Article

Revisiting the Application of the Theories of International Trade and Exploring the Scope for Welfare-*Grundnorm* in International Trade Negotiations

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Abstract

It is normally true that international trade negotiations result in making international trade rules. What is not evidently understood, however, is whether international trade negotiations are designed to apply international trade theories in making rules or not. To put it clearly, what role do international trade theories play in international trade negotiations and rule-making? This paper delves into this fundamental question and analyzes the reasons for the inclination of sidestepping international trade theories in international trade negotiations and rule-making. It observes that one of the fundamental reasons is that most of the existing trade theories do not provide sufficient methodological grounds to shape the rule-making process in the WTO. Second, some of these theories are built to protect local interests through international regimes and thus are unhelpful in shaping international rule-making. In most cases, trade negotiators obsessively try to apply trade theories which have no prospects in defining the content of international trade rules. Third, as an alternative inquiry, this paper analyzes and suggests welfare-*grundnorm* as a theory and methodology for designing international trade negotiations and making international trade rules.

1. Why Trade?

This paper discusses the rationale of international trade, mainly the reasoning of trade. Trade, both at the domestic and international level, is justified mostly with similar reasoning. The need for the existence and efficiency of a government, a profit motive of the producers, and the needs and choices of consumers are the major factors that provide rationale for both domestic and international trade. Nonetheless, some detailed undercurrents make international trade more complex than trade at the domestic level. The complexity is especially driven by the nature of trade: protectionist, managed, liberal, and free. [1] Besides these three rationales of trade, the regime of international trade invites one more rationale; trade as a means and basis of international cooperation.

International trade is not a recent phenomenon. Since early history, human beings have been engaged in trading activities, which Rivloi concisely calls ". . . the story of humankind; all in all, a happy story indeed." [2] Trade is a human propensity and a happy tendency nurtured by human nature, says Adam Smith. [3] However, the nature of ancient trade, medieval trade, and modern trade is vastly different in terms of the diversity of products, risk management, modes of trade, actors, institutions, and rules. This paper cannot cover all these important issues in detail, but will provide a brief overview on the development of the international trading regime from history to the modern day, especially focusing on the post-war trading regime.

Broadly, the explanation of the rationale of international trade can be divided into four paradigms: wealth and righteousness, wealth and advantages, increasing returns, and the expansion of stakeholders' welfare or welfare-*grundnorm*. Welfare is one of the commonly found core elements in all of these four different explanations of trade. Despite a significant amount of justification in placing welfare at the core, these paradigms explain the rationale of international trade in substantially different ways.

From the age of Kautilya [4] and Plutarch [5] to recent days, one of the rationales of trade is built on the idea of righteousness of international cooperation and the tools of wealth accumulation. Kautilya appreciated the role of international trade for promoting international cooperation, focusing on the worth of trade policy and rules in the promotion of international trade. A more systematic explanation and justification of international trade, associated with the idea of acquiring wealth set off by the idea of certain advantages, came from Adam Smith, David Ricardo, and Heckscher-Ohlin. The New Trade Theory, built on the idea of increasing returns and monopolistic competition, offers a more sophisticated explanation of international trade. Complementarily elements of welfare exist in all these three explanations, but their shortcomings in the vindication of the perspectives of stakeholders gives rise to the emergence of a fourth paradigm called welfare-*grundnorm*. The fourth paradigm focuses on the dynamics of stakeholders' relationships and the expansion of their collective and individual welfare as the rationale of trade, both at domestic and international levels. Hereinafter, all four paradigms are discussed briefly, in order to gain a basic level of familiarity with the rationale of international trade.

1.1 First Explanation: Peace, Wealth, and Righteousness

Historically, trade has been understood as one of the most important reasons for peace, wealth creation, and as the right way of conducting international cooperation. Edmund Burke compared free trade with justice, which is a fundamental condition for peace. [6] Mendis succinctly observes that, "Of all available alternatives, the Founding Fathers chose trade as their primary means to advance ideas and ideals. Religion, race, ethnicity, language, and color might unite some individuals and groups, but the classifications might equally prove to be destructive force capable of permanently dividing nations. Trade, however, is not bound by these divisions." [7] Cheaper prices, greater consumer choice, international cooperation, friendship, and cultural understanding are the most alluring benefits of international trade that help to build a sustainable peace. Victor Fung concisely provides an account that in 1919 when businessmen from different countries met in Atlantic City to establish the International Chamber of Commerce (ICC), identifying themselves as 'merchants of peace' and adopted the motto of 'world peace through world trade.' From its inception, the ICC firmly believed in an open global economy as a force for economic growth, job creation and prosperity. These three elements, reasonably distributed, are the fundamental ingredients for peace. [8]

Plutarch argued that international trade was one of the important components of international cooperation, which would contribute in creating wealth and develop human civilization. Plutarch, appreciating the opportunity made available by the sea for trade and cooperation among people, observed that without this, mankind would be savage and destitute. Dougla A. Irwin, in his book *Against the Tide,* splendidly analyzes the ancient ideas about trade. He quotes an interesting passage from Plutarch, "... when our life was savage and unsociable, linked it together and made it complete, redressing defects by mutual assistance and exchange and so bringing about cooperation and friendship . . . the sea brought the Greeks the vine from India, from Greece transmitted the use of grain across the sea, from Phoenecia imported letters as a memorial against forgetfulness, thus preventing the greater part of mankind from being wine-less, grain-less, and unlettered. Without the exchange made possible by the sea . . . man would be savage and destitute." [9]

Kautilya, a professor of one of the world's oldest universities, Takshashila University, located in the Indian sub-continent, provides a classical justification of international trade in his book, *Arthashastra* (economics). Kautilya explained trade as one of the most important components of the four sciences,[10] which he thought to be the sources of righteousness and wealth. Kautilya placed emphasis on the professional integrity of traders. He valued the autonomy of trade and argued that continuing trade using state funds, or with the financial support of the state, had to be prohibited. Additionally he also suggested fines of twice the profit earned from such activities. It reminds us that in those early days, subsidies were treated as the harmful tools of trade. Kautilya had favorably promoted ideas about international trade, not only exports but also imports. He sustained that, "The superintendent shall show favor to those who import foreign merchandise: mariners and merchants who import foreign merchandise shall be favored with remission of the trade taxes, so that they may derive some profit . . . foreigners importing merchandise shall be exempted from being sued for debts unless they are local associations and partners."[11] Kautilya had approvingly promoted the liberal ideas about export of domestic products to international markets. For this reason, he had also assigned the superintendent with a responsibility to develop friendly relations with foreign countries for the promotion of international trade.[12] Kautilya, in the concluding part of his book, mentions that the source of livelihood of people is wealth, which is founded on both the territory of a country and its inhabitants engaged in different occupations including trade. He specified the responsibility of the state to protect the people and promote their wellbeing.[13]

When the world leaders established the General Agreement on Tariffs and Trade (GATT) in 1947 they solemnly recognized international trade as one of the tools for rising living standards, creating employment, promoting growth and income, and expanding production and consumption.[14] The World Trade Organization (WTO) Agreement further adds the idea of sustainable development, and recognizes the need for positive efforts to secure a share of developing and least-developing countries in the growth of international trade.[15] One of the most important studies produced by GATT called the Leutwiler Report, 1985, claims that, “Open international trade is a key to sustained growth. Trade opens vast markets to each nation’s enterprises. It carries technology and innovation around the world. It spurs each nation to greater productivity.”[16]

In the final analysis, wealth, righteousness, and peace should be weighed in terms of people’s wellbeing. It is because “people are the real wealth of a nation.”[17] The following table gives a fairly good idea of how far the objectives of the GATT/WTO have been achieved.

Table 1: A Comparison of Human Development

Countries	HDI Rank	Life Expectancy at birth	GNI Per Capita US $	Mean Years of Schooling
Afghanistan	172	48.7	1416	3.3
Australia	2	81.9	34431	12.0
Ethiopia	174	59.3	971	1.5
Japan	12	83.4	32295	11.6
Nepal	157	68.8	1160	3.2
Norway	1	81.1	47557	12.6
Rwanda	166	55.8	1133	3.3
USA	4	78.5	4301	12.4

Data Source: UNDP, Human Development Report, 2011 available at < http://hdr.undp.org/en/media/HDR_2011_EN_Complete.pdf >.

The table shows that human development, as defined by the Human Development Reports, by the process of enlarging people’s choices in terms of a healthy, educated, and longer life with decent standards of living, still seems to be a long-term goal for many countries in the world. The total value of merchandise exports of the least-developed countries (LDCs) in 2011 was US $204.8 billion, which is 9.27 times smaller than the merchandise exports of China alone. Among the 50 LDCs, Angola, Bangladesh, Equatorial Guinea, Yemen, and Sudan are the top five LDCs exporters accounting for 62 per cent of all exports from LDCs.[18]

Despite the continuous marginalization of the LDCs, Lawrence Lindsey argues that the explosion in international trade has been one of the main reasons that more than a billion people have joined the world’s middle class. International trade has also provided employment for workers in developing countries and lowered prices and therefore higher real wages for workers in developed countries. He also contends that a good portion of the world’s merchandise trade also flows in the reverse direction, as coal and iron ore from Australia and airplanes produced by Boeing and Airbus find their way to the developing world. On the whole, he observes that international trade has been one of the most significant instruments in creating welfare and improving the quality of life beyond measures.[19]

1.2 Second Explanation: Wealth and Advantages

There are a number of theories that justify international trade primarily on the grounds of its role in the creation of wealth. They explain how, through international trade, countries could garner benefits and contribute to the wellbeing of their people. Nonetheless, their explanations differ with each other in a considerable fashion. Among others, Adam Smith's theory of absolute advantage, David Ricardo's theory of comparative advantage theory, the factor proportions theory of Hecksher-Ohlin, the factor equalization theorem of Paul Samuelson, and the product cycle theory of Raymond Vernon are all briefly examined in the following paragraphs.

