitanism

While it is uncontroversial that general normative duties, such as procedural requirements for fair decision-making processes, can be equally applied on all levels, domestic and global, and that their scope is universal, the scope of special requirements of distributive justice is highly contested. There are two extreme ends of the wide spectrum of different positions on transnational socioeconomic justice, namely *statism* and *nationalism* on the one hand and *cosmopolitanism* on the other. In this paper, I argue that the existence of the WTO challenges widely held *statist* and *nationalist* positions that maintain that distributive justice only applies in the *domestic*, rather than the global, realm. On the other hand, I demonstrate that the case for duties of just distribution beyond the domestic arena does not necessarily hinge on *cosmopolitan* arguments for trade-independent principles of global justice.

Cosmopolitan positions that focus on the realization of cosmopolitan principles of global distributive justice which can be enforced vis-à-vis the nation-state accord the *global level* normative supremacy.<sup>5</sup> Nationalist and statist positions, on the other hand, would tend to accord primacy to the level of the domestic realm of the nation-state in the context of the world trading system.<sup>6</sup> In between, we can locate several types of *divided supremacy*: the realization of different principles of application can be split, such that, for example, the global level has supremacy regarding fundamental human rights while the nation-state has primacy in terms of distributive justice.

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<sup>4</sup> See also Alexia Herwig and Thorsten Hüller, "Zur Normativen Legitimität Der Welthandelsordnung" (paper presented at the Transnational Governance Conference, European University Institute, Florence, 2007).

<sup>5</sup> Brian Barry, *Culture and Equality. An Egalitarian Critique of Multiculturalism* (Cambridge Poliy Press, 2001), Thomas Pogge, "Internationale Gerechtigkeit: Ein Universalistischer Ansatz," in *Internationale Gerechtigkeit* ed. Karl Graf Ballestrem (Leverkusen: Leske und Budrich, 2001).

<sup>6</sup> For instance, communitarian approaches, such as David Miller's, suggest normative supremacy at the level of the nation state. See David Miller, *On Nationality* (Oxford: Clarendon Press, 1995). From the perspective of such conceptions, the rules of the world trading system would be evaluated in terms the extent to which it realizes principles of justice that are determined on the level of the nation-state.

## 2.2 Procedural versus Substantive Principles of Application

Among the proponents of *proceduralism*, there are representatives for all three variants of supremacy levels. Authors such as James Bacchus and Robert Hudec represent what could be called *nation-state proceduralism*.<sup>7</sup> The legitimacy of the WTO, they argue, is mostly based on the voluntary national agreement to the WTO-contract. Patrizia Nanz and David Held, on the other hand, represent variants of *cosmopolitan proceduralism*. Nanz, for instance, argues that the WTO processes of decision-making would be fair if NGOs participated in them.<sup>8</sup> Richard Shell's and Steve Charnovitz's proposals go into a similar direction.<sup>9</sup> Held's model of cosmopolitan democracy includes proposals for referenda and the parliamentarization of international organizations.<sup>10</sup> In the course of this paper, I will challenge all types of *purely procedural approaches*.

Among the proponents of *substantivism*, there are many scholars that represent *cosmopolitan substantivism* which is, in my taxonomy, equivalent to *cosmopolitanism* as characterized above. In the context of the legitimacy of the world trading system, the position of cosmopolitan substantivism is, for example, represented by those scholars who argue that the protection of human rights and civil liberties is important for the normative legitimacy of the world trading system.<sup>11</sup>

Other scholars argue in favor of *procedural as well as substantive principles of application*. For example, Thomas Cottier proposes procedural as well as substantive human rights as principles of application but argues in favor of a *divided* application of these normative principles across political levels.<sup>12</sup> In light of potential shortcomings of *cosmopolitan substantivism* and in light of the shortcomings of purely *procedural approaches*, there are good reasons to assume that such 'combined' and 'divided' proposals merit further evaluation which in turn requires an assessment of which procedural and substantive normative principles can be argued to play a role in which way in the context of the WTO, which is what I aim at doing, in the course of this paper.

## 3. The Instrumental Perspective

One option is to argue that here are trade-independent egalitarian duties of socioeconomic international justice and that the WTO should be used as an instrument for discharging these moral obligations. First, the Instrumental Perspective could be rejected on the grounds that duties of distributive justice at the international level are sufficitarian rather than egalitarian in character.<sup>13</sup> Moreover, even if there are in fact egalitarian duties of international justice, the Instrumental Perspective can be challenged on the grounds that the WTO is not a redistributive development agency. Calling the round the Doha Development Agenda, probably raised unrealistic expectations regarding what the trading system is capable of doing for development. Presumptions that an 'equitable and fair' round would (could) address the development concerns expressed by many during 1997–2001 implied a misunderstanding of both the role and the institutional capacity of the WTO. The WTO is not able, by itself, to deliver a

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<sup>7</sup> James Bacchus, "A Few Thoughts on Legitimacy, Democracy and the WTO," in *Preparing the Doha Development Round*, Florence, ed. Ernst-Ulrich Petersmann (Florence: European University Institute, 2004), p. 112. Robert E. Hudec, "Comment," in *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, ed. Roger B. Porter, et al. (Washington: Brookings Institution Press, 2001), p. 295.

<sup>8</sup> Patrizia Nanz, "Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory," in *Multilevel Trade Governance and Social Regulation*, ed. Christian Joerges and Ernst-Ulrich Petersmann (Oxford: Hart, 2006), p. 59.

<sup>9</sup> Richard Shell, "Trade Legalism and International Relations Theory – an Analysis of the World Trade Organization," *Duke Law Journal*, no. 44 (1995): p. 915. Richard Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization," *University of Pennsylvania Journal of International Economic Law*, no. 17 (1996): p. 359. Steve Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization," *University of Pennsylvania Journal of International Economic Law*, no. 17 (1996): p. 331. Steve Charnovitz, "WTO Cosmopolitanism," *New York University Journal of International Law and Politics*, no. 34 (2002): pp. 329-44.

<sup>10</sup> David Held, *Democracy and the Global Order* (Cambridge: Cambridge University Press, 1995), pp. 40f., 219ff., 72ff.

<sup>11</sup> Such a position has been defended, for example, by Thomas Pogge. See Pogge (1999), fn.8

<sup>12</sup> Thomas Cottier and Maya Hertig, "The Prospects of 21st Century Constitutionalism," *Max Planck Yearbook of United Nations Law*, no. 7 (2003): p. 261.

<sup>13</sup> See, for instance, David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).

“development agenda.” Since trade can help promote the development of poorer countries, the relevant consideration is the effect of the trading system in doing so, which is what I will come back to in part 6 of this paper.

#### 4. The Procedural Perspective

In this part of the paper, I will argue against what can be characterized as the Procedural Perspective. This view, represented by the philosopher Thomas Nagel, maintains that the non-existence of sovereign rule in the WTO undermines the application of substantive moral principles of distributive justice in that context.<sup>14</sup> The WTO can only be normatively assessed from the perspective of the “Morality of Transactions,” which belongs to the sphere of general duties. The “Morality of Transactions” refers to specific transactions like particular market exchanges or bargaining deals in trade negotiations and can be regarded as equivalent to the concept of *commutative justice*; it refers to the notion of *voluntary agreement* and entails avoidance of domination, bullying, coercion, exploitation. The notions of *distributive justice* or redistribution in favor of *development* on the other hand, cannot be applied to the WTO according to the Procedural Perspective: the distributive consequences of trade can at most be assessed as distributively just or unjust *within* a given society but *not* in the context of the WTO. However, in my view, the merely-procedural-principles-implications of this position for the assessment of trade and the WTO can be challenged from two different perspectives.

