THE PLACE OF SOCIOECONOMIC RIGHTS IN INTERNATIONAL TRADE LAW

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I certify that this project paper was prepared under my guidance and supervision.

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Dedication

To my parents, for all their support and encouragement

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17. The WTO Agreement on Import Licensing Procedures
18. The WTO Agreement on Government Procurement
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List of abbreviations

CITES: -	The Convention on International Trade in Endangered Species of Wild Fauna and Flora
GATT: -	General Agreement on Tariffs and Trade
GATS: -	The General Agreement on Trade in Services
FAO: -	The Food and Agriculture Organization of the United Nations
ICJ: -	The International Court of Justice
IMF: -	The International Monetary Fund.
NAFTA: -	North American Free Trade Agreement
U N: -	United Nations
WTO: -	The World Trade Organization.
WTO DSU: -	Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU") of the World Trade Organization

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CHAPTER I

GENERAL INTRODUCTION & OVERVIEW

1.1. Introduction

This thesis, at its essence, concerns an examination of the proper role of human rights in international law and the conduct of policy-making international organizations. Specifically, the thesis will deal with the relationship between socioeconomic rights recognized in international human rights law and neoliberal policies, as pursued under the World Trade Organization and expressed in WTO law.

Neoliberalism entails a theory expounding on the minimal role of the state in the economy, and the belief that markets left largely undisturbed by the state are able to allocate resources efficiently, and to work as a sort of invisible hand or create a spontaneous order which channels the individual trader's entrepreneurial pursuits to the benefit of society at large. Neoliberalism has also been explained as follows;

> …Neoliberalism generally also includes the belief that freely adopted market mechanisms is the optimal way of organising all exchanges of goods and services…Free markets and free trade will, it is believed, set free the creative potential and the entrepreneurial spirit which is built into the spontaneous order of any human society, and thereby lead to more individual liberty and well-being, and a more efficient allocation of resources…[1]

In domestic law, the place of human rights as a constraint on the conduct of the state is celebrated. As Makau Mutua stated, underlying the development of human rights, is the belief that the state is a predator that must be contained. Otherwise, it will devour and imperil human freedom.[2] It is apparent that human rights play a similar role as concerns the impact of international organizations on individual rights.

The UN Committee on Economic Social and Cultural Rights has repeatedly emphasised that the realms of trade, finance and investment are in no way exempt from human rights obligations and principles and that international organisations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights.[3]

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[1] Thorsen, D. E., & Lie, A. *What is neoliberalism?* (Unpublished and undated manuscript) Retrieved from: http://folk.uio.no/daget/neoliberalism.pdf <last accessed on July 10, 2013> p. 14-15

[2] Makau Mutua as quoted in Odinkalu, C. A. (2003). Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa. *Journal of African Law*, 47(1), 1-37, p. 1-2

[3] See "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Human rights and intellectual property", Statement by the Committee on Economic, Social and Cultural Rights, 14 December 2001, Doc.E/C.12/2001/15, as quoted in Lumina, C., (2008). Free trade or just

The idea that markets could function to the benefit of society imports into neoliberal discourse, the concept of welfare. Welfare as freedom to choose, freedom from paternalistic impositions and a minimal role for the state, generally and in the economy, has roots in liberalism. It is also a concept that is founded on the key liberal concepts of democracy, freedom and civil and political rights. Civil and political rights are generally viewed as negative freedoms as freedom, for example as relates to the right to life, freedom not to be arbitrarily killed by the state.

While the neoliberal idea of a minimal state within the economy would work well with the kind of negative freedoms that civil and political rights entail, it might not tarry with interferences by the state, within the economy, for purposes of price control law, for example, in order to fulfil socioeconomic rights such as the right to food.

The argument offered against these kinds of interferences in neoliberal thought is that such interferences would be made without adequate information as there is a belief that the state could not possibly be possessed of all the information necessary to make such interferences and that those interferences may work against the natural order or spontaneous order which is revealed by market practices that have been found to be effective.

Friedrich von Hayek's theory on the emergence on spontaneous order from the activities of different individuals with goals that differ, also starts from the premise that knowledge and information alone, even in such scales as the state is able to acquire, is inadequate and could not fully help in making decisions on the appropriate system to be adopted in a given society. This inadequacy of information, in Hayek's view has been explained as the unpredictability of the course of evolution;

> Natural selection operates on mutations, making the path of natural selection unpredictable, regardless of how well we understand the underlying principles. To Hayek, social and cultural evolution are much the same: driven by innovation, fashion, and various shocks that "mutate" people's plans in unpredictable ways with unpredictable results.[4]

In Hayek's view social institutions and rules emerged over time. Over time those systems and rules that are shown to be effective, through a process of evolution, replace the ineffective ones. Hayek went further to defend capitalism and a free market society by elaborating that such systems have demonstrated a higher level of efficiency.

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trade? The World Trade Organisation, human rights and development (Part 1). *Law, Democracy & Development Journal* , 12 (2), 20-40

[4] Schmidtz, D., (2012). Friedrich Hayek, In Zalta, E. N. (ed.), *The Stanford Encyclopedia of Philosophy*. Retrieved from: http://plato.stanford.edu/archives/fall2012/entries/friedrich-hayek/ <last accessed on July 25, 2013>

This thesis focuses on the idea that international trade policy should be influenced by international human rights, especially socioeconomic rights. However, questions have been raised about the applicability of the whole corpus of human rights to a body of law largely concerned with facilitating commercial ends. It has been argued that if international bodies insist upon the respect of human rights obligations in relation to other areas of law, such as trade, economic or humanitarian law, the question concerning the nature of applicability of those obligations would have to be resolved.[5]

Applicability of human rights may be determined by various means. A reading of the sources of international law recognized under Article 38 of the Statute of the International Court of Justice indicates that all treaties rank at the same level with various interpretative rules determining their applicability in situations of conflict. The exception to this would be *jus cogens* and *erga omnes* norms provided for under Article 53 of the 1969 Vienna Convention on the Law of Treaties, which rank higher than any other sources of international law and may only be derogated by norms of a similar stature.

Stipulations providing for precedence may be used to establish the applicability of international norms to particular situations. The United Nations Charter has primacy over other sources of international law, presumably excluding *erga omnes* provisions and *jus cogens* norms, pursuant to Article 103 of the Charter of the United Nations. The said UN Charter makes numerous references to human rights and even provides for obligations for the promotion of human rights.[6] Its role in establishing the place of human rights in international law, and especially as concerns international trade policy, will be one of the subjects of this thesis.

A reading of the constituting instruments of the Bretton Woods institutions and the World Trade Organization indicates that development is an overriding objective. The preamble to the Marrakesh Agreement Establishing the WTO, for instance, speaks of the improvement of the standards of living of the people of its member states as the WTO's key purpose.[7] Currently, this development objective is pursued by means of neoliberal policies and there are various provisions within the WTO law regime that give expression to neoliberalism. These include provisions that support the free movement of goods across borders, such as rules on non-discrimination against foreign traders. The central question that begs an answer is whether the neoliberal framework is able to ensure the attainment of adequate standards of living.

[5] Klein, E., (2009). Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy? *International Law Forum of the Hebrew University of Jerusalem Law Faculty*, Research Paper No. 02-09

[6] See, for example, Article 1(3) and Article 55 of the Charter of the United Nations.

[7] The Marrakesh Agreement Establishing the World Trade Organisation ("WTO Agreement") of 15 April 1994, 1867 UNTS 154, Preamble, para. 1 and 2.

Neoliberal policies may be said to be liberal in the classical sense of reliance on markets and the price mechanism, while giving the state a minimal role in the economy.[8] The market, driven by individual entrepreneurs who are pursuing profit, assumes the nature of a sort of invisible hand, which works to the benefit of society. The state, within neoliberalism, is given a limited role in the economy/market. The neoliberal policies embody a shift from the Keynesian approach that unashamedly approved of state intervention in the interests of social welfare.

The underlying theories within neoliberalism include Adam Smith's theory of the invisible hand and David Ricardo's concept of comparative advantage- both of which have weaknesses that may weigh negatively against the realisation of socioeconomic rights. This thesis will entail a consideration of the impact of neoliberal policies on human rights, especially, socioeconomic rights.

The particular areas in which there is dissonance as between neoliberal policies and socioeconomic rights include, reliance on markets and the price mechanism, privatisation in order to expand markets into areas dominated by state corporations and the general perception of the role of the state and the nature of welfare.

Privatisation may help divert public resources managed by the state for purposes of service delivery to the citizenry into private hands that manage resources with a profit motive. Further, reliance on markets to fix prices may work against price control laws aimed at safeguarding access to essential commodities by low income earners. Perceptions concerning what welfare would require of the state may work against certain disadvantaged groups. Welfare as preferences made by the individual as concerns what the individual finds to be beneficial to that individual is different from the socioeconomic rights sort of welfare where welfare is predetermined in the nature of certain rights. Generally, for an individual to exercise the freedom to make choices, that individual has to be empowered to pick a preference from the set of choices available.

The issues on dissonance between trade policy as expressed in WTO law and socioeconomic rights requirements will form the subject of the thesis.

1.2. Background to the study

It is difficult to reconcile the idea that international organizations which set out their key purposes as development and the improvement of standards of living should not be asked

[8] See Chon, M., (2006). Intellectual Property and the Development Divide. *Cardozo Law Review*, 27(6), 2813-2905, p. 2853

whether their policies are conducive to the realisation of the right to an adequate standard of living,[9] because they are organizations dealing with economics and trade matters.

The World Trade Organization's declared key purpose is to improve the standards of living of the people of its Member States by establishing legally binding rules which help trade to flow as freely as possible.[10] One of the broad aims of international trade is to generate wealth and to help states to fulfil their development aims.

Generally, there are two views on the meaning of development, one based on an assessment of the increase of national income, measured by concepts such as the Gross National Product, GNP; the other, is one based on the raising of standards of living, focusing more on the condition of an individual in society. The concepts are similar and may co-exist within one framework but they differ. The difference is based on the fact that an increase in national income may mean that the rich got richer and the poor may even be worse off; it's possible for nothing to trickle down to the low income earners. It is also possible to raise standards of living, simply by decreasing income disparities, for example by increasing taxes due from high income earners and using the revenue earned for welfare purposes.

The 1990 Human Development Report defined development as a process of enlarging people's choices, emphasizing freedom to be healthy, to be educated and to enjoy a decent standard of living. But it also stressed that human development and well being went far beyond these dimensions to encompass a much broader range of capabilities, including political freedoms, and human rights echoing Adam Smith, "the ability to go about without shame."[11]

It is noteworthy that this perception of development largely resonates the wording of Article 25 of the Universal Declaration of Human Rights,[12] which states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Development as the raising of national income has its place not only in economics but also in providing state resources utilized for purposes of healthcare and education. However, the

[9] See Article 25, Article 28 and the preamble of the Universal Declaration of Human Rights, 1948.
[10] The Marrakesh Agreement Establishing the World Trade Organisation ("WTO Agreement") of 15 April 1994, 1867 UNTS 154, Preamble, para. 1 and 2.
[11] The Overview to the Human Development Report 2010 (A product of the UNDP Human Development Report Office)
[12] The Universal Declaration of Human Rights, 1948

broader view of development which has support in international human rights law is development based on improving the human condition and standards of living.[13]

The view expressed by Amartya Sen, in *Development as Freedom*[14] is largely one that receives the support of socioeconomic rights,

> "The ends and means of development require examination and scrutiny for a fuller understanding of the development process; it is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, 'merely useful and for the sake of something else.' For the same reason, economic growth cannot sensibly be treated as an end in itself. Development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy."[15]

The WTO seeks to achieve the ends of development and improving standards of living via its largely neoliberal policies. The liberal argument that markets are self-regulating and could be allowed to exist in a political and institutional vacuum is largely a myth.[16] Generally, markets are very bad at ensuring the provision of public goods, such as security, stability, health and education.[17] The extent to which neoliberal policies are at odds with socioeconomic rights is the subject of this thesis.

1.3. Statement of the research problem

The World Trade Organization's (WTO) declared objective is to raise standards of living by promoting the free flow of international trade. The International Covenant on Economic, Social and Cultural Rights provides (Article 11) that every person has a right to an adequate standard of living. It therefore follows that the WTO ought to support the realization of the right to an adequate standard of living. The WTO has adopted neoliberalism as its guiding policy framework. This study is concerned with analyzing whether neoliberalism as practiced by the WTO is able to secure the realization of the right to an adequate standard of living. This issue will form the core of the discussion as to the link between human rights standards and international trade policy.

[13] See also the preamble to the Charter of the United Nations.
[14] Amartya, S., (1999). *Development as Freedom*. New York: Anchor Books
[15] Amartya S., (1999). *Development as Freedom*. New York: Anchor Books, quoted in Chon, M., (2006). Intellectual Property and the Development Divide. *Cardozo Law Review*, 27(6), 2813-2905, p. 2813
[16] See The Overview to the Human Development Report 2010 (A product of the UNDP Human Development Report Office)
[17] The Overview to the Human Development Report 2010 (A product of the UNDP Human Development Report Office)

1.4. The research hypothesis

Free trade policies alone will not lead to the realisation of the attainment of the World Trade Organization's objective of raising standards of living. The achievement of that objective will require the incorporation of socioeconomic rights concerns into the World Trade Organization's mandate.

1.5. The objectives of the study

The objective of the study is:-

1. To argue for the need to link human rights policy requirements to the formulation and requirements of international trade policy. Specifically, this objective would include: -
   a.) Explaining the legal basis, in international law, of the influence of human rights in international trade law.
   b.) Examining the terms of WTO law and its policy framework, and illustrating that neoliberalism is part of the WTO law framework.
   c.) Illustrating the specific points where international trade law and socioeconomic rights, differ and explaining how such differences can be resolved.

1.6. Research questions

1. What is the relationship between international human rights law and international trade law?
2. What nature of influence should socioeconomic rights have on international trade policy?

1.7. Theoretical framework

Neoliberalism is a concept founded on granting individual choice and freedom to pursue entrepreneurial aims within the market to traders, and granting the state a minimal role within the market, which mostly entails creating a secure environment conducive to trade and protecting private property rights. It is also a concept which seeks to increase entrepreneurial choice by opening up markets in areas where there are state monopolies through privatisation, or in areas largely within state control and by offering a wide definition to goods and services. In this way, traders have a large pool of options, in terms of sectors in which to carry on trade, to choose from.

Within the concept, the market takes up a form of invisible hand role, by channelling individual entrepreneurial pursuits to the benefit of society as a whole; such that by trading, the individual is able to improve the range and quality of products available to society, for example by

competing with other traders. In this sense, the concept borrows much in terms of ideology from Adam Smith's theory of the invisible hand.

Comparative advantage as posited by David Ricardo, within neoliberalism, would come in to rationalize free trade and the removal to barriers to international trade. Comparative advantage proposes that states should specialize in trading in what they have the natural ability to produce very efficiently, and buy from other states commodities that they can only produce inefficiently and at a relatively greater cost than those states that have advantages enabling them to produce the commodity cheaply. A further analysis of the concept of neoliberalism forms the subject of Chapter III of this thesis.

The underlying theories in neoliberal thought include Adam Smith's theory of the invisible hand and David Ricardo's comparative advantage.

1.8. Research methodology

As this thesis seeks to examine concepts, such as neoliberalism and to test the concepts against a socioeconomic rights framework, the purpose of the study is to analyse, evaluate and examine the correlation between varied concepts. The main concepts being examined are the international trade policy of neoliberalism and socioeconomic rights. It is therefore a study that aims to apply certain policies into a socioeconomic rights framework and to assess their suitability to such a framework.

The proper sources of data utilized herein include primary sources of international law such as treaties, customary international law, general principles of law, judicial decisions and the works and teachings of distinguished scholars.[18] Particularly, international human rights instruments such as the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966, form the main sources of data. Similarly, sources of data will include judicial decisions of international courts and tribunals, particularly on socioeconomic rights.

An examination and evaluation of the applicable World Trade Organization Agreements and the General Agreement on Tariffs and Trade (GATT) provisions will also be undertaken.

[18] The sources of International Law recognized in Article 38(1) of the Statute of the International Court of Justice.

Secondary sources of information such as books, publications on statistical information and journal articles, will be used to provide an illustrative factual context, to trace divergent viewpoints on particular issues and also to determine the settled interpretation and meanings of various concepts.

1.9. Literature review

In a sense, prepositions, on the relationship between socioeconomic rights and international trade law, embody an analysis of the relationship between the market and the state, *albeit*, in the context of international law. Generally, in problematizing development, including the issue of raising standards of living, some authors include the role of civil society alongside the role of the state and the role of the market.

Gordon White wrote an article on civil society with the aim of investigating the relationship between civil society and democratization in the context of developing nations. He explained that in discussing development, civil society is part of the analytical aspects, the other aspects include the state and the market and how they relate to each other.[19] He explains that civil society is an intermediate associational realm between state and family populated by organizations which are separate from the state, which enjoy autonomy in relation to the state and are formed voluntarily by members of the society to protect or extend their interests or values. [20]

Within the neoliberal context, and particularly the aspects of liberalism and libertarianism that neoliberalism entails, civil society would fit into the neoliberal context as form of negative freedom from state interferences, which often take the form of civil and political rights such as rights to association. It would include the freedom to associate for any purpose and to agitate for social reform. On issues such as the rights of commercial sex workers, neoliberalism would provide a supportive framework in articulating the interests of bringing social relations into the realm of the market so as to aid the expansion of entrepreneurial freedoms.

Further, there have been various prepositions on the nature of influence that human rights should have in international trade law. Some authors base such prepositions on the fact that states that are signatory to international trade treaties are also signatories to the Charter of the

[19] White, G. (1996). Civil society, democratization and development. In Luckham, R. and White, G. (eds), *Democratization in the South: The jagged Wave*, Manchester: Manchester University Press. p. 178
[20] White, G. (1996). Civil society, democratization and development. In Luckham, R. and White, G. (eds), *Democratization in the South: The jagged Wave*, Manchester: Manchester University Press. p. 179

United Nations and other human rights treaties. Other authors base such prepositions on the hierarchical position of certain treaties as expressly stipulated in those treaties, for example, Article 103 of the UN Charter gives the UN Charter precedence over other treaties in situations of conflict in their respective provisions.

Sigrun I Skogly, has utilized Article 103 of the UN Charter to argue that the IMF and the World Bank have human rights obligations.[21] Skogly utilizes the fact that the member states of the IMF and the World Bank are member states of the United Nations, to argue that those states have human rights obligations which cannot be limited by their entry into other international treaties.

Further, it has been argued that even the United Nations itself has human rights obligations. Paust J Jordan,[22] elaborates that part of the United Nations' mandate, as expressed in Article 1(3) of the Charter of the United Nations is to promote the advancement of human rights. He argues that Article 55(c) of the U.N. Charter is a provision that incorporates customary human rights into the UN Charter by reference. Together with the U.N., according to Paust J Jordan, member states to the United Nations under Article 56 of the UN Charter are bound to take joint and separate action towards the promotion and observance of human rights. Therefore, human rights norms may gain superiority in international law by virtue of these norms being part of the provisions of the UN Charter.

Additionally, on the issue of hierarchy, Jure Vidmar,[23] opines that the UN Charter, with its Article 103, and the concept of *jus cogens* may be said to add a hierarchical dimension into the system of international legal norms. Vidmar further explains that *jus cogen* and *erga omnes* norms rank at a superiors level to the UN Charter. In turn, pursuant to Article 103 of the UN Charter, the UN Charter ranks higher than other sources of international law, except, *jus cogens* and *erga omnes* provisions.