Should there be surplus production in order to engage in international trade? Can international trade take place even in a situation of a production deficit at the domestic level? Adam Smith in his famous book, *Wealth of Nations*, 1776, argued that when a country has a surplus production and is better (or more cost-effective) than other countries in terms of producing more with less input, especially regarding labor force, it retains absolute advantages on producing such goods over another country and will benefit by trading with another country. He suggested that every country could garner benefits through focusing on production in the area where they can produce goods in a cost-effective way and engage in trading such goods with other countries. He argued that by switching the labor force from a less cost-effective sector to a more cost-effective sector, countries could produce more and export their products. They can also import goods from other counties in which they do not produce cost-effectively. With international trade, Smith argued that countries could create wealth and promote the wellbeing of their people.[20] Smith eloquently presents the rule of supply and demand as the basic reason for international trade. He observes, "A country that has no mines of its own, must undoubtedly draw its gold and silver from foreign countries, in the same manner as one that has no vineyards of its own must draw its wines . . . We trust, with perfect security, that the freedom of trade, without any attention of government, will always supply us . . . The quantity of every commodity, which human industry can either purchase or produce, naturally regulates in every country according to the effectual demand . . ."[21]

Forty years after the publication of the *Wealth of Nations*, David Ricardo, in his book *The Principles of Political Economy*, 1817, postulated that countries could engage in international trade even without having a surplus production. This could be done by switching their labor force from a comparatively less advantageous sector to a comparatively more advantageous sector, called the "opportunity cost" or the theory of "comparative advantage". He justifies his claim with a two country two goods model, under the conditions of free trade and the assumption of a perfect competitive environment (where no buyer or seller retains the power to alter the price of goods or services in the market) in all markets. Ricardo observes that, "No extension of foreign trade will immediately increase the amount of value in a country, although it will very powerfully contribute to increase the mass of commodities, and therefore the sum of enjoyments."[22]

Ricardo further explains that, "It is quite as important to the happiness of mankind, that our enjoyments should be increased by the better distribution of labor, 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." The Smithian theory of absolute advantage and the Ricardian theory of comparative advantage can be explained with the following example.[23]

Table 2: Smithian and Ricardian Trade Models

Country	Product Unit X	Product Unit Y	Exchange Rate or the Price of the Product
A	100	50	2:1
B	50	50	1:1

Let us say, the distribution of labor is equal in both sectors, i.e. 50 laborers in both X and Y products. In this example, country A has the absolute advantage in the production of X product over county B, thus country A can switch its labor force from Y to X sector. But, in neither sector does country B have an absolute advantage. Under the Smithian model, country B cannot benefit from international trade and should develop its absolute advantage in another sector. Under the Ricardian model both countries can benefit from international trade even under these conditions. This is because 1 unit of Y product can buy 2 units of X product in country A, whereas, 1 unit of Y can only buy 1 unit of X in country B. Therefore, if country B switches its labor force from sector X to sector Y it can produce 100 units of Y. It can export 50 units of Y to country A and can import 100 units of X from country A. If the country B does not engage in international trade, it cannot create an opportunity to consume 100 units of X, since its labor force can produce only 50 units of X. Under this Ricardian model of opportunity cost, both countries can benefit from international trade. Now the question comes, how could country A benefit from switching its labor force from Y product to X product and entering into international trade with country B. The exchange rate of product X and Y in country B is 1:1. When country A switches its labor force from sector Y to X, it will produce 200 units of X. If it exports 100 units of X to country B, in exchange it receives 100 units of Y from country B, as in country B the exchange ratio is 1:1. Country A will also garner 100% profit from international trade.

However, both of these absolute advantage and comparative advantage models are based on simplistic assumptions: substantial price differences, perfect competition, one country one product, a situation of free trade or no trade barriers in place, and equally efficient labor force across both countries. These models ignore the role of governments, policy disparities, transactions costs, global exchange rate system, and technology, among others. On the whole, these models are simplistic; nevertheless, they still offer the idea of an advantage as an important insight for the rationale of international trade. The Hecksher-Ohlin (H-O) model does not solve all weaknesses associated with absolute and comparative advantages models, although does manage to remove some of the spurious assumptions by emphasizing the rationale of international trade with the perspective of intensive use of relatively abundant factors of production. The H-O model argues that any country could benefit from international trade with the maximum utilization of its abundant factors of production. If the country is abundant in capital, it should focus on capital-intensive production. If a country has abundance in labor, it should focus on labor-intensive goods. Looking at the recent growth pattern in Bangladesh, China, Vietnam, and other countries, the H-O model seems attractive.

The Nobel Prize Organization has brilliantly summarized the idea of the H-O model. It mentions that, "The Heckscher-Ohlin theory explains why countries trade goods and services with each other. One condition for trade between two countries is that the countries differ with respect to the availability of the factors of production. They differ if one country, for example, has many machines (capital) but few workers, while another country has a lot of workers but few machines. According to the Heckscher-Ohlin theory, a country specializes in the production of goods that it is particularly suited to produce. Countries in which capital is abundant and workers are few, therefore, specialize in production of goods that, in particular, require capital. Specialization in production and trade between countries generates, according to this theory, a higher standard-of-living for the countries involved."[24)]

Wassily Leontief, who studied the US trade pattern of the period immediately after the World War II, challenges the H-O theory. Leontief found that the US was a capital-abundant country but it had traded in more labor-intensive products. Leontief findings are known as the "Leontief paradox", as it shows a paradox in the H-O model. However, the study was primarily based on data from a limited period. In fact, subsequent data from the US trade do not support the Leontief model. Besides the Leointif paradox, another challenge to the H-O model comes from the concept of factors price equalization by Paul A. Samuelson.[25)] As a result of international trade, countries having different levels of factors of production gradually achieve an identical situation in which their factors of production equalize. For example, at some point of time one country might have cheap labor and another country abundant capital. In the country having cheap labor, capital is scarce and expensive. In the country of abundant capital, labor is scarce and capital is comparatively available easily. As a result of international trade, the labor-abundant countries gains capital, lifting the living standard of its labor force. The cheap labor becomes gradually more pricy and the previously scarce capital becomes gradually available. As this process further grows, both trading countries become closer with the identical value of their factors of production. Europe, the US, and Japan are some of the prime examples to support the Samuelson's factors equalization theorem. China is also an interesting example in this regard. As a whole, the logical consequence of Samuelson's model is that countries gain by international trade, despite the fact that some sectors might gain more and some sectors might lose. The effects of this factor price equalization theorem fall upon the H-O model which states it is not possible to gain continuously from international trade only by intensively using abundant factors of production since the factors of production are not constant.

The classical or neo-classical theories, as discussed above, chiefly reason that by specializing in the area of comparative advantage and using the abundant factors of production intensively, countries could benefit from international trade. They have also shown that, by lowering trade barriers, countries have created many opportunities and enhanced welfare. Wells argues that these elegant economic theories stated mathematically or geometrically could be manipulated to yield under certain assumptions. Nevertheless, so long as the problems posed are of a very broad nature, the theories provide a useful way of analysis. However, when the theory is applied to detailed problems facing business, they become of limited value.[26] The 'product life cycle'[27] concept of Raymond Vernon is an alternative approach to explain international trade. It aims to create practical tools to understand and analyze the real effects and benefits of trade, not only from a country's perspective but also from an individual investor's perspective. The concept in its simplest form is that by understanding the life cycle of a product, the business community will be able to gain a better understanding and take the necessary policy decisions.

Raymond Vernon[28] explains the life cycle of a product or business in four different stages. In the first stage, a producer manufactures products and markets them both in domestic and international markets. In this stage, the product is new and there is little competition from foreign producers. In the second stage, foreign firms start to produce the same product. In the third stage, the foreign producers bring their products into the foreign market and the competition gets tougher. In the final stage, the foreign producers export their products in the domestic market where the products were first produced or introduced. In this stage, the competition intensifies not only on international markets but also in the domestic market. The occurrence of the intensive competition also offers further opportunities. Firms might opt for a number of alternatives; they may invest in the foreign market, producing the product with increasing returns to scale and marketing of the product. They may also differentiate their products from each other and ensure distinctiveness of their products for competition in the market.

Despite the fact the majority are based on simplistic model and faulty assumptions, most of these theories discussed above provide valuable explanations of the rationale of international trade. Vernon's explanation stands out from other explanations. Nevertheless, Vernon's explanation is limited by only endorsing the perspective of producers or investors. It does not take into account the role of government and consumers. Thus, it is also limited, like other theories. Let us now turn to the third explanation of international trade.

1.3 Third Explanation: New Trade Theory

Classically, trade theories assume relative factor endowments among the countries, relatively immobile factors of production at international level, lack of barriers for exports and imports, production specialization, and competitive market environment as the necessary preconditions for free trade. Charges against free trade are basically aimed at these very assumptions.[29]

For example, trade takes place not only among countries having distinct factor endowments but also between countries having very similar factor endowments. Foreign direct investment, licensing, franchising, outsourcing, upstream and downstream marketing, electronic commerce, and other features of business strategies have changed the traditional concept of immobility factors. This said, land and labor are still immobile on the international level in comparison with capital and technology. The flow of trade is often guided with normative considerations at the domestic level thus posing barriers to exports and imports. Production specialization is often subjected to organizational behavior, firms' strategies, and market conditions. Institutional settings including laws, policies, administrative mechanism, judicial behavior, and social attitude greatly impact market conditions. Another equally important condition that impacts a market is the strategy of competitors. Market competition is often destined to be part of a complex set of trading concepts. Perhaps, increasing returns play an equal role with comparative advantage, and a number of factors affect competition in the market. Often the market is not perfectly competitive, as traditionally thought, but it is still competitive albeit imperfectly.

The new trade theory is an approach to international trade that raises some important questions. Why does trade occur in the environment of monopolistic competition? Why are firms' behaviors influenced by increase returns to scale (economies of scale)? Why is there international trade? Paul R. Krugman answers these questions with penetrating analysis comparing between 'traditional theories' and 'new trade theory.'[30] Krugman argues that there are two reasons why countries specialize and trade. First, countries differ in terms of resources and technology. They specialize in the area of their advantage and do relatively well. This explanation of trade is based on traditional theories. Second, economies of scale provide reason for trade, which is the explanation of the new trade theory.[31] He observes that, "The traditional theory answers, because countries are different. Canada exports wheat to Japan because Canada has so much more arable land per capita, and as a result in the absence of trade, wheat would be much cheaper in Canada. The difference between countries that drive trade may lie in resources, technology, or even in tastes, but in any case, traditional theory takes it as axiomatic that countries trade in order to take advantage of their differences."[32] Krugman further argues that, "The new theory acknowledges that differences between countries are one reason for trade, but it adds another . . . the new theory says that much trade, especially between similar countries, represents specialization to take advantage of increasing returns rather than to capitalize on inherent differences between the countries."[33]

For the new trade theory, it is not the differences between countries or the opportunity cost and availability of the factors of production, but the increasing return to scale[34] is the fundamental reason for international trade. In its simplest form the idea of 'returns' can be explained as an output. For example, Firm A produces 10 units of output with Y amount of input (5 elements of input). Let us say, the firm adds an additional 100 percent (an additional 5 elements) of input and as a result adds 15 more units as output, altogether 25 units of output. In this case, the returns are increasing. In other words, with 100 percent added input the output has increased by 150 percent, meaning the marginal cost of production has decreased and profit has increased. Krugman presents the state of increasing returns to scale as the incentive and rationale for international trade. In Krugman's judgment the constant return to scale is the basic idea of the theory of comparative advantage. Diminishing returns to scale are omitted from being the rationale of international trade. If returns in proportion to input are constant or equal, the marginal cost of production stays constant, which is a situation of constant returns to scale. In a situation of diminishing returns to scale, the output will decrease in proportion to the input, or the marginal cost of production becomes costly, which is considered as a situation of diseconomies or negative externalities.

What keeps an industry or business in a particular location? Why are aircrafts manufactured in Seattle? Why are software companies located in Silicon Valley? Krugman argues that it is not comparative advantage but it is the favoring of increasing returns driven by scale production. He also compares that for traditional theory, trade barriers like tariffs and import quotas are bad trade tools. For the new trade theory, trade barriers could be either much worse or much better. With this perspective, Krugman argues that traditional trade theory strongly held free trade as the optimal trade policy. However, the new trade theory implies, in Krugman's words, a 'more complex view', suggesting tools of trade barriers like export subsidies, tariffs and so on, as legitimate grounds for national interest protection.[35)] Furthermore, Krugman argues that trade arises entirely because of increasing returns, in a world of initially identical countries where the presence of scale economies have altered the pattern and volume of trade. Also, the distributional effect of trade crucially depends on the motives of trade. In short, the new trade theory maintains that trade is caused by economies of scale instead of differences in factor endowments or technology. Economies of scale give rise to trade and gains from trade even when there are no international differences in tastes, technology, or factor endowments.[36)]

Krugman's explanation of the rationale of international trade is penetratingly important. Nevertheless, there are some serious flaws in his explanation. First, he considers free trade and trade liberalization argument as a textbook argument.[37)] He dubs some of the important features of international trade liberalization as a misleading cliché or pop internationalism.[38)] In other words, his explanation emanates from the belief that the international trade rules should be subservient to the domestic interest, which is plainly refutable and unacceptable. Second, Krugman undermines the role of international trade in creating domestic and global welfare, which is unsatisfactory. He argues that, ". . . the idea that a country's economic fortunes are largely determined by its success on world markets is a hypothesis, not a necessary truth; and as a practical, empirical matter, that hypothesis is flatly wrong. . ."[39)] Third, he also ignores the role of national competitiveness in international trade and a need for promoting the national competitiveness of least-developing countries by enabling them to acquire more benefit from trade.[40)] Fourth, the policy prescription of the new trade theory is not new. Indeed, it is the policy of strategic trade in which governments are subtly recommended to promote domestic industries for monopolistic competition. These theories basically give space to those concerns expressed in the US and other countries that the course of the WTO should be reversed, limiting its ability to affect domestic regulation.[41)] Sixth, Krugman holds a dubious position on protectionism. On the one hand he projects protectionism as a tool that could lead to trade wars;[42)] on the other hand, he subscribes quotas, licensing, and export tax as welfare improving tools.[43)] Seventh, Krugman's explanation of trade largely ignores the role and interests of other stakeholders except the producers, specifically multinational corporations.

