

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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# **BALANCING ACTS: EXPLORING DISTRIBUTIVE JUSTICE IN INTERNATIONAL TRADE GOVERNANCE - A WTO PERSPECTIVE**

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## **Abstract**

Globalization has made the world closely knit and the countries are cooperating with a better tomorrow. Areas like agriculture, technology, trade, and culture have gone through vast changes and advancements. In this era of globalization, developed countries have the advantage of more resources than other countries. The major expansion has been in the area of International Trade. We have observed changes in the way of doing business after World War II. The countries after World War II realized that a new trade system was very important for them to survive and grow. The World Trade Organization came into existence after GATT. The WTO ensures that there remains no discrimination between the developed states and the Least Developed States.

The WTO boasts of its non-discrimination policies. The WTO framework is such that it tries to protect the developing and the LDCs from the developed countries. The principles of Distributive Justice are very crucial in the 21<sup>st</sup> Century. International trade has helped all the countries to come forward and grow. Distributive Justice is the need of the present time because if these principles are ignored then there cannot be harmonious growth of all the nations.

The paper examines different principles of the WTO framework and the presence of the principles of Distributive Justice in them.

**Keywords** – WTO, Distributive Justice, International Trade, Parallel Import, Pharmaceuticals.

## Introduction

*“The rules of distributive Justice cannot be rules for the conduct towards equals but must be rules for the conduct of superiors towards their subordinate.”<sup>1</sup>*

-F.A. Hayek

In this era of globalization, countries aspire for the greatest powers wherein every country wants to become a superpower and have effective control in the international sphere. History shows that there cannot be a single entity at the international forum controlling the world and with time new powers emerge and the countries with more economic backing end up influencing the world at large. The Developed countries are now being challenged by the Developing countries not only at the Regional but also at the international stages. The post-World War II globalized world has observed a technological and economic boom with the developing countries opening doors to international trade and making their presence felt at the global level.

The expansion of trade and investment has helped the growing countries reap the maximum benefits and become more stable economically. These growing economies have at the international forums shown an aggressive approach to influence the world powers to focus on their needs and requirements. The so-called ‘Superpowers’ handling and controlling the major resources in the world have not been very fair and just to the Developing and Least Developed Countries, in terms of resource distribution and securing their rights at International Forums. In the post-World War II era, the countries supported unrestricted and open trade to maximize economic benefits for their citizens and their growth. Discriminatory treatment was discouraged and not discrimination and the right to trade freely was supported. The idea of Distributive Justice and the right of the countries to express their need and trade according to their national requirements was embodied as the principle of the new world trade order where efforts were made to reduce the gap between the global North and South.

Considering the same, the World Trade Organization was conceptualized and established with the principles of distributive Justice as a part of the concept behind the Organization. The same can be observed from the Preamble which vouches for a “better tomorrow for the countries”. The Preamble states clearly that the WTO would work to raise the standard of living and ensure full employment. The WTO’s framework is designed to ensure that the developing and the least

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<sup>1</sup> F.A Hayek, Law, Legislation and Liberty: A New Statement of The Liberal Principles of Justice and Political Economy, 248, Routledge and Kegan Paul Ltd., 2014.

developing countries share the same growth opportunities and utilize their potential to the fullest.

The basic premise behind the concept of Distributive Justice as promulgated by John Rawls was that all social goods should be distributed equally, and unequal distribution should only be promoted if it would be for everyone's advantage<sup>2</sup> The idea of Distributive Justice relates to the just distribution of goods in society but also allocating the benefits and burdens equally and justly. The idea of Distributive Justice has become more relevant in the present times as societies have evolved, and the concept of 'justice' has also evolved. These new dimensions to the idea of justice have brought forward many propositions. The concept of distributive justice has been dealt with by many philosophers and jurists.

The World Trade Organization (WTO) is one of the few international institutions that has the power to enforce its principles through different steps and measures. The WTO framework ensures non-discriminatory practices in international trade. In principle, it ensures that the developing and the least developed nations receive the same benefits as the developed countries. One such feature of the framework is the Parallel import, which can be said to embody the principle of distributive justice in the true sense.

The paper focuses on examining different principles of the WTO which have the elements of distributive justice specifically, parallel import concerning pharmaceuticals.

