



**“Substantive and Procedural Justice in the World Trade
Organization”**

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ABSTRACT

Since the end of World War II, global governance has been characterized by the presence of international institutions. International institutions are typically perceived to operate in the pursuit of global justice. The World Trade Organization, for example, which has existed in its current form since 1995, is typically considered a means to the end of fair and liberal international trade. However, there is presently much conjecture regarding the justice or otherwise of such institutions. In this paper, I introduce two main branches of global justice, namely ‘substantive justice’ and ‘procedural justice.’ Then, I apply these concepts to the World Trade Organization in order to analyse its policies, practices, and structural foundations. In doing so, I conclude that the theoretical justice of the World Trade Organization is inconsistent with its practical justice. Whilst the World Trade Organization is internationally just on paper, it systematically advantages developed countries over developing countries. For an international institution that allegedly promotes economic and international trade equality, these findings are troubling.

Since the Cold War, Western society has emphasized security arrangements based on international institutions.¹ Indeed, contemporary world politics relies on bodies further to national governments; international institutions, in essence, provide “governance without government.”² International trade has been a focus of such institutions; the eventual establishment of the World

Trade Organization in 1995 was “the capstone of a gradual process of global trade liberalization that started after World War II.”³

Although international institutions are typically seen to guide values of global justice and peace, there have been calls worldwide for greater transparency in international institutions.⁴ In this paper, I specifically consider the

¹ John J. Mearsheimer, “The False Promise of International Institutions,” *International Security* 19, 3 (1994-1995): 5.

² Robert O’Brien, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2000), 2.

³ Bernard Hoekman, “Global Trade Governance,” in *International Organization and Global Governance*,

ed. Thomas G. Weiss and Rorden Wilkinson (New York: Routledge, 2014), 552.

⁴ Alexandru Grigorescu, “Transparency of Intergovernmental Organizations: The Roles of Member States, International Bureaucracies and Nongovernmental Organizations,” *International Studies Quarterly* 51, 3 (2007): 625.

World Trade Organization (WTO). Today, the WTO is “the only global institutional organization dealing with the rules of trade between nations,” rendering it suitable for analysis in terms of international justice. This paper will firstly provide a brief introduction to the history and global relevance of the WTO. Then, two distinct approaches to global justice will be introduced, namely ‘substantive justice’ and ‘procedural justice.’ Finally, this paper will situate the WTO in context of both substantive and procedural justice, ultimately contending that the WTO is not impartial, nor internationally just.

The World Trade Organization was 50 years in the making. The idea of an international trade organization was initially developed in 1944 at Bretton Woods.⁵ Two years later, the International Trade Organization (ITO) was established. The ITO “regulated trade in goods and commodity agreements,”⁶ and led to the creation of the General Agreement on Tariffs and Trade

(GATT).⁷ The ITO never fully came to fruition; however, the GATT remained as a multilateral agreement of trade regulation.⁸ The GATT subsisted from 1948 until it was incorporated into the WTO in 1995.⁹ For this time, the GATT applied on a ‘provisional’ basis; though technically never more than a treaty, its impact was considerable.¹⁰ Between 1948 and 1993, eight rounds of multinational negotiations took place, resulting in “a gradual extension of the trading system” over time.¹¹ The Uruguay Round (1986-1994) contentiously led to the incorporation of fields such as intellectual property, investment, and services.¹² The world trade order also moved from a power-based system to a rule-based system during this period.¹³ As a result, the WTO was officially established in 1995.¹⁴ It now contains 161 member countries worldwide, and serves as a forum for international trade negotiations.¹⁵ It is in this context that the WTO has been questioned in regard to international justice. Here, two

⁵ Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Oxford: Oxford University Press, 2006), 1.

⁶ Hoekman, “Global Trade Governance,” 553.

⁷ Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Oxford: Oxford University Press, 2006), 2.

⁸ Hoekman, “Global Trade Governance,” 553.

⁹ *Ibid.*, 553-554.

¹⁰ *Ibid.*

¹¹ *Ibid.*, 554-555.

¹² Susan K. Sell, “Big Business, the WTO, and Development: Uruguay and Beyond,” in *Political Economy and the Changing Global Order* (3rd edition), ed. Richard Stubbs and Geoffrey Underhill (Ontario: Oxford University Press, 2006), 183.

¹³ *Ibid.*

¹⁴ “The WTO,” World Trade Organization, accessed September 10, 2015.

¹⁵ World Trade Organization, “The WTO.”

approaches to global justice are most salient and need consideration.