1.4 Fourth Explanation: Welfare-Grundnorm

As mentioned earlier, all the above discussed trade theories provide important insights on the explanation of the rationale of international trade but are lacking major dynamics in the understanding and explanation of international trade. These dynamics are: the existence of a government, profit motive of the producers, and needs and choices of the consumers. To complement and address the gaps in the earlier theories, I would like to propose the fourth explanation: welfare-*grundnorm* (WG).[44]

Perhaps, any modern state could be best explained in reference to the dynamic relationships among its key stakeholders: the consumers, producers, and government, founded on the system of governance attributable to the rule of law. The dynamic relationship is constantly shaped by the nature of interactions among these key stakeholders. The very dynamics reflected in the interests of these key stakeholders give reasons for international trade. The responsibility of a government in providing security, guarantying individual liberty and freedom, maintaining law and order, securing justice, promoting welfare, ensuring good international relations, realizing growth and development, and reducing social problems including poverty, inequality, and discrimination, among others, requires the existence of state apparatuses including a bureaucracy, security agencies, a judiciary, and other institutions. A government also needs to invest in a basic social infrastructure for creating conducive environment for growth and opportunities in society. The other two stakeholders, especially consumers, bear all the cost of the expensive institution of government. The bigger the government, the higher the cost and burden will be to the other two stakeholders. The smaller the government, the less the cost and burden will be to the other two stakeholders. It is often unsure of which size of a government is optimal, but it is widely acclaimed that the government should be effective in fulfilling its responsibilities and produce good governance.[45]

Habitually, a government is a necessary evil.[46] One of the widely held mechanisms of realizing the financial needs of a government is taxation. People can pay tax only when there are economic activities, income, and profit. Economic activities are sparked by production, supply, demand, and consumption. In other words, the financial needs of a government can only be gratified by market mechanisms. Normally, these dynamics are reflected in the market. Practically, a market can be created, broken, and distorted with measures taken by a government. Thus, the tensions between markets and governments often invite a defining moment for streamlining the nature of the dynamics. However, with state apparatuses legitimized by law, a government often defines the nature of the market and trade. It is not only the government but also powerful sections of society who often try to manipulate markets in their interests. These instances help to draw an idea that with the rise of the modern state and government, markets are not free. Markets are rather controlled, manipulated, managed, and sometimes liberalized progressively. Undeniably, markets are bound to operate within the framework of the state apparatuses.

On the part of producers, profit is one of the key motivational factors for trade. Expanding the size of their "pie" with a rational choice for consumption is the guiding motivation on the part of consumers. As discussed above, the apparatuses interest is a driving force on the part of the government motivation. Expansion of these three motivations from domestic to regional or international levels offers the very rationale of trade. Most of the earlier trade theories have explained the rationale of trade not from the perspective of this overall dynamics of stakeholders but mostly from the limited perspective of the producers' interests.

Unsurprisingly, production activities take place in society for profit. At the same time, the production activities satisfy the needs of the consumers too. Invariably, production activities are carried out within boundaries fixed by laws. The freedom of investment or production cannot ignore the limits of law. In this context, the energetic connections between domestic law and international trade law play an important role in shaping supply and demand. Producers, subject to their production capability, supply their products on the domestic and international markets. The success of a producer always depends on the demand in the market. If there is no demand for a product, no producers will take the risk of a loss of investment, no matter how sophisticated the technology, skills, and capital adequacy they might have. For example, in recent times, there is a growing demand for Apple products. With the phenomenal demand seemingly everywhere, Apple has become the largest company in terms of its market value, which has already exceeded 650 billion US dollars.[47] At the same time, another smartphone company, Palm Inc., due to the lack of demands to its products could not compete on the market and was finally acquired by Hewlett-Packard (HP) in April 2010. These two examples clearly offer that unless there is a demand in the market, producers rarely venture in production of goods and services. Besides the demand situation in markets, a government can substantially influence both the supply and demand sides. A government, by imposing restrictive trade measures such as tariff barriers and non-tariff barriers, can change the supply and demand size in the market. For example, in May 2012 the US government adopted a policy imposing an almost 250 percent tariff, an anti-subsidy duty, on Chinese solar products in the US market. As a result, Chinese solar products have become expensive in the US market and their demand has decreased exceptionally. This case has subsequently been brought before the WTO.[48]

If consumers do not demand, neither the modern state apparatus could exist nor would the profit motive of producers be realized. Consumers are the foundation of a government and production activities. As consumers, we all need goods and services for our survival, personal development, and a happy life. Consumers' needs are those factors that propel demand. Smart producers supply the demand. In this chain of supply and demand, two prominent activities keep taking place: sales and purchases. Supposedly, these contractual activities of sales and purchases are freely carried out, which is called the freedom of contract. The freedom of contract is the foundational element of the market. However, in real practice, the market operates not only on the grounds of the freedom of contract alone but also within the boundary of laws and strategic corporate pressures. In essence, these boundaries and pressures undermine the consumers' sovereignty. The mainstream theories have thus failed to conceptualize the rationale of trade established on the fact that consumers are the foundation of both markets and governments.

In short, the needs of government, consumers and the profit motive of the producers are the key rationales of trade, both in the local and global marketplace, which can be termed as the 'interests of the stakeholders.' The key stakeholders enter into the regime of international trade only when they find that international trade promotes their interests. If international trade hurts their interests, the response to international trade can switch to reluctance or perhaps unhesitatingly show resistance. Unfortunately, most of the earlier trade theories are not enough to be able to convince developing countries to embrace the idea of trade liberalization, mainly because of the fact that historically these theories, especially the New Trade Theory, have helped to sustain the asymmetric structure in the GATT/WTO rules.

The *WG* approach aims to remove the fundamental defects of the earlier theories, offering a positive[49] and universal legal structure where the interests of all key stakeholders will be maximized and not limited to the detriment of any aspects. In a case where the welfare of all key stakeholders cannot be maximized without compromising the welfare of one or more stakeholders, the *WG* reasons consumer welfare to be the priority policy choice. Doing so, the *WG* recommends: (1) the legislators, negotiators, and policy makers should first concentrate on removing all asymmetric and derogatory provisions both at the domestic level and in the WTO Agreement; (2) all trade distorting domestic measures legitimized by the GATT/WTO legal structure should be abolished; (3) liberalization and openness should be applied standards to design rules compatible with global factors of production and welfare; (4) technical requirements should not go beyond scientific international standards; and (5) along with these four strategies, non-discrimination should be held as the guiding tool for participation of all countries in the rule-making process at the international level.

The validity of these five strategies arises from the theoretical framework of the *WG*. Jurisprudentially, any rule is expected to fulfill three fundamental characteristics: validity, authority (broadly connected to enforceability), and legitimacy. Social scientists, especially economists, focus on legitimacy, and most legal philosophers focus on authority along with legitimacy. For example, the Arrowian Social Choice Theory (SCT) explains the legitimacy aspects of choice or policy alternatives with a majoritarian approach, ignoring the validity aspect.[50] H.L.A. Hart explains validity as one of the components of the legitimacy and authority.[51] These theories ignore the fact that legitimacy and authority when detached from the validity criterion are the poorest tools in deciding the question of choosing a best policy. The hallmark that distinguishes democracy from authoritarianism, right from wrong, liberal trade from protectionism, and a best policy choice from among available alternatives, is the validity criterion. An authoritarian regime can fulfill the condition of legitimacy and authority, but lacks validity. Thus, a just and equitable regime of international trade is supposed to fulfill these three criteria to internalize the rationale of international trade.

Due to the absence of a validity criterion, both theoretical and practical problems of making rules in the GATT/WTO are mired in deeper problems. In particular, the Doha Round is virtually detached from the appreciation of *WG*. An important question arises: how would the validity criterion be able to address the problems of making rules in the WTO? To answer these questions, let us take an example of "zeroing," in which "z" represents the American concept and "y" represents the Friends of Anti-dumping Negotiations (FANs) concept.[52] The major issue is how to choose the best policy from the alternatives provided by "z" and "y" concepts. The validity test of the "z" and "y" concepts depends on their consequences. This is because each rule or a regime brings forth different consequences. No rule or regime exists without a consequence or implication. If we choose "zeroing" (i.e., concept "z"); it will allow possibilities for more application of anti-dumping

(AD) measures in place. If "zeroing" is prohibited (i.e., if concept "y" is chosen); it will come up with fewer possibilities for the application of AD measures. AD measures require consumers to pay a higher price for goods or services, or at least consumers will be deprived of the opportunity to choose goods at a better price. That is to say, AD measures limit consumers' welfare at the domestic level; and penalize producers at the global level. Therefore the act of choosing "z" fails to corroborate the three criteria: legitimacy, authority and validity.

A nascent belief is that by using AD measures, the price of imported goods will be increased at least to the level of the price of domestic goods, thereby protecting the interests of domestic producers. However, it is not certain that by using AD measures the welfare of producers will be enhanced. This nascent belief in AD measures is fundamentally faulty.[53] First, it does not necessarily follow that consumers will stop buying imported goods. Second, it does not follow that higher prices artificially discourage consumers from buying imported goods. Third, it is not logical that consumers will buy only domestic goods. Fourth, to protect producers at the cost of consumers is not the best market policy, neither from the perspective of savings or from investment. Fifth, it is not certain that the comparative advantage of domestic producers will be enhanced by AD measures. Sixth, it is however certain that AD measures will harm the welfare of producers at the global level and the welfare of consumers at the domestic level. Therefore, from the perspective of both global producers (efficient producers) and domestic consumers, the concept of "zeroing" is harmful. Obviously, it is incompatible with *WG*.

This example clearly demonstrates that the best way to harmonize and transform concepts into a construct (or rules) is the compatibility test with the *WG*. Simply choosing "z" over "y" on the basis of majoritarianism does not ensure that the choice is compatible with efficiency, social welfare and trade liberalization. In short, a policy decision can be taken by choosing any alternative that is compatible with the criterion of validity. Thus, majoritarianism justified with the validity criterion is the best way of deciding a policy, harmonizing contesting concepts, and transmuting contesting concepts into a construct.

This example provides a glimpse of how concepts need to be tested with the validity criterion to harmonize and transmute them into a construct. The GATT/WTO rule-making and the current Doha Round of negotiations have not applied this criterion. As a result, most of the GATT/WTO rules are incompatible with liberalization, openness, and fair trade.