##### The Voluntariness Argument

First, it can be argued that we need *substantive* principles even if all that applies in the case of trade is commutative justice – which undermines not only the coherence of Nagel’s position but also, more generally, points to the shortcomings of purely procedural approaches regarding the assessment of the WTO from a normative perspective.

##### The Fairness Argument

Second, and this is the aspect I will focus on in part four of this paper, the merely-procedural-principles-implications – and *statist* and *nationalist* positions in general – can be questioned by demonstrating that the WTO gives rise to duties of distributive justice in its own right.

#### 4.1 The Voluntariness Argument – Arguing for the Need of Substantive Standards

The concept of commutative justice refers to the notion of legitimate moral claims against others which come about on the basis of voluntary agreement in the context of social cooperation.<sup>15</sup> At first sight, it appears reasonable to argue that the principles of commutative justice can be uncontroversially applied *equally* on the domestic *and* on the international level because they can be expressed in purely *procedural* terms like avoidance of domination and coercion, reliability and transparency of procedural rules, equal access to information relevant for decision and other formal standards which have to be met if agreement is to be considered “voluntary.”<sup>16</sup> However, the application of such principles involving the notion of “voluntary agreement” is not as straightforward as it may seem at first glance. As I will argue in what follows by assessing David Gauthier’s position on bargaining, we cannot judge the “voluntariness” of a bargain or a transaction (*procedural justice*), which is in the realm of commutative justice, independently from *substantive* standards of what would be morally just outcomes of the bargaining or transaction process under consideration. Thus, even if we merely aim at assessing specific transactions like trade bargains, we still need *substantive* principles about what would be morally just outcomes to judge them appropriately.

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<sup>14</sup> Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33, no. 2 (2005).

<sup>15</sup> See Wilfried Hinsch, "Die Verschuldung Ärmster Entwicklungsländer Aus Ethischer Sicht," in *Die Diskussion Um Ein Insolvenzrecht Für Staaten*, ed. M. Dabrowsky, A. Fisch, and K. Gabriel (Berlin: 2003).

<sup>16</sup> See Christine Chwaszcza, "Normative Theory and Transnational Economic Justice," (EUI, forthcoming), pp. 16f.

## David Gauthier and the Notion of Moral Bargaining

The notion of voluntariness plays a key role in Gauthier's account of *Morals by Agreement*. Gauthier argues that, whatever their specific terms, agreements are considered legitimate chiefly, first, by virtue of having been concluded *voluntarily* and, second, by being *mutually advantageous*. The question is whether his two criteria of voluntariness and mutual advantage guarantee *fairness* and in what sense his bargaining solution can be said to be fair. The view that a bargaining solution can be said to be fair hinges on the assumption that *no* agreement the bargaining parties themselves arrive at could be unfair. This assumption also seems to underlie the notion of commutative justice: if the parties arrive at an agreement, there are no grounds on which we can question it; justice is the implementation and carrying out of the agreement in question and has no applicability to its terms.<sup>17</sup> However, as I will argue in what follows, there are agreements that are both *mutually advantageous* and adopted on the basis of *voluntary agreement* but that should still be viewed as unfair, in particular, if they involve taking unfair advantage by one party of the agreement of the other.<sup>18</sup>

### The Notion of Taking Unfair Advantage

In this section, I will take a closer look at the notion of "taking unfair advantage" between two parties and argue that party *A* can take unfair advantage of party *B* even if *B* is *not* coerced.

That taking unfair advantage may be harmful to the weaker party is relatively uncontroversial; an example of such a relationship is the case of slavery. But the case I am focusing on is more controversial:<sup>19</sup> rather than looking at cases in which the weaker party is worse off as a result of the transaction in question, I am concentrating on cases which are *mutually beneficial* transactions that benefit parties, the exploiter as well as the exploitee.

What exactly it is that makes mutually advantageous transactions potentially unfair? It is true that, measured against a *non-agreement baseline*, mutually advantageous transactions are beneficial for both parties. Thus, in instances of mutually beneficial exploitation the exploited party *B* is better off than if the transaction in question had not taken place.<sup>20</sup> This is the way proponents of *Justice as Mutual Advantage* like Gauthier perceive of mutual advantage – each party gains compared to what parties could expect to get if there was no agreement. However, while the participants may have a preference for any outcome within what could be called the 'zone of agreement' as opposed to the non-agreement solution, they care about the different terms of the agreement within this zone. Mutually advantageous but exploitative transactions arise when *A* and *B* benefit in comparison to the non-agreement baseline, but where the distribution of the gains between *A* and *B* is *unfair* to *B* compared to an appropriate fairness baseline.<sup>21</sup>

On the other hand, a transaction is not unfair simply because there is unfairness in the distribution of gains. For example, as Wertheimer points out, if *B* voluntarily agrees to what might otherwise be a maldistribution of advantages, as when *B* voluntarily decides to make a gift of goods to *A*, then it seems wrong to say that this is an unfair transaction. Thus, a relationship or transaction is unfair only if there is some flaw in the *process* by which it was brought about. More particularly, the transaction in question must have come about through some special advantage of one party in the negotiation process, which that party takes advantage of in order to induce the other party to engage in this relatively less beneficial exchange. *A* can have some 'special advantage' in a number of ways; roughly,

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<sup>17</sup> Brian Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), pp. 54f.

<sup>18</sup> For recent discussions of exploitation, see Andrew Reeve, ed., *Modern Theories of Exploitation* (London: Sage Publications, 1987), Alan Wertheimer, *Exploitation* (Princeton: Princeton University Press, 1996).

<sup>19</sup> For example, Allen Buchanan's definition of exploitation implies that the transaction in question is necessarily harmful for *B*. See Allen Buchanan, *Ethics, Efficiency, and the Market* (Totowa, NJ: Rowman and Allanheld, 1985), p. 87.

<sup>20</sup> Joel Feinberg holds that if a transaction is mutually beneficial, then *A* does not gain at *B*'s expense. See Joel Feinberg, *Harmless Wrongdoing*, vol. 4, *Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1988), p. 178.

<sup>21</sup> Wertheimer, *Exploitation*, pp. 13-15, 20f.

these factors fall into two categories, (a) asymmetries in information and (b) asymmetries in bargaining power.<sup>22</sup>

Unlike in cases of information asymmetries and coercion, there are cases of mutually advantageous transactions in which B's consent is not undermined in either of these ways and in which B gives voluntary and appropriately informed consent to the transaction in question.<sup>23</sup> Yet, such transactions should still be regarded as unfair if asymmetries in bargaining power cause B to agree to a mutually advantageous transaction to which she would not have agreed under better background conditions. If negotiating parties do not enjoy equality of bargaining power, then unequal bargainers will be able to impose terms which reflect their own positional advantage. Taking unfair advantage occurs when the favored parties actively use their position to get the maximum return from those who have no alternative but to deal with them on the terms proposed.<sup>24</sup> Hence, some transactions or contractual arrangements, although "voluntary," may be unduly exploitative (and therefore possibly illegitimate) because of the background conditions in which they are entered into. For example, consider the case of a doctor in an isolated town who overcharges for surgery if his patients' condition is so painful that they cannot shop around or hold out. There is a moral defect in this relationship between the doctor and the patients, even if the transactions make these patients better off than they would be in the doctor's absence: the doctor takes unfair advantage of the fact that the severity of the potential patients' condition makes it harder for them to advance their interests in bargaining with him.<sup>25</sup> In case of bargaining power inequalities, stronger parties should abstain from pressurizing the weak into accepting terms which, to impartial observers, would appear unfair, even though they may be advantageous to all parties.<sup>26</sup> To the extent that we find that these conditions are not met in the real world in the context of WTO negotiations, we have to come to the conclusion that WTO trade rules and the process in which they are adopted are unfair.