The two most fundamental approaches to global justice in the realm of global governance are ‘substantive justice’ and ‘procedural justice’. Broadly, substantive justice can be understood as the provision of policies and structures that encourage fair outcomes.¹⁶ Substantive justice – or, perhaps, a lack of substantive justice – can be analysed in terms of how certain parties are impacted by trade negotiations. Most pertinently, substantive justice is concerned with distribution of wealth, resources and power, more with the procedure of distribution itself.¹⁷ In this way, an agreement could be considered substantively just (resulting in ‘fair’ outcomes for all parties) even if it is conducted in a procedurally unjust way. Procedural justice, on the other hand, focuses on whether or not the manner of events is fair, irrespective of the outcome that it produces.¹⁸ Insofar as procedural justice emphasizes fairness of

manner, concepts of representation, coercion and power are all included under this umbrella term.¹⁹ More generally, one might say that substantive justice is concerned with the fruits of structures and processes, whilst procedural justice is more interested with the actual makeup of those structures and procedures. Some argue that substantive and procedural justice are independent; others argue that procedural justice is “prior and fundamental” to achieving substantive justice.²⁰ Regardless, there presently exist concerns of the WTO regarding both branches.

Since its inception, there has been much conjecture regarding substantive justice of the WTO. Indeed, some have questioned the WTO’s legitimacy on substantive grounds.²¹ In particular, the WTO’s policies and agreements have been criticized for allegedly favouring developed nations over developing nations in issues such as poverty, the environment and human rights.²² One example in the realm of intellectual

¹⁶ Mary Elsbernd and Reimund Bieringer, *When Love is Not Enough: A Theo-Ethic of Justice* (Minneapolis: The Liturgical Press, 2002), 173.

¹⁷ Nancy Ehrenreich, “Foreword: Conceptualizing Substantive Justice,” *The Journal of Gender, Race & Justice* 13, 1 (2009-2010): 536.

¹⁸ E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988), 2.

¹⁹ John Thibaut, Laurens Walker, Stephen LaTour, and Pauline Houlden, “Procedural Justice as

Fairness,” *Stanford Law Review* 26, 1 (1973-1974): 1271.

²⁰ See, e.g., Helen E. S. Nesadurai, “Bandung And The Political Economy of North-South Relations: Sowing The Seeds For Revisioning International Society,” *With Compliments* 95, 1 (2005): 10.

²¹ Daniel C. Esty, “The World Trade Organization’s legitimacy crisis,” *World Trade Review* 1, 01 (2002): 19.

²² *Ibid.*

property is The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). TRIPs was developed “[u]nder strong pressure by... industrialized countries,”²³ and aimed to protect the creation of new technology – primarily that of the United States of America.²⁴ Developing countries agreed to the arrangement with great hesitancy, and largely unwillingly; TRIPs debatably inhibits the economic progress of developing nations.²⁵ Indeed, it seems that developed nations sought to universalize their own conceptions of intellectual property rights, which had grown on the back of technological and social advancements in their nations.²⁶ Although the desire to protect intellectual property was not in itself unreasonable, developed countries – led by the United States of America – worked toward cementing an asymmetrical division of labour. That is, TRIPs would ensure that technological power remained in ‘the

North,’ and that ‘the South’ would continue to provide a market for that power.²⁷

It was largely industries of nations in the Organisation for Economic Cooperation and Development (OECD) that benefitted from TRIPs.²⁸ In the context of such asymmetrical international power, “developing countries realized that their choice was... between [the] GATT and aggressive unilateralism (US economic coercion).”²⁹ Developed countries’ desire to protect innovation and investment was grounded in the increasing emphasis on information economies in modern society.³⁰ Such a divide with developing countries, however, can lead to drastic consequences. For example, TRIPs has made essential medicines less easily accessible, particularly to the populations of developing countries.³¹ TRIPs removed the option of producing pharmaceuticals without a patent, resulting in increased prices and

²³ Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (London: Zed Books Ltd., 2000), 1.

²⁴ Sell, “Big Business, the WTO, and Development: Uruguay and Beyond,” 185.

²⁵ William A. Kerr, Jill E. Hobbs, and Revadee Yampoin, “Intellectual property protection, biotechnology and developing countries: will the trips be effective?” *AgBioForum* 2, 3 (1999): 203.

²⁶ Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (London: Zed Books Ltd., 2000), 3.

²⁷ *Ibid*, 5.

²⁸ Hoekman, “Global Trade Governance,” 555.

²⁹ Sell, “Big Business, the WTO, and Development: Uruguay and Beyond,” 190.

³⁰ Michael W. Smith, “Bringing Developing Countries’ Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam’s Efforts to Normalize an Intellectual Property Regime,” *Case Western Journal of International Law* 31, 2 (1999): 218.