Vidmar also cites instances where courts have ruled that Article VII of the UN Charter on peace and security overrides human rights instrument provisions touching on security. He explains

[21] Skogly, S. I. (2001). *The Human Rights Obligations of the World Bank and the International Monetary Fund.* London: Cavendish Publishing Limited.
[22] Paust, J. J., (2010). The U.N. is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity. *Harvard International Law Journal Online*, 15, 1-12
[23] Vidmar, J., (2012). Chapter 2: Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System? In E. de Wet & Vidmar, J., (eds.), . *Hierarchy in International Law: The Place of Human Rights*. Oxford: OUP.

that in *Al Jedda*,[24] for example, Lord Brown of Eaton-Under-Heywood upheld the primacy of an obligation created under the UN Charter over Article 5(1) of the ECHR (the right to liberty and security of person.) However, concerning hierarchy within the human rights system, it has been argued that the concept of hierarchy of norms to international law is widely debated and is in fact still debated. [25]

Given that Article 103 of the UN Charter may give hierarchical superiority to socioeconomic rights found in Article 55 of the UN Charter, questions may be raised about certain provisions within the WTO law regime and neoliberal policies that work against the realisation of socioeconomic rights.

Lumina[26] touching on the correlation between trade policy and human rights, notes that the WTO has been receiving criticism based on the perceived negative impact of its agreements and insensitivity to human rights concerns. Common criticisms are that the WTO is not working in the interests of the majority of its members; global trade, as presently organised, only serves the interests of large multinational corporations; the WTO poses a threat to democracy, environmental justice, labour laws and nations' control of their destinies; and that the global trading system (underpinned by the WTO) does not address the concerns of developing countries but exposes them to pressures from powerful countries.[27]

Additionally, in explaining the primacy of international human rights law, Lumina states that Article 1(3) of the Charter of the United Nations sets human rights as the cornerstone for the achievement of the purposes of the United Nations.

There is a general agreement amongst various authors that neoliberal policies entail a minimal role for the state in the economy, a belief in free trade and free markets. For example, Harvey has argued that neoliberalism entails the adoption of certain free trade and free market rules that express the hope that such institutional arrangements, would take on a life and momentum of their own and would be very difficult to reverse.[28] The general belief is that measures taken up within the neoliberal framework would create wealth and improved wellbeing for the population at large.

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[24] R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58, (2008) 1 AC 332; ILDC 832 (UK 2007)

[25] Klein, E., (2009). Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy? *International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper No. 02-09,* 477-488

[26] See Lumina, C., (2008). Free trade or just trade? The World Trade Organisation, human rights and development (Part 1). *Law, Democracy & Development Journal* , 12 (1), 20-40

[27] Lumina, C., (2008). Free trade or just trade? The World Trade Organisation, human rights and development (Part 1). *Law, Democracy & Development Journal* , 12 (2), 20-40

[28] Harvey, D., (2005). *A Brief History of Neoliberalism.* Oxford: Oxford University Press. p. 7

In some explanations given to neoliberalism, the perception of the market as a sort of invisible hand, which is unintentionally driven by the individual traders in the market, is clear. It is said that the market proves to be an efficient means of resource allocations in terms of supply and ensuring that the resources are put into the most productive and efficient use possible. It makes the trader think of how to produce more using less and how to offer quality goods that can beat the competition in the market.

In Sayigh's explanation, the invisible hand's assumption of the role of the state in the economy receives expression. He traces such elaborations back to Adam Smith and states that the belief in the ability of the invisible hand to arrange economic life efficiently, smoothly, and to everybody's satisfaction dominated economic thinking between Adam Smith and the Great Depression.[29] Generally, to a large degree, instead of the state, within neoliberalism, it is the market that takes the role of generating well-being within the economy; the state is supposed to be minimalist.

Beyond creating a market that is largely free from the hold of the state, neoliberalism also entails the expansion of markets into areas which were not previously open to private traders or were the preserve of state monopolies. Harvey has argued that privatisation is redistributive in the sense that it transfers state assets, administered for public purposes, to the hands of those possessed of capital; mostly the upper class. Further, Harvey elaborates that unscrupulous managers can gain control over newly privatized corporations and their assets all too easily and use them for their own personal enrichment.[30]

The privatisation of state corporations which administer public assets, for example those relating to housing and pensions may have a negative impact on certain socioeconomic rights. It has been argued by Narsiah, for instance, that the privatisations of housing utilities in South Africa has undermined the realisation of the right to shelter which is recognized in the South African Constitution.[31]

Some authors have shown that largely open borders, within the free trade framework, could lead to an undue reliance on imports and create imbalances whereby a state imports much more than it exports to the detriment of its economy. The free trade ideal whereby the free flow of trade across borders is encouraged is part of the neoliberal framework.

[29] Sayigh, Y. A., (1961). Development: The Visible or the Invisible Hand? *World Politics*, 13(4), 561-583 p. 561
[30] Harvey, D., (2005). *A Brief History of Neoliberalism.* Oxford: Oxford University Press. P. 145
[31] Narsiah, S. (2002). Neoliberalism and privatisation in South Africa. *Geojournal*, 57(1/2), 29-28, p. 29

Pacheco-López,[32] on the effect of trade liberalization in the case of Mexico, demonstrates that Mexico is a large participant in international trade. He states that due its pursuit of a program of trade liberalization, Mexico has become the thirteenth-largest exporter and the tenth-largest importer in the world. He goes on further to explain that the potential gains from trade have been diluted because trade policies have not addressed fundamental weaknesses in the industrial and financial sectors. He identifies Mexico's increased dependence on imported inputs, especially of raw materials and parts for assembly as an effect of liberalization.

In some literature, it is argued that free trade at the international level exposes vulnerable developing states and industries to international competition which they are not able to handle effectively.

The Zapatista uprising on January 1, 1994 drew international attention to the plight of Mexico's indigenous farmers, and highlighted their opposition to the North American Free Trade Agreement ("NAFTA") and to the neoliberal restructuring of Mexico's economy of which the agreement was a part.[33] Gonzalez,[34] in his assessment of this matter, finds that there might be some justification for the resistance to NAFTA.

He states that NAFTA devastated rural livelihoods, increased unemployment, and accelerated migration to the United States. While U.S. and Mexican government officials argued that NAFTA would create jobs in Mexico and reduce illegal immigration to the United States, the Zapatista rebels regarded NAFTA as the codification of economic policies that marginalized and impoverished Mexico's rural indigenous communities.[35]

Gonzalez goes further to explain how government subsidies in the US agricultural sector enabled US farmers to market their harvest at a rate as low as 40% of the production cost, much to the disadvantage of farmers in developing countries.

Generally, in the body of existing literature, it is accepted that international trade policies such as neoliberalism have an impact on the livelihoods of disadvantaged or vulnerable segments of

[32] Pacheco-López, P., (2005). The Effect of Trade Liberalization on Exports, Imports, the Balance of Trade, and Growth:The Case of Mexico. *Journal of Post Keynesian Economics*, 27(4), 595-619
[33] Gonzalez, C., G., (2011). An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms. *University of Pennsylvania Journal of International Law*, 32, 723-803
[34] Ibid.
[35] Gonzalez, C., G., (2011). An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms. *University of Pennsylvania Journal of International Law*, 32, 723-803

society. The question on the nature of alignment that needs to exist between trade and human rights has not received sufficient focus in a large volume of existing literature.

1.10. Summary of chapters

Chapter I entails a general overview of the main theme of the paper. It begins with introductory remarks, gives a background to the study and goes on to give a brief description and explanation of key concepts.

Chapter II is on a study of the place of international human rights law in international law generally, and with regard to international trade law in particular. It examines primacy prepositions based on the Charter of the United Nations and the Universal Declaration of Human Rights, 1948. On the other hand, due consideration is given to other divergent views as concerns hierarchy in international law.

Chapter III is an analysis of the concept of neoliberalism as concerns international trade policy. It examines the expression received by neoliberalism within the WTO law regime and the impact of privatisation as practised within a neoliberal framework on socioeconomic rights. It also considers the nature of the role of the state within the economy.

Chapter IV introduces a socioeconomic rights perspective to international trade policy. It considers the extent to which policy stipulations may be questioned on the basis of human rights. It also involves a consideration of areas of conflict between international trade law and international human rights law, and the impact of such conflicts on the realisation of socioeconomic rights.

Chapter V will be a concluding chapter which will seek to summarize the general theme and main prepositions expressed in the thesis. It will entail the conclusion and the recommendations applicable to the thesis.

1.11. Significance of the study & contribution to scholarship

This study hopes to contribute to the attainment of socioeconomic rights concerns within international trade policy. It also aims at elaborating views, mostly from a developing world perspective, on the need to make trade policy not just uniform but equitable.

It seeks to examine the socioeconomic rights framework and see whether such rights could contribute to making international trade policy equitable.

Its contribution to scholarship is that it aims to bring clarity to the issue concerning the hierarchical position of human rights in international law by explaining the sources of the hierarchical superiority of human rights in international law and examining divergent views and expounding on them. There are premises to the effect that human rights have primacy and fundamental importance but not necessarily superiority in international law. The degree to which that premise is true, forms part of the subject of the thesis.

A further contribution to scholarship lies in the attempts in the thesis to clarify the link between international trade law and international human rights law. These areas of international law, in conventional thought, are said to be specialized regimes with different fields of applicability.

CHAPTER II

ESTABLISHING THE PRIMACY OF INTERNATIONAL HUMAN RIGHTS IN INTERNATIONAL LAW

2.1. Introduction

This chapter aims to explore the legal basis, in international law, for stating that socioeconomic rights should influence, and even, in some situations, take precedence over the provisions of international trade law. It moves discourse away from the conventional view that international human rights law and international trade law are different regimes applicable in different contexts, into considering the need for coherence, collaboration and some shared authority within the two specialized regimes.

It considers the impact of Article 103 of the Charter of the United Nations in giving precedence to the human rights provisions found in the Charter over the provisions of other treaties. Further, in situations where there is no conflict between international human rights law and international trade law, the impact of Article 31(3) (c) of the Vienna Convention on the Law of Treaties, 1969, is considered to be one that introduces the need for integrative interpretation such that it would be possible to introduce socioeconomic rights concerns into international trade law.

2.2. General overview on sources of international law and hierarchy

Article 38(1) of the Statute of the International Court of Justice[36] lists sources of international law which include international conventions, international customs, general principles of law judicial decisions and scholarly works. The said Article 38 provides a list of sources of international law but does not go into giving a hierarchical order within the sources, stated verbatim, it reads;

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:-
>
> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ;
> b) international custom, as evidence of a general practice accepted as law;
> c) the general principles of law recognized by civilized nations ;
> d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[36] The Statute of the International Court of Justice, signed in San Francisco, California, on June 26, 1945.

Despite the fact that a ranking order is not provided for in the Statute of the International Court of Justice,[37] there are prepositions that even under Article 38 of the Statute of the International Court of Justice, there exists some ranking within the sources of international law, especially where the different sources' provisions are inconsistent. However, it is noteworthy that the said Article 38 categorizes judicial decisions and the teachings of publicists as subsidiary sources of international law. Effectively, treaties, customary international law and general principles of law have a higher rank than judicial decisions and the teachings of publicists, as sources of international law.

An example of prepositions, on hierarchy, includes the classification of sources of international law as primary sources, complementary sources and subsidiary sources. Such a classification supposes that where incompatible rules derive from different sources of international law (e.g., treaty rule v customary law), an embedded hierarchy is apparent: treaty and customary rules are regarded as primary sources of international law, general principles of law are viewed as complementary rules and are applied in cases where the dispute cannot be settled either on the basis of treaties or custom, and the judicial decisions and writings of authors are considered as subsidiary sources of international law.[38]

Additionally, the order in which the sources are listed has often been understood as a rough hierarchy—treaties are often considered first and treated as the most authoritative sources.[39]

> ...Such a hierarchy and list of sources reflects the prevailing positivist understanding of international law. According to this view, international law is based primarily on the consent of sovereign states. Treaties, having been negotiated, written, signed, and ratified, present the strongest evidence of consent...[40]

Under international law, generally, treaty and custom have equal weight, and inconsistencies are regulated by three interrelated principles: (i) *lex specialis derogat generali* – meaning that a specific rule prevails over a general one; (ii) *lex posterior derogate priori* - a later rule prevails over a prior one; (iii) respecting the parties' intentions - where the parties intended to replace a rule deriving from one source of international law with another rule included in another source

[37] Article 38(1) of the Statute of the International Court of Justice, signed in San Francisco, California, on June 26, 1945.
[38] Hirsch, M., (2011). Sources of International Investment Law. *International Law Forum of the Hebrew University of Jerusalem Law Faculty* , Research Paper No. 05-11, 1-28, p. 25
[39] Paraphrased and sourced from Cohen, H. G., (2007). Finding International Law: Rethinking the Doctrine of Sources. *Iowa Law Review* 93, 65-129, at p. 77
[40] Cohen, H. G., (2007). Finding International Law: Rethinking the Doctrine of Sources. *Iowa Law Review*, 93, 65-129, p. 78

of law (e.g., replacing a customary rule with a treaty rule), the rule preferred by the parties will prevail.[41]

Positivist legal scholars, who ascribe the rules of international law to the consent of states, treat custom and treaty as the only significant sources of international law.[42] Other sources of international law, which are not directly created by the consent of states, for instance, scholarly works often contain the subjective views of a given author. It is generally held by positivists that treaties are a more clear source of international law; their terms are certain; unlike customary international law, treaties do not lend themselves to doubts concerning whether they reflect the general state practice.

However, it may be questioned whether the whole body of treaty law rests on consent alone-treaties are often a product of negotiations and there is some compromise involved. Most participants recognize that, in practice, international legal rules are frequently formed, applied, and changed without such developments being the will of all the states concerned.[43]

The natural law school of thought gives more credence to a practiced custom because it could evidence not only consent but also the law of nature. For instance Emerich de Vattel described international law as a law "based on the principles of the law of nature and written with a view to practical application." For Grotius, international law had two sources (which are deeply intertwined: (1) the law of nature and (2) mutual consent—or, in his terms, "the law of nations."[44]

The general position is that customary international law is a manifestation of the law of nature which is apparent to states in their general conduct based on an application of natural reason. Therefore, practices appeal to reason because there is something in the natural order of things to support the existence of the customary practices.

The issue of consent has given rise to the categorization of sources of international law either as hard sources which are grounded in consent or as soft sources which are not grounded in consent. Doctrines about the creation of custom and treaty indicate that what needs explaining about a treaty is its hard basis in consent, while what needs explaining about custom is its soft

[41] Ibid.
[42] Sornarajah, M., (2010). *The International Law on foreign investment.* New York: Cambridge University Press p. 85
[43] Kingsbury, B., (2003). The International Legal Order. *Institute for International Law and Justice (IILJ) Working Paper 2003/1 (History and Theory of International Law Series)* 1-27, p. 4
[44] Cohen, H. G., (2007). Finding International Law: Rethinking the Doctrine of Sources. *Iowa Law Review*, 93, 65-129

basis in the natural order of the system, or, in recent discourse, the conditions under which consent can be implied.[45] Accordingly, treaties, having been negotiated, written, signed, and ratified, present the strongest evidence of consent.[46]

> ...Treaties seem quintessentially hard: the ultimate expression of sovereign consent. Custom, by contrast, and certainly "general principles," seem soft: binding because it is just to do things as they have been done, to preserve expectations or reinforce a natural selection of wise norms. In general, positivists, who eschewed soft sources, preferred treaties to custom. Naturalists, by contrast, often emphasized custom and general principles of justice...[47]

A reading of Article 38(1) of the Statute of the International Court of Justice may also support the interpretation that sources of international law rank equally. The doctrine of equality of sources of international law is to the effect that international norms do not differ from each other as their legal value and their effects are ultimately based on the will or acceptance of the states alone;

> ...International norms are accordingly, as Combacau notes, undifferentiated: their validity, like their effects, has no other ultimate basis than the will of or acceptance by the states for which they are law; unlike the model of domestic law, no hierarchical structuring among them is conceivable. The principal reason for this phenomenon lies in the fact that international legal norms proceed, albeit in different degrees, from the manifestation of the will of sovereign states. This voluntarism is certainly one of the essential features of classical international law...[48]

Beyond prepositions as to whether Article 38(1) of the Statute of the International Court of Justice provides sources of international law that rank equally, there is the generally accepted view that *jus cogens* norms and *erga omnes* norms rank higher than any other sources of international law and may only be derogated by norms of a similar character. This view is expressed in Article 53 of the 1969 Vienna Convention on the Law of Treaties.

The lack of a clear standard or objective criteria for determining that a given international law norm has acquired the status of a *jus* cogens creates difficulties in determining the hierarchical

[45] Kennedy, D., (1987). The Sources of International Law. *American University International Law Review,* 2(1), 1-96, p. 33

[46] See Cohen, H. G., (2007). Finding International Law: Rethinking the Doctrine of Sources. *Iowa Law Review,* 93, 65-129, p. 78

[47] Kennedy, D., (1987). The Sources of International Law. *American University International Law Review,* 2(1), 1-96, p. 78

[48] Salcedo, J. A. C., (1997). Reflection on the Existence of a Hierarchy of Norms in International Law. *European Journal of International Law* , 8, 583-595, p. 585

status of a given norm. Klein[49] states that, in making such determinations, it might be difficult not to overstretch the two elements of customary law (*opinio juris* and state practice) in order to establish additional peremptory norms.[50] He however notes that most norms bearing the character of *jus cogens* are human rights norms.

While not affecting the superior status of *jus cogens* and *erga omnes* norms, Article 103 of the UN Charter may give the Charter of the United Nations a rank higher than any of the sources of international law listed under Article 38(1) of the Statute of the International Court of Justice. Article 103 of the UN Charter gives the provisions of the UN Charter precedence in situations where the provisions of the UN Charter conflict with the provisions of other treaties.

2.3. The fragmentation of International Law and the realization of socioeconomic rights

The question on whether international law is a legal system or a set of sub-systems is one which concerns fragmentation of international law and one that seeks answers on the nature of interactions between specialized regimes of international law, amongst themselves and also in relation to general international law. The International Law Commission has described international law as a legal system,[51] which means that there is need for coherence within the system. However, claims to autonomous and exclusive jurisdiction as concerns certain issues by specialized international organizations may work against coherence and may weigh against efficacious interactions between specialized regimes. Specialized regimes of international law have impacted on difficulties in creating coherence within international law;

> ...The specialization it occasioned has permitted a quick deployment of international law in numerous new fields. As a result, we have witnessed sweeping developments in various areas of law, such as environmental law, human rights law, the law of the sea, or world trade law. At the same time, however, it has contributed to the emergence of new institutional settings and judicial bodies with limited mandates dealing with highly specific questions within their respective fields of law. And indeed, the ensuing diversity of rules and institutions can invite serious difficulties, at least whenever they fail to abide with international law at large. As a result, questions regarding the

[49] Klein, E., (2009). Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy? *International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper No. 02-09,* 477-488

[50] Ibid

[51] International Law Commission, (2006). Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, in Report of the International Law Commission, 58th Session (2006) UN Doc A/61/10 (2006), ch. XII, paras 233-51.