## Distributive Justice

'Justice', said Daniel Webster is the greatest interest of man on the earth<sup>3</sup>; Justice<sup>4</sup>, as Aristotle puts it is like the bond of man with the society and state without justice is like robber's bands. Justice is both an objective reality and abstract quality within the realm of law involving the ideas of ethics, morality, equality, liberty, individual needs and good conscience. Justice also involves man fold ideas and principles; it has varied forms such as legal, social, natural, democratic, totalitarian etc. This classification is viewed as the basis for understanding the concept and nature of justice. According to J.S. Mill 'Justice' means something which is not wholly right to do or

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<sup>2</sup> John Rawls, available at <https://Plato.Stanford.Edu/Entries/Rawls/>

<sup>3</sup> Suresh Sharma, *Distributive Justice Under Indian Constitution with Reference To Right To Equality And Property*, Deep & Deep Publications, 1989.

<sup>4</sup> Ibid.

wrong but through which an individual can claim some moral rights.<sup>5</sup> Hence, in short, the idea of justice is not bounded or abstract instead it is evolving and changing with the needs of the time.

Distributive justice primarily concerns itself with the fair, just or equitable distribution of benefits and burdens. These benefits and burdens are an integral part of social life and assume all forms such as income, economic wealth, political power, taxation, work obligations and education. Hence distributive justice aims to bring in order and maintain a just distribution of benefits and burdens in society.<sup>6</sup>

Campbell said, “*it remains illuminating for me to see that what justice has to do with the distribution of benefits and burdens amongst persons, these being loosely defined so as to cover the desirable and undesirable thing or experience*”.<sup>7</sup> Thus, the means of determining what amounts to just distribution, the means of achieving it and maintaining such a distribution is the burden.

Due to the belief that social obligations include bringing about just distribution, distributive justice is frequently viewed as a form of social justice. In addition to being a legal concept, distributive justice is also a moral, intellectual, and political one. The term justice can be defined in a variety of ways, but in all cases, it denotes a notion, a claim, and a right. Hence, legalized moral demands include those pertaining to minimum wages, pensions, and health care. John Rawls in his book *Theory of Justice and Political Liberalism* has in the simplest form dealt with the concept of distributive justice. The theory sets out the framework for political justification that outlines the significance of different relevant factors and offers an approved description of the perspective from which judgments are crafted. It has also been tasked with rationale for the allocation of societal resources in a manner that is fair, efficient, and not violative of rights.

## WTO AND ITS PRINCIPLES

The early and modern trade relationships were shaped by colonization and corresponding restrictions of import from sources other than the colonizer.<sup>8</sup> Trade has been one of the most

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<sup>5</sup> John Stuart Mill, *Utilitarianism*, pp. 392-672, Fraser’s Magazine for Town and Country, 1861.

<sup>6</sup> Julian Lamont & Christi Favor, Distributive Justice, Stanford Encyclopedia of Philosophy (available at, <https://Plato.Stanford.Edu/Entries/Justice-Distributive/>).

<sup>7</sup> Suri Ratnapala, *Jurisprudence*, 333, Cambridge University Press, 2nd ed., 2009.

<sup>8</sup> Simon Lester, Bryan Mercurio et al., *World Trade Law: Text, Materials and Commentary*, 56, Hart Publishing, 2d ed., 2012.

important aspects for the countries since time immemorial but trade during the colonization period was restricted and reserved. As time progressed, the countries focused on the importance of liberalization in trade policies for peace and growth and equal opportunities for the nations. It was only during the 17<sup>th</sup> and 18<sup>th</sup> Centuries that the idea of trade liberalized, and markets started opening for everyone. Non-discriminatory provisions were found in the bilateral treaties of Friendship, Commerce and Navigation. These provisions included ‘most favored nation’ status and ‘National treatment’.<sup>9</sup>

The road to the establishment of WTO was not a smooth one as it was difficult to align the national interests of different countries with each other which included the developed, developing and least developed countries. It was a result of long-term negotiations and the zeal for collective cooperation of the countries for development and growth.

It was result of a long-term negotiation and the collective cooperation of the countries. After the World War I, through the League of Nations the idea of liberalized trade was given favor. The United States of America brought the Smoot Hawley Tariff Act, 1930 and increased the tariffs. After the World War II, the countries realized that they cannot trade in the same restricted manner, and they were doing before the wars.