#### **4.2 Requirements of Fair Procedure and Commutative Justice**

First, Fairness demands that bargaining power inequalities should not be abused to coerce weaker parties or to get them to agree to a transaction to which they would not have agreed in the case of more symmetric bargaining power or under better or perhaps more just background conditions. But a closer look at unanimity-based decision-making in the WTO shows that the unanimity rule results in a number of problems for some of the negotiating parties, even in the absence of bargaining power inequalities:<sup>27</sup> First, unanimity-based decision-making presupposes presence in the meeting at which the decision is taken, and a number of poor developing countries lack permanent representation in Geneva. Second, in order to foster reaching agreement, many developing countries are excluded from a number of stages of the negotiation process. Third, in the WTO, unanimity is 'measured' through an open show of hands rather than a secret ballot. Many developing countries fear that open opposition to a proposition that a developed country is supporting would give rise to retaliatory consequences against them, and hence decide to remain silent, which, however, is also interpreted as consensus.<sup>28</sup> In sum, decision-making by unanimity does not seem to be a sufficient condition for WTO negotiations to be fair and the resulting agreements to be commutatively just. There are additional conditions that have to be satisfied.

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<sup>22</sup> See David Miller, "Exploitation in the Market," in *Modern Theories of Exploitation*, ed. Andrew Reeve (London: Sage Publications, 1987).

<sup>23</sup> For Wertheimer's discussion of what he calls "consensual exploitation," see Wertheimer, *Exploitation*, pp. 353f.

<sup>24</sup> Miller, "Exploitation in the Market," p. 159.

<sup>25</sup> See also Richard Miller, "Globalization Moralized," *The American Philosophy Association* 77, no. 3 (2004): p. 12.

<sup>26</sup> See also Cecilia Albin, "Negotiating International Cooperation: Global Public Goods and Fairness," *Review of International Studies* 29 (2003).

<sup>27</sup> See also Amrita Narlikar, "Fairness in International Trade Negotiations. Developing Countries in the GATT and WTO" (paper presented at the Conference on Political Economy of Fairness and Globalization, Tulane University, 2005), p. 13.

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

Therefore, a second requirement of public institutions is the right to equal participation in the decision-making process of the institution under consideration. Some progress in this regards has been made in the Doha Round but contrary to the promises of change after developing countries had expressed their frustration with the 'Green Room' system (named after the location where inner-circle meetings were held during the Uruguay Round), exclusive negotiation processes are still very relevant.

Third, in order to have an effective voice in the negotiations, participants must be well-informed which in turn requires trained staff and material resources. While the WTO has increased its efforts in this field, some developing and least developed countries still lack the diplomatic and analytical resources to make meaningful use of their rights of participation.<sup>29</sup>

In sum, in the WTO, the requirement of unanimous agreement seems therefore not an adequate sign of fairness or commutative justice, even in the absence of inequalities of bargaining power, because unanimous agreement may conceal the fact that the conditions relevant for arriving at an informed decision and the opportunity to present a position can differ tremendously.

#### **4.3 Summing Up: The Need for Substantive Standards**

The core of my objection to the Procedural Perspective is that we cannot judge "voluntariness" or fairness of a bargain or a transaction (*procedural* justice), which is in the realm of commutative justice, independently from *substantive* standards of what would be morally just outcomes of the bargaining or transaction process under consideration. In conclusion, contrary to the Procedural Perspective, both the quest for and the application of substantive standards of what would be fair or just trade outcomes is inescapable even if all we want to do is focus on seemingly uncontroversial principles of commutative justice.

So what does this imply normatively? It is uncontroversial that developing countries ought not to be implicitly coerced into accepting unjust or exploitative international agreements. More controversial is how far, if at all, the WTO should be moved by considerations of fairness justice beyond the narrow stricture not to directly promote unjust arrangements within and between member countries. This is the question I will assess in the remainder of this paper.

### **5. The Fairness Perspective**

In this section, I will argue in favor of the Fairness Perspective by demonstrating that the WTO itself can be perceived as a subject of distributive justice (thereby further challenging the Transactional Perspective). Accordingly, I do not take it as a given that the scope of distributive justice is either exclusively *domestic*, as proponents of statism and nationalism insist, or *global*, as cosmopolitans maintain; rather, I aim at challenging these existing poles in the debate by arguing that the analysis of trade regulation in the context of the WTO suggests that we should go beyond the simple dichotomy of regarding the scope of distributive justice as either purely domestic or global, thereby suggesting a novel answer to the key question in the context of theories of international socioeconomic justice, namely what the domain is where we should apply principles of distributive justice.

#### **5.1 The WTO as Subject of Justice as Fairness – The Quest for Fair Terms of Cooperation**

The notion of distributive justice I am referring to in what follows corresponds to a broadly Rawlsian view: I regard the problem of distributive justice as finding principles by which to distribute the burdens and benefits of cooperation among participating contributors.<sup>30</sup> Rawls refers to justice as fairness in the terms governing a cooperative system, which must be fair in the sense that they are terms each participant may reasonably accept. Thus, we can view the fairness of social institutions as a

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<sup>29</sup> See Bhagirath Lal Das, *The WTO and the Multilateral Trading System: Past, Present and Future* (London: Zed Books, 2003), Richard H Steinberg, "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO," *International Organization* 56, no. 2 (2002).

<sup>30</sup> John Rawls, "Kantian Constructivism in Moral Theory: The Dewey Lectures 1980," *Journal of Philosophy*, no. 77 (1980): p. 546.

matter of whether the principles ultimately governing the nature of those institutions can be justified in public reason, and whether it is possible for a member of that institution – from the point of view of the member’s own preferences – to wish the institution was different yet accept that, as things stand, it is fair that it is not.<sup>31</sup>

According to Rawls, the terms of social cooperation must be fair in the sense that they “are terms each participant may reasonably accept, provided that everyone else likewise accepts them.”<sup>32</sup> Underlying this notion of fair terms is an idea of *reciprocity*.<sup>33</sup> As Rawls says, “that its [the system of cooperation] fair terms be reasonable for all to accept is part of its idea of reciprocity.”<sup>34</sup> Gibbard points out that the idea of reciprocity involves the notion of exchange, which in turn requires “terms of trade”: we exchange unlikes, and we can ask what makes the exchange fair or unfair.<sup>35</sup> Rawls can be interpreted as arguing that *justice* is fairness in exchange, but on a grand scale: it is fairness in the terms governing a society-wide system of reciprocity.<sup>36</sup> This system of reciprocity consists in each member of the system supporting and upholding the basic structure of society, on the one hand, and drawing benefits from the structure, on the other; *Justice as Fairness* consists in returning these benefits fairly by constraining ourselves by principles of justice.<sup>37</sup> As Gibbard suggests, the key question Rawls tackles might be not “Why accept inequality?” but rather “Why restrict myself in pursuit of my own advantage?” to which Rawls, in effect, replies: “Whether you are badly off or well-off, you have what you have only because others constrain themselves and the pursuit of their own advantage by rules that head for a fair cooperative venture for mutual advantage. Constrain yourself by those rules in return, and you give them fair return for what they give you.”<sup>38</sup>

In sum, the core of the idea of *Justice as Fairness* is that contribution to a cooperative enterprise generates requirements of fairness and justice because those who benefit from the contributions of others owe the latter something in return and that by constraining yourself by principles of justice, you give others a fair return for what everyone else has given you.