The methodological aspect of *WG* is derived from an *a priori* foundation of liberal trade justified by reasons that are also tested in practice. Open or liberal trade possesses the character of universality. It is affirmed by universal reason. Plato, in his book, *Meno*, explains *a priori* as innate, because it is familiar to us in all our lives and we can no longer dismiss it from our mind.[54] It is also argued that if there is anything universal and necessary, not particular and contingent, it must have been derived *a priori* from reason.[55] Bentham also justifies the idea of liberal trade derived from the universal reason of utility. Conspicuously, the idea of liberal trade is not contingent on normative standards of any particular domestic policy choice. It is universal in the sense that it creates global welfare. This regime of global rules institutionalizes a global legal system. The global legal system operates with the jural relations of validity, authority, and legitimacy. However, this global legal system will be undermined when normative concepts overwhelm the legal policy decision.

Normative influence on WTO rules can be remedied by positivism with the application of the *a priori* standard. Its features are represented in *WG*. The *a priori* features need no proof or justification, though its reason can be proved inductively by empirical evidence. Thus, *a posteriori* experience can lend support to the *a priori* rationale. In his *Critique of Pure Reason,* Kant explains the *a priori* and *a posteriori* relationship useful to explain the regime of liberal trade. Kant shows how reason determines the conditions under which experience and knowledge are possible. In turn, experience lends further support to sharpen the reason.[56] It is natural to think that the reason for WTO rules should be based on liberal trade. Making rules in the WTO; thus, needs to be tested using the validity criterion. However, the *a priori* criterion and nature of free trade is marred in the rule-making process of the WTO with persistently sustained weaknesses of earlier trade theories. These illusions need to be deconstructed permanently if international trade regime should serve the cause of justice, fairness, equity, and efficiency across the globe.

Then, a question may arise: is international trade beneficial to the key stakeholders in all countries? We will discuss this question in the following sub-heading.

2. Controversies: New and Old, and the Winners and Losers of International Trade

There were defenders as well as enemies of free trade in history, which is also true today. The fundamental arguments advanced either in the defense or opposition of free trade remains fundamentally similar in both the past and the present. The opponents of international trade argue that trade hurts the poor, workers and small farmers, serves the interests of the rich and multinational corporations, corrupts local culture, accelerates foreign domination, and compromises sovereignty. The proponents of international trade argue that it produces wealth, generates growth, creates jobs and equity, promotes peace and friendly international relations, and enhances the wellbeing of the people. To certain extent, both sides hold water because there are winners and losers. Let us briefly examine the arguments of both opponents and protagonist of the GATT/WTO before we assess them.

2.1 The Backlashes

The ideas of international trade, especially of free trade, have constantly been attacked since early history. The land of ancient thinkers, Greece, was not warmhearted towards international trade. Horace argued that the sea brought contact with strangers who could disrupt domestic life by exposing citizens to the bad manners and corrupt morals of barbarians.[57] Professor Bhala succinctly questions that, “Is trade an opportunity for peaceful intercourse to advance prosperity? Or, is it a threat to moral fiber and civic security? The dichotomy remains to the present, resonating in contemporary debates about globalization.”[58]

Despite the continuous controversies, international trade has always been one of the important elements of international relations and cooperation among countries. From the ancient period to the present day, traders supply goods and services for human needs and choices. Bernstein observes that in the ancient Rome, "Although the Romans knew Chinese silk, they knew not China."[59] A lack of the means of communication, transportation, and technology further aggravated by natural barriers had ostensibly limited the scope of trade in those ancient days. The delivery of fabric from China to Greece used to take almost eighteen months. Despite all those difficulties, autarky was not the norm of the day. Countries had established trading relations not only with neighbors but also with distant countries. Bernstein presents a fascinating account of the nature of trade in the ancient period.[60]

In the ancient period only a few goods, the most prized goods such as silk, spices, jewels, porcelain, and medicine used to travel between countries.[61] Due to high production and transportation costs, the prices of the tradable goods were extremely expensive. Silk could be affordable only either for the rich or the members of royal family as it was a hundred times costlier than its weight worth in gold. Cotton was also equally expensive, since it was produced and exported from India and Egypt.[62] The price was not based on supply and demand factors alone. Richard L. Smith observes that, ". . . the use of supply and demand to establish price did not appear until the fourth century BCE."[63] Now the prices of goods and services have been decreased dramatically and a significant numbers of goods and services are traded across the globe. Goods and services are more affordable than ever before because of the reduction in production, transportation, and communication costs. As a result, consumers have been the beneficiaries of international trade. Now, not only royal family members or the rich but also 'commoners' have access to goods and services. This said, the controversy on winners and losers is still afresh.

Since history to date, the simple and perhaps correct answer might be that there are winners and losers. A number of factors lead to the end result of winners and losers. Domestic factors, including the system of governance, the rule of law, socio-cultural practices, natural conditions, availability of the factors of production and a temperate business climate among others, make differences. All these can be termed as the domestic environment. The domestic environment of one country affects the international trade of other countries in terms of market access for goods and services in that country. The more diverse the domestic environment, the more disharmonious the international trading regime will be. One of the rationales for developing an international trading regime comes from the logic of reducing the state of disharmony among countries and bringing them closer to each other in terms of harmonizing their legal regulatory mechanism to facilitate an international trading regime through creating a situation of better market access and predictability in business relationships. The origin of the GATT in 1947 and its successor WTO in 1995 vindicate the concept of harmonization between domestic trade regimes and international rules for better and more open market conditions across the globe, which can be termed as the concept of trade liberalization.

However, the concept of trade liberalization has continuously been challenged and limited by the idea of protectionism and managed trade mired in the forms of derogation, divergence, constructed advantage, asymmetry, and skepticism.[64] It is not uncommon that countries, when entering into a rules-based international trading regime, try to bend international rules in their favor from the very beginning of the formulation of rules to their praxis. Both the GATT and WTO exemplify how powerful countries have manipulated international rules in their favor. This approach is not peculiar to our days alone. Since the early days, countries have often tried to secure advantages for their domestic producers through the system of international rules. Adam Smith remarks that, "By advantageous treaties of commerce, particular privileges were procured in some foreign state for the goods and merchants of the country, beyond what were granted to those of other countries . . . By the establishment of colonies in distant countries, not only particular privileges, but a monopoly was frequently procured for the goods and merchants of the country which established them." [65]

The colonial, mercantile, and protectionist policies have aggravated criticisms and controversies over the praxis of trade liberalization. For example, from the establishment of the GATT to the WTO, the controversies have not been dismissed but whetted. The extreme comes in the 5th WTO Ministerial in Cancun (2003), when a Korean farmer and activist named Lee Kyung-hae stabbed himself to death in protest of the WTO.[66] When the Uruguay Round was concluded, one of the widely read newspapers in India wrote, "If the Uruguay Round of trade negotiations has become one of the most controversial GATT Rounds, it is because of the intransigence of the developed economies, especially the United States and the European Community, and the selfish manner in which they have defended their economic interests at the cost of the developing world. However, despite this regrettable lack of balance in the final outcome, it is extremely important for India to remain a part of the multilateral trading system." [67]

The debate on the winners and losers of the WTO has yet to weaken. Rather, the controversy has been associated with globalization and becoming mired in a globalization backlash around the world. In 2000, GRAIN (Genetic Resources Action International) produced John Madeley's study of 37 countries, which definitively concluded that, ". . . the so-called 'free trade' as promoted by the World Trade Organization benefits only the rich, while making the poor more vulnerable to food insecurity."[68] The Third World Network, supporting the GRAIN report, observed that ". . . evidence on the relationship between trade liberalization, the prescription for the world's continued economic growth and prosperity, and food security and poverty suggests that there will be more losers than winners."[69] In 2003, former British Trade and Industry Minister Stephen Byers said that, "I was wrong about free trade, I was wrong. Free market trade policies hurt the poor."[70] Globalization makes the world better off and trade liberalization increases economic growth are two myths, claim the Global Trade Watch.[71] It also observes that the winners are corporations and the rich. The losers are workers, small farmers, and the environment.[72] The ultimate outcome of the WTO is the commercialization, privatization and deregulation of the world's economies. It is a process whereby governments progressively negotiate their regulatory authority, taking power away from citizens and empowering multinational corporations.[73]

For Graham Dunkley, an Australian economist, the idea of free trade is central to today's world-dominating globalization project. He contends that the more euphoric globalists uncritically assume that free trade has universal and unequivocal benefits for all people and countries. Further he believes that the perpetual negotiations under the WTO are wholly based on the presumption of free trade.[74] A study conducted by Hoekman, Horn, & Mavroidis in 2008 concluded that in the WTO Dispute Panel, a bias was manifest against developing countries.[75] Ralph Nader, an American activist, makes some succinct arguments against the WTO. He claims the following:[76]

- It is not free trade, it is corporate managed trade
- It is not win-win, we are exporting jobs
- NAFTA & GATT rules supersede national laws
- High-tech jobs are lost to foreign countries
- Human rights, environment, and labor issues are Subordinate to commerce
- Renegotiate NAFTA and WTO: as if human beings matter

Sandara Polaski's study on the Winners and Losers of the Doha Round reveals that the modest overall gains would have quite different economic effects on different countries and regions. There are both net winners and net losers under different scenarios, and the poorest countries are among the net losers under all likely Doha scenarios. At the country level, maximum gains or losses are about 1 percent of GDP for the most affected economies. The biggest country to gain is China, with gains ranging from 0.8 to 1.2 percent of GDP under different scenarios. The biggest losers are some Sub-Saharan African countries, which have seen a reduction in income of just less than 1 percent. Most countries' gains or losses range from 0 to 0.5 percent of current GDP.[77]

These comments do not project the whole story of international trade, the GATT and the WTO. There are also protagonists, who project the benefits of international trade. Let us briefly examine the benefits.