> relationship between general international law and more specific areas of law must invariably arise...[52]

The fact that WTO law and international human rights law are considered to be distinct legal regimes in international law, may be sourced from the issues and the context to which the two regimes are intended to apply, and the fact that each of them has distinct compliance and enforcement mechanisms.

For instance, a dispute falling within the WTO regime would be overseen by the Dispute Settlement Body which adopts the decision of a select WTO panel which actually tries and receives evidence as concerns a particular dispute. On the other hand, within the international human rights regime, the Human Rights Committee would receive complaints and issue decisions pertaining to the enforcement of the International Covenant on Civil and Political Rights of 1966. Additionally, the United Nations Committee on Economic, Social and Cultural Rights oversees the enforcement of the International Covenant on Economic, Social and Cultural Rights, 1966. The applicable law to these different types of disputes would also be different, it would either be WTO law or norms sourced from the international bill of rights.

While it has been argued that the main problems with fragmentation are technical, not normative, in nature,[53] certain issues that are not technical in nature may be sourced from the subject of fragmentation. For instance, there are situations where different bodies have jurisdiction over the same subject matter. For example, fisheries issues are governed by various treaties whose jurisdictional areas overlap. These include the United Nations Convention on the Law of the Sea, 1982, (UNCLOS,) Convention on International Trade in Endangered Species of Wild Fauna and Flora[54] (CITES), and a series of agreements signed pursuant to Article XIV of the Constitution of the Food and Agriculture Organization of the United Nations.[55] The effect of such overlap of jurisdiction has been posited as one that creates problems of conflict and co-existence;

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[52] Lindroos, A., & Mehling, M., (2005). Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO. *European Journal of International Law*, 16(5), 857–877, p. 858

[53] Michaels, R. & Pauwelyn, J., (2012). Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law. *Duke Journal of Comparative & International Law,* 22(3), 349-376, p. 349-350

[54] The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), was signed in Washington, D.C. on 3 March 1973.

[55] The agreements touching on fisheries include the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009,) the Agreement on the Central Asian and Caucasus Regional Fisheries and Aquaculture Commission (2009),the Agreement for the Establishment of the Regional Commission for Fisheries (RECOFI) (1999), the Agreement for the Establishment of the Indian Ocean Tuna Commission (1993),and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, (1993).

> ...The resulting web of norms and institutions, which were all developed at different times and agreed [to] by differing states, gives rise to problems of co-existence and conflict which are made more complex by the absence of a world legislature. It is part of a general phenomenon known as the 'fragmentation of international law'...[56]

With recognition of the fact that each regime engages in specialization, it may be assumed that it is clear that an interpretation concerning what the right to food would entail would fall within the competence of the United National Committee on Economic Social and Cultural Rights, 1966. It may also be assumed that an interpretation, on the question as to whether certain import commodities should be taxed at higher rates, would fall into the domain of WTO law. Although such prepositions seem clear, it is probable that tariffs on imports relating books and computers, and also medical equipment and medicine, would affect the right to education and the right to health for certain disadvantaged classes of persons for reasons related to affordability.

Fragmentation may be seen substantively as the fragmentation of substantive norm (as is the case in fisheries affairs) or the fragmentation of authority at the international level.[57] There is clearly some basis for the assertion that the division of authority between market access (the WTO role in reducing barriers to international trade which includes import tariffs) and the access to essential commodities such as those which promote the right to education and the right to health, has limiting effects. The fragmentation of authority, where it's interpreted in such a manner as to exclude the mandate of the WTO in ensuring the realization of socioeconomic rights is not advantageous in raising standards of living.

The question that would arise is on whether it would be okay to ask for a drop in tariffs in favour of the right to education and the right to highest attainable standard of health and whether it would be the business of the WTO to consider such issues in developing its policies on tariffs relating to international trade. Within the current dispensation, it is the state's role to determine the rate of taxation on commodities but it is noteworthy that the state has an interest in keeping tariffs at such rates as would enable them to raise resources for public expenditure.

Although within the WTO law regime, non-agricultural market access negotiations are aimed at reducing or eliminating tariffs relating to international trade, such negotiations do not generally target essential commodities which may closely relate to the attainment of socioeconomic

[56] Young, M., (2009). Fragmentation of Interaction: The WTO, Fisheries Subsidies and International Law. *World Trade Review*, 8(4), 477-515, P. 480

[57] Delimatsis, P., (2011). The Fragmentation of International Trade Law. *Journal of World Trade*, 45(1), 87-116

rights.[58] Such negotiations would cover items defined as non-agricultural products and these include industrial goods, manufactured goods, textiles, fuels and mining products, footwear, jewelry, forestry products, fish and fisheries, and chemicals.

It would also be the role of the state to offer welfare services to disadvantaged classes of persons. However, even where the national law constitutionally protects socioeconomic rights, the state could fail to secure the realization of such rights and on grounds of limited resources, especially in developing countries. Enforcement of socioeconomic rights via the international human rights regime may also be faced with challenges, which include unavailability of resources at the national level.

It seems that in such an instance, the WTO would be best placed to control certain factors that affect the pricing of commodities that are crucial to the realization of certain socioeconomic rights within certain defined limits. Such measures would reduce the extent to which socioeconomic rights are not realized because of the state's limited resources. It would therefore be plausible if welfare-generation at the international level could extend to policy-making decisions made under the auspices of the WTO.

2.4. WTO law as a specialized regime and the applicability of international human rights law

This sub-heading entails a legal analysis that supports the preposition that international human rights law generally, without the need to source it in *jus cogens* or *erga omnes* norms, enjoys a superior rank, as against other treaties in international law. This would be based on a reading of Article 55 and Article 103 of the Charter of the United Nations. However, where a later treaty is able to defeat the effect of Article 103 by providing for a rule of conflict similar to Article 103 of the UN Charter, then the superiority of that treaty over international human rights provisions would be established, except in the case of human rights norms constituting *erga omnes* or *jus cogens*. Such a treaty would gain superiority under the rule expressed in the Latin maxim *lex posterior derogate priori* (a later rule prevails over a prior one).

However, contrary views on hierarchy of international human rights law in international law exist. On the question of hierarchy, it has been suggested that while the constitutional importance of human rights in international law is recognized, international human rights

[58] In its website the WTO expresses that the aim of the negotiations would be, "To reduce or as appropriate eliminate tariffs, including the reduction or elimination of high tariffs, tariff peaks and tariff escalation as well as Non-Tariff Barriers, in particular on products of export interest to developing countries."
Information retrieved from: - http://www.wto.org/english/tratop_e/dda_e/status_e/nama_e.htm <last accessed on May 3, 2013.>

treaties are generally not superior to other sources of international law, except where they constitute a form of *jus cogens* or *erga omnes* provision (for example, the norm against racial discrimination also concerns the right against discrimination on any prohibited ground, but would generally not cover the discrimination concerning sexual orientation.) In expressing this perspective on hierarchy, it has been argued;

> ...because of the community interest and values that human rights norms enshrine, norm conflict situations involving human rights are, as we shall see, frequently considered to be of constitutional importance, even though human rights norms are per se not hierarchically superior to other norms of international law...[59]

This view on constitutional importance of human rights, without there being hierarchical superiority is only true where the hierarchical effect of Article 103 is defeated by a similar provision in a latter treaty. Otherwise, the effect of Article 103 of the UN Charter would be to uplift the provisions of the UN Charter to a superior status so as to allow them to take precedence over other provisions of international law where conflict exists.

Furthermore, Paust stated that there is no interpretative *lex specialis* that could override human rights law.[60] Through *lex specialis*, a later treaty dealing with a particular matter is able to override an earlier treaty that deals with that matter in a general way. His argument on *lex specialis* is that human rights are *jus cogens*. Paust fails to elaborate on whether all human rights constitute *jus cogens*. However, not all human rights norms constitute *jus cogens* norms and therefore their hierarchical superiority must lie on a different premise and Article 103 of the UN Charter provides such a basis.

Furthermore, there are suggestions that tension exists between Article 103 of the UN Charter, which gives precedence to the provisions of the UN Charter as relates to situations of conflict with any other treaty, and Article 3(2) of the Dispute Settlement Understanding of the WTO.[61] It has been said that the said Article 3(2), gives WTO law the status of *lex superiores* (superior law).[62] On the basis of the differences existing as relates to the nature of conflicts and sources of

[59] Milanovic, M., (2008). Norm Conflict in International Law: Whither Human Rights? *Social Science Research Network* (website), Retrieved from: http://ssrn.com/abstract=1372423 <last accessed on August 10, 2012> at p. 2

[60] Paust, J. J., (2010). The U.N. is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity. *Harvard International Law Journal Online*, 15, 1-12

[61] Michaels, R. & Pauwelyn, J., (2012). Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law. *Duke Journal of Comparative & International Law* 22(3), 349-376, p. 369-370

[62] Bartels, L., (2001). Applicable Law in WTO Dispute Settlement Proceedings. *Journal of World Trade*, 35(3), 499-519

international law that the two legal provisions are applicable to, it can be shown that such views on superiority as between the UN Charter and the WTO law, are inaccurate.

Article 103 of the UN Charter governs relationships between the UN Charter and all other treaties, while Article 3(2) of the Dispute Settlement Understanding of the WTO,[63] governs the relationship between judicial decisions (particularly, the judicial decisions adopted by the Dispute settlement Body of the WTO) and WTO law. In terms of its effect on superiority of sources of international law, the said article 3(2) is a reflection of Article 38(1) (d) of the Statute of the International Court of Justice which establishes the subsidiary nature of judicial decisions as compared to treaty law. It does not go into affecting the relationship between WTO law and other international treaties. Therefore the status of the UN Charter as *leges superiors*, against WTO law is not affected. Article 3(2) of the Dispute Settlement Understanding of the WTO states,

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

Article 3(2) of the Dispute Settlement Understanding of the WTO, is not a rule of precedence, it is a rule meant to preserve the original meaning and intent embodied in WTO law against interpretations that narrow down or extend the intent of its drafters. On the other hand the effect of Article 103 of the UN Charter as relates to an interpretation of the extent of applicability of its human rights obligations is one that accords precedence to such obligations.

It is apparent that Charter rights including the socioeconomic rights recognized under Article 55 of the UN Charter enjoy precedence and rank higher than the provisions of any other treaty. Article 103 of the UN Charter often provides support to the existence of hierarchy within the sources of international law. For practical reasons, the hierarchical effect of Article 103 of the UN Charter must be extended into customary international law because treaties often embody a codification of customary international law;

> ...Article 103 has thus elevated the UN Charter to the status of a superior international treaty. Although the reference to any other agreement' and the drafting history of the Charter may suggest that its superiority is limited to treaty law, it can be argued that international law has evolved since then and

[63] The Dispute Settlement Understanding of the WTO is a shortened title for the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.

> the superiority can also be extended to obligations arising under customary international law. If Article 103 is not interpreted in this way, even the superiority of the UN Charter over other treaty obligations would be fraught with difficulty. Many obligations arising under multilateral treaties also arise under customary law, and the superiority of the UN Charter only in relation to obligations created by treaties would thus, in many instances, remain without actual effect...[64]

The Charter of the United Nations gives particular provisions on socioeconomic rights, and it also establishes the Economic and Social Council to enforce the socioeconomic rights.[65] Particularly, Article 55 of the UN Charter states,

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and inter-national cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Specifically, paragraph a and b of Article 55 of the UN Charter, give weight to the assertion that the achievement of the goals of economic development and the realisation of the socioeconomic rights are significant objectives which have a higher hierarchical place within treaty law. These goals should influence the WTO law regime.

Article 55(c) of the UN Charter may be said to make reference to the general body of human rights including civil and political rights (the first generation rights) and the collective rights also known as the third generation rights. It however, fails to elaborate on the specific nature of the said rights.

Article 1(2) of the UN Charter is another provision that concerns the promotion of human rights but does not particularize the nature of the human rights. It states that one of the purposes of the United Nations is;

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

[64] Vidmar, J., (2012). Chapter 2: Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System? In E. de Wet & Vidmar, J., (eds.), (2012). *Hierarchy in International Law: The Place of Human Rights*. Oxford: OUP. p. 8

[65] Article 61 of the Charter of the United Nations entered into in San Francisco, California, on June 26, 1945

The preamble to the Universal Declaration of Human Rights, 1948, expressly speaks of the UN Charter's objective of promoting human rights and it articulates that there is need to create a shared understanding of human rights.[66] The Universal Declaration of Human Rights contains substantive provisions particularizing the various human rights.

The legal effect of the reference to the UN Charter in the preamble to the Universal Declaration of Human Rights 1948 is doubtful for two main reasons. First, the Universal Declaration of Human Rights, 1948, notwithstanding the fact that it has gained wide recognition and acceptance is a declaration and as such it has no binding effect. Secondly, the UN Charter's provisions have a higher rank and cannot be modulated by other treaties. However, hierarchical superiority is only available in situations of conflict. Therefore, this second reason is largely qualified.

The qualification to the hierarchical superiority of the Charter of the United Nations such that the said superiority is only applicable to situations where there is conflict means that references to UN Charter obligations in other treaties may be used to interpret the UN Charter. Thus, a reading of the preamble to the International Covenant on Civil and Political Rights, 1966, and the preamble to the International Covenant on Economic, Social and Cultural Rights, 1966 may be said to provide particularization to the obligation to promote human rights found in the UN Charter.

Therefore, a reading of its preamble, may lead to the inference that the International Covenant on Civil and Political Rights, 1966, gives particularization to the obligation to promote human rights. In part, the preamble reads,

> ...Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms...

The International Covenant on Economic, Social and Cultural Rights, 1966, is to a similar effect and its preamble similarly reads,

[66] In part, the preamble to the Universal Declaration of Human Rights, 1948 reads, "...Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge..."

> ...Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms...

2.5. The WTO as a specialized regime and integrative interpretation

A self-contained regime, also known as a special regime, is recognized as one that provides specific and particularized rules to cover certain defined aspects of a given subject matter, usually with in-built procedures on dispute settlement and enforcement. The body of WTO law is often cited as an example of a specialized regime. In a hierarchical sense, a specialized regime gives rise to a *lex specialis* that is capable of overriding provisions of general law that conflict with its specific provisions.

Further, the Dispute Settlement Understanding (DSU) within the WTO regime may be used to elaborate on the specialized nature of the WTO regime, in that it details particular procedural rules and enforcement measures applicable to the WTO regime;

> ...Articles 1, 3, 4, 7, 11 and 19 of the DSU identify the WTO as a subsystem of international law which contains its specific rights and obligations (the covered agreements), specific causes of action, specific remedies and specific countermeasures. Specific rights and obligations, specific remedies and a specific dispute settlement mechanism are mandatory and countermeasures have been regulated, WTO members can be seen as having set up a system that contains a specific applicable law, a *lex specialis* system...[67]

By use of the term *lex specialis,* reference herein is made to the maxim *lex specialis derogat generali* which means that a specific rule prevails over a general one. In this context, the Charter of the United Nations is the general law while the WTO law regime provides the specific law on certain aspects of international trade. Additionally, it is noteworthy, that international human rights law may also be seen as a form of a specialised regime giving rise to a form of *lex specialis*.

While it is recognized that specialized regimes create a strong form of *lex specialis*, it has not been suggested that they enjoy a hierarchical status that is higher than that of other specialized treaties or specific provisions.[68] *Lex specialis* is, however, understood more narrowly to cover the case where two legal provisions that are both valid and applicable, are in no express

[67] Marceau, G., (2002). WTO Dispute Settlement and Human Rights. *European Journal of International Law,* 13, 753-814, p. 767

[68] See, for example, International Law Commission, (2006). Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission - Finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (April 13, 2006)

hierarchical relationship, and provide incompatible direction on how to deal with the same set of facts.[69]

Accordingly, the extent to which *lex specialis* rules are applicable to the UN Charter-WTO law regime is curtailed by the fact that Article 103 of the UN Charter gives the provisions of the Charter precedence/superiority over the provisions of any other treaty. The said Article 103 reads, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[70]

It is therefore apparent that *lex specialis* may not have effect in situations where there are express provisions giving interpretative precedence to a general law and its provisions. Thus the relationship between the WTO law and human rights provisions is governed by Article 103 of the Charter of the United Nations. The said Article 103 gives precedence to the Charter rights, which include socioeconomic rights. The foundation of an interpretation based on provisions such as Article 103 of the UN Charter is the need to honour the agreement between parties to treaties and to respect their expressed intentions. The principle of respecting the parties' intentions is reflected (though in more implicit manner) in Article 59 of the Vienna Convention [Vienna Convention of the Law of Treaties, 1969.)[71]

However, for such an interpretive tool to be applicable there must be conflict; between the UN Charter's provisions and the WTO law. Conflict, for purposes of public international law, has been explained in the following terms;

> ...[T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously...Not every such divergence constitutes a conflict, however...Incompatibility of content is an essential condition of conflict...conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the

[69] Paragraph 55 of International Law Commission, (2006). Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission - Finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (13 April 2006)
[70] Article 103 of the Charter of the United Nations entered into in San Francisco, California, on June 26, 1945
[71] Hirsch, M., (2011). Sources of International Investment Law. *International Law Forum of the Hebrew University of Jerusalem Law Faculty* , Research Paper No. 05-11, 1-28, p. 5

> same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary...[72]

Accordingly, the clearest form of conflict arises where the observance of an obligation in one treaty creates a breach of obligations in a second treaty. Differences in standards of compliance or the existence of a conflicting privilege or discretion which is not mandatory does not amount to a conflict. Therefore, the given definition of conflict is quite limiting as conflict may arise from situations where a discretion, which is permissible in one treaty, is exercised in breach of an obligation in another treaty. On the need to expand the definition of conflict, it has been argued that;

> ...The problem with this strict definition is that it does not recognize that a permissive norm may conflict with an obligation or a prohibition. Consequently, established conflict principles such as the *lex posterior* and *lex specialis* maxims cannot be applied in order to determine whether a permissive norm actually constitutes a *lex posterior* or *lex specialis* intended by the contracting parties to be the prevailing norm. In other words, permissions have to give way, even when they are later in time and more specific...[73]

The question as to whether there is true conflict between the WTO regime and socioeconomic rights as recognized under the UN Charter does not yield a clear answer. It seems that socioeconomic rights considerations may be infused into WTO policy considerations without having a massive overhaul of the system. In fact the WTO cites the improvement of standards of living as its key purposes. [74] Whether the neoliberal framework within which the WTO seeks to achieve its purposes is one which is compatible with the attainment of that purpose and whether that neoliberal framework is able to deliver and protect socioeconomic rights, is a key issue marking dissonance between the WTO regime and socioeconomic rights concerns.

Further, the existence of a *lex specialis*, such as the WTO regime and the absence of a clear conflict does not shield a specialized regime from the influence of the rest of the body of international law. On this point, the International Law Commission stated,

> ...The role of *lex specialis* cannot be dissociated from assessments about the nature and purposes of the general law that it proposes to modify, replace, update or deviate from. This highlights the systemic nature of the reasoning of which arguments from "special law" are an inextricable part. No rule,

[72] Wolfram, K., (1984). Conflicts Between Treaties. in Bernhardt, R., (ed.), (1984). *Encyclopedia of Public International Law,* 7, 468-473, at p. 468 as quoted in Marceau, G., (2002). WTO Dispute Settlement and Human Rights. *European Journal of International Law,* 13, 753-814, p.792

[73] Vranes, E., (2006). The Definition of 'Norm Conflict' in International Law and Legal Theory. *European Journal of International Law*, 17(2), 395–418, p. 395-396

[74] The Marrakesh Agreement Establishing the World Trade Organisation ("WTO Agreement") of 15 April 1994, 1867 UNTS 154, Preamble, para. 1 and 2.

> treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a vacuum...[75]

Generally, in situations where a clear conflict is not established, recourse may be had to an integrative approach of treaty interpretation. As every WTO Member has ratified the U.N. Charter, U.N. human rights conventions and other international agreements (such as ILO conventions, the constitutive agreements of other worldwide organizations), the interpretation and application of WTO rules may be influenced by non-WTO rules and legal obligations under general international law.[76] On this issue, Article 31 of the Vienna Convention on the Law of Treaties, is to the following effect

> ...1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended...

Article 31(3) (c) is particularly illustrative as to the influence of other sources of international law as concerns the interpretation of the terms of a particular treaty. Therefore, in interpreting the WTO law even in situations where there is no clear conflict (in the terms aforementioned,) it may still be possible to infuse human rights concerns such as environmental rights concerns into a reading of WTO law as was the case in Shrimp-Turtle.[77] In US – Shrimp, the Appellate Body highlighted the importance of the WTO preamble by suggesting that the objectives of the

[75] International Law Commission, (2006). Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission - Finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (13 April 2006), para. 120

[76] Petersmann, E. U., (2006). Ten Years of the WTO Dispute Settlement System: Past, Present and Future. *Journal of International Law & Policy*, III, 1-48, p. 21

[77] WTO United States: Import Prohibition of certain Shrimp and Shrimp Products-Report of the Appellate Body (12 Oct 1998) WT/DS58/AB/R; (1999) 38 ILM 118.

WTO as depicted therein should 'add colour, texture and shading' to the interpretation of the WTO agreements. [78] As already stated, the objectives of the WTO include raising standards of living for the people of its Member states.

Part of the basis of Article 31(3) (c) of the said Vienna Convention is that agreements must be honoured, *pacta sunt ser vanda*. Parties are deemed to have entered into agreements or treaties whose provisions are compatible with their pre-existing treaty obligations and such treaties are read in such a way as to produce a harmonious result. Further, a treaty must be seen to be part of a system of the general body of international law such that it must be interpreted in a manner that obligations within the rest of the body of international law are respected. This would curtail the occurrence of the broader systemic risk: that the development of specialized fields of international law-if progressed in isolated compartments-could lead to serious conflicts of laws within the international legal system as expressed by Ian Brownlie.[79]

2.6. Conclusion

Generally, there is need to bring coherence to international law, especially, as concerns the specialized regimes, of trade and of human rights, either by using the rules on hierarchy (for example, Article 103 of the Charter of the United Nations) or using an integrative approach to treaty interpretation (as found in Article 31(3) (c) of the Vienna Convention on the Law of Treaties, 1969.)

Certain matter concerning which authority in international law is exclusively claimed by the World Trade Organization, for example agreements on tariffs, have a bearing on socioeconomic rights because such tariffs could impact on the affordability of essential commodities in the market. It would serve the ends of coherence in international law if the fulfilment of socioeconomic rights concerns did not exclusively fall within the mandate of specific human rights bodies but were instead allowed to influence other international bodies, which are not specifically dealing with human rights, by means of integrative interpretation.

[78] Delimatsis, P., (2010). The Fragmentation of International Trade Law," *TILEC Discussion Paper* DP 2010=010, Retrieved from *Social Science Research Network, SSRN*. Retrieved from: http://ssrn.com/abstract=1554909, <last accessed on November 2, 2012> 1-25, p. 24

[79] McLachlan, C., (2005, April). The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention. *The International and Comparative Law Quarterly,* 54(2), 279-319, p. 284

CHAPTER III

NEOLIBERALISM: IT'S FOUNDATIONS & LIMITATIONS

3.1. Introduction

This chapter explains what neoliberalism means. It traces certain provisions of WTO law to demonstrate how neoliberalism has received expression in WTO law. It also explains the underlying theories that provide rationales to neoliberalism and these include David Ricardo's comparative advantage and Adam Smith's theory of the invisible hand. The chapter also deals with the weaknesses of neoliberalism starting from the theoretical weaknesses of the underlying theories and moving to the difficulties created by certain concepts in neoliberalism such as the conception of the role of the state in the economy and the impact of privatisation in diverting public assets meant to provide service to the citizenry into private hands which exploit the assets for commercial gain.

The chapter will also deal with the question concerning the proper extent of the role of the state in the economy.

3.2. Neoliberalism and the WTO law regime

The key features of neoliberalism may be traced to the minimal role that the state is given within the economy and the great belief in the efficiency of markets and open competition in the economy. The neoliberal model actually contains very little that is new, but is largely a repackaged version of traditional neoclassical or free market economic principles.[80]

The central ideas in neoliberalism are largely expressed in classical economics; they do not differ greatly from the writings of Adam Smith on the invisible hand or David Ricardo's comparative advantage. The theory of comparative advantage plays a central role in legitimating...the ideology of free trade and the economic policy recommendations of the World Trade Organization (WTO), the World Bank, and the International Monetary Fund (IMF.)[81]

Neoliberalism has been defined as follows;

> ...Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and

[80] Brohman, J., (1996). Postwar Development in the Asian NICs: Does the Neoliberal Model Fit Reality? *Economic Geography*, 72(2), 107-130, p. 108

[81] Gonzalez, C., G., (2011). An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms. *University of Pennsylvania Journal of International Law*, 32, 723-803, p. 736

> free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary. But beyond these tasks the state should not venture. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit...[82]

Within neoliberal thought the state plays a limited role, in the economy, of creating an environment conducive to entrepreneurship and this includes providing institutions for the protection of private property. Such institutions include court systems for the enforcement of contracts and land registries for recognition of property rights relating to land. The rationale given against giving the state a robust role within the economy is an argument against paternalism- that the state does not possess enough information to second-guess market signals. An additional rationale for the state's limited role is that the state may be hijacked by certain powerful groups.

The argument on paternalism and inadequacy of information possessed by the state is a view reminiscent of Friedrich von Hayek's theory on the emergence of spontaneous order.

Hayek recognizes that while the state is able to acquire information and the necessary manpower for purposes of analysing the information, such information is still inadequate. The state could not use it to determine what sort of economic organization would be suitable to society. He explains that issues concerning social institutions including the economy are products of evolution. In Hayek's view, evolution runs across an unpredictable path. Within this context, Hayek explains that natural selection operates on mutations, making the path of natural selection unpredictable, regardless of how well we understand the underlying principles.

Hayek states that social and cultural evolution are driven by innovation, fashion, and various shocks that "mutate" people's plans in unpredictable ways with unpredictable results.[83] According to him, social institutions are products of evolution. In the process of evolution, systems that are shown to be effective, replace the ineffective systems. Hayek defends

[82] Harvey, D., (2005). *A Brief History of Neoliberalism.* Oxford: Oxford University Press. p. 2

[83] Schmidtz, D., (2012). Friedrich Hayek. In Zalta, E. N. (ed.), *The Stanford Encyclopedia of Philosophy*. Retrieved from: http://plato.stanford.edu/archives/fall2012/entries/friedrich-hayek/ <last accessed on July 25, 2013>

capitalism and a free market society by explaining that such systems have demonstrated higher levels of efficiency.

Instead of the state, the market composed of individuals pursuing entrepreneurial freedoms, serve to promote human well-being. Such an interpretation of the role of individual players in the market amounts to an invisible hand explanation. An invisible hand explanation is a pattern that seems to arise by conscious design but is actually the result of different agents, who unintentionally, cause the occurrence of the pattern.[84] The concept of the market in neoliberalism is reminiscent of Adam Smith's theory of the invisible hand.

In a manner similar to that propounded by classical economists, neoliberalism favours the removal of artificial barriers to trade. Neoliberalism embodies a shift against government interventionism; the removal of government's hold over the economy and the reintroduction of open competition into economic life.[85]

> ...As with earlier liberal positions in classical and neoclassical economics, neoliberalism sees markets as optimally efficient means of organizing economies. State intervention, especially in social-democratic forms, disturbs the natural tendency for competition, specialization, and trade to generate economic growth. So neoliberal economic policies favor an outward-oriented, export economy, organized entirely through markets, along with privatization, trade liberalization, and limited state budget deficits. This set of policies became the standard recipe, the "Washington Consensus," applied by global governance institutions to supplicant countries, regardless of national or cultural circumstance...[86]

In explaining away the role of the state in the market, neoliberalism presents an argument against paternalism. Paternalism is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm.[87] However, it would not be true, in every case, that the state's involvement amounts to a certain imposition upon individuals on what the state thinks is good for them.

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[84] Nozick, R., (1994). Invisible-Hand Explanations. *The American Economic Review-Papers and Proceedings of the Hundred and Sixth Annual Meeting of the American Economic Association*, 84(2), 314-318, p. 314

[85] Cohen, J. N., & Centeno, M. A., (2006). Neoliberalism and Patterns of Economic Performance, 1980-2000. *Annals of the American Academy of Political and Social Science- Chronicle of a Myth Foretold: The Washington Consensus in Latin America,* 606, 32-67, p. 33

[86] Hartwick, E., & Peet, R., (2003). Neoliberalism and Nature: The Case of the WTO. *Annals of the American Academy of Political and Social Science- Rethinking Sustainable Development,* 590, 188-211, p. 189

[87] Dworkin, G., (2010). Paternalism. In Zalta N. E., (ed.), (2010).*The Stanford Encyclopedia of Philosophy*, Retrieved from: http://plato.stanford.edu/archives/sum2010/entries/paternalism/ <last accessed on May 3, 2013>

State involvement in economic affairs may simply be done in furtherance of the definition of the role of the state of providing certain essential goods and services to the citizenry. Under Keynesian ideology, the state's role included investing in infrastructure, roads and public utilities, and provision of certain essential commodities. Whereas under Keynesian welfarism the state's provision of goods and services to a national population was understood as a means of ensuring social well-being, neo-liberalism is associated with the preference for a minimalist state.[88]

To a large degree, neoliberalism embodies a paradigm to the effect that welfare should be a matter of individual preferences; it is for the individual to decide on what would be good for that particular individual. Such a choice would be made on the basis of certain freedoms, including freedoms to engage in trade. However, socioeconomic rights discourse embodies a view on welfare that decides for the individual that certain ideals, which are couched as socioeconomic rights, would be to the benefit of the individual.

Generally under the General Agreement on Tariffs and Trade (GATT), the reduction of the role of the state in the market may be seen in the manner in which Article XVII seeks to ensure that state trading enterprises act like private non-state trading entities. It seeks to have state entities act on commercial considerations (and not necessarily other public interest considerations.) Article XVII (1) (b) of GATT provides that state trading enterprises shall make any purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties an adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

The entrepreneurial freedoms, in neoliberalism, are pursued within a free trade framework allowing such freedoms to be exercised beyond the borders of a given state without restraints being imposed by state agents. The framework strongly favours largely open borders and limited barriers to free trade within a state. For example, the preamble to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights[89] (TRIPS) states that one of the objectives of the agreement is to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

[88] Larner, W., (2000). Neo-liberalism: Policy, Ideology, Governmentality. *Studies in Political Economy*, 63, 5-25, P. 5

[89] The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994

Furthermore, there are various provisions on non-discrimination within WTO law. Article III of the WTO Agreement on Government Procurement provides for national treatment and non-discrimination. It provides that with respect to legal provisions pertaining to government procurement, a state should give the supplies and services of foreign entrepreneurs, the same treatment accorded to their domestic counterparts. Additionally, foreign entrepreneurs participating in government procurement processes should be subjected to the same treatment; entrepreneurs from certain countries should not be treated more favourably. Also, the WTO Agreement on Government Procurement provides that locally-established suppliers should not be discriminated on the basis of having foreign affiliation ownership.

Free trade and non-discrimination in international trade is rationalized within the comparative advantage framework. Comparative advantage as posited by David Ricardo requires each state to specialize in what it can produce most efficiently, and trade with it in the international market. What a state cannot produce efficiently is bought by that state in the international market at a lower cost, than the cost that the state would have incurred if it was producing it, from a state that produces it efficiently. The theory rationalizes the need for free trade across national borders.

Beyond ensuring that there is individual entrepreneurial freedom and that there is free trade beyond a state's borders, the neoliberal framework also ensures that there are markets in all possible areas that an entrepreneur may want to carry on trade. It has been argued that neoliberalism supposes that social good will be maximized by maximizing the reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market.[90]

Expansion of markets may be carried on by expanding the definition of goods and services, and it may also be carried on by encouraging privatisation in sectors in which the government traditionally provided monopoly services. For instance, Article II (3) of the General Agreement on Trade in Services (GATS) provides that "services" includes any service in any sector except services supplied in the exercise of governmental authority; and "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers. Thus, the definition of services in GATS is inclusive and only excludes those services that are offered by the government on a non-competitive and non-commercial basis (for example, registration of births.)

[90] Harvey, D., (2005). *A Brief History of Neoliberalism.* Oxford: Oxford University Press. p. 3

Expansion of markets by means of privatisation is best done by the WTO in collaboration with the International Monetary Fund and the World Bank. Under Article III (5) of the Agreement Establishing the World Trade Organization, with a view to achieving greater coherence in global economic policy-making, the WTO is bound to cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies. Economic policies including liberalization measures are pursued by the IMF and the World Bank group by means of conditionalities,[91] including structural adjustment measures, attached to its loan agreements with individual states. By such means, the IMF is able achieve a measure of deregulation and the privatisation within the economies of individual states.

Generally, neoliberal policies include the elimination of exchange-rate controls and restrictions on international trade, deregulation of the financial sector, privatization of state enterprises, creation of an unregulated labour market, specialization according to "comparative advantage" and market- driven resource allocations, and generally defining a "minimalist" role for the state in development.[92] Creation of an unregulated labour market may be viewed as a form of conversion of human labour into a commodity within the market.[93]

The underlying theories in the concept of neoliberalism include Adam Smith's theory of the invisible hand and David Ricardo's comparative advantage.

3.2.1. Adam Smith's theory of the invisible hand

Adam Smith's theory of the invisible hand is based on two of his publications, namely; *The Theory of Moral Sentiments (1757)* and *The Wealth of Nations (1776.)*

Adam Smith's theory of the invisible hand begins with the self-interested pursuit of personal benefit and an illustration that the pursuit of self-interest is to the benefit of the society at large. For instance, in pursuit of self-interest, the capitalist looks into the most efficient use of his capital and boosts his productivity to such degrees that enable him to create employment and increase the nature and quality of goods available to society.

Therefore, within Adam Smith's theory of the invisible hand, public good is driven by actors within the market who pursue their own well-being with the unintended effect being that of contributing to public good. The invisible hand is a pattern or institutional structure that could

[91] For further discussions on IMF conditionalities, see Chossudovsky, M., (1995). 'Effective Global Surveillance' IMF's New Role. *Economic and Political Weekly*, 30(23), 1364-1365, p. 1364

[92] Brohman, J., (1996). Postwar Development in the Asian NICs: Does the Neoliberal Model Fit Reality? *Economic Geography*, 72(2), 107-130, p. 108

[93] Harvey, D. (2006). Neo-liberalism as creative destruction. *Geografiska Annaler*, 88B(2), 145-158, p. 153

apparently only arise by conscious design but instead can actually originate or be maintained through the interactions of agents having no such overall pattern in mind.[94] It may be claimed that the invisible hand, suggests ways to devise institutions and policies "which harness self-interest" for the social good.[95] There are a number of well-known passages in *the Wealth of Nations* in which Smith asserts the existence of a more-or-less complete harmony between the general interests of society and the particular interests of individuals.[96]

> ...It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages...Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily leads him to prefer that employment which is most advantageous to the society . . . As every individual, therefore, endeavors as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it...[97]

For the pursuit of self-interest to be possible, there should be liberty availed to individuals allowing them to trade and to pick an occupation. In Adam Smith's terms this self-interest is driven by a belief in the value of having riches. Adam Smith regarded the advantages of great personal riches as largely illusory- but because men have persisted in thinking otherwise, they have worked to make the earth redouble her natural fertility, and to maintain a greater multitude of inhabitants.[98] It is these attitudes towards riches and self-interest that drive the invisible hand. It is further argued that providence has so fashioned the constitution of external nature as to make its processes favourable to man, and has implanted in human nature such sentiments as would bring about, through their ordinary working, the happiness and welfare of mankind.[99]

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[94] See Nozick, R., (1994, May). Invisible-Hand Explanations. *The American Economic Review-Papers and Proceedings of the Hundred and Sixth Annual Meeting of the American Economic Association*, 84(2), 314-318, p. 314

[95] Rothschild, E., (1994, May). Adam Smith and the Invisible Hand. *The American Economic Review-Papers and Proceedings of the Hundred and Sixth Annual Meeting of the American Economic Association*, 84(2), 319-322

[96] Viner, J., (1927, April). Adam Smith and Laissez Faire. *Journal of Political Economy*, 35(2), 198-232, p. 209

[97] A quotation from Smith, A., (1776). The Wealth of Nations. In Viner, J., (1927). Adam Smith and Laissez Faire. *Journal of Political Economy*, 35(2), 198-232, p. 209

[98] Letiche, J. M., (1960). Adam Smith and David Ricardo on Economic Growth. *The Punjab University Economist*, 1(2), 7-35, p. 13

[99] Viner, J., (1927). Adam Smith and Laissez Faire. *Journal of Political Economy*, 35(2), 198-232, p. 202

For Adam Smith, public regulation could work against this natural order that channels human sentiment to work towards public good. Smith's further doctrine was that this underlying natural order required, for its most beneficent operation, a system of natural liberty, and that in the main public regulation and private monopoly were corruptions of that natural order.[100] Accordingly, in this manner, the natural law school of thought finds expression in Adam Smith's theory of the invisible hand. Generally, natural forces work to allow human sentiment which favours personal accumulation of wealth to increase the level of productivity in society and the efficient use of resources in society.

Adam Smith stated, "Projectors disturb nature in the course of her operations on human affairs, and it requires no more than to leave her alone and give her fair play in the pursuit of her ends that she may establish her own designs . . . Little else is required to carry a state to the highest degree of affluence from the lowest barbarism but peace, easy taxes, and a tolerable administration of justice; all the rest being brought about by the natural course of things..."[101]

It is however noteworthy that Adam Smith does not completely rule out the role of the state in the economy nor does he fully favour a completely liberalised laissez faire market, but he leans more towards a minimal government and market-driven economy;

> ...There is no express formulation of a principle of laissez faire, and no explicit condemnation of governmental interference with individual initiative; but it is quite clearly implied that self-interest, if regulated by justice, which may be natural justice, but is likely to be more effective if it is administered by a magistrate, is sufficient to attain the ends of Nature in the economic world...[102]

The question is often stated as if the choice lay between no interference on the part of the state and complete arrangement and control; but it is really a question of degree and in creating such a balance there is difficulty.[103] On the question of the degree of state interference in the economy, Adam Smith was inclined to less rather than more, interference.[104] Particularly, Adam Smith gave the state three main roles concerning the economy, namely; defence, administration of justice and the maintenance of public works.