³¹ Frederick M. Abbott, “The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO,” *Journal of International Economic Law* 5, 1 (2002): 469.

more stringent conditions of production.³² The patent must now be valid for a minimum of twenty years.³³ The United Nations Commission on Human Rights recognizes medicinal access “in the context of pandemics as an essential human right.”³⁴ Each year, roughly 11 million people – mostly in developing countries – die from preventable diseases.³⁵ Approximately two billion people in developing countries have no regular access to vital medicines.³⁶ Yet, TRIPs has, and will continue to, “restrict competition, increase prices, and further reduce the already limited access of poor people to vital medicines” by virtue of disallowing ‘generic drugs’ (low-cost imitations of the original product).³⁷ In this way, TRIPs can be understood as a barrier to, rather than a server of, international human rights protection.

The ‘Singapore issues’ and post-Uruguay Round trends also exemplify substantive injustice in TRIPs. The

Singapore issues – trade and investment, trade and competition, transparency in government procurement, and trade facilitation – had all been debated heavily since the induction of the WTO in 1995.³⁸ Each of these issues appears to serve the interests of industrialized nations.³⁹ Many developing countries may also simply lack the resources required to adhere to the Singapore issues.⁴⁰ It seems the case, then, that the Singapore issues are substantively unjust both in the country groups that they favour, and also in the requirements that they impose. Moreover, even when agreements have been settled upon, many developed nations since the Uruguay Round have not upheld their commitments toward developing countries. For example, developed countries have not complied in the fields of agriculture and textiles, which are priorities for many developing nations.⁴¹ Lower tariffs in these fields, which are beneficial to developing countries, were theoretically

³² Sell, “Big Business, the WTO, and Development: Uruguay and Beyond,” 190.

³³ Lauren Winter, “Cultivating Farmers’ Rights: Reconciling Food Security, Indigenous Agriculture, and TRIPs,” *Vanderbilt Journal of Transnational Law* 43, 1 (2010): 234.

³⁴ “TRIPs: Council Discussion on Access to Medicines: Developing country group’s paper,” World Trade Organization, accessed September 14, 2015. https://www.wto.org/english/tratop_e/trips_e/paper_develop_w296_e.htm

³⁵ Oxfam, *Cut the Cost: Patent Injustice: How World Trade Rules Threaten the Health of Poor People* (London, 2001), 3.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Simon J. Evenett, “Five hypotheses concerning the fate of the Singapore issues in the Doha Round,” *Oxford Review of Economic Policy* 23, 3 (2007): 395-397.

³⁹ Sell, “Big Business, the WTO, and Development: Uruguay and Beyond,” 192.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

provided in return for stronger intellectual property rights.⁴² Developing countries accepted TRIPs on the assumption that concessions on agriculture and textiles would be made, and that aggressive unilateralism from the United States of America would reduce.⁴³ Further, the initial protection afforded to developing countries in the fields of agriculture and textiles was inferior to the protection afforded to developed countries in the field of intellectual property.⁴⁴ Subsequently, many developing nations have become dissatisfied with the TRIPs agreement, arguing that it “fails to take into consideration their needs, interests, and local conditions.”⁴⁵ It seems clear, then, that TRIPs can be couched as substantively unjust. However, procedural justice must also be considered.

The WTO operates on a ‘one-state, one-vote’ basis, in which each state has an equal say in proceedings.⁴⁶ In theory, this exemplifies procedural justice; each state is treated the same, and is represented equally. In practice,

however, this is not the case. Although voting is technically possible in the WTO, decisions are typically made as a result of consensus.⁴⁷ The benefits of such a system, and perhaps the WTO’s rationale for implementing it, are clear: generally, there will be broad support for the decision, no party loses face, and the decision-making process very seldom results in open battle.⁴⁸ It is true, however, that more powerful states tend to be more influential than less powerful states in the bargaining process.⁴⁹ If one large state disagrees with a particular proposal, that proposal is highly unlikely to proceed; this is much less likely to be the case should a smaller state be the only state to disagree.⁵⁰ This is likely due to the threat of economic coercion. Whilst states might agree to terms based on mutual beneficence, this is not always the case. Economic coercion, or the threat of economic coercion, can lead to ‘forced co-operation’ in the international arena.⁵¹ Although each state may hold ‘agency’ insofar as being able

⁴² Peter K. Yu, “TRIPs and Its Discontents,” *Marquette Intellectual Property Law Review* 10, 1 (2006): 371.

⁴³ Sell, “Big Business, the WTO, and Development: Uruguay and Beyond,” 186.

⁴⁴ Yu, “TRIPs and Its Discontents,” 371.

⁴⁵ *Ibid.*, 369.

⁴⁶ Ngaire Woods and Amrita Narlikar, “Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank,” *International Social Science Journal* 53, 170 (2001): 573.

⁴⁷ Hoekman, “Global Trade Governance,” 556.

⁴⁸ Claus-Dieter Ehlermann and Lothar Ehring, “Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?” *Journal of International Economic Law* 8, 1 (2005): 66-67.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 558.