2.2 The Paybacks

Patrick McDonald claims that a series of statistical tests demonstrates that a higher level of free trade, rather than trade alone, reduces military conflict between states. Moreover, contrary to the conventional wisdom, these arguments suggest how the puzzling case of World War I may confirm, rather than contradict, the central claim of trade liberalization.[78] A study by Milner and Kubota's in 1970-99 shows that liberalization of trade policy in many developing countries has helped to foster democracy. Democratization of the political system has also helped to reduce the ability of government to use trade barriers. They also argue that democracy flourishes with lower trade barriers.[79] Devereux finds a two-way relationship between trade liberalization and economic growth. One way is the negative relationship in which tariff war equilibrium causes low growth rate, high tariffs, and low trade. Second, in trade liberalization equilibrium, growth rates are high, tariffs are low, trade ratio is higher, and trade increases over time.[80]

Unlike Lori Wallach and Ralph Nader' arguments, the American Trade Policies show that trade liberalization has expanded trade — imports as well as exports — leading to more prosperous businesses, more choice of goods, lower prices for consumers, and more opportunities for farmers and workers, leading to higher wages, more jobs and economic growth. They also claim that expanding trade brings particular benefits to lower-income people who are squeezed both as consumers and taxpayers.[81] Opening international markets is critical for the U.S. economy since 10,000,000 jobs in merchandise sectors are supported by exports activities alone. More than the merchandise sector, exports are the lifeblood of many American farms and ranchers. Agriculture exports support 800,000 jobs in the United States, observes the Trade Policy 2010.[82] The OECD 2012 Report looks at evidence related to oft-voiced concerns about the effects of offshoring and trade in services as well as adjustment costs associated with trade. On balance, the report found that in virtually all of these dimensions trade can play an important role in creating better jobs, increasing wages in both rich and poor countries, and improving working conditions. It also remarks that benefits of trade do not accrue automatically, and policies that complement trade opening are needed to have full positive effects on growth and employment. Moreover, as with adjusting to technological progress, the process of trade-induced growth necessarily entails the continual reallocation of resources away from less productive activities to more productive ones, and this can mean that, even as average wages and employment conditions improve, some workers may experience unemployment or may even see their real wages decline as they change jobs. For these reasons, policies that embed trade reforms in a context of macroeconomic stability and a sound investment climate on the one hand, and, on the other, protection for workers, maintenance of high-quality working conditions, and facilitation of labor transitions, can play an important role in realizing the potential wage, employment and income gains associated with trade.[83]

The cross-country study by Jeffrey Sachs, Warner, Åslund, & Fischer shows that trade liberalization not only establishes powerful direct linkages between the economy and the world system, but also effectively forces the government to take actions in other areas of the reform program under the pressure of international competition.[84] Their study further answers several debates concerning cross-country growth patterns. They suggest that poor countries could grow more rapidly than richer countries and could close the proportionate income gap over time by economic liberalization coupled with importing capital and modern technologies, thereby reaping the advantages of backwardness. However, they observe that the poor countries have not shown the overall tendency to catch up or converge with the richer countries.[85] They also argue that the power of trade in promoting economic convergence is the most venerable tenet of international trade since the days of Adam Smith. In many cases, they have found that economic reform has paid off after a few years in terms of accelerated growth of GDP.[86] Their study also shows that open economies have outperformed closed economies on three main dimensions of economic performance: economic growth, avoidance of extreme macroeconomic crises, and structural change. The study also shows that poor countries tend to grow faster than richer countries as long as they are linked to international trade.[87]

3. Assessments and Reality Check

Outside of negotiations, all trade negotiators and their countries present themselves as if they are the real proponents of trade liberalization and believe in the theoretical underpinning of trade liberalization. When it comes to negotiations however, they disregard trade liberalization issues and become obsessed with the protection of their domestic producers by bending international rules to permit mercantilist and protectionist policies at the domestic levels in the form of concessions, exceptions, and derogations, of which the Doha Round presents examples with certitude. From the very beginning of the Doha Round, to its 11 years of negotiations, key players are mired in all sorts of subterfuges that allow continuity of managed or protectionist trade. For example, the US and EU were reluctant with the idea of a development round until the last moment of the Doha Round endorsement.[88] In late July 2001 reality check, Mike Moore, the WTO Director General had concluded that, "A large number of players are not yet convinced . . . the situation is fragile, and without generosity, good manners, and goodwill the process could implode and become unmanageable,"[89] which has been proved correct.

An objective perspective could only be captured when the arguments of both the opponents and proponents of the WTO are checked against the following realities. In short, the following reality checks show that both of them are conceptually muddled, limited on focus and coverage, and flawed in reasoning. Despite these weaknesses, both of them show important aspects of international trade that are hard to ignore. Let us assess them in the following four sub-headings.

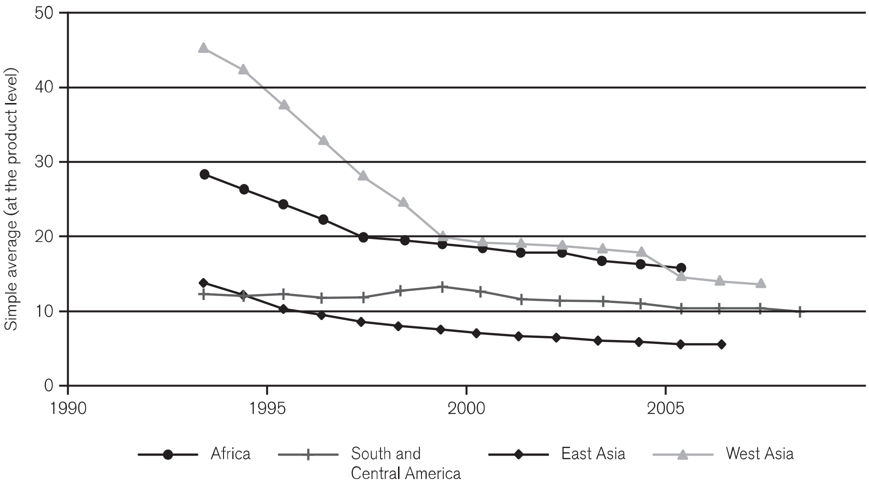
3.1 Conceptual Muddle: WTO is not a Free Trade Institution and the Sole Agency of Globalization

There are three apparent conceptual disarrays. First, the opponents of free trade criticize the WTO as being an institution for free trade, which is utterly wrong. Free trade is a situation where no trade barriers exist between countries. In other words, it is the abolition of all tariff and non-tariff barriers altogether. When all trade barriers are absent, the WTO does not need voluminous and complex agreements. A single powerful sentence that 'all trade barriers are abolished and no country will resort to trade barriers' would be a sufficient provision supported by a strong dispute settlement mechanism, if it is violated. Unfortunately, it is not the case. The thousands of pages of WTO agreements mainly sustain trade barriers in different forms. As discussed above, until the pricy institution of government exists, no country will be able to abolish tariff and non-tariff barriers altogether. Nonetheless, the abolition of trade barriers is possible on economic grounds as governments can keep exercising sales tax and other taxes to survive, which is outside the purview of the WTO, if practiced non-discriminatorily. Clearly, the WTO Agreement does not aim to abolish trade barriers. It only aims to reduce the existing trade barriers. Therefore, to explain the existing international trading regime under the WTO auspices as a free trade regime and the WTO as a broker of free trade is conceptually muddled.

Second, from the GATT to the WTO, the focus is on the reduction of trade barriers. The reduction of trade barriers is broadly understood as trade liberalization. The GATT, through its eight different rounds of trade negotiations, reduced tariff barriers both horizontally and vertically, although the GATT mainly negotiated the bound tariff; as does the WTO. Largely, countries driven by the goals of economic growth opened their market and lowered trade barriers including applied tariffs. In this process, China has less variance between applied and bound tariff rates than many other countries. Nevertheless, the bound tariff negotiations in the GATT provided an impetus to the countries to open their market. This concept of trade liberalization seems appealing but is vague. The proponents of trade liberalization have not offered a specific scale that could be termed as trade liberalization. In other words, neither the WTO, nor the proponents have offered a formal definition that what level of reduction to trade barriers could be called trade liberalization. For them, tariff negotiations under GATT Article II are the models of trade liberalization. At the core, Article II does not aim to create harmonious tariff system among the countries; rather it permits different levels of tariffs among the member countries. The state of disparity of tariff reduction is one of the serious barricades to trade liberalization, but for most of the trade liberalization proponents this muddle is acceptable. More specifically, the proponents have failed to distinguish between a condition of managed trade and liberal trade by overlooking the need of a specific and harmonious scale of reduction of trade barriers. As a result, a state of managed trade is also acceptable for them as an example of liberal trade, which is a serious conceptual mismatch.

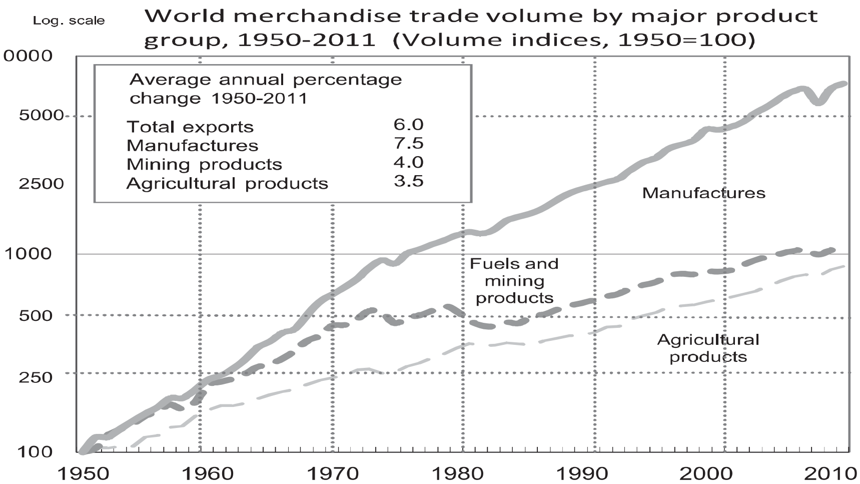
Third, misleadingly, the WTO is projected as the sole agent of globalization, with globalization being regarded as completely negative phenomenon. Both of these sweeping generalizations are wrong.[90] If gradual reduction of trade barriers and opening up markets across the globe is an attribute of globalization, the arguments of the opponents are lopsided. Trade liberalization has reduced the price of commodities and services, offered more choice to consumers, helped promote investment and growth, helped to reduce poverty and has created jobs. Examples can be taken from Bangladesh, China, Brazil, India, and many other countries. The United Nations observes that the fastest growth and sharpest reductions in poverty continue to be found in Eastern Asia, particularly in China, where the poverty rate is expected to fall to under 5 per cent by 2015. India has also contributed to the large reduction in global poverty. In India, poverty rates are projected to fall from 51 per cent in 1990 to about 22 per cent in 2015. In China and India combined, the number of people living in extreme poverty between 1990 and 2005 declined by about 455 million, and an additional 320 million people are expected to join the middle-class rank by 2015.[91] In comparison, the poverty rate in the USA is still above 14 percent.[92] The issue of sweatshops and exploitation of laborers by multinational corporations have not yet been undone. Visibly, these problems are not the outcome of the GATT/WTO regime. No single provision of the WTO allows for sweatshop or exploitation of workers. Rather they want to improve the conditions of workers by integrating labor issues with trade, which opponents discredited from being included into the WTO. However, they contradictorily argue about child labor. The labor conditions at home belong to the remit of domestic laws and policies. With strong domestic laws and policies the labor conditions can be improved, which is closely associated with good governance at home. It is not trade liberalization but bad governance at home warrants to be blamed.

Chart 1: MFN Tariff Trends in Developing Countries



Source: WTO, World Trade Report, at 124 (2011).

Chart 2: World Merchandise Trade 1950-2010



Source: WTO, World Commodity Profiles for 2011, availale at http://www.wto.org/english/res_e/statis_e/world_commodity_profiles11_e.pdf

3.2 Derogations, Divergences, Constructed Advantage, and Asymmetry

One of the most pervasive illusions in making rules in the GATT/WTO is associated with the attitude of winners and losers. That is, one will be a winner only when another is a loser. Most 1947 GATT provisions and some of the WTO Agreements legitimize this illusion. Despite tariff reductions, the legal structure from the GATT to the WTO constantly shows four problems: derogations, divergences, constructed advantage, and asymmetries.[93] Derogation implies exceptions and concession inconsistent to the concept of trade liberalization. Divergence implies different set of rules among different countries. Constructed advantage denotes to policy preference for the protection of producers at home rather than promoting global welfare. Asymmetry is a condition in which certain countries are disposed to receive benefits by the contents of rules and some are unable to enjoy those rules due to their level of development. In fact, all four of these concepts are closely related and complementarily to each other. The exemption of the colonial preferences from the GATT discipline of MFN (Most Favored Nations) in response to protectionist pressures[94] retains the asymmetric nature of the GATT rules. For example, the citadel of GATT is erected on five major concepts that are known as the five pillars: most-favored nation treatment (Article I); tariff schedules and bindings (Article II); national treatment (Article III); prohibition of non-tariff barriers (Articles XI and XIII); and transparency (Article X). These pillars are the basic rationale for any country seeking to join the GATT/WTO. However, there are major cracks in each pillar[95] that have caused derogation from the principles of trade liberalization. On the one hand, these cracks have empowered the rich countries and on the other, weakened the GATT/WTO system.