> ...The System of Natural Liberty Prerequisite to economic growth was the limitation of the sovereign's duties to three "of great importance": defense, administration of justice, and the maintenance of public works that, though

[100] Viner, J., (1927). Adam Smith and Laissez Faire. *Journal of Political Economy*, 35(2), 198-232, pp-198-199
[101] Adam Smith as quoted in Reisman D. A., (1998). Adam Smith on Market and State. *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für diegesamte Staatswissenschaft,* 154(2), 357-383, p. 358
[102] Viner, J., (1927). Adam Smith and Laissez Faire. *Journal of Political Economy*, 35(2), 198-232, p. 206
[103] Price, L. L., (1893). Adam Smith and His Relations to Recent Economics. *The Economic Journal*, 3(10), 239-254, p. 243
[104] Ibid.

> useful and essential, lay outside the interest and power of even a "small number of individuals" In all other areas, every man would be "left perfectly free to pursue his own interest his own way," and to compete with "any other man, or order of men" restrained only by "the laws of justice." The sovereign would be discharged from "the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interest of society" a duty "for the proper performance of which no human wisdom or knowledge could ever be sufficient" No "statesman" or council or senate could be trusted "to direct private people in what manner they ought to employ their capitals" no trust could be put in "the skill of that insidious and crafty animal, vulgarly called a statesman or politician, whose councils are directed by the momentary fluctuations of affairs..."[105]

3.2.2. A critique of Adam Smith's theory of the invisible hand

While Adam Smith's treatment of the invisible hand in his work *The Theory of Moral Sentiments (1757)* gives the impression that the invisible hand leads to harmonious results, in *The Wealth of Nations (1776*,) Adam Smith accepts that there may be conflict in the working of the invisible hand. He states;

> ...beyond dispute the existence of a wide divergence between the perfectly harmonious, completely beneficent natural order of the Theory of Moral Sentiments and the partial and limited harmony in the economic order of the Wealth of Nations. Masters and workmen have a conflict of interest with respect to wages, and the weakness in bargaining power of the latter ordinarily gives the advantage in any dispute to the former. Masters, traders, and apprentices, on the one hand, and the public on the other, have divergent interests with respect to apprenticeship rules. The interest of merchants and manufacturers is in high profits, which are disadvantageous to the public. Merchants and manufacturers have interests opposed to those of the farmers and land lords, and of the general public. "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice..."[106]

Perhaps the recognition of conflicting interests between the master and his labourers, the trader and the consuming public, the landlord and the tenants by Adam Smith in *the Wealth of Nations (1776,)* unpins the sources of weakness in Adam Smith's Theory of the Invisible Hand. In whole the theory of the invisible hand's failure lies in it being a theory of wealth accumulation that is so removed from certain social realities that it fails to consider the interests of different groups of individuals wholesomely, by favouring the merchant and giving less regard to the labourer for example, and by failing to consider that social goals, even for economic purposes extend beyond wealth accumulation.

[105] Spengler, J. J., (1976). Adam Smith on Population Growth and Economic Development. *Population and Development Review*, 2(2), 167-180, p. 168-169

[106] Viner, J., (1927). Adam Smith and Laissez Faire. *Journal of Political Economy*, 35(2), 198-232, p. 214-215

Generally, Adam Smith's treatment of the working class and disadvantaged groups is lacking. The interests of property and wealth accumulation seem to override those of disadvantaged individuals. When he spoke about the release of black slaves in Pennsylvania, for example, he rationalized it as having been possible because the said slaves did not form a great portion of their owner's wealth;

> "The late resolution of the Quakers in Pennsylvania to set at liberty all their negro slaves, may satisfy us that their number cannot be very great. Had they made any considerable part of their property, such a resolution could never have been agreed to."[107]

With this being the case, Smith, did not propose that the functions of the state included protecting the interests of the disadvantaged in society. In fact he opposed such protective laws. Support of the needy is not included among the functions of Smith's state; indeed, he opposed the mercantilist protective principle according to which the state was obligated to protect the weak in society and to protect its industries against those of other states.[108]

Further, the state's role did not concern the development of the educational needs or skills of the working class beyond basic literacy skills. While, Adam Smith appreciated the role of labour in driving an economy, he was not particularly concerned about the welfare of labourers. For "the common people . . . have little time to spare for education. Their parents can scarce afford to maintain them [i.e., the children] even in infancy. As soon as they are able to work, they must apply to some trade by which they can earn their subsistence..."[109] Notwithstanding such handling of labourer's Adam Smith speaks of the importance of a good workforce in promoting development;

> ...Smith observed that the richest nations generally excelled all their neighbours in agriculture as well as in manufacturing; but they were ordinarily more distinguished by their superiority in manufacturing. Their lands, he noted, were in general better cultivated. ***This superiority, however, was seldom much more than in proportion to the superiority of the labour and the greater expense incurred on those lands***. It was the impossibility of so complete specialisation in agriculture that explained this phenomenon; in effect that productivity of labour in agriculture rose more slowly than in industry...[110]

[107] Viner, J., (1927). Adam Smith and Laissez Faire. *Journal of Political Economy*, 35(2), 198-232, p. 211
[108] Spengler, J. J., (1976). Adam Smith on Population Growth and Economic Development. *Population and Development Review*, 2(2), 167-180, p. 169-170
[109] Ibid.
[110] Letiche, J. M., (1960). Adam Smith and David Ricardo on Economic Growth. *The Punjab University Economist*, 1(2), 7-35, p.9-10

Further, Adam Smith appreciates that the invisible hand, driven by self-interest, does not generally produce equitable distribution of wealth. There will of course be the labourer who may suffer the receipt of lower wages in the interests of creating a profit/surplus and also, there may be the poor man who is completely left out of the opportunity to earn wages. In handling the plight of the poor, Adam Smith, considers that there is apparent equality because of the greater peace of mind and similar emotional comfort enjoyed by the poor as compared to the rich.

> ...Beneficent Nature so operates the machinery behind the scenes that even inequality in the distribution of happiness is more apparent than real: [The rich] are led by an invisible hand to make nearly the same distribution of the necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species. When Providence divided the earth among a few lordly masters, it neither forgot nor abandoned those who seemed to have been left out in the partition. These last, too, enjoy their share of all that it produces. In what constitutes the real happiness of human life, they are in no respect inferior to those who would seem so much above them. In ease of the body and peace of the mind, all the different ranks of life are nearly upon a level, and the beggar, who suns himself by the side of the highway, possesses that security which kings are fighting for...[111]

Additionally, there is a general tendency amongst businessmen to pursue ventures which appear to be more profitable. Thus in pursuing profits, certain less profitable sectors of the economy may attract few resources and may be left underdeveloped.

Development pursued in unguided manner, without the state having the role of limiting investment in certain sectors or giving incentives in favour of certain sectors, as is the case in Adam Smith's theory, may lead to inefficiency whereby some important sectors are poorly developed.

> ...Every system which endeavours, either, by extraordinary encouragements, to draw towards a particular species of industry a greater share of the capital of the society than what would naturally go to it; or, by extraordinary restraints, to force from a particular species of industry some share of the capital which would otherwise be employed in it; is in reality subversive of the great purpose which it means to promote. It retards, instead of accelerating, the progress of the society towards real wealth and greatness; and diminishes, instead of increasing, the real value of the annual produce of its land and labour...[112]

[111] Viner, J., (1927). Adam Smith and Laissez Faire. *Journal of Political Economy*, 35(2), 198-232, p. 204

[112] Reisman D. A., (1998). Adam Smith on Market and State. *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für diegesamte Staatswissenschaft,* 154(2), 357-383, p. 360

Furthermore, the pursuit of self-interest may not always lead to socially beneficial outcomes. One may seek personal benefit via means that include corruption and theft from the public. The success of the invisible hand depends on whether people choose to pursue their own interests by political influence, by the use of force, or in other ways.[113] It thereby requires both good institutions and good norms, whereby individuals pursue their interests within the rules of well-defined games, and not by seeking to influence institutions or rules.[114]

3.2.3. David Ricardo's comparative advantage

Developed by David Ricardo, the theory of comparative advantage posits that each country should specialize in the goods that it produces relatively more efficiently and should import the goods that it produces relatively less efficiently.[115] The theory of comparative advantage was developed by David Ricardo in his work, *Principles of Political Economy and Taxation (1817.)*

Comparative advantage is an axiom of western market economics which is to the effect that international trade is good because it maximises the goods and services that can be produced by the populations of our tiny planet and – to put the same point in another way – because it produces and distributes those goods and services in the most efficient and economical manner possible, using the least amount of resources, energy, labour and capital.[116] It allows states with a greater ability to produce certain goods more efficiently and a relatively lower cost, to produce them to a scale that exceeds national consumption, and through international trade, such productivity is able to benefit states that may be unable to produce those goods efficiently.

The comparative advantage itself may emerge from a multiplicity of favourable factors existing in a given nation to a larger extent as compared to other nations. The advantage may be based on extensive tracts of fertile land, cheap and skilled labour or technology, etc.[117]

However, David Ricardo did not support the creation of comparative advantage by means of subsidies, taxation measures or tariffs. Furthermore, according to David Ricardo, subsidies and tariffs are inefficient because they distort comparative advantage and encourage countries to

[113] Rothschild, E., (1994). Adam Smith and the Invisible Hand. *The American Economic Review- Papers and Proceedings of the Hundred and Sixth Annual Meeting of the American Economic Association,* 84(2), 319-322 p. 322

[114] Ibid.

[115] Gonzalez, C., G., (2011). An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms. *University of Pennsylvania Journal of International Law*, 32, 723-803, p. 736-737

[116] See Lowe, V., (2007). Changing Dimensions of International Investment Law. *University of Oxford Faculty of Law Legal Studies Research Paper Series,* Working Paper No 4/2007, 1-124, p. 6

[117] Costinot, A., (2009). An Elementary Theory of Comparative Advantage. *Econometrica*, 77(4), 1165-1192

produce goods in which they do not have a comparative advantage and which might be produced more cheaply elsewhere.[118]

In order to reap benefits from such comparative advantages, according to David Ricardo, a state should engage in international trade with the aim of supplying commodities which it is able to produce more efficiently and at lower costs while importing commodities which it is able to produce at comparatively higher costs. Hence, the modern theory of comparative advantage (or comparative costs) derives directly from David Ricardo's insight that international commerce enables a nation to specialize in those commodities which it can produce relatively cheaply, and exchange on the international market at better terms than are available domestically for those products it produces at a relatively greater expense.[119]

The context in which David Ricardo conceived the concept of comparative advantage concerned a power struggle, in England, between the industrial working class and the landlords living on rents derived from their agricultural land. A related concern was the possible development of revolutionary forces in the emerging industrial working class - forces generated in part by the high cost of bread resulting from the Corn Laws (in France in 1830 bread absorbed between 30 per cent and 50 per cent of a working man's wage).[120] Ricardo argued that abolition of Corn Laws and allowing for free trade on corn would allow for cheap corn imports and would lower the cost of bread. It would also be possible to release some of the labour expended in farming agricultural products for purposes of providing labour for manufacturing. It would therefore smash the landed gentry as a serious challenge to the power of industrial capital- releasing labour for employment in manufacturing.[121]

In providing an illustration for his theory, David Ricardo uses the example of the production of cloth and wine in England and Portugal. Internal non-import based production requires 100 men to produce cloth and 120 men to produce wine in England while in Portugal such production requires 90 men to produce cloth and 80 men to produce wine.[122] Clearly, England

[118] Gonzalez, C., G., (2011). An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms. *University of Pennsylvania Journal of International Law*, 32, 723-803, p. 737

[119] Weaver, F. S., (1971). Positive Economics, Comparative Advantage, and Underdevelopment. *Science & Society*, 35(2), 169-176, p. 170

[120] Evans, D., (1976). Unequal Exchange and Economic Policies: Some Implications of Neo-Ricardian Critique of Theory of Comparative Advantage. *Economic and Political Weekly*, 11,(5/7), *Annual Number: Limits of Export-Led Growth*, 143-158, p. 144

[121] Ibid, note 119.

[122] For further explanations see Bouare, O., (2007). An Evaluation of David Ricardo's Theory of Comparative Costs: Direct and Indirect Critiques. This paper was presented at *the Conference on Development and Change held in Cape Town, South Africa on 9-11 December 2007*.

has no absolute advantage over Portugal which is able to use relatively less labour to produce both cloth and wine. Since it takes much less labour, at least by 40 men, to produce wine in Portugal as compared to producing wine in England, Portugal should specialize in producing wine.

England should specialize in producing cloth and it should import wine because it would be able to free up the labour expended in producing wine. Portugal would be able to import English cloth because if it focuses on producing wine, it is able to take advantage of its lower labour costs; there is a greater advantage in specializing in a commodity that allows one to save on the labour 40 men as against one that allows for savings on the labour of 10 men.

3.2.4. A critique of David Ricardo's comparative advantage

The chief criticism is that comparative advantage is essentially a static concept which ignores a variety of dynamic elements.[123] The relevance of comparative advantage in international trade, in the terms posited by David Ricardo is questionable as countries with largely similar endowments trade with each other. States with very similar endowments and ability to manufacture similar goods are able to trade with each other. It is a theory that does not fully explain the large volume of trading that occurs amongst developed countries or amongst countries in the global south.

> ...a great deal of world trade occurs between the major OECD countries (the ''North''). This has been viewed as puzzling within a comparative advantage framework, which relies on cross-country differences (in endowments, technology, etc.) to explain trade. As a result, the large volume of North-North trade has been taken as critical evidence favoring a scale economies theory over one based on comparative advantage. There are reasons to question this account. In its simplest form, it is claimed that the endowments of these countries are too similar to admit a large volume of trade...[124]

In giving the example on the production of wine and cloth in England and Portugal, David Ricardo makes the assumption that the scale of production is equal. He states that it takes 100 men to produce cloth and 120 men to produce wine in England and that it takes 90 men to produce cloth and 80 men to produce wine in Portugal. Ricardo's theory, however, is questionable because it setting the scale of production of cloth in Portugal and that of wine in

[123] Chenery, H. B., (1961). Comparative Advantage and Development Policy. *The American Economic Review*, 51(1), 18-51, p. 18

[124] Davis, D. R., (1997). Critical Evidence on Comparative Advantage? North-North Trade in a Multilateral World. *Journal of Political Economy*, 105(5), 1051-1060, p. 1051-1052. (However, in this paper Donald R. Davis strives to demonstrate the existence of comparative advantage within North to North Trade.)

England equal.[125] He does not consider that the scale of production and the amount of wine and cloth produced may be large enough in volume to offset the larger wage bill created by a larger number of labourers and this may be a practical reality.

There is the further issue concerning the unintended curtailment of demand or reciprocal demand. Tastes differ and they even change over time, while there may be no artificial barriers created by governmental measures such as taxes and import restrictions, there may still be no market for a given commodity. For example, under free trade, after complete specialization, even if England has a comparative cost advantage in producing cloth and Portugal in producing wine, and even if England and Portugal can supply each other with the respective quantities of cloth and wine they demand, trade will not be beneficial for both countries if some English consumers do not like Portuguese wine or some Portuguese consumers do not like English cloth.[126]

There are three classes in David Ricardo's theory- landlords, capitalists and workers whose sources of income differ. The capitalists' income, profit, is the value of output minus the value of wage goods paid to workers and the rental value paid to landlords.[127] The use to which capitalists put their profits is what gives them the primary role in the Ricardian system. [128]

It is the capitalist, the profit earned by the capitalist and how that profit is channelled back into the economy, that is given importance in Ricardo's theory; Ricardo's theory leaves out a proper consideration of the other classes such as workers. For instance, Ricardo opposed taxes on capital, wages, raw materials, and necessities; he also opposed the poor laws; all these levies, he believed, would raise money wages and lower profits.[129] It is largely true that in Ricardo's theory, the interests of other social classes, excluding the capitalist, are often sacrificed in the interests of profit-making.

Ricardo was actually silent on the issue of how the gains from foreign trade are distributed to the various classes of society and, hence, was prevented from adequately analyzing the effects of

[125] Bouare, O., (2007). An Evaluation of David Ricardo's Theory of Comparative Costs: Direct and Indirect Critiques. This paper was presented at *the Conference on Development and Change held in Cape Town, South Africa on 9-11 December 2007,* p. 5
[126] Bouare, O., (2007). An Evaluation of David Ricardo's Theory of Comparative Costs: Direct and Indirect Critiques. This paper was presented at *the Conference on Development and Change held in Cape Town, South Africa on 9-11 December 2007,* p. 12
[127] Mumy, G. E., (1986). Silences in Ricardo: Comparative Advantage and the Class Distribution of Free Trade Benefits. *Review of Social Economy*, 44(3), 294-305, p. 295
[128] Ibid.
[129] Letiche, J. M., (1960). Adam Smith and David Ricardo on Economic Growth. *The Punjab University Economist*, 1(2), 7-35

foreign trade on capital accumulation and economic growth.[130] Thus, in Ricardo's concept grossly unbalanced and unequal distribution of income and wealth accumulation is a probable eventuality.

The nineteenth-century German economist Friedrich List (1916 [1844]) claimed that comparative advantage was a doctrine of the dominant; the dominated could expect to derive little advantage from it.[131] If taxes and subsidies are trade distortive because they encourage inefficient production of commodities where conditions do not favour their efficient production, the question that remains centres on how a developing country should strive to become industrialized. David Ricardo's theory seems to favour the status quo by advocating for nations to specialize in what they already have an ability to specialize in. Given that developing countries usually rely on agricultural products which may not yield much profit in the international markets, this kind of specialization puts them at a disadvantage.

3.3. Neoliberalism (privatisation) and socioeconomic rights

Within the neoliberal framework, privatisation of state corporations is pursued for purposes, of opening up markets in areas where the state enjoys a near monopoly or in areas where the opportunities to carry on business are limited and competition is minimal. The creation of markets in such areas allows individuals to have a wide range of choices in pursuing their entrepreneurial freedoms.

In accordance with neoliberal thought, public utilities of all kinds (water, telecommunications, transportation), social welfare provision (social housing, education, health care, pensions), public institutions (universities, research laboratories, prisons) and even warfare (as illustrated by the 'army' of private contractors operating alongside the armed forces in Iraq) have all been privatized to some degree throughout the capitalist world and beyond (for example in China).[132] Therefore, areas previously falling within competence of the state are subsumed under a capitalist mode of production and are placed within the control of the private sector.[133]

Privatisation has, to a considerable degree, undermined the achievement of socioeconomic rights, which depend on the provision of certain public utilities. The privatisation of utilities in

[130] Mumy, G. E., (1986). Silences in Ricardo: Comparative Advantage and the Class Distribution of Free Trade Benefits. *Review of Social Economy*, 44(3), 294-305, p. 294
[131] Brohman, J., (1996). Postwar Development in the Asian NICs: Does the Neoliberal Model Fit Reality? *Economic Geography*, 72(2), 107-130, pp. 116-117
[132] Harvey, D., (2005). *A Brief History of Neoliberalism.* Oxford: Oxford University Press. p. 160
[133] Narsiah, S. (2002). Neoliberalism and privatisation in South Africa. *Geojournal*, 57(1/2), 29-28, p. 29

sectors such as housing, water and sanitation, has a bearing on socioeconomic rights and the state's ability to make provision for its citizenry. Accordingly, it has been argued that the privatization of housing utilities in South Africa has undermined the socioeconomic right to shelter;

> ...The Constitution of South Africa is unique in that it enshrines in its Bill of Rights, access to adequate housing and sufficient water (Republic of South Africa, 1996). In other words these rights are recognised as universal and cannot be applied subjectively, i.e., privatised. However, these socioeconomic rights have been systematically undermined and violated at the grassroots level. Critics have almost without exception placed the blame firmly at the door of government's macroeconomic policy position. The question arises: How can socio-economic rights of the citizens of South Africa be respected if the Bill of Rights and macro-economic policy are at odds? Two words in the Bill of Rights has created sufficient space for maneuver: 'access to adequate housing' and 'access to sufficient water' (emphasis added). The word 'access' also carries enormous power. Thus the government can provide RDP houses and 6 kiloliters of free water and not be in violation of its citizens' rights...[134]

While, in some instances, the aim of privatisation may be to allow low income earners to gain ownership of certain utilities, such privatisation projects may end up having a different effect. For example, the privatisation of housing programme pursued in Britain, in the 1980s by the then Prime Minister Thatcher, was intended to transfer ownership of housing at low cost to the lower classes of society. After the transfers were done, housing speculation was experienced, particularly in prime central locations, eventually bribing or forcing low-income populations out to the periphery in cities like London and turning erstwhile working-class housing estates into centres of intense gentrification.[135]

The net effect of privatisation, in such contexts, is that assets which were in the public domain, and were administered by the state for purposes of service provision to the citizenry, are transferred to private individuals who administer the assets on a commercial for profit basis. It is noteworthy that in the provision of public utilities the state may decide to charge graduated fees and the net effect may be that certain utilities in areas that are designated as low income areas attract lower fees than in areas deemed to be relatively affluent. Such graduated service provision fees, which have a positive redistribution effect in favour of low income earners, may be lost where public utilities are transferred into private hands in which profit and not purely service provision is the goal.