## 5.2 Does the WTO Trigger Duties of Distributive Justice?

When do concerns of distributive justice arise? It is not enough to maintain that individuals mutually affect each others’ economic status. Rather, there has to be a structure of interaction. But, of course, not any type of interaction will be sufficient to prompt normative arguments on the basis of reciprocity. For example, sporadic or unintentional interactions will not meet the requirements to prompt normative arguments based on reciprocity. This in turn implies that in a world of negligible or unpredictable interactions between societies, concerns of fairness or justice regarding a larger, emergent pattern of distributional consequences of these interactions would not arise.<sup>39</sup> Rather, the fairness argument presupposes that we consider relations among agents that have a certain quality or structure and that exist on the basis of time-extended repeated interactions that go beyond irregular influence.<sup>40</sup> While it is plausible to suppose that the above criteria are lacking on a general scale in the international context, it appears reasonable to assume that they are present in the context of the WTO. Moreover,

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<sup>31</sup> See Catriona McKinnon, "Giving as Good as You Get?" *Res Publica*, no. 12 (2006).

<sup>32</sup> See Rawls, *Political Liberalism*, p. 16.

<sup>33</sup> *Ibid.*, p. 17.

<sup>34</sup> John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005), pp. 49f.

<sup>35</sup> See Allan Gibbard, "Constructing Justice," *Philosophy & Public Affairs* 20, no. 3 (1991): p. 266.

<sup>36</sup> *Ibid.*

<sup>37</sup> Rawls endorses Gibbard’s interpretation of his view as justice as reciprocity in Rawls, *Political Liberalism*, p. 17n. See also John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), pp. 76f and 132. Barry, *Theories of Justice*, pp. 234-41. Brian Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1995), pp. 46-51. See also Andrea Sangiovanni, "Global Justice, Reciprocity, and the State," *Philosophy and Public Affairs* 35, no. 1 (2007): fn. 40.

<sup>38</sup> Gibbard, "Constructing Justice," p. 266. See Brian Barry, "Justice as Reciprocity," in *Liberty and Justice*, ed. Brian Barry (Oxford: Clarendon Press, 1991), p. 212.

<sup>39</sup> See also Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs* 30 (2001).

<sup>40</sup> See Chwaszcza, "Normative Theory and Transnational Economic Justice," p. 11.

the WTO can be characterized as an ongoing, rule-based, cooperative venture for mutual advantage.<sup>41</sup> This is important because even though, in the world we live in, there are both significant and regular interactions between societies, nevertheless, the existing extent of coordination, organizational control and governance of these interactions might not fulfill the conditions of the kind of agreement and mutuality required for a cooperative venture for mutual advantage. Even if it is the case that our world is characterized by regular trade interactions among societies, questions of fairness and justice in terms of what sort of patterns of transactions with which kind of distributive consequences occur, still might not arise because of a potential lack of organizational control regarding the issues in question like in the case of “black markets,” where societies hardly have any control over what transactions are conducted and which resulting distributions arise.<sup>42</sup> However, the GATT/WTO treaty has given rise to an ongoing, rule-based system which is governed by negotiations that are subject to decision on the basis of unanimity, adjudicated by a dispute settlement system and enforced by authorized reciprocal trade sanctions.<sup>43</sup> Therefore, in sum, distributive justice does seem an appropriate standard in the context of the WTO. In light of this, establishing and maintaining a social organization, say the WTO, raises special moral concerns and responsibilities in the context of that organization: ensuring that the structure of the WTO is just can be regarded as the fair price of undertaking and maintaining the cooperative venture of trade liberalization for the sake of mutual advantage.

### 5.3 Substantive Fairness Standards

In this section, I will briefly set out what sort of substantive moral principles might be adequate in the context of the WTO.

#### [1] No Harm Principle

The first principle is based on the idea that when people (or their activities) are organized as a governable social practice, as in the WTO, we can expect them to take reasonable precautions to prevent foreseeable negative consequences of their joint activity and to protect people against and compensate for any resulting net losses.

#### [2] Relative Gains Principle

Moreover, one could argue that a joint project like the WTO is to be organized such that all members, who do their part in terms of supporting and upholding the structure of the system, receive a fair share of its benefits, and no more than an equal or just or otherwise acceptable share of the burden that make those benefits possible. But what is the fairness baseline? In what follows, I will reply to this question from the perspective of bargaining theory, which has its origins in John Nash's work.<sup>44</sup> Nash's axiomatic solution to the bargaining problem is that the product of the relative utility increase of each bargainer is maximized. This solution suggests that (i) each player will have a *threat point* (their best alternative to a negotiated agreement, BATNA); (ii) the magnitude of the potential net benefits will depend on the subjects that are on the table (the *negotiating set*); and (iii) the improvements that can be attained relative to the threat points through the negotiation process will depend on the players' *power*. Against this background, we can define a 'fair' agreement as an agreement that distributes the per-capita benefits to nations more equally, relative to threat points, as compared with what would be the

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<sup>41</sup> Since the process of trade liberalization and the rules by which it is governed involve commitments in the interest of mutual benefit, the process in question can be said to represent a cooperative venture for mutual advantage. See also Miller, "Globalization Moralized," p. 9.

<sup>42</sup> See Aaron James, "Distributive Justice without Sovereign Rule: The Case of Trade," *Social Theory and Practice* 31, no. 4 (2005): p. 7. Aaron James, "Skepticism About Fairness in Trade," (2006), p. 10.

<sup>43</sup> See James, "Skepticism About Fairness in Trade," p. 9.

<sup>44</sup> John Nash, "The Bargaining Problem," *Econometrica*, no. 18 (1950).

outcome of the Nash bargaining solution<sup>45</sup> A potential starting point for achieving more fairness are tariff peaks and tariff escalation and other trade rule biases against developing countries. While the Doha Round has placed renewed emphasis on the importance of sharing the benefits of trade reform fairly among developed and developing countries, there has been less attention paid to the distribution of adjustment costs among countries. Yet, there are not only gains but also pains from trade. Insofar as multilateral trade liberalization is imposing adjustment costs on developing countries, those who benefit relatively more of the system should meet these costs: adjustment costs can be thought of as the 'fair return' to be paid for the benefits of multilateral tariff reduction.

### [3] Effective Market Access Principle

Last but not least, it seems reasonable that trading nations are to provide WTO members with effective market access. Market access is not the most important variable constraining export growth in many developing economies.<sup>46</sup> Many developing countries (notably the poorest) are ill equipped to take full advantage of new trade opportunities because of significant supply-side and institutional constraints.<sup>47</sup> Consider the domestic analogy. In the domestic case it is important that individuals do not merely enjoy certain formal rights but are entitled to a share of the social means allowing them to effectively exercise those rights. So too in the WTO case: formal market access guarantees would be meaningless unless they were backed up by a substantive reduction of supply side constraints, allowing WTO members to make effective use of such guarantees. The extent to which gains from trade can be realized in practice, notably in low-income developing countries, depends on the complementary policy actions taken to improve the investment climate, build trade-related capacity, and meet adjustment costs.<sup>48</sup> Improved market access without the capacity and transportation to sell is not much use.