For example, Article XI.2(c) of the GATT was designed to extend American and European domestic laws and practices to international rules. Article XI.1 prohibits quantitative restrictions (QRs). The reason is that the system of production and consumption is regulated by market mechanisms. It is the consumers who determine demand. It is the producers and suppliers who supply the demand. In this embryonic market mechanism, government intervention is unwanted and unnecessary, but Article XI.2(c) legitimizes government intervention in the market through governmental measures, especially to restrict the importation of agricultural products. In short, Article XI.2(c) serves two fundamental purposes. First, it allows governments to decide how much to be produced and how much to be supplied. Second, it primarily legitimizes the American and European concepts derived from their domestic practices. Thus, GATT Article XI.2(c) permits a flagrant derogation from trade liberalization.

Giving leeway to the American and European protectionist policy, GATT negotiators were not satisfied with GATT Article XI.2(c) alone. In addition, they added Article XIII. In principle, Article XIII prohibits quantitative restriction, but allows exceptions in Article XIII.2 and XIII.3, legitimizing protectionism through the veil of quantitative restrictions (QRs) in the form of quotas. This means that quotas can be applied indiscriminately to similar products of all GATT/WTO members. Besides, where quotas are not practicable, import licensing or permits can be imposed. As a result, powerful countries dangle a carrot and stick before poor countries. The net result of these rules is trade distortion and the elimination of trade gains.[96] The examples of Articles XI.2(c), XIII.2 and XIII.3 clearly show how deeply derogations and asymmetries were institutionalized in the GATT legal structure, which is bequeathed to the WTO.

Not only GATT provisions but also several provisions of the WTO Agreements are derogatory to trade liberalization. Either the legal structure intelligently protects the interests of the rich countries or, even at the subtle level, allows rich countries to use the legal structure more efficiently than the poor countries. Tarrification under the Agreement on Agriculture is one of such examples among many others. It reminds us of the fact of why governments choose to ignore the equity approach.[97] For example, even at the domestic level the condition of the use of legal rights including human rights by the poor and rich varies conspicuously due to their capability distinctions and disparities in exploring opportunities.

In short, from the above discussion it can be drawn that the WTO legal structure is not friendly towards trade liberalization in many respects. It reminds us that the WTO is an institution for managed trade, aspiring for trade liberalization. To achieve the aspiration of trade liberalization, the derogatory, asymmetric, divergent, and constructed advantaged provisions should be removed from the WTO. In this regard, the Doha Round has only limited agenda items. A real trade liberalization negotiation round starts when these four problems are brought at the center and addressed effectively.

3.3 Domestic Practices

Non-tariff barriers, including subsidies, technical requirements, anti-dumping and countervailing measures, safeguard measures, waivers, and tariff barriers in the form of tariff escalation, are some of the trade distorting measures existing in developed countries. Except quotas, most of the developing and least-developed countries have comparatively less non-tariff barriers measures in place than tariff barriers. With quota and tariff barriers, market access in developing countries echoes the pattern of managed trade. These practices are merciful to producers, and harmful to both consumers at the domestic level and efficient producers at the global level.

To promote the trading capabilities of the developing and least-developing countries, the 1965 Special and Differential Treatment (S&D) and the 1979 Enabling Clause were introduced. However, both of these measures have failed to create rights for the developing and the least-developed countries. Instead, they have empowered the discretionary power of rich countries. Among others, the textile and clothing sector, the Banana case,[98] and the Tariff Preference case,[99] give a succinct overview of the true nature of such mechanisms. Also, from the perspective of the use of these measures by the developing and least-developing countries, two serious flaws become apparent. First, at the domestic level, they seek more protection. Second, at the international level, they seek more favorable or concessionary trade rules. The rationale of having such rules is that poor countries need time to become competitive. The question remains open, for how long should their domestic inefficiency be protected? And for how long should the taxpayers bear a burden in protecting the inefficiency, corruption, and political exploitation in poor countries? Is it fair to demand unilateral protection and unlimited concessions? All these questions are politically sensitive. They are also apt to create an economic illusion because they are based on the doctrinal heritage of restrictive or managed trade. When trade is free, inefficiency does not need to be protected.

3.4 Question of Governance

Garnering opportunities and removing threats from international trade often recounts the state of governance in place. Countries rife with inefficient governance, corruption, political criminalization, lawlessness, conflict, and violence have a low level of human development achievements and are not able to garner the benefits from international trade. Countries with political stability, a high quality educational and health care system, together with the rule of law, are demonstrating better performances and garnering benefits from international trade. Angola, Bangladesh, and Vietnam, among others, can be taken as examples.

Good governance matters the most for trade and development. Economic activities thrive with good governance. Good governance is the centerpiece of development, which most of the poor countries dreadfully lack. A culture of lawlessness, corruption and abuse of state apparatuses for personal benefit, an envy of meritocracy, a lack of individual dignity, widespread insecurity to those who are outside the political circle, and abjuration of free thinking breeds grave crises in any society. Most of the poor countries are fraught with this culture. Blaming globalization and the WTO cannot help them to solve their domestic problems. The solution to the problems should come from within. Borrowed models and solutions are often not only ill suited, but also harmful. Politics is indeed local and it needs its own *sui generis* development broadly compatible with liberal democracy rooted in the idea of the rule of law and constitutionalism.

4. Conclusion

As discussed above, there are different explanations of the rationale of trade. All these explanations emphasize the fact that international trade is beneficial to countries. However, the controversy often resonates on the issue of which policy would be better. The question is, better for whom? Better for all stakeholders, the global community, or for a few countries only? Despite the policy level controversies, it has almost been universally realized that protectionism is a bad policy tool. It hurts all. One of the classical examples can be taken from the U.S. Smoot-Hawley Tariff Act of 1930.[100] Bhagwati argues that local interests and ideology interact to shape the underlying tendency of protectionism. He claims that instead of protectionism, growing globalization and interdependence in the world economy offer grounds for optimism.[101] The Leutwiler report, published a few decades ago, powerfully argued that open trade is the key to sustained growth.[102]

Let us conclude with UNCTAD's observation, ". . . while globalization and technological change, and their interplay, have created both winners and losers, . . . policies have channeled incomes towards the top 1 percent of the income ladder. Neither globalization nor technological improvements inevitably require the kind of dramatic shift in the distribution of income that favors the very rich and deprives the poor and the middle-class of the means to improve their living standards. On the contrary, with more appropriate national and international policies . . . job creation can be accelerated, inequality reduced and the requisite degree of economic and social stability guaranteed."[103]

In essence, the WTO is an important institution for opening markets and liberalizing trade engaging in shaping the international trade negotiations and rule-making within the framework of Welfare-*grundnorm*. It should be understood however that the WTO is not an institution of free trade. At best, the WTO is an institution for trade negotiations and trade liberalization. At worst, it is an institution for managed trade. Multilateralism is the key methodology of trade liberalization. With the deep eclipse on the Doha Round, multilateralism has been obscured but it is still resilient. With three specific steps taken in the future, the fruit of trade liberalization can be said to be ripening. First, the WTO should start a round of negotiation to end the derogations, divergences, constructed advantages, and asymmetries from the legal structure of the WTO agreements. Second, WTO Member countries, both developed and developing should end the trade-distorting domestic measures in place and develop a stable political climate for trade liberalization at home. Third, poor countries especially need to focus on good governance at home and active participation in international trade negotiations.

NOTES

1) *See generally* Surendra Bhandari, Making Rules in the WTO: Free or Managed Trade? (RoseDog Books, 2012).
2) *See* Pietra Rivoli, The Travels of a T-Shirt in the Global Economy, *cited in* William J. Bernstein, A Splendid Exchange: How Trade Shaped the World, kindle location 31 (Grove Press, 2009).
3) *Cited in* William J. Bernstein, A Splendid Exchange: How Trade Shaped the World, kindle location 222 (Grove Press, 2009).
4) Kautilya (370–283 B.C.) is also known by other names such as Chanakya, and Vishnu Gupta. He was a Professor of Economics and Political Science at the ancient university of Takshashila in India. Today, Takshashila University does not exist and the land belongs to Pakistan. He authored one of the earliest books ever written on economics called *Arthashstra*, which was considered as the main guiding instructions to Maurya eEperor Chandragupta. *See* Kautilya's Arthashastra (R. Shamasastry trans., Spastic Cat Press, 2009).
5) Plutarch (46–120 A.D.) was a Greek historian, who contributed dozens of literary books and also wrote about trade.
6) *Cited in* Patrick Mandis, Trade for Peace, kindle location 820 (New York, iUniverse, Inc., 2009).
7) *See* Patrick Mandis, Trade for Peace, kindle location 820 (New York, iUniverse, Inc., 2009).
8) *See* Victor Fung, *Preface: The ICC Vision*, in Peace and Prosperity through World Trade, kindle location 335 (Fabrice Lehmann & Jean-Pierre Lehmann eds., Cambridge University Press, 2011); see also Peter D. Sutherland, *Foreword*, in Peace and Prosperity through World Trade, kindle location 307 (Fabrice Lehmann & Jean-Pierre Lehmann eds., Cambridge University Press, 2011).
9) *See* Douglas A. Irwin, Against The Tide: An Intellectual History Of Free Trade 11 (Princeton University Press, 1997).
10) *See* Book II, Ch. II (R. Shamasastry trans., Spastic Cat Press, Kindle 2009). The four sciences comprises of: Anvikshaki (the philosophy of sankhya, yoga, and lokayata), Vedas (Rig, Sama, Yajur, Atharva), Varta (trade, business, and profession), and Danda-Niti (the science of government). However, Manu the ancient legal philosopher and jurist holds that there are only three sciences: Vedas, Varta, and Danda-Niti. Except on the philosophy, both Manu and Kautilya have common vision on the issue of social science.
11) *Id.*, Ch. XVI.
12) *Id*.

13) *See generally* L. N. Rangarajan, Introduction to Kautilya's Arthashastra (L. N. Rangarajan trans., New Delhi, Penguin Books, 1992).

14) *See* the Preamble of the General Agreement on Tariffs and Trade (1947). It provides that, "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."

15) *See* the Preamble of the Marrakesh Agreement Establishing the World Trade Organization (1994). It provides that, ". . . while allowing for the 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, . . . 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."

16) *See* Trade Policies for a Better Future: The Leutwiler Report, the GATT and the Uruguay Round 10 (Martinus Nijhoff Publishers, 1987).

17) *See generally* UNDP, Human Development Report (2010 &1990), available at <http://hdr.undp.org>.

18) *See* UNCTAD, The Least-Developed Countries Report, 2012, available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=249 >.

19) *See* Lawrence Lindsey, Foreword in Lori Ann LaRocco, Dynasties of the Sea (Marine Money Inc., 2012).

20) *See* Adam Smith, The Wealth of Nations 293-294 (Illustrated Version, Kindle Edition, 2011). Smith observes that the different progress of opulence in different ages and nations, has given occasion to two different systems of political economy, with regard to enriching the people. The one may be called the system of commerce, the other that of agriculture . . . and wealth and money, in short, are, in common language, considered as in every respect synonymous."

21) *Id.*, at 297-298.

22) *See* David Ricardo, On the Principles of Political Economy and Taxation Kindle Location 1229 (London, John Murray, 1817, Kindle Edition, 2011).