[134] Narsiah, S. (2002). Neoliberalism and privatisation in South Africa. *Geojournal*, 57(1/2), 29-28, p. 33-34
[135] Harvey, D., (2005). *A Brief History of Neoliberalism.* Oxford: Oxford University Press. p. 163-164

Effectively privatisation facilitates the reversion of common property rights won through years of hard class struggle (the right to a state pension, to welfare, to national health care) into the private domain.[136] Through privatisation, neoliberalism may be seen to be effecting a redistribution which mostly favours the upper class which is possessed of capital needed to acquire privatised public assets.

> ...But neoliberalism has been a huge success from the standpoint of the upper classes. It has either restored class power to ruling elites (as in the US and Britain) or created conditions for capitalist class formation (as in China, India, Russia and elsewhere). Even countries that have suffered extensively from neoliberalization have seen the massive reordering of class structures internally. The wave of privatization that came to Mexico with the Salinas administration in 1992 spawned extraordinary concentrations of wealth in the hands of a few people (such as Carlos Slim who took over the state telephone system and became an instant billionaire). With the media dominated by upper-class interests, the myth could be propagated that territories failed because they were not competitive enough (thereby setting the stage for even more neoliberal reforms)...[137]

While working to the advantage of the upper class, neoliberalism often explains that territories that have failed to thrive within a neoliberal framework, have failed due to non-competitiveness, some cultural or personal beliefs;

> ...If conditions among the lower classes deteriorated, this was because they failed, usually for personal and cultural reasons, to enhance their own human capital (through dedication to education, the acquisition of a Protestant work ethic, submission to work discipline and flexibility, and the like)...[138]

The handling of the disadvantaged lower social class within the neoliberal framework is lacking and tends to indicate that neoliberalism in a sense supports the Darwinian argument that only the fittest should and do survive.[139] Such arguments, serve to allow for the emergence of a society with great inequalities and income disparities between the different social classes. Generally, the situation is made worse by privatisation which allows for the transfer of public assets, which serve the benefit of the lower classes, to the upper class which has the capital to acquire the assets.

3.4. Neoliberalism: - the role of the state and circumstantial differences

In neoliberalism, markets are freed from the control of the state with the assumption being that the state could not possibly be possessed of enough information to second-guess market signals and that it would be an intrusion of individual choice to allow the state to determine what

[136] Harvey, D. (2006). Neo-liberalism as creative destruction. *Geografiska Annaler*, 88B(2), 145-158, p. 153-154
[137] Harvey, D. (2006). Neo-liberalism as creative destruction. *Geografiska Annaler*, 88B(2), 145-158, p. 152
[138] Harvey, D., (2005). *A Brief History of Neoliberalism.* Oxford: Oxford University Press. p. 157
[139] Harvey, D. (2006). Neo-liberalism as creative destruction. *Geografiska Annaler*, 88B(2), 145-158, p. 152

would be good for the individual. Thus, the market, driven by the individual choices of the traders in it, assumes the role of the invisible hand and is expected to advance individual well-being.

> ...The founding figures of neoliberal thought took political ideals of individual liberty and freedom as sacrosanct, as 'the central values of civilization' , and in so doing they chose wisely and well, for these are indeed compelling and great attractors as concepts. These values were threatened, they argued, not only by fascism, dictatorships and communism, but by all forms of state intervention that substituted collective judgements for those of individuals set free to choose. They then concluded that without 'the diffused power and initiative associated with (private property and the competitive market) it is difficult to imagine a society in which freedom may be effectively preserved'...[140]

However, the neoliberal system, generally designated as perfect competition, had simple assumptions.[141]

Generally the role of the state in development must depend on the circumstances prevailing in the state, the neoliberal model however seems hinged towards a more fixed and limited role. The idea of limited state intervention in the markets is challenged by the context provided by the Asian newly industrializing countries where it has been said that development is generally "more characterized by the long arm of state intervention than ... the invisible hand of the free market."[142]

> ...Only Hong Kong could be said to have followed a laissez-faire type of development strategy; even there, the government's "positive nonintervention" policies are involved in a broad range of activities (public housing, public services and social welfare, export promotion, economic diversification, and technological change). State intervention elsewhere has played a key role in stimulating growth and facilitating structural change. In South Korea and Taiwan the state has used its ownership of all major commercial banks, as well as a comprehensive system of trade controls and industrial licensing, to shape decisions concerning investment and production. In Taiwan half of all assets are either directly owned by the state or controlled by the ruling Kuomintang...[143]

Further, as Hall...reminds us, "ideas have real power in the political world, but they do not acquire political force independently of the constellation of institutions and interests already

[140] Harvey, D. (2006). Neo-liberalism as creative destruction. *Geografiska Annaler*, 88B(2), 145-158, p. 146
[141] See Sayigh, Y. A., (1961). Development: The Visible or the Invisible Hand? *World Politics*, 13(4), 561-583 pp. 561-562
[142] Brohman, J., (1996). Postwar Development in the Asian NICs: Does the Neoliberal Model Fit Reality? *Economic Geography*, 72(2), 107-130, p. 115
[143] Ibid.

present there."[144] It is the circumstances of each state, particularly as represented by the interests of the more dominant members of society that give potency to policies and legal stipulations alike. They make those policies an ingrained part of that society as opposed to the policies being an imposition. Usually if the existing cultural and political context does not in fact tarry with a policy, there may be situations where policy objectives are not met.

It is with deference to the importance of context, that a theorist like Max Weber for example, considered the impact of Catholicism and Protestantism on wealth and capital accumulation. Landes[145] is quoted as having stated, "Max Weber was right. If we learn anything from history of economic development, it is that culture makes all the difference." Thus, culture goes into impacting on the sustainability of policies and laws. For example, scholars such as Maine and Savigny attributed the brilliance of Roman law to the fact that, for whatever reason, Roman culture glorified jurists who, for a long period of time, were dedicated to the aim of continually improving Rome's legal institutions.[146]

The appropriateness and viability of specific development policies for individual countries depends in large part on the historical experience of those countries and the complex web of socio-cultural, political, and economic structures that condition development.[147]

In one society or state, there may be cultural variations. However, it is often the case that the more dominant members of society are able to impose their own norms and protect their interests through legal means. The Washington Consensus has been described as a consensus reached amongst dominant groups and enforced by those groups upon other subordinate groups via use of legal norms.

> ...It [the Washington Consensus] was indeed a consensus because it represented a congruence of interests among the hemisphere's dominant groups, and these interests were being advanced through institutions that command power (the hemisphere's states and the international financial institutions). The consensus also achieved ideological hegemony by setting

[144]Margheritis, A., & Pereira, A. W., (2007). The Neoliberal Turn in Latin America: The Cycle of Ideas and the Search for an Alternative. *Latin American Perspectives*, 34(3), 25-48, p. 32

[145] See Davis, E. K., & Trebilcock, M. J., (2008). The Relationship between Law and Development: Optimists Versus Skeptics. Retrieved from *Social Science Research Network,* SSRN. Retrieved from http://ssrn.com/abstract=1124045 <last accessed on January 15, 2012> p. 40

[146] See Davis, E. K., & Trebilcock, M. J., (2008). The Relationship between Law and Development: Optimists Versus Skeptics. Retrieved from *Social Science Research Network,* SSRN. Retrieved from http://ssrn.com/abstract=1124045 <last accessed on January, 15, 2012> p. 43

[147] Brohman, J., (1996, April). Postwar Development in the Asian NICs: Does the Neoliberal Model Fit Reality? *Economic Geography*, 72(2), 107-130, pp. 113-114

> the parameters for, and the limits to, debate among subordinate groups on options and alternative projects for the hemisphere...[148]

Neoliberal policies, such as the deregulation of labour and their success depend on the context in which they are applied. In John Brohman's assessment of the neoliberal model,[149] the existence of a strong labour mobilization environment in Latin America is viewed as a factor that would work against policies intended to or whose effect would be to reduce wages. However, for the newly industrializing Asian countries, where labour organizations were weak and fragmented and wages were already comparatively low, the circumstances were such that cheap labour formed one those countries' comparative advantage. Such historical variations within societal structures imply that elements of development models are only rarely directly transferable from one Third World region to another.[150]

There are various prepositions on the proper role of the state within the economy and some of those prepositions suggest that in certain contexts it may be beneficial to depart from the specialization ideals suggested by David Ricardo's comparative advantage and adopt an export-led development framework or to even depart from free trade and take up a protectionist framework as suggested by Friedrich List.

Export led development embodies a shift of emphasis from import substitution to export-led growth which has made developing countries turn to investment by multinational corporations in the hope that they would manufacture and export products from their countries and thus earn foreign exchange.[151] The model for such development is provided by the newly industrialising states – Singapore, South Korea, Taiwan and Hong Kong – whose exports led to the spectacular growth of their economies.[152]

The avenues used to drive such export-led development includes imposition of export targets, requiring investors to export a certain percentage of their produce, and creation of export processing zones which entail designated zones, which may be physically centralized or dispersed, whereby goods are produced for exports and government incentives such as tax breaks are given to such exporters. There are various goals pursued via export processing

[148] Margheritis, A., & Pereira, A. W., (2007). The Neoliberal Turn in Latin America: The Cycle of Ideas and the Search for an Alternative. *Latin American Perspectives*, 34(3), 25-48, p. 34
[149] Brohman, J., (1996). Postwar Development in the Asian NICs: Does the Neoliberal Model Fit Reality? *Economic Geography*, 72(2), 107-130, pp. 107-130
[150] Brohman, J., (1996). Postwar Development in the Asian NICs: Does the Neoliberal Model Fit Reality? *Economic Geography*, 72(2), 107-130, pp. 113-114
[151] Sornarajah, M., (2010). *The International Law on foreign investment.* New York: Cambridge University Press p. 111
[152] Ibid.

zones, namely; attracting foreign direct investment, creating jobs, transfer of skills and technology and also earning foreign exchange.

However, there have been arguments that such development models are trade distortive because they encourage the production of commodities in such places that are less efficient production channels than other areas which may have a comparative advantage and may be able to produce such commodities more efficiently and even cheaply.

The United States has consistently opposed such export quotas on the basis that they amount to performance requirements and that they are distortive of international trade.[153] The Trade-Related Investment Measures (TRIMS) that came into existence along with the establishment of the World Trade Organization deals with performance requirements but does not affect the imposition of export requirements.[154]

Friedrich List introduces the idea that free trade may not always be the best policy to pursue especially for a state with nascent industries which cannot effectively compete at the international level. In such a situation of underdevelopment temporary protectionist measures may be advisory. The crux of List's growth theory... is [that] the transformation of a mature agricultural state into one with higher productive powers by the introduction of industries, depends on whether the industrializing nations are at the same level of development - in which case it can be accomplished by free trade - or some nations have outdistanced others in manufactures, which makes the adoption of a protective tariff system by less advanced nations necessary, in order to be able to compete in the international economic sphere.[155]

It seems that trade under the neoliberal framework favours those states that can take advantage of largely open borders and have strong production for export industries. If everyone is told to open up their economies, it is those who have the resources and ability to take advantage of such a situation that will benefit. For instance, the absence of an export interest in financial services was frequently cited as a reason for the developing countries' grudging participation in the negotiations concerning GATS. [156]

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[153] Sornarajah, M., (2010). *The International Law on foreign investment.* New York: Cambridge University Press p. 112

[154] Ibid.

[155] See Boianovsky, M., (2013). Friedrich List and the economic fate of tropical countries. *History of Political Economy* 45(4) (Forthcoming), Retrieved from *Social Science Research Network, SSRN*. Retrieved from: http://ssrn.com/abstract=1810846 <last accessed on December 28, 2012> pp. 6-7

[156] Harms, P., Mattoo, A., & Ludger Schuknecht, L., (2003). Explaining Liberalization Commitments in Financial Services Trade. *Review of World Economics / Weltwirtschaftliches Archiv*, 139(1), 82-113 p. 84

The influx of foreign competition could work against developing states with nascent industries which are unable to effectively compete with the foreign imports. It could even lead to dependencies where the underdevelopment of local industries leads to an undue reliance on imports.

It is however noteworthy that Friedrich List did not advocate for the development of the regions he described as "tropical," "torrid" or "hot," and he also did not define the extent of such regions but it may be said that regions in Africa and South America may qualify as having tropical climates. List's claim is that national and political development is an exclusive attribute of nations in the "temperate zone."[157]

3.5. Conclusion

The concept of neoliberalism has received expression in various provisions of WTO law. Neoliberalism and its underlying theories such as Adam Smith's theory of the invisible hand and David Ricardo's comparative advantage, focus on the entrepreneur and the profit that the entrepreneur makes without looking at how the profit is distributed and at other social classes such as the disadvantaged groups.

Privatisation, which is pursued for purposes of expanding the choices available to an entrepreneur in terms of fields in which to trade, by releasing certain industries from state monopolies, may have a negative impact. It may increase income disparities and reduce access to services by diverting public asserts, managed by the state for the benefit of the citizenry, into the hands of persons possessed of the capital to acquire them and who manage the assets with a profit motive. It may make those who have capital even richer while divesting those who are in need of certain services of affordable access to the services.

[157] See Boianovsky, M., (2013). Friedrich List and the economic fate of tropical countries. *History of Political Economy* 45(4) (Forthcoming), Retrieved from *Social Science Research Network, SSRN*. Retrieved from: http://ssrn.com/abstract=1810846 <last accessed on December 28, 2012> at p. 3

CHAPTER IV

THE ATTAINMENT OF SOCIOECONOMIC RIGHTS WITHIN THE GENERAL WTO INTERNATIONAL TRADE REGIME

4.1. Introduction

This chapter includes a summary on the nature of influence socioeconomic rights ought to have on international trade law. It traces the legal sources of such influence. It also goes into considering the qualitative nature of socioeconomic rights in order to show that while socioeconomic rights are being used as a framework in which to assess neoliberalism, they constitute a framework that is not always clear, for example states with similar resources and similar socioeconomic rights guaranteed to the citizenry, may be able to meet the realisation of socioeconomic rights at different paces and in different ways, without violating the citizenry's rights.

The chapter also entails an appreciation of welfare within the neoliberal framework and the socioeconomic rights framework. The chapter will examine the issue on whether welfare would require provision of certain basic commodities to the individual and not just granting the individual freedom to make choices on what would be good for that individual. It also considers whether allowing the market through forces of demand and supply (the price mechanism) to fix the prices of goods would be suitable or whether it would be necessary to impose price control laws for certain essential commodities.

The chapter will also consider whether the WTO's objective of raising standards of living is being successfully served via a neoliberal framework. It will examine the impact of the failure of neoliberalism, especially in developing countries to achieve the objectives of the WTO, and the impact of such failure on the realisation of socioeconomic rights.

4.2. The nature of the influence of socioeconomic rights in international trade policy

The hierarchical place accorded to the provisions of the Charter of the United Nations,[158] including the socioeconomic rights provided for in Article 55 of the Charter, means that the influence of human rights over the rest of the body of international law is not transient. For instance, the United Nations also has powers (e.g. in Articles 13 and 62-64 of the UN Charter) to call upon international organizations to submit annual 'human rights impact statements'

[158] Article 103 of the Charter of the United Nations, signed in San Francisco, California, on June 26, 1945.

examining and explaining the contribution of their respective laws and practices to the promotion of human rights.[159]

The Agreement Establishing the WTO cites the improvement of standards of living as its key purposes.[160] This puts the WTO system firmly within the socioeconomic rights purview as the attainment of adequate standards of living forms the core of socioeconomic rights discourse. To the extent that WTO policies have a bearing on socioeconomic rights, it is necessary that those policies be such that they enhance as opposed to acting in dissonance with socioeconomic rights.

While there is much insight and useful suggestions in the writings of Ernst-Ulrich Petersmann on the subject of human rights and international economic law,[161] there is no agreement in this thesis to the preposition on the conversion of 'market freedoms' into 'fundamental rights' thereby giving them the same status as socioeconomic rights. Socioeconomic rights ought to influence and constrain the exercise of market freedoms. Otherwise, trade-restricting market interventions made in order to fulfil social or other human rights obligations are likely to be viewed with great scepticism if one sees trade liberalization rules as economic rights.[162] The right to trade is not a recognized human right and it should not have the same status in international law as other human rights.

In order to remain democratically acceptable, global integration law (e.g. in the WTO) must pursue not only 'economic efficiency' but also 'democratic legitimacy' and 'social justice' as defined by human rights.[163] Otherwise, citizens will rightly challenge the democratic and social legitimacy of integration law if it pursues economic welfare without regard to social human rights, for example the human right to education of the 130 million children (aged from 6 to 12) who do not attend primary school; the human right to basic health care of the 25 million Africans living with AIDS, or of the 35, 000 children dying each day from curable diseases; and

[159] Petersmann, E. U., (2002). Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons for European Integration. *European Journal of International Law* (13)(3), 621-650, p. 626

[160] The Marrakesh Agreement Establishing the World Trade Organisation ("WTO Agreement") of 15 April 1994, 1867 UNTS 154, Preamble, para. 1 & 2.

[161] See for example Petersmann, E. U., (2002). Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons for European Integration. *European Journal of International Law* (13(3), 621-650, and Petersmann, E. U., (2008). Human Rights, International Economic Law and 'Constitutional Justice.' *The European Journal of International Law* , 19(4), 769-798

[162] Howse, R. (2002). Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann. *European Journal of International Law*, 13(3), 651-659, p. 655

[163] Petersmann, E. U., (2002). Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons for European Integration. *European Journal of International Law* (13)(3), 621-650, p. 626

the human right to food and an adequate standard of living for the 1.2 billion people living on less than a dollar a day.[164]

The WTO framework is largely neoliberal. However, the impact of neoliberalism on socioeconomic rights is questionable. In New Zealand, when the Labour Government came into power in 1984, led by Prime Minister David Lange and Finance Minister Roger Douglas, the government introduced a radical program of neoliberal restructuring that devastated the New Zealand welfare state system, previously the finest in the world (tax-supported free health care, education, etc.)[165] It is also true that the neoliberal economic policy prescriptions, in some (albeit not all) aspects, have contributed to social and political instability in some Latin American countries, threatening the gains of democratization.[166]

This chapter will concern itself with the impact of neoliberalism on socioeconomic rights.