## 5.4 Summing Up: Is it 'Just' Trade or is there a Case for 'Trade Justice'?

This part of the paper was devoted to defending the claim that international trade regulation in the context of the WTO raises issues of justice as fairness in its own right, which suggests that there are

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<sup>45</sup> Bernard Hoekman and David Vines, "Multilateral Trade Cooperation: What Next?," *Oxford Review of Economic Policy* 23, no. 3 (2007). Because actual gains from trade depend not only on liberalization by others but also on ones own actions, one key difficulty in interpreting normative requirement that assess the fairness of the distribution of gains from trade in one way or another is that it is likely to be misleading to focus exclusively on the overall benefits each country receives. For example, a very substantial share of the costs of agricultural subsidies is born by the developed countries. Not only are there huge budgetary costs associated with the subsidies, but the subsidies distort production, and thus there is an efficiency loss associated with them. Were developed countries to eliminate their subsidies, they would therefore be among the main beneficiaries. Thus, a refinement of the Nash-based fairness criterion would also take account of the benefit granted to others. See Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All. How Trade Can Promote Development* (Oxford: Oxford University Press, 2005), p. 123. p. 76.

<sup>46</sup> Bernard Hoekman, "More Favorable Treatment of Developing Countries: Ways Forward," in *Trade, Doha, and Development: Window into the Issues*, ed. Richard Newfarmer (Washington, D.C.: The World Bank, 2005). Julia Nielson, "Aid for Trade," in *Trade, Doha, and Development: Window into the Issues*, ed. Richard Newfarmer (Washington, D.C.: The World Bank, 2005). Joseph E. Stiglitz and Andrew Charlton, "Aid for Trade," *A report for the Commonwealth Secretariat* (2006). Simon J. Evenett, "Some Tough Love On "Aid for Trade"," *Intereconomics* (2006). Hoekman and Vines, "Multilateral Trade Cooperation: What Next?." Bernard Hoekman, "Strengthening the Global Trade Architecture for Development: The Post Doha Agenda," *World Trade Review* 1, no. 1 (2002). Bernard Hoekman and Susan Prowse, "Economic Policy Responses to Preference Erosion: From Trade as Aid to Aid for Trade," *World Bank Policy Research Working Paper Series*, no. 3721 (2005). Bernard Hoekman and Carlos A. Primo Braga, "Special and Differential Treatment and the Doha Development Agenda: Beyond Tariff Preferences," *World Bank* (2006). Bernard Hoekman, "Operationalizing the Concept of Policy Space in the WTO," *World Bank Policy Brief*, no. 4 (2004). Susan Prowse, "'Aid for Trade': Increasing Support for Trade Adjustment and Integration—a Proposal," in *Economic Development and Multilateral Trade Cooperation*, ed. S. Evenett and B. Hoekman (Basingstoke: Palgrave Macmillan, 2006). Ernesto Zedillo and UN Development Project Task Force on Trade, *Trade for Development* (London: Earthscan, 2005). Bernard Hoekman, "Aid for Trade: Helping Developing Countries Benefit from Trade Opportunities," in *Aid for Trade and Development*, ed. D. Njinku and H Cameron (Cambridge: Cambridge University Press, 2008). International Monetary Fund and World Bank, *Doha Development Agenda and Aid for Trade* (Washington, D.C.: IMF and WB, 2006).

<sup>47</sup> World Bank and IMF 2005.

<sup>48</sup> Hoekman and Winters 2004.

moral obligations in the context of the WTO even if we reject the notion that the WTO should be seen as a redistributive agency to transfer income to developing and least developed countries.

## **6. From Theory to Practice – Developing Countries in the WTO**

What are the implications of the above assessment for the WTO? In what follows, I focus on two aspects that are important in this context and link back to the normative assessment of procedural and substantive fairness question in the context of the WTO and its links with development: first, the challenges of participation and inclusion and second, more effective favorable treatment for developing countries.

### **6.1 Participation and Inclusion: A Parliamentary Dimension**

Developing countries are demanding more participation and greater inclusion in WTO negotiations. Which steps could be taken to better incorporate developing-country voices – in line with the procedural normative fairness requirements? In what follows, I set out two options: first, rule-based steering body and second, of a parliamentary dimension to the WTO.

[1] Once participation in a group or committee exceeds a certain number, say 25 or 30, becomes progressively more difficult and ultimately impossible. Large organizations typically deal with this problem by having a steering body with a limited membership (the IMF and the World Bank Executive Boards, the UN Security Council). The WTO has no corresponding limited-membership formal body – a problem that is not addressed by the Sutherland Report. The issues are how best to balance formality with informality, politicians with officials and transparency with effectiveness, so that everyone has confidence in the process allowing a legitimate decision to emerge by consensus.<sup>49</sup> Since small group meetings seem inevitable, the reliance on steering groups, technical and administrative staff to draw up the agreements and the preparation of the agreements by subgroups or coalitions strategies can be regarded as acceptable strategies of bargaining but in order to be adequate, the moves should be transparent and there should exist some rules according to which the game is played that are well-defined and binding for all.<sup>50</sup>

[2] A formal WTO parliamentary assembly, even if merely consultative in the beginning, would strengthen the input of global civil society and developing countries in trade negotiations significantly. Moreover, it would also give a voice to the concerns of those within member states. Of course, the prospects for creating a parliamentary assembly that could exercise some rules oversight or other powers analogous to domestic legislative bodies in the WTO seem very small in the near term. Yet, there are a number of steps that could both reinforce parliamentarians' influence and raise pressure on the WTO to eventually consent to a formal standing body.<sup>51</sup> For instance, the informal WTO Parliamentary Conference could take on a greater role in observing rules formation in the organization. A crucial next option would be to work towards a more formal and representative structure for the Parliamentary Conference. In the longer run, a WTO parliamentary body with some co-decision powers regarding the organization's governance could be created. Options for co-decision powers include a confirmation role in the selection of new directors general and members of the WTO Appellate Body and participation in budgetary oversight.

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<sup>49</sup> Robert Wolfe, "Decision-Making and Transparency in the 'Medieval' WTO: Does the Sutherland Report Have the Right Prescription?," *Journal of International Economic Law* 8, no. 3 (2005).

<sup>50</sup> Blackhurst, "The Future of the WTO: Some Comments on the Sutherland Report."

<sup>51</sup> The following draws on Luis Cabrera, "The Inconveniences of Transnational Democracy," *Ethics & International Affairs*, 21, no. 2 (2007).

## 6.2 Is There a Link between Procedural and Substantive Duties?

Procedural and substantive duties of justice are very closely intertwined.<sup>52</sup> But how do procedural and substantive duties relate to each other? Is there a direct link? In light of the above assessment and of what follows in this section, this does not seem to be the case: changing the procedures to automatically achieve substantive justice seems difficult if not impossible.

First, it may not be possible to bring about complete procedural justice in the WTO in the first place. From a theoretical or moral perspective, the voluntariness-requirement of procedural justice might seem trivial. From a practical perspective, the requirement is not trivial at all because unanimous agreement is not *per se* an indication that requirements of commutative justice are met insofar as the influence of unequal bargaining power in the context of WTO negotiations heavily undermines its fulfillment.