23) *Id.,* at Kindle Location 1285.

24) *See* Nobelprize.org, Why Trade?, available at <http://www.nobelprize.org/educational/economics/trade/ohlin.html >

25) *See* Paul A. Samuelson, *International Trade and the Equalization of Factors Prices*, 58 the Economic Journal 180, 163-184 (1948). Samuelson argues that, "If we superimpose on the free commodity trade situation, free factor movements, labor will begin to migrate. But it certainly will not have to migrate until full factor proportionality has been achieved in both regions. Short of that condition, the regions will become enough alike in factor endowments so that free trade can equalize factor prices-so that each country only partially specializes and by a judicious weighting of the relative importance of different industries achieves the common optimal world pattern of production."

26) *See* Louis T. Wells Jr., *A Product Life Cycle for International Trade*? 32 Journal of Marketing 1, 1-6 (1968).

27) *See* Raymond Vernon, *The Product Cycle Hypothesis in a New International Environment*, 41

Oxford Bulletin of Economics & Statistics 255-267 (1979).

28) *See* Raymond Vernon, *International Investment and International Trade in the Product Cycle*, LXXX Quarterly Journal of Economics 190-207 (1966).

29) *See generally* Paul R. Krugman, *What Should Trade Negotiators Negotiate About*? 35 Journal of Economic Literature 113-120 (1997); Elhanan Helpman and Paul R. Krugman, Trade Policy and Market Structure 1-10 (The MIT Press, 1989); Paul R. Krugman, *Introduction: New Thinking About Trade Policy*, in Strategic Trade Policy and The New International Economics 1-22 (Paul R. Krugman, ed., MIT Press, 1986); Paul R. Krugman, *New Theories of Trade Among Industrial Countries*, 73 American Economic Review 343-347 (1983); Paul R. Krugman, *Scale Economies, Product Differentiation, and the Pattern of Trade*, 70 American Economic Review 950-959 (1980).

30) *See* Paul A. Krugman, *The Increasing Returns Revolution in Trade and Geography*, 99 American Economic Review 561-571 (2009); Paul A. Krugman & Maurice Obstfeld, International Economics: Theory and policy Ch. 6 (Addison-Wesley, Fifth edition, 2000); Paul A. Krugman, *New Theories of Trade Among the Industrial Countries*, 73 American Economic Review 343-347 (1983); Paul. A. Krugman, *Scale Economies, Product Differentiation, and the Pattern of Trade*, 73 American Economic Review 950-959 (1980).

31) *Id.* Krugman & Obstfeld, Ch. 6.

32) *See* Paul A. Krugman, Rethinking International Trade 2 (MIT, fourth printing, 1994).

33) *Id.*

34) *See supra* note Krugman & Obstfeld, Ch. 6. The authors state that, ". . . When there are increasing returns, however, large firms usually have an advantage over small, so that markets tend to be dominated by one firm (monopoly) or, more often, by a few firms (oligopoly). When inceasing returns enter the trade picture, then, markets usually become imperfectly competitive."

35) *See supra* note Krugman, Rethinking 2-3.

36) *Id.* 5-19.

37) *See* Paul A. Krugman, *The Conscience of a Liberal: Bad Free Trade Arguments,* (June 14, 2008), <http://krugman.blogs.nytimes.com/2008/06/14/bad-free-trade-arguments>; *see generally* Paul A. Krugman, The Conscience of a Liberal (W. W. Norton & Company, 2007).

38) *See* Paul A. Krugman, *What Do Undergraduate Need to Know About Trade*? 83 American Economic Review 23-26 (1983).

39) *See* Paul A. Krugman, Pop Internationalism 4 (The MIT Press, 1997). Krugman further argues that, "Thinking in terms of competitiveness leads, directly and indirectly, to bad policies on a wide range of issues, domestic and foreign, whether it be health care or trade."

40) *Id.*, at 6. Krugman argues that, ". . . A corporation is uncompetitive; we mean that its market position is unsustainable—that unless it improves its performance, it will cease to exist. Countries, on the other hand, do not go out of business. The may be happy or unhappy with their economic performance, but they have no well-defined bottom line. As a result, the concept of national competitiveness is elusive."

41) *See* Paul Krugman, *What Should Trade Negotiators Negotiate About*? 35 Journal of Economic Literature 113-120 (1997); *see also* J. Peter Neary, *Putting the 'New' into New Trade Theory: Paul Krugman's Nobel Memorial Prize in Economics*, 111 Journal of Economics 217-250 (2009); Van Bergeijk and Dick L. Kabel, *Strategic Trade Theories and Trade Policy*, 27 Journal of World Trade 175-187 (1993); Paul Krugman, *Introduction: New Thinking about Trade Policy*, in Strategic Trade Policy and The New International

ECONOMICS, (Paul. Krugman ed., The MIT Press, 1986); Paul Krugman, "New Theories of Trade Among Industrial Countries, 73 *American Economic Review* 343-347 (1983).

42） *See supra* note KRUGMAN, POP INTERNATIONALISM, at 4. Krugman further argues that, "Thinking in terms of competitiveness leads, directly and indirectly, to bad policies on a wide range of issues, domestic and foreign, whether it be health care or trade."

43） *See* ELHANAN HELPMAN & PAUL R. KRUGMAN, TRADE POLICY AND MARKET STRUCTURE 16 (The MIT Press, 1989). Helpman & Krugman argue that, ". . . if an import quota is imposed on a foreign product, and licenses are assigned to Americans to import the quota product, the effect would be the same as that of an export tax, which is always welfare improving."

44） For a detail discussion on the WG *see* SURENDRA BHANDARI, MAKING RULES IN THE WTO: FREE OR MANAGED TRADE? (RoseDog Books, 2012); Surendra Bhandari, *Developing Countries in the WTO and Doha Round*, 20 SEOUL LAW REVIEW 411-453 (2012).

45） For a detail discussion on effective and good governance *see* The World Bank, World Development Report 1997: the State in a Changing World, available at <http://wdronline.worldbank.org/worldbank/a/c.html/world_development_report_1997/abstract/WB.0-1952-1114-6.abstract >. The World Bank observes, "The world is changing, and with it our ideas about the state's role in economic and social development. Today's intense focus on the state's role is reminiscent of an earlier era, when the world was emerging from the ravages of World War II, and much of the developing world was just gaining its independence. Then development seemed a more easily surmountable—and largely technical—challenge. Good advisers and technical experts would formulate good policies, which good governments would then implement for the good of society. State-led intervention emphasized market failures and accorded the state a central role in correcting them. But the institutional assumptions implicit in this worldview were, as we all realize today, too simplistic. Flexibility to implement the policies devised by technocrats was accorded pride of place. Accountability through checks and balances was regarded as an encumbrance. In a few countries things have indeed worked out more or less as the technocrats expected. But in many countries outcomes were very different. Governments embarked on fanciful schemes. Private investors, lacking confidence in public policies or in the steadfastness of leaders, held back. Powerful rulers acted arbitrarily. Corruption became endemic. Development faltered, and poverty endured."

46） *See* THOMAS PAINE, COMMON SENSE, kindle at 5 (Moncure Daniel Conway ed., Vol. I, Amazon Digital Service, 2009). Paine succinctly observers that, "Society in state is a blessing but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries BY A GOVERNMENT, which we might expect in a country WITHOUT GOVERNMENT, our calamity is heightened by reflecting that we furnish the means by which we suffer."

47） As of September 21, 2012 the market value of the Apple is 654.97 Billion US dollars and the stock price is 698.70 US dollars each share. The market value of the Apple exceeds the annual budget of many countries.

48） See United States — Countervailing Duty Measures on Certain Products from China, available at <http://www.wto.org/english/news_e/news12_e/dsb_28sep12_e.htm> The Dispute Settlement Body of the WTO has established a Panel on 27 September 2012, ". . . to study the complaint against countervailing duty measures taken by the United States on certain products from China that the US considers are subsidized. China said that it recognizes WTO members' legitimate rights to adopt trade remedy measures but such rights must be exercised in accordance with WTO rules and not be subject to any form of abuse. The US said that the measures applied were necessary in order to offset injurious subsidies bestowed (by China) on the manufacture, production or export of goods, and to counteract the injury caused by China's subsidies. Members requesting to exercise their third-party rights were: European Union, Japan, India, Turkey, Norway, Viet Nam, Australia, Russian Federation, Canada, Brazil and Korea."

49) Based on the premise that positive rules are not normative, this paper operationalizes the positive nature of rules into four essential features. They are: (1) when rules are promulgated their meaning will not be affected by moral or ethical considerations. In this sense the meaning is fixed and predictable. (2) Rules should provide equal opportunity to all subjects in terms of their use and application. For example, in the context of international agreement, if some of the member countries can use the rules for their benefit alone on the face of the inability of other members, such rules lack the positive nature. (3) When rules benefit only some of the members at the detriment of other members, such rules cannot be called positive. (4) For a positive rule, while transforming concepts into construct or rules, objective methodology should be applied. The positive nature of rules explained by most of the positivist jurists resemble to the type (1) standard of this classification of positive rules. The author of this paper explains positive nature of rules with all these four standards.

50) *See* Kenneth J. Arrow, Social Choice and Individual Values 46 (John Wiles & Sons Inc. 2nd ed. 1963) (1951).

51) *See* H. L. A. Hart, The Concept of Law 18-25 (Oxford, Clarendon Press 2nd ed. 1994) (1961); *see also* Candace J. Groudine, *Authority: H. L. A. Hart and the Problem with Legal Positivism*, 4 Journal of Libertarian Studies 273-288 (1980).

52) *See* WTO Negotiating Group on Rules, *Statement on "zeroing" in the Antidumping Negotiation: Statement by Brazil, India, Japan and other Members*, TN/RL/W/214/Rev.2 (Dec. 18, 2007). In the statement the Members have emphasized that the Chair's text permitted the practice of zeroing, thus running counter to DDA. Zeroing was a biased and partial method for calculating the margin of dumping that inflated AD duties. If the use of such practice would prevail in the future, it would nullify the results of trade liberalization efforts. Therefore, they called upon all Members to ensure that the multilateral trading system would not be undermined through zeroing. *See also* WTO Negotiating Group on Rules, Communication from Japan: Proposal on the Prohibition on Zeroing, TN/RL/GEN/126 (April 24, 2006).

53) *See* Jagdish Bhagwati, *Fifty Years: Looking Back, Looking Forward*, (1998), *available at* http://www.columbia.edu/~jb38/WTOsymp.pdf. *See also* Joseph Stiglitz, *Trade and the Developing World: A New Agenda* 387-393, 98 Current History 631 (1999). Stiglitz says, ". . . Perhaps the most egregious of these barriers are antidumping and countervailing duties. While there are few topics on which economists agree, on with almost universal consensus is that, as implemented, antidumping and countervailing duties make little economic sense; instead, they are thinly disguised protectionist measures."

54) *See* Benjamin Jowett, *On the Ideas of Plato*, *in* Plato, Meno 22 (trans. by Benjamin Jowett, The Project Gutenberg EBook, 2008), *available at* http://www.gutenberg.org/files/1643/1643-h/1643-h.htm .

55) *See* D. W. Gotshalk, *The A Priori*, 30 Journal of Philosophy 253, 253-262 (1933).

56) *See* Immanuel Kant, Critique of Pure Reason 1-20 (trans. by J. M. D. Meiklejohn, New York, Colonial Press, 1900).

57）*Cited in* RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 4 (LexisNexis, 3rd ed., 2008).