On the other hand, the question as to whether there is a perfect policy prescription that can lead to the attainment of an adequate standard of living for all human beings creates a limitation on the critiques concerning neoliberalism. There is no clear and tested route to development and economic theories are not perfect;

> Development economists admit that they have no reliable knowledge about how to generate economic development. Successful projects in one context do not necessarily work in another. Recent writing on economic and political development has once again come around to the position that "culture matters." According to a prominent development economist, "If we learn anything from the history of economic development, it is that culture makes almost all the difference." Economic development thrives in cultures that value "thrift, investment, hard work, education, organization, and discipline." Contemporary political scientists likewise conclude that societies without an ethos of broad participation and deliberation—especially those with culturally established inequalities, hierarchy, and rigid obedience to authority—suffer from stunted democracy or no democracy.[167]

[164] Petersmann, E. U., (2002). Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons for European Integration. *European Journal of International Law* (13)(3), 621-650, p. 626

[165] Hartwick, E., & Peet, R., (2003). Neoliberalism and Nature: The Case of the WTO. *Annals of the American Academy of Political and Social Science-Rethinking Sustainable Development*, 590, 188-211, p. 192

[166] See Howse, R. (2002). Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann. *European Journal of International Law*, 13(3), 651-659, p. 651

[167] Tamanaha, B. Z., (2010). The Primacy of Society and the Failures of Law and Development: Decades of Stubborn Refusal to Learn. Retrieved from *Social Science Research Network, SSRN*. Retrieved from: http://ssrn.com/abstract=1406999 <last accessed on February 2, 2012> p. 6

4.3. Socioeconomic rights: - qualitative assessment

While socioeconomic rights form the framework for analysing international trade policy in this thesis, the complexity of policy considerations that are made as relates to the mode, pace and manner in which socioeconomic rights are to be fulfilled, makes the practical requirements of socioeconomic rights flexible and thus socioeconomic rights as a framework for analysis also yields to the same flexibility. Therefore, the question concerning the manner in which policies should be questioned on the basis of socioeconomic rights is a question whose basis and framework is not completely settled and is flexible.

Concerning the policy-making dimension in socioeconomic rights discourse, much has been said against legal adjudication. This includes raising concerns about rights ambition, separation of powers and arguing that socioeconomic rights are positive rights entailing expenditure and national budget decisions and asserting that socioeconomic rights involve complex policy choices that should not be reduced into rigid stipulations. For these reasons the content of socioeconomic rights and their requirements have remained fluid in definition and largely unsettled.

In the Canadian context where the Canadian Charter of Rights and Freedoms[168] does not expressly recognize any socioeconomic rights, sections 7 and 15 of the Charter, which, respectively, protect security and equality rights, have served as tools for the indirect recognition of fundamental social and economic rights.[169] However, Canadian courts have expressed hesitance in adjudicating socioeconomic rights;

> In short, courts consider the elected government as the only institution that can legitimately decide how to allocate public funds. Adjudication on social and economic rights by courts is therefore seen as an inappropriate judicial incursion into the political arena. Judges also consider themselves incompetent to adjudicate on complex socio-economic issues. They say that the content of social and economic rights and the obligations thereby imposed are variable or vague, and depend on economic, social, political and cultural factors. In other words, in their view, social and economic rights are not universal. The judges therefore feel that it is up to the politicians to develop welfare programs corresponding to the needs of citizens, the kind of expertise that courts, of course, do not have. In this context, it would also be difficult for

[168] The Canadian Charter of Rights and Freedoms is technically known as Schedule B, Part I of the Constitution Act, 1982. It forms part of Canada's Constitution.

[169] Robitaille, D., (2007/2008). Adjudication of Social and Economic Rights in South Africa: Beyond the Rhetoric of Illegitimacy and Excessive Complexity. *National Journal of Constitutional Law; 2007/2008; 23, CBCA Reference,* 23, 215-229, p. 221

> a judge to find any breach of a right that does not impose a clear obligation on the state.[170]

Socioeconomic rights under the separation of powers argument, fall into the political arena and are in the hands of the executive which is charged with the task of policy making and allocation funds for public expenditure and welfare which includes provisions for public utilities. Therefore, the argument is that there are unique needs for each state and the ability of the state to meet socioeconomic rights is curtailed by its own economic situation. This argument tarries well with the assertion that socioeconomic rights involve decisions affecting the distribution of state resources in contrast to civil and political rights, which are "negative" in that they only involve limiting government intrusion into the private sphere.[171]

Generally, it has been opined that the theoretical differences between these categories (of positive rights and negative rights) is unhelpful at best and incoherent at worst given that all rights—even the "negative" ones—rely on state expenditures. The right to vote, for example, is a civil and political right which comes at great expense to the state in terms of availing the facilities and manpower to conduct free and fair elections. A similar position was made in the 1996 South African case of *Re Certification of the Constitution of the Republic of South Africa, 1996,*[172] where the court stated,

> It is true that the inclusion of socioeconomic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of State benefits to a class of people who formally were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that results in a breach of separation of powers.

Additionally, there is the complexity or polycentric argument to the effect that socioeconomic rights involve policy prescriptions of a complex nature requiring technical expertise from different fields. For instance, it is not easy to tell which policy should be adopted amongst a given set of options, in order to raise standards of living.

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[170] Robitaille, D., (2007/2008). Adjudication of Social and Economic Rights in South Africa: Beyond the Rhetoric of Illegitimacy and Excessive Complexity. *National Journal of Constitutional Law; 2007/2008; 23, CBCA Reference,* 23, 215-229, p. 218-219

[171] Ray, B., (2009). Polycentrism, Political Mobilization and the Promise of Socioeconomic Rights. *Stanford Journal of International Law* 45, 151-200, p. 153

[172] *Re Certification of the Constitution of the Republic of South Africa, 1996,* (1996) 2 S.A. 97 (South Africa Constitutional Ct.) CCT 37/96 [Certification]

However, the adoption of policentric reviews where interpretive authority is shared amongst different organs, including the courts and government technocrats has been workable in situations of policy formulation. Policentric review enhances the informational basis for implementing these rights by giving the courts the benefit of the other branches which have better informed perspectives on the complex policy choices involved in enforcing these rights.[173] At the same time, extending interpretive authority to the other branches also establishes a democratic basis for making those policy tradeoffs.[174]

The contribution of separation of powers and complexity arguments into socioeconomic rights discourse is that such arguments have made it difficult to give precise definitions on what socioeconomic rights require or the precise nature of obligations raised by socioeconomic rights.

However, there have been attempts at providing definitions as to the requirements of socioeconomic rights, For instance, there is the concept of minimum core which seeks to recognize the essential levels of socioeconomic rights, while trimming such a core and freeing it from deontological excess;[175]

> The concept of the "minimum core" seeks to establish a minimum legal content for the notoriously indeterminate claims of economic and social rights. By recognizing the "minimum essential levels" of the rights to food, health, housing, and education, it is a concept trimmed, honed, and shorn of deontological excess. It reflects a "minimalist" rights strategy, which implies that maximum gains are made by minimizing goals. It also trades rights-inflation for rights-ambition, channelling the attention of advocates towards the severest cases of material deprivation and treating these as violations by states towards their own citizens or even to those outside their territorial reach. With the minimum core concept as its guide, economic and social rights are supposed to enter the hard work of hard law.[176]

Minimum core definitions can be applied in adjudicating socioeconomic rights claims. For instance, some academics have criticized the South African Constitutional Court for its refusal to determine the minimum core content of the right to adequate housing in the *Grootboom case*.[177] They would have preferred that the Court give more precise details on what is required of the

[173] Ray, B., (2009). Polycentrism, Political Mobilization and the Promise of Socioeconomic Rights. *Stanford Journal of International Law*, 45, 151-200, pp. 153-154
[174] Ibid, note 16
[175] Young, K. G., (2008). The Minimum Core of Economic and Social Rights: A Concept in Search of Content. *The Yale Journal of International Law*, 33, 113-175, pp. 113-114
[176] Young, K. G., (2008). The Minimum Core of Economic and Social Rights: A Concept in Search of Content. *The Yale Journal of International Law*, 33, 113-175, pp. 113-114
[177] *South Africa v Grootboom, (2000),* 1 S.A. 46, 10 B.H.R.C. 84 (South Africa Constitutional Ct.) CCT 11/100 [Grootboom]

state and provide a better definition of adequate housing: "How big must a dwelling be? Must it be waterproof? Must it be a two-bedroom house of brick and mortar?"[178]

In *South Africa v Grootboom, 2000*, [179] Ms. Grootboom and other Plaintiffs had been evicted from private land on which they lived unlawfully. They brought a claim pursuant to Section 26 of the South African Constitution claiming that the government had not taken measures to guarantee their rights to housing. The court found that the right of access to adequate housing compelled the state to develop reasonable and appropriate programs. By using the term "reasonable," the court meant that state programs must be sufficiently flexible and able to contribute towards the satisfaction of immediate, mid-term or long-term needs.

Instead of determining the minimum core content of social and economic rights or giving a detailed description of the minimal protection the state must grant, the court preferred a more general approach by setting forth an obligation of reasonableness.[180] The problem with reasonableness as a standard is that it may not always generate a uniform result.

While the minimum core concept may help create some certainty and clarity on the practical requirements of the socioeconomic rights framework, it also faces criticism.

The minimum core concept has been criticised for threatening the broader goals of economic and social rights, and reducing them into the most bare of requirements while in fact, in some contexts, higher standards may be possible. The concept also makes attempts at creating determinacy by requiring that the precise obligations arising under a given socioeconomic right be precisely defined, for example by requiring that the quality of the house to be availed by virtue of the right to shelter be defined. Such strict and precise definitions work against flexibility and may not always be possible. Precision, as concerns the right to healthcare for instance, may not be an efficacious approach because patients and their circumstances during treatment differ. In particular, in certain emergency situations, it may be necessary to treat a patient at a remote area with the use of limited medical equipment. Further, it is also a concept

[178] Robitaille, D., (2007/2008). Adjudication of Social and Economic Rights in South Africa: Beyond the Rhetoric of Illegitimacy and Excessive Complexity. *National Journal of Constitutional Law; 2007/2008; 23, CBCA Reference,* 23, 215-229, p. 225

[179] *South Africa v Grootboom, (2000),* 1 S.A. 46, 10 B.H.R.C. 84 (South Africa Constitutional Ct.) CCT 11/100 [Grootboom]

[180] Robitaille, D., (2007/2008). Adjudication of Social and Economic Rights in South Africa: Beyond the Rhetoric of Illegitimacy and Excessive Complexity. *National Journal of Constitutional Law; 2007/2008; 23, CBCA Reference,* 23, 215-229, p. 222

that tends to focus on minimum requirements as concerns developing countries. Is the minimum core in Mali the same as the minimum core in Canada?[181]

Therefore, the search for a clear definition of the practical requirements created by socioeconomic rights and the mode of their enforcement is a continuing one.

4.4. Questioning neoliberal WTO policies on the basis of socioeconomic rights

Socioeconomic rights include rights such as the right to food, shelter, education and access to healthcare.[182] On the question of human rights and extreme poverty, Maria Magdalena Sepulveda Carmona, reiterated that poverty was both a cause and a consequence of human rights violations, and that human rights norms and principles provided guidance and a normative framework for poverty reduction.[183] The WTO objective of raising standards of living[184] has socioeconomic rights connotations and such connotations imply that the WTO policy framework, which entails neoliberalism, should be one that works in consonance with the realisation of socioeconomic rights.

Concerning what development and raising standards of living entails, Amartya Sen's[185] celebrated words are illustrative and they are to the effect that development is not only a process of increasing national income but should also be a process concerned with expanding peoples' freedoms and choices;

> The ends and means of development require examination and scrutiny for a fuller understanding of the development process; it is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, 'merely useful and for the sake of something else.' For the same reason, economic growth cannot sensibly be treated as an end in itself. Development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy.[186]

According to Amartya Sen, development should encompass the enjoyment of human rights by the citizenry and the actual improvement of their quality of life. To Sen freedom involves both a process aspect and an opportunity aspect, while libertarians most often confine freedom to the

[181] Young, K. G., (2008). The Minimum Core of Economic and Social Rights: A Concept in Search of Content. *The Yale Journal of International Law*, 33, 113-175, p. 114

[182] These rights are recognized in the International Covenant on Economic, Social and Cultural Rights, 1966, and also the Universal Declaration of Human Rights, 1948.

[183] Report of the 2009 Social Forum (Geneva, 31 August–2 September 2009) at p. 4. (The report contains a summary of discussions and recommendations of the 2009 Social Forum, which was held in Geneva from 31 August to 2 September 2009, in accordance with Human Rights Council resolution 10/29.)

[184] See the Marrakesh Agreement Establishing the World Trade Organisation ("WTO Agreement") of 15 April 1994, 1867 UNTS 154, Preamble, para. 1 and 2.

[185] Amartya, S., (1999). *Development as Freedom*. New York: Anchor Books

[186] Amartya Sen's words in Development as Freedom, quoted in Chon, M., (2006). Intellectual Property and the Development Divide. *Cardozo Law Review*, 27(6), 2813-2905, p. 2813

first aspect (entailing freedom from external restrictions, such as those freedoms which constitute civil and political rights, to pursue certain individual aims) and do not care if disadvantaged people suffer from systematic deprivation of substantive opportunities or not.[187]

Sen has proposed that welfare should be measured in terms of capability. In Sen's view positive freedom is a kind of capability to function that is of intrinsic worth, while those resources that can increase this capability are useful if they help increase our capability to function.[188]Therefore freedom, in terms of welfare should not entail just freedom from certain negative interferences or occurrences (such as arbitrary arrest and detention) but should also entail freedom to do certain things and to develop oneself and attain certain achievements (as may be supported by the right to food, the right to education and the right to shelter.)

The problem with neoliberalism, from the point of view of socioeconomic rights, is the general rejection of the welfare state and welfare is the core subject of socioeconomic rights. Although the WTO framework does not wholly reject welfare, it often embodies neoliberal policies that may work against welfare, in terms of the role of the state in generating welfare. Usually, within the framework, welfare is something that could happen as a matter of individual choice, for example to make donations to a charitable organization, with the government's role being the facilitation and regulation of such organizations.

In a pure form, neoliberalism views welfare as a matter of individual preferences, giving an individual a choice to select what that individual would find worthwhile and not, as determined by the socioeconomic rights discourse, deciding for an individual that certain things are good for that individual. However, the problem with such a view of welfare is that it subjects the individual to the range of choices available in the market without empowering the individual enough to make sure that the individual has the ability to make a choice. Therefore, by saying that welfare is letting people decide on what is good for them as individuals, neoliberalism fails to show that an individual would be able to afford the choices availed by the market without measures being put in place to ensure that everyone, endowed or disadvantaged, is able to exploit the market.

Further, the classical foundations of neoliberalism, from Adam Smith's theory of the invisible hand to David Ricardo's comparative advantage do not embody a holistic view of development; they embody a theory of development that entails wealth maximization without looking at the distribution of that wealth amongst various social classes. The central focus is the capitalist, the

[187] Syll, L. P., *Amartya Sen on neo-liberalism.* (Unpublished & undated)
[188] Sen, A. (1985). *Commodities and Capabilities*. Amsterdam: North-Holland.

profit he makes and how that profit is ploughed back into the economy. It is not a theory concerned with other social classes such as the disabled or the poor and social inequalities are a probable consequence.

> Most of these theorists (defined in the study of ideologies as 'neo-liberals') advocate a minimal 'night-watchman' state where the only legitimate role for government consists of national defence, protection against force and fraud, and the enforcement of contracts. Advocates of neo-liberalism reject the welfare state and view almost all state activity as that which undermines individual freedoms (though these are 'freedoms' which, as critics of neo-liberalism are not shy to point out, rely on one having wealth).[189]

For instance, in the case of price controls and GATT Article III, the socioeconomic right to food may be negatively impacted. Kenya's then President Mwai Kibaki initially refused to pass into law a bill that would have returned the country to fixing essential food and fuel prices, a policy abandoned in the 1990s in favour of economic liberalisation.[190] Providing his rationale in a memorandum submitted to the Speaker of the National Assembly, the President stated, "Apart from going against the policy of liberalisation, this clause also violates the fundamental principle of the World Trade Organization on national treatment of which of Kenya is a contracting party." Kenya is a country that occasionally faces hunger and the urban poor often forego meals.

The Price Control (Essential Goods) Act, No. 26 of 2011, was later passed into law.[191] It does not, however, define what essential goods would include. Instead, it allows the relevant minister to make declarations that certain goods are essential commodities and to set a maximum price for those goods in consultation with the industry affected by the pricing.[192] The Act makes it a criminal offence to sell essential goods at a price which exceeds the maximum price allowed.[193]

However, the prices for basic commodities, in Kenya, such as milk, bread and maize-meal continue to rise, apparently in an unrestrained manner.

No policy that seeks to attain development has been found to be perfect. However, this study pursues the thesis that the neoliberal framework and the general WTO policy framework could

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[189] Crawshaw, M., (2001). Neoliberalism in New Zealand Education: A Critique. Retrieved from: www.education.auckland.ac.nz/.../ACE_Paper_1_Issue_6-1.doc <last accessed on February 7, 2013> p. 3

[190] Denge, M., (2010). Kenya's President Kibaki rejects bill to control prices. *Reuters, Nairobi September 1, 2010*, Retrieved from: http://www.reuters.com/article/2010/09/01/kenya-prices-idAFLDE6801T020100901 <last accessed on February 7, 2013>

[191] The Bill was assented to on September 16, 2011 and the commencement date for the Price Control Act (Essential Goods) Act, No. 26 of 2011, is September 19, 2011.

[192] Section 2 of the Price Control (Essential Goods) Act, No. 26 of 2011.

[193] Section 5 of the Price Control (Essential Goods) Act, No. 26 of 2011.

benefit from a more progressive definition of development and should open up its policies to socioeconomic rights concerns.

4.5. The success/failure of neoliberalism and its impact on socioeconomic rights generally

Some of the aspects of neoliberalism are the ideas of free trade and minimal governmental market restrictions. However, free trade may work against countries with nascent industries that cannot compete with goods from the more established industries of developed countries. The failure of such industries to thrive in the market may mean that developing countries may have to rely on imports of goods concerning which they have potential to produce. The handling of such issues under the special and differential treatment framework is lacking.

The failure to protect a developing country's domestic industries has an impact on the country's participation in trade and may negatively affect economic growth. As a result, the state's ability to meet socioeconomic rights, in terms of resources may be limited. Unbalanced participation in free trade may increase a state's debt burden as loans may be sought for purposes of correcting trade imbalances.

Dani Rodrik's[194] comparison of Vietnam, which has since the 1980s followed Chinese-style gradualism and a two-track reform program and Haiti which has followed the WTO framework on economic growth, raises questions on the suitability of neoliberalism. Vietnam engaged in state trading, maintains import monopolies, retained quantitative restrictions and high tariffs (in the range of 30-50 per cent) on imports of agricultural and industrial products and until January 2007, it was not a WTO member. On the other hand, Haiti, a WTO member slashed import tariffs to a minimum of 15% and removed all qualitative restrictions, earning a rare commendation from the US State Department that 'there are few significant barriers to U.S. exports.'