Second, it could be doubted whether it is desirable at all to achieve procedural justice in the WTO. On the one hand, some commentators seem to imply that meeting the requirements of procedural justice, for instance, the right for each of all members of the WTO to participate in all the stages of the negotiation process, is not desirable from the perspective of outcome effectiveness, which – and this is important – in turn is likely to have crucial effects on normative criteria like justice and legitimacy. Advancing procedural justice by enhancing each member's participation in each stage of the negotiation process may actually divert discussion to another (possibly even less participatory) forum.<sup>53</sup>

In sum, since there is no direct link between procedural and substantive duties, there are two leverages, that is, two complementary sources of normative concern. What follows from the above discussion is that we need to apply a dynamic view of procedural and substantive justice to overcome a rigid dichotomy. A categorization that focuses either on processes and structures or on output runs the risks of segmenting the problem, cutting it into small slices and losing the broader picture. Procedural and substantive questions are clearly linked. And there seem to be potential trade-offs between procedural and substantive justice that make the relation more contentious than is often assumed. We need to ask how significant these potential trade-offs are and how reforming elements of the system affects the overall functioning of the institution and in what instances and how it may be possible to overcome the potential trade-off between procedural and substantive justice.<sup>54</sup>

## 6.3 Strengthening Differential Treatment for Developing Countries

The traditional approach to Special and Differential Treatment (SDT) for developing countries – and 'development' more generally – in the WTO comprises *limited reciprocity* in trade negotiations and (transitory and permanent) *exemptions* from certain rules in addition to *trade preferences*. The Doha Declaration called for a review of SDT provisions but no agreement has yet proved possible on strengthening SDT provisions. In what follows, I will argue that there are three major components of more effective SDT:<sup>55</sup> [1] greatly improved market access for developing countries, [2] mechanisms to ensure that WTO rules and disciplines support development and [3] increased 'Aid for Trade' (AfT). I will argue that combining greater overall non-discriminatory access to markets with an enhanced ability

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<sup>52</sup> For a discussion of the similar notion of input and output legitimacy and their interrelation in the context of the EU, see Fritz W Scharpf, *Regieren in Europa: Effektiv Und Demokratisch?* (Frankfurt a.M.: Campus Verlag, 1999).

<sup>53</sup> Wolfe, "Decision-Making and Transparency in the 'Medieval' WTO."

<sup>54</sup> Of the static analyses that focus on either of the related notions of input or output legitimacy, there are relatively few on the *output side*. Research has been dominated by contributions concentrating largely on the *input side*, focusing, for example, on domestic factors influencing trade policy-making, various aspects of decision-making in the WTO and the role of non-governmental organizations. See Andreas R. Ziegler and Yves Bonzon, "How to Reform WTO Decision-Making? An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy," *NCCR Trade Working Paper* 2007, no. 23 (2007). Future research on the balance and dynamics of procedural and substantive justice in the WTO could potentially focus on comparative social scientific analysis and draw from real-world experience in national policy arena or in other global economic multilateral organizations, such as the World Bank, IMF or regional economic organizations, such as the European Union.

<sup>55</sup> The following is based on Hoekman, "More Favorable Treatment of Developing Countries: Ways Forward."

on the part of low-income countries to exploit such access with the help of AfT is a better instrument to pursue fairness and development than providing exemptions and opt-outs.<sup>56</sup>

### **[1] Market Access for Disadvantaged Countries: MFN Instead of Preferences**

Trade preferences have been one major component of SDT over the past decades. One option to enhance SDT would be to broaden duty-and-quota-free market access, as under the 'Everything but Arms' agreement between the EU and Least Developed Countries (LDCs), to *all* developing countries.<sup>57</sup> From a normative perspective, preferences should be targeted on the poor, wherever they are located, and not on a restricted group of countries. In terms of absolute numbers, most poor people are based in countries that are not LDCs, such as China and India. By restricting preferences to LDCs, the majority of the poor are not taken account of: some of them confront tariffs that are more than twice as high as those confronting non-poor producers.<sup>58</sup> But deep trade preferences for larger economies like China and India are not politically realistic. Even more importantly, evidence suggests that preferences are much less effective than expected. Preferences are usually of little value [i] because they exclude items of interest to developing countries such as textiles and agricultural products, [ii] because they restrict the value of exports eligible for preferential treatment [iii] because other non-tariff measures are used to restrict access or because [iv] of complex administrative requirements and red tape, notably restrictive rules of origin.<sup>59</sup>

In light of the above, action is required to liberalize, on a nondiscriminatory basis, trade in goods and services in which developing countries have a comparative advantage.<sup>60</sup> MFN-based market access is not traditionally considered an element of SDT. Yet it may well have the largest positive effect on development. For instance, it could decrease 'biased' trade rules in the WTO by undoing special opt-outs and exemptions that benefit interest groups in industrialized countries at the expense of developing countries. Examples include agricultural subsidy programs, high protection for textile products, tariff peaks and escalation. MFN liberalization should be combined with actions to redistribute some of the global gains from trade to assist the poorest countries so that they can benefit more from trade opportunities (see below) – aid, rather than preferences, is a more efficient instrument to provide assistance.<sup>61</sup>

### **[2] Implementation of WTO Rules**

As mentioned above, the traditional approach to SDT comprises opt-outs or exemptions from certain WTO rules. Whether this enhances development or not depends on whether or not the exempted countries would benefit if they did in fact implement the rules at issue.<sup>62</sup> In this context, it is important to differentiate between trade-policy disciplines and rules that require significant investment of resources to establish or reform institutions.<sup>63</sup> The former should apply uniformly to all WTO members.<sup>64</sup> Yet, in relation to the latter, one size does not fit all. While some rules may necessitate

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<sup>56</sup> See, for example, Hoekman (2002), Bhagwati (2004), Sutherland et al. (2004), UN (2005), Zedillo *et al.* (2005), Page (2006) and Prowse (2006).

<sup>57</sup> Hoekman, "More Favorable Treatment of Developing Countries: Ways Forward."

<sup>58</sup> World Bank (2002).

<sup>59</sup> Çağlar Özden and Eric Reinhardt, "The Perversity of Preferences: GSP and Developing Country Trade Policies 1976–2000," *World Bank Working Paper*, no. 2955 (2003). Bernhard Hoekman, "Dismantling Discrimination against Developing Countries " *CEPR Discussion Paper No. 4694* (2004): p. 9. Aaditya Mattoo and Arvind Subramanian, "The WTO and the Poorest Countries: The Stark Reality," *World Trade Review* 3, no. 3 (2004). Paul Brenton, "Integrating the Least Developed Countries into the World Trading System," *Journal of World Trade* 37, no. 3 (2003).

<sup>60</sup> Hoekman, "More Favorable Treatment of Developing Countries: Ways Forward."

<sup>61</sup> Bernard Hoekman, "Development and the Global Trade Architecture. An Overview of the Global Trade and Financial Architecture Project," *World Bank*, no. August (2005).

<sup>62</sup> Hoekman, "More Favorable Treatment of Developing Countries: Ways Forward."

<sup>63</sup> J. Michael Finger, "Implementation and Imbalance: Dealing with Hangover from the Uruguay Round," *Oxford Review of Economic Policy* 23, no. 3 (2007).

<sup>64</sup> Bernard Hoekman, C. Michalopoulos, and A. Winters, "Special and Differential Treatment in the WTO after Cancún," *The World Economy* 27, no. 4 (2004).

various requirements before their implementation will be beneficial, others may not be suitable for very small countries that may lack the scale needed for benefits to top implementation costs. Accordingly, there is a need to distinguish among developing countries when determining the scope of resource-intensive WTO rules. As suggested by Hoekman, possible approaches to differentiation are:<sup>65</sup>

(a) One approach is based on the current state of affairs – essentially, to allow for (and facilitate) opt-outs by developing countries. This approach is clearly discernible in many countries' current proposals but as the status of the negotiations suggests, it is unlikely to be successful.