58）*Cited in id.*, at 5.

59）*See* WILLIAM J. BERNSTEIN, A SPLENDID EXCHANGE: HOW TRADE SHAPED THE WORLD, Kindle Location 137, (Perseus Books Group, Kindle Edition, 2009).

60）*Id.,* at Kindle Location 138-148. "How did goods get from China to Rome? Very slowly and very perilously, one laborious stage at a time. Chinese traders from southern ports loaded their ships with silk for the long coastwise journey down Indochina and around the Malay Peninsula and Bay of Bengal to the ports of Sri Lanka. There, they would be met by Indian merchants who would then transport the fabric to the Tamil ports on the southwest coast of the subcontinent—Muziris, Nelcynda, and Comara. Here, large numbers of Greek and Arab intermediaries handled the onward leg to the island of Dioscordia (modern Socotra), a bubbling masala of Arab, Greek, Indian, Persian, and Ethiopian entrepreneurs. From Dioscordia, the cargo floated on Greek vessels through the entrance of the Red Sea at the Bab el Mandeb (Arabic for "Gate of Sorrows") to the sea's main port of Berenice in Egypt; then across the desert by camel to the Nile; and next by ship downstream to Alexandria, where Greek Roman and Italian Roman ships moved it across the Mediterranean to the huge Roman termini of Puteoli (modern Pozzuoli) and Ostia. As a general rule, the Chinese seldom ventured west of Sri Lanka, the Indians north of the Red Sea mouth, and the Italians south of Alexandria. It was left to the Greeks, who ranged freely from India to Italy, to carry the greatest share of the traffic."

61）*Id.*, at Kindle Location 115.

62）*Id.*

63）*See*, RICHARD L. SMITH, PREMODERN TRADE IN WORLD HISTORY, Kindle Location 160, (T & F Books, Kindle Edition, 2009).

64）*See generally supra* note BHANDARI, MAKING RULES IN THE WTO.

65）*See* ADAM SMITH, THE WEALTH OF NATIONS 309 (Illustrated Version, Kindle Edition, 2011). Smith further mentions that countries restrain imports from other countries sometimes through high duties, and sometimes through absolute prohibitions. Countries encourage exportation sometimes by drawbacks, sometimes by bounties, sometimes by advantageous treaties of commerce with foreign states, and sometimes by the establishment of colonies in distant countries.

66）*See* Jonathan Watts, *Field of Tears*, THE GUARDIAN (16 September 2003), available at <http://www.guardian.co.uk/world/2003/sep/16/northkorea.wto>.

67）*Cited in* ERNEST H. PREEG, TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM 175 (The University of Chicago Press, 1995).

68）*See* GRAIN, Trade and Hunger (2000), available at <http://www.grain.org/article/entries/212-trade-and-hunger>.

69）*See* Chakravarthi Raghavan, More Losers than Winners from the WTO's Free Trade (2001), available at <http://www.twnside.org.sg/title/losers.htm>.

70）*Id.,* at Global Trade Watch, The World Trade Organization: An Australian Guide, at 4 (2006), available at <http://www.tradewatch.org.au/guide/New_WTO_Guide.pdf >.

71）*Id.,* at 5-6.

72）*Id.,* at 7-12.

73）*Id.,* at 13.

74）*See generally* GRAHAM DUNKLEY, FREE TRADE: MYTH, REALITY AND ALTERNATIVES (Zed Books, ebook ed., 2013). For counter argument *see* BHANDARI *supra* note MAKING RULES.

75) *See* Bernard Hoekman, Henrik Horn, & Petros C. Mavroidis, Winners & Losers in the Panel Stage of the WTO Dispute Settlement System, IFN Working Paper No. 769 (2008), available at <http://www.ifn.se/Wfiles/wp/wp769.pdf >.

76) *See* Ralph Nader on Free Trade, available at <http://www.ontheissues.org/2004/Ralph_Nader_Free_Trade.htm>. *See also* LORI WALLACH, PATRICK WOODALL, & RALPH NADER, WHOSE TRADE ORGANIZATION?: A COMPREHENSIVE GUIDE TO THE WORLD TRADE ORGANIZATION (New Press, 2nd revised ed., 2004).

77) *See* Sandra Polski, Winners and Losers: Impact of the Doha Round on Developing Countries, Carnegie Endowment for International Peace (2006), available at <http://www.carnegieendowment.org/files/Winners.Losers.final2.pdf>.

78) *See* Patrick J. McDonald, *Peace Through Trade or Free Trade*? 48 JOURNAL OF CONFLICT RESOLUTION 547-572 (2004).

79) *See* Helen V. Milner & Keiko Kubota, *Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries*, 59 INTERNATIONAL ORGANIZATION 107-143 (2005).

80) *See* Michael B. Devereux, *Growth, Specialization, and Trade Liberalization*, 38 INTERNATIONAL ECONOMIC REVIEW 565-585 (1997).

81) *See* Letter from the President to the Congressional Leadership, May 10, 2001, *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010510-5.html>; *see also* The President's 2001 International Trade Agenda, May 10, 2001, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010511.html>. The Letter provides that, "The trade agenda reflects my strong commitment to open markets around the world for the benefit of American workers, farmers, and businesses. I also am committed to open markets to provide lower prices and greater choices for U.S. consumers and industries. Open trade fuels the engine of economic growth that creates new jobs and new income in the United States and around the world. We have no time to waste in reasserting America's leadership on trade. The President has not had trade negotiating authority since it expired in 1994. We can no longer afford to sit still while our trading partners move ahead without us. For that reason, I have placed the enactment of U.S. Trade Promotion Authority at the top of my trade legislative agenda. . . I am committed to . . . rebuild the consensus needed to allow America to reassert its leadership in the trade arena. . . ."

82) *See* USTR, The President's 2010 Trade Policy Agenda, at 1-2 (2010), available at <http://www.ustr.gov/webfm_send/1673>.

83) *See* OECD, Policy Priorities for International Trade and Jobs, D. Lippoldt, ed., e-publication, 2012), available at <www.oecd.org/trade/icite>.

84) *See* Jeffrey D. Sachs, Andrew Warner, Anders Åslund, & Stanley Fischer, *Economic Reform and the Process of Global Integration, 1995 Brookings Papers on Economic Activity*, 2, 1-118 (1995).

85) *Id.*

86) *Id.,* at 3.

87) *Id.,* at 35.

88) *See* Earnesto Zedillo, *Introduction*, in GLOBAL TRADE AND POOR NATIONS: THE POVERTY IMPACT AND POLICY IMPLICATIONS OF LIBERALIZATION 1 (in Bernard M. Hoeakman & Marcelo Olarreaga eds., Brookings Institute of Press, 2007).

89) *Id.,* 1-2.

90) For detail discussion on the positive sides of trade liberalization and globalization, *see*

generally JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (Oxford University Press, 2007). Bhagwati succinctly argues that we lack a clear and comprehensive sense of how globalization works and how it can do better.

91) *See* UN, The Millennium Development Goals Report 2011, at 7 (United Nations, 2011), available at <http://www.un.org/millenniumgoals/pdf/(2011_E)%20MDG%20Report%202011_Book%20LR.pdf >.

92) According to the US Census Bureau, there are roughly 44 million people, or 14.3 percent of Americans, who live below the poverty line. Another 60 million people live between the poverty line and shadow of poverty line. For details *see* JEFFREY D. SACHS, THE PRICE OF CIVILIZATION, kindle locations 216, 3913 (Random House, 2012).

93) For a detail discussion on these issues *see generally* SURENDRA BHANDARI, MAKING RULES IN THE WTO: FREE OR MANAGED TRADE (DoseDog Books, 2012).

94) *See* Art. I.2, I.3, & Annex A-D of the General Agreement on Tariffs and Trade, 1947; *see also* E. U. Petersmann, *Introduction and Summary of the Book* to REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 5 (Ernst-Ulrich Petersmann with the assistance of James Harrison eds., Oxford University Press, 2005).

95) *See supra* note BHALA, INTERNATIONAL TRADE LAW, pp. 337-348, 361-366, 400-404, & 428-433.

96) *See* Andrew Schmitz et. al., *Domestic Farm Policy and the Gains from Trade*, 68 AMERICAN JOURNAL OF AGRICULTURAL ECONOMICS 820, 820-827 (1986).

97) *See generally* UNDP, Human Development Report 2010, 20th Anniversary Edition: The Real Wealth of Nations The Pathways to Human Development (Palgrave McMillan, 2010), *available at* http://www.beta.undp.org/content/dam/undp/library/corporate/HDR/HDR_2010_EN_Complete_reprint-1.pdf .

98) *See* Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador* WT/DS27/AB/R, (Sept. 9, 1997).

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国際貿易論の再検討と国際貿易交渉における福祉的根本規範の可能性について

国際貿易交渉の末，国際貿易ルール（条約）が作られるのは周知の事実である。しかしながら，国際貿易ルールを決定するために利用される国際貿易交渉は国際貿易論の検討によるかは明確に定まっていない。そこで国際貿易交渉やルール制定の場において，国際貿易論はどのような役割を担うのであろうか。今回の論文では，上記の根本的な問題を取り上げ，国際貿易論が国際貿易交渉やルール作成の場において横歩きである傾向の理由を分析する。まず１つ目の論点として挙げたいのは，理論の曖昧性である。WTO がルール策定時に検討される貿易理論の多くは，十分な方法基盤がない。２番目に，これらいくつかの理論は国際レジームに基づいて地方の利益保護のために作成されているものが多い。そのためこれらは国際的ルール策定には不適切だと考えられる。また貿易交渉者は，ほとんどの場合に貿易理論の適用に固執する傾向にある。つまり国際貿易ルールの内容策定を試みることが不可能になっている。そのため，３つ目の論文事案として，これまでの現状を通して新たに提案するという形を取りたい。

福祉的根本規範理論と国際貿易交渉や国際貿易ルール作成のための方法論について触れる。貿易の理論的根拠の様々な見方は，国際貿易への良い影響を生むと考えられる。一連の論争は，どの国際貿易政策が最も利益があるかといった点において，議論の余地を残す。ここで問題になってくるのが，誰がどの政策適用によって得をするかということだ。例えばだが，全てのステークホールダーやグローバルコミュニティー，或いは限られた国々のみが恩恵を受けられるのだろうか。政策レベルの論争にも関わらず，保護貿易主義は悪い政策手段であり，同時に好ましくないということは，普遍的に認識されている。

世界貿易機関は，福祉的根本規範の枠組みに基づいて国際貿易交渉ないし政策立案を行い，市場開放や自由貿易を目指す上で重要な機構である。しかし，世界貿易機関は自由貿易機構でないことを再度確認されたい。世界貿易機構の最大の役割は貿易交渉や貿易自由化推進である。また当機関は管理貿易の役割も担う。自由貿易化の鍵を握るのは多国間主義である。ドーハ開発ラウンドに目立った進展がない中，多国間主義は不透明さを残すものの，そこには弾力性がある。将来，次の３つの明確な手段を踏むことにより，貿易自由化という果実が熟すであろう。第１に，世界貿易機構は損傷・相違・作られた好都合・不均整らを世界貿易協定の法的構成から排除するという名目で交渉を開始すべきだ。第２に，世界貿易協定の加盟国である先進国と発展途上国は，国内のゆがんだ貿易基準を終わらせるべきだ。そして貿易自由化の発展に向けて安定した政治基盤を自国で形成していくべきである。第３に，貧困国は自国のガバナンスに専念し，国際貿易交渉に積極的に参加すべきである。

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