The United States of America in 1945, through a publication, ‘Proposals for expansion world trade and empowerment’<sup>10</sup> proposed creation of an International Institution (International Trade Organization). The idea of an international Institution did not materialize but the General Agreement on Trade and Tariff (GATT), which was signed by 23 nations in October 1947 did come into existence. As the countries were pushing for a liberal trading system, GATT was adopted to reduce the trade barriers that existed in the form of tariffs and quotas.

It took effect as an international agreement on January 1, 1948. The purpose is clear from its preamble, which states “substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.”<sup>11</sup> There existed no International Institution, but this Agreement resulted in creation of principles freer trade between

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<sup>9</sup> Ibid. At 57.

<sup>10</sup> PART V, PROPOSALS FOR EXPANSION WORLD TRADE AND EMPOWERMENT, Department of State, Publication 2411, Commercial Policy Series 79.

<sup>11</sup> Preamble, WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994)

the countries. The principles of 'Most favored Nation' and 'National Treatment' are results of GATT.

The International Trade Organization did not see the sun, but a new Institution was adopted after the Uruguay Rounds of trade negotiations. 123 countries signed the Marrakesh Agreement<sup>12</sup> to bring the World Trade Organization into existence. The Uruguay Rounds can be said to be the most ambitious rounds of trade negotiations. There was another agreement part of it, which related to services, Intellectual Property, Capital, Textiles and agriculture. The establishment of the World Trade Organization can be said to be one of the most important steps in implementing liberalization and non-discrimination policies in International Trade. Though the principles were given in the GATT, it was the WTO that implemented and enforced them.

It is the government that negotiates, signs and implements the agreements, the goal of WTO is to "help the producers and importers and exporters conduct business".<sup>13</sup> The negotiations have aided in opening trade markets in cases when nations have encountered and desired a reduction in trade barriers. However, the WTO's mandate extends beyond market liberalization; in certain situations, its regulations encourage the upholding of trade barriers to safeguard consumers or stop the spread of illness, for example.<sup>14</sup>

- **Preamble of the Marrakesh Agreement**

The preamble of the Marrakesh agreement through which the WTO was established made it certain that the objective of the Organization would be to help all the countries grow together and without discrimination. The preamble asserts that the parties involved in the agreement should acknowledge that their actions aim to improve living standards, guarantee full employment, and foster a substantial and consistently increasing level of actual income and effective demand. Additionally, it advises that these endeavours should prioritize the optimal utilization of the world's resources in alignment with the goal of sustainable development.

The more important, with relation to the concept of distributive justice, is the second one wherein, it is further recognized that there is a requirement for affirmative actions aimed at ensuring that

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<sup>12</sup> Ibid

<sup>13</sup> Supra 8

<sup>14</sup> Understanding The WTO, Information and External Relations Division, 5th Ed. 2005, available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf)

developing countries, particularly the least developed among them, attain a proportionate share in the expansion of international trade that aligns with the necessities of their economic development. This clearly shows the intent behind the WTO. The principles of distributive justice are enshrined deeply in the Marrakesh Agreement.

- ***Most Favoured Nation Treatment***

As per the Most-Favoured-Nation (MFN) treatment, Members are required to grant all other Members the most advantageous tariff and regulatory treatment that is given to a particular Member's product during the import or export of 'like products'.<sup>15</sup> It is against the Most-Favoured-Nation (MFN) clause for Members to treat trading partners differently. It is included in a number of World Trade Organization agreements and is widely recognized as a key component of the multilateral trading system.<sup>16</sup> It can be said that it means that the trading partners would enjoy lower tariffs, fewer barriers and the highest import quotas or it could mean none of this. The treatment must be non-discriminatory. No country can discriminate against the other in the matter of trade except for the exceptions of the MFN principle.

The Most-Favoured-Nation (MFN) principle is a fundamental tenet that can assert a valid role in substantially contributing to the success of the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) in promoting trade liberalization and enhancing overall welfare. It can be said to be one of the most important principles of WTO. It has been in practice for a long time. The nature of this has changed with time as earlier it was used in the bilateral agreements and then later many measures were taken that resulted in limiting the function of MNF. It is believed that this was one of the reasons that the division of trade blocs happened. After the WWII, this principle was adopted unconditionally in GATT.<sup>17</sup>

The countries can use their discretion as to tariff classification under this principle, but it should not result in discriminating against another member. In SPF Case<sup>18</sup>, the panel recognized that each WTO member had the authority to express notable preferences in tariff classifications in the

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<sup>15</sup> Report Of Ministry of Economy, Trade and Industry on Most Favored Nation Principle, Japan, available at [Http://Www.Meti.Go.Jp/English/Report/Downloadfiles/2010WTO/2-0Overview.Pdf](http://www.meti.go.jp/english/report/downloadfiles/2010WTO/2-0Overview.Pdf).