(b) A second approach is *country-specific* determinations of eligibility for rule-related SDT provisions. A major advantage of differentiation on the basis of simple country criteria is that there is no need for additional negotiation. The disadvantage is that criteria are inherently arbitrary, and to date has been resisted by many WTO members.

(c) A third alternative is an agreement-specific approach in which objective criteria in each agreement would link implementation by developing countries to local conditions, priorities, and capacities and to availability of technical assistance. This option would allow the issue of defining general eligibility to be avoided, but it involves significant transaction costs.<sup>66</sup>

(d) A fourth alternative is to define a set of 'core' disciplines – rules arguably the MFN rule, the ban on quantitative restrictions, committing to ceiling bindings for tariffs, engaging in the process of reciprocal trade liberalization, and transparency of policy – and to make these binding.<sup>67</sup> Given agreement on a set of 'core' principles, countries would be permitted not to implement 'non-core' WTO rules on development grounds. The aim of this approach is to assist better integration of developing countries into the WTO. Advantages of the proposed approach are that it would involve the generation of assessments whether instruments are realizing development objectives, allow inputs from development institutions that have the experience, local presence and capacity to provide both policy advice and financial resources and help advance communication between the development and trade communities. It would supplement the approach that has greatest support in the current negotiations: an agreement-specific approach involving the *ex ante* setting of specific criteria to determine whether countries could opt out of the application of negotiated disciplines.

### **[3] Aid for Trade**

AfT encompasses five main activities, which are generally combined in successful aid-for-trade projects.<sup>68</sup> (i) Technical assistance: to assist countries confronted with the complexities of modern trade. (ii) Capacity building: to deal with trade issues, for example, through the training of government officials. (iii) Institutional reform: helping to create a framework of sound and well-functioning institutions for trade, for example, in customs. (iv) Infrastructure: improving roads and ports etc. through investment in infrastructure. (v) Assistance with adjustment costs: fiscal support and policy advice to help countries cope with any transitional adjustment costs from liberalization: effects on fiscal income, preference erosion, effects of the adjustments required (including labor adjustments in connection with restructuring) and agreement implementation costs, in particular in areas such as intellectual property and rules for services.

The first category of assistance (i to iv) is aimed at trade capacity building for development and at strengthening competitiveness. It refers to long-term needs which, for the most part, do not depend on the current negotiations. The second type of assistance (v), which is intended to meet trade reform

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<sup>65</sup> Hoekman, "More Favorable Treatment of Developing Countries: Ways Forward." Currently, whether SDT is invoked in the WTO is left to individual members (i.e., whether or not to self declare as a developing country), with a mix of unilateral action and bargaining by developed country members whether to accept this and provide SDT.

<sup>66</sup> *Ibid.*

<sup>67</sup> Hoekman, B. 2005. "Operationalizing the Concept of Policy Space in the WTO." *Journal of International Economic Law* 8(2): 405-24.

<sup>68</sup> Nielson, "Aid for Trade."

costs, is a response to short-term needs and is geared to situation where costs are imposed on some countries as a result of reform while there are gains for other countries or overall gains.

### **Justifying Differential Treatment and Aid for Trade**

AfT, and differential treatment more generally, can be argued for and justified from different perspectives. In what follows, I will first make the case that justifying AfT with reference to preference erosion faces problems. Second, I will apply the three substantive fairness standards developed in part 5 of this paper to the case of AfT, assess their potential and limits with respect the convincing justification of different types of AfT and argue that they should be combined in to complement each other.

#### **[A] Preference Compensation Justification**

A frequently occurring argument for AfT is based on the demand for compensation of the costs that are generated through preference erosion. There are a number of problems with this approach.<sup>69</sup> First, restricting AfT to preference compensation is likely to narrow the potential pool of donors since the problem of preference losses is arguably a question that concerns the recipients and the granters of preferences, mainly the EU and the US. Other rich countries may be unwilling to provide assistance to settle a challenge they did little to create. More importantly, AfT would be targeted at those countries who are most disadvantaged by preference erosion, rather than those countries who are most in need overall or those countries facing the largest net-losses from the round as a whole. Losses from preference erosion only concern the few countries that have managed to take advantage of preferential market access, and these are not, for the most part, the least developed countries. Moreover, it is doubtful that countries which have benefited from a historical preference should be compensated above those who are currently more needy.

#### **[B] No Harm and Political Justification**

A second justification for AfT is based on the 'no harm principle' set out above, which implies that trade agreements should not lead to net losses. This justification overlaps with the political motivation to try to 'buy' progress in the Doha Round.<sup>70</sup> This view leads to the conclusion that aid should go to those countries that would be net losers from the Doha Round and have an incentive to impede its progress.<sup>71</sup> From a normative perspective, the problem with focusing exclusively on this approach is that it may prevent AfT reaching the neediest countries.

#### **[C] The Fair Relative Net Gains Justification**

A third justification for AfT is fairness regarding the distribution of net gains from trade across WTO members. An ambitious Doha agreement will generate considerable benefits for developed member states – and that these gains will far outweigh the benefits for poor countries. Above I have argued that a joint venture for mutual advantage like the WTO is to be organized such that all members receive a fair share of its benefits, for example, such that the share of the gains from the agreement that accrue to all players are more equal than in the case of a Nash bargain. Moreover, in this context, AfT can be seen as a mechanism through which the reality of the unbalanced outcome can be squared with calling the Doha Round the "Development Round." However, since influencing the distribution of gains among WTO members is likely to be extremely controversial and potentially counterproductive with respect to the overall amount of gains from trade, it may be better to focus in relative *net* gains by taking account of adjustment costs. In this context, the one could argue that developing countries should be compensated by the beneficiaries for costs and losses arising from trade agreement, independent of their gains in other areas and in the deal as a whole.

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<sup>69</sup> Stiglitz and Charlton, "Aid for Trade."

<sup>70</sup> Ibid.

<sup>71</sup> Evenett (2005).

Against this, one could maintain that each liberalizing country should take responsibility for the adjustment and the resulting costs. A country liberalizes, adjusts, and gains – what do other have to with this? There are at least two replies to that question, which I call [a] the Cooperative Scheme Argument, [b] the Mutual Imposition of Costs Argument:

First, one could argue that the existence of the WTO as a cooperative scheme of multilateral trade liberalization implies that both the benefits and the burdens of the cooperative activity ought to be shared and take account of the different starting positions of different countries. There are several reasons for why adjustment to new trade rules is a thoroughly difference experience for developed and developing countries.<sup>72</sup> First, when tariffs are reduced, developing countries lose one of their main sources of income. Second, developing countries are most vulnerable to trade rule changes because many are dependent on the export and hence world price of just one or two commodities. Third, developing countries are likely to have to make the largest adjustments to satisfy international trade rule regulations. Thus, part of the problem is that in developing countries, which are already characterized by high unemployment, weak insurance markets and low levels of social protection, the burdens and adjustment costs of trade liberalization may have a particularly severe effect. Accordingly, the joint cooperative activity of trade liberalization involves much more severe challenges and burdens for individuals in developing rather than in developed countries. Suppose developing countries have entered the WTO due to lack of better alternatives and suppose that they confront special, severe challenges and burdens as a consequence of joining; then those others, who do not need to cope with analogous challenges and burdens and who derive benefits from the shared cooperative arrangement, should employ their benefits to lessen the weight of the special burdens the others face.