⁵¹ Sell, “Big Business, the WTO, and Development: Uruguay and Beyond,” 190.

to govern its own population, this agency is “embedded in broader and deeper structures characterized by glaring power asymmetries.”⁵² During the Uruguay Round, developed nations were advantaged by the structure of trade negotiations by virtue of holding greater economic influence. This was the case even when developing nations formed coalitions, suggesting that the WTO is procedurally unjust.⁵³ This asymmetry of power should not be ignored.

Procedural injustice is evident, too, in the exclusion of some of the WTO’s member states during core decision-making consultations.⁵⁴ Historically, Canada, the European Union, Japan, and the United States of America – collectively known as ‘the Quad’ – have been at the centre of decision-making and negotiations.⁵⁵ This remains the case: typically, ‘Green room’ discussions include only the Quad in addition to any countries to whom the issue at hand is of particular salience.⁵⁶ All other states

are excluded from this process.⁵⁷ As such, the disparity of influence between member states, coupled with the sheer amount of negotiation that takes place in the WTO, has pushed many developing countries outside the realistic scope of decision-making.⁵⁸ Many developing nations have not been provided with the means to truly influence negotiations, rendering it difficult for them to be impactful when finally involved.⁵⁹ The rule-based, consensus decision-making procedures of the WTO ultimately allow power asymmetry in the same way that a power-based structure would.⁶⁰ Here, theoretical procedural justice in terms of the ‘one-state, one-vote’ system has clearly not led to practical procedural justice in the WTO.

Dispute settlement mechanisms are also considered an important aspect of procedural justice in the WTO. The WTO plays a crucial role in the enforcement of international trade commitments.⁶¹ Since 1995, over 450 cases have been adjudicated; in the majority of

⁵² Ibid, 193.

⁵³ Peter Drahos, “When the Weak Bargain with the Strong: Negotiations in the World Trade Organization,” *International Negotiation* 8, 1 (2003): 79.

⁵⁴ Woods and Narlikar, “Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank,” 577.

⁵⁵ Hoekman, “Global Trade Governance,” 555.

⁵⁶ Woods and Narlikar, “Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank,” 577.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid, 578.

⁶⁰ Richard H. Steinberg, “In the Shadows of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO,” *International Organization* 56, 2 (2002): 339.

⁶¹ Hoekman, “Global Trade Governance,” 552.

these cases, the ‘losing’ party has agreed to comply with international standards.⁶² It is true that developing nations have at times used this scheme to their advantage. In 2004, for example, the WTO ruled in favour of Brazil over the United States of America in relation to the latter’s cotton subsidies.⁶³ Insofar as the WTO is governed in a rule-based manner, it may be the case that developing countries have greater leverage to challenge more powerful states. However, in this scheme, it remains evident that power asymmetries dictate many negotiations. Retaliation from state to state can now be used to ‘encourage’ the infringing country to better comply with international standards.⁶⁴ As some countries are too small to be able to realistically influence larger countries in meaningful ways, developed nations are advantaged by the WTO’s present dispute settlement mechanism.⁶⁵ Indeed, small countries that inflict import barriers will likely cause more harm to the welfare of their own country than to the infringing, larger state.⁶⁶ As such, the WTO is structured in a way that is skewed toward the interests of developed nations.

⁶² Ibid.

⁶³ Sell, “Big Business, the WTO, and Development: Uruguay and Beyond,” 193.

⁶⁴ Hoekman, “Global Trade Governance,” 557.

Since 1945, which marked the end of World War II, there has been great emphasis on the role of international institutions in global governance. The World Trade Organization was formally established in 1995 on the back of the General Agreement on Tariffs and Trade, which subsisted provisionally from 1948 until 1995. Despite the general perception that such institutions work toward the protection of global justice, there remain calls for greater transparency in both their structures and outcomes. In this paper, two branches of global justice – substantive justice and procedural justice – were introduced. Each of these was discussed in relation to the WTO. Analysis suggests that the WTO may be substantively unjust. Policies such as TRIPs and the ‘Singapore issues’ appear to favour developed countries over developing countries; further, developed countries seem not to have fulfilled their international commitments in fields most salient to developing nations. The WTO also appears to be procedurally unjust. Although voting theoretically exists in the WTO, ‘consensus’ is often achieved in practice as a result of significant power

⁶⁵ Ibid.

⁶⁶ Bernard Hoekman and Petros Mavroidis, “WTO Dispute Settlement, Transparency and Surveillance,” *World Economy* 1, 1 (1999): 5.

asymmetries. Many developing nations are excluded from core decision-making negotiations, and the dispute settlement mechanism also seems to favour more powerful states. For an international institution that allegedly promotes economic and international trade equality, these findings are troubling. This paper has focused exclusively on the WTO; however, it has offered an insight into international institutions governing global trade, finance and development in general. Although many aspects of these institutions could be considered ‘formally just,’ their practical justice appears questionable.

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