Even before joining the WTO, Vietnam had been phenomenally successful; achieving not only high growth and poverty reduction, but also a rapid pace of integration into the world economy despite high barriers to trade.[195] Haiti is still grappling with economic problems and high levels of poverty.

[194] See Rodrik, D., (2001). The Global Governance of Trade, As if Development Really Mattered. *The United Nations Development Programme, October 2001* (A background paper designed to generate discussion and feedback on issues of trade and sustainable human development for a series of consultations culminating in the UNDP Trade and Human Development Report in 2002)

[195] Rodrik, D., (2001). The Global Governance of Trade, As if Development Really Mattered. *The United Nations Development Programme, October 2001* (A background paper designed to generate discussion and feedback

Among the better known critiques to trade liberalisation is the development of underdevelopment thesis. The main cause of growing underdevelopment is dependency on foreign aid, loans, imports, even ideologies on traditionalism and modernization theories and the general inability of infant industries to compete in an open trade system which can easily be dominated by more established foreign industries. An example of such a thesis includes Andre Gunder Frank's *The Underdevelopment of Development*;[196]

> ... Development became increasingly equated with economic development, and that became equated de facto if not de jure with economic growth. It in turn was measured by the growth of GNP per capita. The remaining 'social' aspects of growth = development were called 'modernization.' Development meant following step by step in our (American idealized) footsteps from tradition to modernity. The measure of it all was how fast the modern sector replaced the traditional one in each dual economy and society. That is, as long as there were no far-reaching structural reforms, let alone political revolutions...[197]
>
> ... The third work in 1963 sought to develop an alternative reading, interpretation, and theory of the development of underdevelopment. I saw it as the result of dependence and as the opposite side of development within a single world capitalist system...[198]

The issues concerning neoliberalism's failure to fully encompass a holistic view of development and its failure to allow for cultural differences instead of insisting on a modernization[199] have a bearing on the success of neoliberal policies as applied to states with different circumstances.

Modernization theorists contend that a society's underdevelopment was both caused by and reflected in its traditional (as opposed to modern) economic, political, social and cultural characteristics or structures. According to the theory, in order to advance, underdeveloped societies would have to undergo the same process of evolution from traditionalism to modernity previously experienced by more developed societies.[200] Modernization under the

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on issues of trade and sustainable human development for a series of consultations culminating in the UNDP Trade and Human Development Report in 2002

[196] Gunder, F. A., (1996). The Underdevelopment of Development. Retrieved from: http://aprendeenlinea.udea.edu.co/revistas/index.php/ceo/article/viewFile/6716/6151 <last zccessed on February 7, 2013> pp. 6 and 12

[197] Ibid.

[198] Gunder, F. A., (1996). The Underdevelopment of Development. Retrieved from: http://aprendeenlinea.udea.edu.co/revistas/index.php/ceo/article/viewFile/6716/6151 <last accessed on February 7, 2013> p. 12

[199] For a discussion on the modernization theory, see Chapter I and for a discussion on culture and circumstantial differences, see Chapter III.

[200] Davis, E. K., & Trebilcock, M. J., (2008). The Relationship between Law and Development: Optimists Versus Skeptics. Retrieved from *Social Science Research Network,* SSRN. Retrieved from http://ssrn.com/abstract=1124045 p. 9

neoliberal framework entails an adoption of policies that are capitalist and allow the market to allocate prices and support efficient modes of production and sources of supply.

However, the modernization theory has its misgivings. The transposition of policies that work in one society into another society may not always be advisable. It may amount to a one size fits all affair where the particular needs or requirements of a given state are not in consonance with such a policy. Scholars such as Robert Cooter and Hernando de Soto claim that it is generally useful for formal legal norms to mimic the content of local non-legal norms so as to ensure that informal mechanisms associated with non-legal norms work to enhance the potency of legal norms.[201] The success of policies often depends on the socio-cultural context in which they are applied and whether the circumstances are such as to allow for their reception.

Underdevelopment based on non-competitiveness of infant industries is an idea that may be traced back to Friedrich List[202] who expressed the view that free trade is not the proper option to states whose level of development is generally low and have infant industries. He stated that some nations have outdistanced others in manufactures and this makes it necessary for the adoption of protective tariff systems by the less advanced nations.[203] Friedrich List is noted as being a scholar that did not advocate for the development of the global south; especially the hot/tropical climate countries such as those belonging to Africa.

Admittedly, on the other hand, there are strong arguments against protectionism, extreme discrimination and protectionism in international trade may mean that states cannot fully explore their productive capacities and create surplus for purposes of trading with foreign countries due to restrictions on market access to those countries. Indeed such restrictions and discriminatory practices were the driving force behind the formation of GATT;

> ...The origins of GATT go back to the 1930s, when many countries were pursuing beggar-my-neighbour policies including competitive devaluations and high, discriminatory trade barriers in an attempt to keep the effects of the economic depression out of their countries. In fact, this increasing protectionism led to a deep and persistent economic slump, the implosion of trade, the collapse of the international monetary system, and the termination of international lending as well as worsening domestic economic problems, including unemployment and inflation. The great depression of the 1930s made clear the huge costs of the failure to develop international rules and organizational structures to guide the conduct of economic policies, and the

[201] Ibid.
[202] These views are traced to the concept of "national economic development," developed by Friedrich List in the mid 19th Century for Germany and the United States and other developing countries of that time.
[203] See Boianovsky, M., (2013). Friedrich List and the economic fate of tropical countries. *History of Political Economy* 45(4) (Forthcoming), Retrieved from *Social Science Research Network, SSRN*. Retrieved from: http://ssrn.com/abstract=1810846, <last accessed on December 28, 2012> pp. 6-7

> absence of an institutional framework allowed countries to pursue opportunistic policies that compounded their neighbours' problems...[204]

The balance between free trade and protectionism lies in creating reasonable exceptions to free trade where the circumstances justify the availability of such exceptions.

It has been argued that protection of infant industries may be pursued by virtue of Article XII of the General Agreement on Tariffs and Trade (GATT,) as an exception for nations facing serious financial problems, mainly in the form of balance of payment problems.[205] This may loosely be seen as a measure that advances the aims of special and differential treatment. However, under Article XII of GATT such protective measures are available where there is a balance of payments problem and where such measures are necessary to correct such a problem.

It is the orthodox view that a balance-of-payments deficit arises from a basic macroeconomic disequilibrium between output and expenditure, an excess of expenditure over savings.[206] For instance payments made for imports may far outweigh receipts gained through exports. Free trade often creates balance of payments deficits for developing countries. Mexico has been described as one of the countries that engaged in international trade in large volumes.[207] However, its vibrant participation in free trade has also meant an increase in reliance on imports and a risk of facing balance of payments problems;

> ...Although the volume of trade has grown twenty-three-fold, the growth of the economy has slowed. On the surface, this presents a paradox, but what is argued in this paper is that the potential gains from trade have been diluted because trade policies have not addressed fundamental weaknesses in the industrial and financial sectors. As one of the effects of trade liberalization, Mexico has increased its dependence on imported inputs, especially of raw materials and parts for assembly. Moreover, trade liberalization has made imports much more sensitive to increases in domestic income, and worsened the balance of payments. This increase in the income elasticity of demand for imports has not been compensated by a sufficiently faster growth of exports and has therefore, reduced the growth f domestic income consistent with a sustainable balance-of-payments position...[208]

[204] Dommen, C., (2002). Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies. *Human Rights Quarterly*, 24(1), 1-5, p. 3-4

[205] Carey, T., (2009). Cartel Price Controls vs. Free Trade: A Study of Proposals to Challenge OPEC's Influence in the Oil Market Through WTO Dispute Settlement. *American University International Law Review*, 24(5), 785-812, p. 793

[206] McCusker, K., (2000). Are Trade Restrictions to Protect the Balance of Payments Becoming Obsolete? *Intereconomics*, March/April 2000, 89-93, p. 90

[207] Pacheco-López, P., (2005). The Effect of Trade Liberalization on Exports, Imports, the Balance of Trade, and Growth: The Case of Mexico. *Journal of Post Keynesian Economics* 27(4), 595-619, p. 596-597

[208] Ibid.

Further, aside from potentially increasing the existence of balance of payments problems, free trade often favours countries with a strong export market.[209] Countries that are less industrialized, which do not have a strong export market and have nascent industries are at a disadvantage.

Given that the International Monetary Fund's mandate includes the provision of recommendations and even monetary support to correct balance of payments problems, it is often difficult for many nations to show that protective measures are necessary- meaning that there are no less restrictive measures to correct balance of payments problems available to them. It is unlikely that such restrictions will be available to a large majority of developing countries which have infant industries and have balance of payment problems. However loans may be more accessible to such states.

From an instrumental point of view, the principle of special and differential treatment can be understood as recognition of the fact that while trade theory suggests that the prosperity and development of smaller economies depends ultimately on trade openness, smaller economy industries are uniquely vulnerable to competition from older, more established and technologically advanced developed countries.[210] Unrestricted competition in an unprotected developing country market would have severe effects on developing countries' employment and industrialization, ultimately working to the disadvantage even of export-oriented developed country industries which need new markets for high end consumer goods and capital goods.[211]

A similar special and differential treatment measure is found in GATT's Article XVIII: 1-2, which reads,

> 1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.
>
> 2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement.

[209] Harms, P., Mattoo, A., & Ludger S. L., (2003). Explaining Liberalization Commitments in Financial Services Trade. *Review of World Economics / Weltwirtschaftliches Archiv*, 139(1), 82-113
[210] Garcia, F. J., (2000). Trade and Inequality: Economic Justice and the Developing World. *Michigan Journal of International Law*, 21, 975-1049, p. 989
[211] Ibid.

However such protective measures are often unavailable, the availability of other options which include taking loans means that it is unlikely that such measures would be found to be necessary. For instance, in November 1997, the United States requested the establishment of a dispute settlement panel, [*United States v India*,[212]] claiming that India's import restrictions were inconsistent with India's obligations under, inter alia, Article XVIII: 11.[213] The panel stated that the problem of structural adjustment to import competition is not a justification for balance-of-payments measures; for these situations other provisions are available.[214]

The grant of loans to correct balance of payments problems whose source may be traced to a reliance on imports due to the non-competitiveness of local nascent industries increases the state's debt burden and reduces its ability to provide resources in fulfilment of socioeconomic rights. It also serves to maintain a situation where such industries continue to exist in an unfavourable and uneven playing field.

4.6. Conclusion

Socioeconomic rights ought to influence international trade law. The concept of welfare requires the state to empower the citizenry, through the fulfilment of socioeconomic rights, to make informed choices on what would be beneficial to them. It would not just require the state the secure the existence of a free market in which a citizen is granted the freedom to choose what would be beneficial for that citizen, as is the case in the neoliberal framework. Measures such as price control laws for essential commodities would empower the citizenry by enabling them to have a reasonable starting point from which to exercise choices within the market and also as concerns their own welfare.

Generally, neoliberal policies and their success or failure have an impact on the realisation of socioeconomic rights. For example, they may expose countries with nascent industries to competition from foreign goods from industries that are more established, and thus affect the pace of growth of such local industries and their ability to create local jobs and to contribute to the state's tax revenue.

[212] India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R, 6 April 1999

[213] McCusker, K., (2000). Are Trade Restrictions to Protect the Balance of Payments Becoming Obsolete? *Intereconomics*, March/April 2000, 89-93, p. 92

[214] McCusker, K., (2000). Are Trade Restrictions to Protect the Balance of Payments Becoming Obsolete? *Intereconomics*, March/April 2000, 89-93, p. 93

CHAPTER V

CONCLUSION & RECOMMENDATIONS

5.1. Conclusions

The link between affordability of basic commodities such as food in the market and the hunger that a deprived person faces is not just one of fact. It is also a link that concerns the moderation of trade policy in favour of certain socioeconomic rights such as the right to food.

While there exists dissonance at the theoretical level as to what welfare would require as between neoliberalism as expressed in WTO law and welfare as expressed in the form of socioeconomic rights, such dissonance should not work against the underprivileged. Therefore the view, within neoliberalism, that welfare is about allowing the individual to make choices expressing that individual's personal preference on what is good for that individual, should be moderated by the view that it is also necessary to enable the individual to have the ability to make such choices.

The business of empowering individuals to make choices within the market, should be at least in part, about an appreciation of socioeconomic rights, as rights that preserve human dignity and the general conditions of life for the human being. Such rights should be seen as rights that enable the individual to make choices in pursuit of their chosen path in life.

The applicability of socioeconomic rights to the WTO law regime should not be curtailed by the view that international human rights law and international trade law are separate, specialized and self-contained regimes. The interaction between international human rights law and international trade law, is not just a question of determining the range of relevant facts and the field of applicability, it is also a question of looking into rules on hierarchy of norms in international law and also the need for integrative interpretation in international law.

The hierarchical place of socioeconomic rights in international law may be drawn from their protection and recognition under Article 55 of the Charter of the United Nations. Particularly, Article 103 of the Charter of the United Nations provides that the provisions of the charter enjoy precedence over other international laws, including the WTO Agreements, in situations of conflict.

It is recognized that the WTO law regime is a specialized regime which entails its own procedures for enforcement and dispute settlement. As such the WTO regime may be seen to

give rise to a form of *lex specialis* (drawn from the maxim *lex specialis derogat generali* which means that a specific rule prevails over a general one.) However the *lex specialis* rule has no effect in situations where there exists a specific express rule giving precedence to the provisions of a general law, such as the Charter of the United Nations, and Article 103 of the Charter of the United Nations.

Further, by virtue of Article 31(3) (c) of the Vienna Convention on the Law of Treaties, 1969, which provides that in the interpretation of a treaty, any relevant rules of international law applicable should be considered, the provisions of the Charter of the United Nations, particularly, on socioeconomic rights, can be factored into interpretations of the body of WTO law (the WTO Agreements.)

There is need to bring some alignment between international trade policies such as neoliberalism and socioeconomic rights. Neoliberal policies receive expression in various WTO law agreements.

The underlying theories in neoliberalism include Adam Smith's theory of invisible hand and David Ricardo's comparative advantage. However, the weaknesses of both Adam Smith's theory of the invisible hand and David Ricardo's comparative advantage may weigh against the attainment of socioeconomic rights within the neoliberal international trade policy framework.

In their theories, both Adam Smith and David Ricardo fail to consider the interests of other social groups apart from the capitalist. They both see development as an increase in national income without considering the question as to whether the income is equitably distributed amongst different social groups. Adam smith goes as far as stating that the poor are also wealthy because they enjoy more emotional comfort than their richer counterparts. Furthermore, Adam Smith is generally opposed to 'poor laws,' which entail state intervention in favour of a disadvantaged social group.

Additionally, David Ricardo's theory of comparative advantage tends to favour the status quo by asserting that states should focus on producing what they already produce more efficiently and advantageously. The question that remains centres on how a developing country should strive to become industrialized and gain the resources necessary to secure the attainment of socioeconomic rights if it's to maintain status quo as far as what it is producing is concerned.

The WTO objective of raising standards of living has socioeconomic rights connotations and such connotations imply that the WTO policy framework, which entails neoliberalism, should be one that works in consonance with the realisation of socioeconomic rights.

There are areas of conflict between the WTO neoliberal policy framework and socioeconomic rights. For example using neoliberal policies to allow prices to be determined by the market forces of supply and demand could make essential commodities unaffordable to the poor. Price control laws may serve the ends of socioeconomic rights by allowing the different classes of the public to access essential goods at affordable prices.

Additionally, the issue of privatising state corporations, under the neoliberal ideal of expanding markets into areas where the state has been dominant, may have the effect of handing over public assets administered by the state for the benefit of the citizenry, to the hands of the private individual capitalist who works for a profit motive and not for the benefit of the citizenry.

Generally, the linking of international trade law to international human rights, would serve to ensure that issues of equity in international trade are dealt with.

5.2. Recommendations

Neoliberalism, conceptually, gives primacy to the interests of the capitalist and chiefly considers the interests of the entrepreneur and the market. It embodies a theory that the entrepreneur is an agent who unknowingly drives the invisible hand of the market, by ensuring efficient allocation of resources and the supply of goods. It does not adequately consider the interests of other social groups such as the poor and the disadvantaged.

The neoliberal framework which receives expression in international trade policy also embodies a view that welfare is generating by giving an individual the freedom to make a choice on what would be beneficial to that individual. It does not, however, consider the capability of that individual to make a choice and does not adequately consider that an individual's choices within the neoliberal framework are limited to what the market can avail and may be curtailed by issues of expense and affordability.

In 1891, in the first papal encyclical *Rerum Novarum*[215] Leo XIII wrote, "Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it; but the limits of that intervention must be determined by the nature of the occasion which calls for the law's

[215] Rerum Novarum means "New Things."

interference-the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief."[216]

Socioeconomic rights should form one of the guiding factors in the formulation of international trade policy. They could moderate issues of capability to exercise choice within the market, either in terms of knowledge, availability of goods and services and also in terms of financial ability.

In terms of merging the different views of welfare from a neoliberal perspective and from a socioeconomic rights perspective there is need to examine the theoretical basis for the influence of socioeconomic rights in international trade law. As a matter of policy, socioeconomic rights should influence international trade law.

Within the socioeconomic rights, welfare is couched in terms of certain rights that would be deemed to be beneficial to the individual, for example the right to education and the right to healthcare. Such rights could empower an individual to move into the realm of the market and make informed choices concerning their own welfare. The infusion of socioeconomic rights into international trade discourse provides instruments such as price control laws and allows for more robust goods and service provision role for the state, and would militate against the negative aspects of the neoliberal framework within international trade.

While neoliberalism encourages the state to have a minimal role in the economy, interventions by governments and international policy-making organizations including the World Trade Organization, in favour of vulnerable groups such as a the poor who face grave material deprivations, should be carried on in support of the realisation of socioeconomic rights.

For instance, instead of allowing prices for all goods to be determined by the market forces of supply and demand, thereby exposing access and affordability of essential commodities such as food to the vagaries of the market, price control laws for essential commodities should be put in place.

In promoting the free flow of trade across international boundaries, the WTO plays the role of minimizing the artificial barriers to trade and these include tariffs. For example, through a process known as binding a tariff, a state could promise not to raise tariffs for certain goods. This would ensure stability and predictability such that future investors are able to gauge the

[216] Leo XIII, (1891). Rerum Novarum: Encyclical Letter on Capital and Labor. In Claudia, C., (ed.) (1990). The Papal Encyclicals 1878-1903, p. 241 as quoted in Carozza, P. G., (2003). Subsidiarity as a Structural Principle of International Human Rights Law. *The American Journal of International Law*, 97(1), 38-79

prevailing investment climate. If the WTO were to consider certain tariff-related avenues for controlling the prices of essential commodities, it would be a way of ensuring access to such commodities without the state having to directly give subsidies or provide for them in its budget.

Therefore, it would aid the cause of socioeconomic rights, if the WTO would consider having tariffs adjusted in favour of certain essential commodities that are crucial in the fulfilment of socioeconomic rights. Items such as hospital equipment, for public hospitals, for example, would help secure the right to health if their affordability was boosted by ensuring that favourable tariff rates are applicable at the import stage.

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