At present, trade liberalization seems like a marriage in which one spouse makes the majority of the sacrifices that are required to sustain a successful shared family life while her partner could generate a more balanced basis for their shared achievements; the fact that existing arrangements are better for her than separation or divorce hardly justifies the extent of the imbalance in their relationship.<sup>73</sup> The basic indictment here is not harm but rather wrongful neglect and unfair distribution of the burdens of a mutually beneficial process that is governed by a joint cooperative organization like the WTO.

Second, one could also reply by pointing out that the effects of trade liberalization are of course not limited to the liberalizing country itself and that other countries' liberalization measures, from which they benefit, also impose adjustment costs on yourself. In this context, there is an important asymmetry: "what developing countries do in opening up their markets to developed countries has a much smaller impact on the developed countries than the converse – what the developed countries do in opening up their markets to the developing world. In short, the developed countries themselves gain from liberalizing their own markets, because they are able to adjust, and the disturbances posed to them by the developing countries are small. The developing countries are in a far more disadvantageous position – they will need assistance in making the required adjustments."<sup>74</sup>

In sum, it is morally objectionable if high-income countries benefit from engaging in trade relations with low-income countries, while not taking account of their excessive burdens in the joint activity of international trade – unless they do enough to use their benefits to reduce such burden. The above discussion makes clear that the *fair relative net gains approach* can justify the compensation of adjustment costs, which is a crucial element of a fair trade agreement. However, this approach should be combined with a focus on effective market access in order to cover both types AfT measures outlined above.

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<sup>72</sup> See also Bernhard Hoekman and Constantin Michalopoulos, "Special and Differential Treatment of Developing Countries in the WTO: Moving Forward after Cancún," *The World Economy* 27 (2004).

<sup>73</sup> See Miller, "Globalization Moralized," p. 11.

<sup>74</sup> See Stiglitz and Charlton, *Fair Trade for All*, p. 108.

#### **[D] Effective Market Access Justification**

A further rationale for AfT is to conceive it as a necessary complement to the core market access issues at the core of the Doha negotiations.<sup>75</sup> AfT should create 'effective market access' by removing internal barriers to trade. The message from least developed and developing countries should be that AfT must be an indispensable component of the market access agenda because it is meaningless to provide tariff-free entry if the countries in question are unable to make use of it: providing market access must mean providing both free entry and aid to ensure access can be used.

#### **Principles and Institutional Framework for Managing of Aid for Trade**

The fundamental principles that an AfT mechanism should meet include the following: assistance should be provided in the form of grants, be credible and predictable, apply to a large number of developing countries, identify trade capacity needs in a strictly country-driven and country-owned process and be independently monitored.<sup>76</sup> Resources should be fully additional to existing aid budgets, rather than diverted from other priority areas.<sup>77</sup>

Page and Kleen (2004) propose that a new AfT fund be established within the WTO that would distribute funding to recipient countries in accordance with their loss of preferences.<sup>78</sup> There are good reasons to doubt the merits of establishing such a new separate fund dedicated to AfT.<sup>79</sup> Most importantly, creating a stand-alone fund aimed at one particular structural adjustment need runs counter to a more harmonized approach to development assistance and the emerging wisdom on enhancing international policy coherence. Rather, increased trade assistance should build upon existing programs, in particular the Integrated Framework (IF), which brings together the IMF, ITC, UNCTAD, UNDP, the WTO and the World Bank. The objective of the IF is to embed a trade agenda into a country's overall development strategy. Recent challenges for the IF have included lack of in-country capacity, insufficient and uncertain financing and variable donor response to priorities identified in the diagnostic trade integration study. However, recent improvements to the IF are targeted at tackling those issues.<sup>80</sup>

### **6.4 Summing Up: Participation, Inclusion and Differential Treatment**

In this last part of the paper, I have outlined some of the implications of my assessment of the normative issues discussed above. In terms of procedural dimension, I have focused on the challenges of participation and inclusion. In this context, I have argued in favor of a new basis for putting together such sub-groups, which should be is fully transparent, predictable, equitable and legitimate in the eyes of all WTO members and in favor of a parliamentary dimension of the WTO that would lead to better representation of the demands of all stakeholders. In terms of the more substantive outcome dimension, I have focused on favorable treatment for developing countries. I have set out the three pillars that such an approach should include. SDT and increasing efforts to use additional adjustment assistance to rebalance outcomes *within* countries and AfT to rebalance them *between* countries should be regarded as moral obligation rather than as charity. The three building blocks of SDT referred to above are not just to be seen as an charitable 'extra' benefit for developing countries to foster development but rather as indispensable elements for a fair and just trading system. Moreover, from a

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<sup>75</sup> Stiglitz and Charlton, "Aid for Trade."

<sup>76</sup> Prowse, "'Aid for Trade': Increasing Support for Trade Adjustment and Integration—a Proposal."

<sup>77</sup> The fact that in absolute terms developed countries would gain economically more than developing countries from WTO trade liberalization means that they should be able to provide even more assistance.

<sup>78</sup> Peter Kleen and Sheila Page, "Special and Differential Treatment of Developing Countries in the World Trade Organization," *Global Development Studies*, no. 2 (2004). Similarly Grynberg and Silva (2004) suggest the creation of a Special Fund for Diversification to benefit preference dependent countries.

<sup>79</sup> Stiglitz and Charlton, "Aid for Trade." See also Prowse, "'Aid for Trade': Increasing Support for Trade Adjustment and Integration—a Proposal."

<sup>80</sup> See Prowse, "'Aid for Trade': Increasing Support for Trade Adjustment and Integration—a Proposal." and Nielson, "Aid for Trade."

normative point of view, notions such as ‘favourable’ or ‘special’ treatment for developing countries are potentially problematic. To refer to something as ‘favourable’ or ‘special’ treatment may suggest that the person receiving the treatment is being given an unfair advantage. Yet, just as we would be wary of calling stair-lifts for wheelchair users ‘favourable’ or ‘special’ treatments, we should be wary of calling measures like longer transition periods for developing countries ‘special treatments’ – they are just different treatments for countries with different capabilities and needs: as poor countries are in need of measures like longer transition periods, allowing for them is simply a differential treatment, and *not* a ‘special’ treatment.

## 7. Conclusion

In this paper, I have first challenged the *Instrumental Perspective* on the grounds that the WTO is not a vehicle for income transfers and does not have access to enough instruments to promote development. Second, I undermined the *Procedural Perspective* by demonstrating that it is not possible to judge the voluntariness or fairness of a bargain or a transaction independently from substantive moral criteria regarding fair or morally just outcomes. I also pointed to three procedural normative standards for the WTO. Third, I have argued in favor of what I characterize as the *Fairness Perspective* by demonstrating that the WTO itself can be perceived as a subject of substantive standards of justice as fairness. Moreover, I have set out four substantive normative standards that are relevant in the context of the WTO. My line of argument shows that international institutions like the WTO prompt important questions regarding international socioeconomic justice. Specifying these normative requirements of international institutions is work in progress that has hardly begun but it must try to go beyond the poles of statism and nationalism on the one hand and cosmopolitanism on the other. This is where a crucial part of the objective of working out requirements of international socioeconomic justice lies. Last but not least, I have assessed how the substantive-justice-oriented development relevance of the WTO could be improved regarding SDT. Of the three major dimensions of SDT – better market access for developing countries’ exports of goods and services, implementation and enforcement of WTO rules, and expanded AfT – agreement on how to deal with implementation constraints and define policy flexibility is likely to take time but rapid movement is possible on the first and last. However, aid in itself is not enough – at least as important is setting up suitable policies that encourage trade and investment in developing countries.

*Clara Brandi*

*European University Institute, Florence*

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