<sup>16</sup> Henrik Horn & Petros C. Mavroidis, "Economic and Legal Aspects of The Most-Favored-Nation Clause", EUROPEAN JOURNAL OF POLITICAL ECONOMY, Vol 17 pp. 233-279, 2001.

<sup>17</sup> Supra 15

<sup>18</sup> Report of the Panel, Japan – SPF Dimension Lumber, L/6470 - 36S/167, available at <http://www.sice.oas.org/dispute/gatt/88lumber.asp>

SPF dispute. However, these classifications would only be considered legitimate if they did not discriminate against similar items made by different WTO members.<sup>19</sup>

- **Exceptions to MFN Principle**

- Regional Integration

- According to GATT Article XXIV, regional integration is allowed as an exemption to the Most-Favoured-Nation (MFN) criterion, but only under specific circumstances. First and foremost, practically all trade in the region needs to be free of tariffs and other trade restrictions. Second, the trade obstacles and tariffs imposed on foreign nations must not rise above the pre-regional integration levels.<sup>20</sup>

- The Generalized System of Preferences

- Generalized System of Preferences is a specific policy that is offered to developing nations in an effort to increase export earnings and promote overall development Under the Most-Favoured-Nation (MFN) designation, goods coming from developing nations are eligible for lower tariff rates than those charged at standard rates under the (GSP) framework.<sup>21</sup> The GSP has the following characteristics: First, preferential tariffs may be applied not only to countries with special historical and political relationships. Second, the beneficiaries are limited to developing countries. Finally, it is a benefit unilaterally granted by developed countries to developing countries.<sup>22</sup>

There are some other exceptions to this rule. Though the MFN is a principle of non-discrimination, there are certain drawbacks of this principle. Firstly, the Countries may choose to subsidize their own sectors in the absence of tariffs, allowing them to export goods at incredibly low rates. This unjust behaviour may cause businesses in the nation of the trading partner to relocate. Following the competitors' demise, the government providing the subsidy decreases it, leading to price hikes and the establishment of a monopoly. This practice is commonly referred to as dumping.<sup>23</sup>

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<sup>19</sup> Ibid.

<sup>20</sup> ARTICLE XXIV, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

<sup>21</sup> Generalized System of Preferences, UNCTD, TD/B/GSP/FORM/2/Rev.1, available at [https://unctad.org/system/files/official-document/tdbgspform2rev1\\_en.pdf](https://unctad.org/system/files/official-document/tdbgspform2rev1_en.pdf)

<sup>22</sup> Supra 15

<sup>23</sup> Peter Bossche, The Law And Policy Of The World Trade Organization 42, Cambridge University Press, 2005.

Secondly, the Customs Unions, Developing Nations, and Regional Trade Zones are the only exceptions to this rule.<sup>24</sup>

- ***National Treatment***

GATT Article III encapsulates the idea of treating other people equally to one's citizens. This provision requires that, once they clear customs, imported goods shall be treated no less favourably than comparable domestically produced commodities. Furthermore, national treatment is covered by GATS Article 17 and TRIPS Article 3 concerning services and intellectual property protection, respectively.<sup>25</sup>

The national treatment rule within the WTO serves the purpose of removing covert domestic trade barriers by requiring WTO Members to treat imported products no less favorably than domestically produced ones. Adhering to this principle is crucial for preserving a balance of rights and obligations and is fundamental for the sustenance of the multilateral trading system.<sup>26</sup>

As a result of protectionist demands from home producers, importing countries frequently try to utilize discriminatory application of domestic taxes and laws to safeguard national output. This lowers economic welfare by distorting the terms of competition between imported and native goods. Importing nations frequently are inclined to apply domestic taxes and regulations in a discriminatory manner, largely due to pressure from local producers advocating for protection. The competitive environment between imported and domestically produced items is distorted by this behaviour, which eventually lowers economic welfare.<sup>27</sup> National treatment is the basic and inventive solution to take care of issue of overall protection for innovative designers, authors and creators.

National treatment, wherein a treaty member extends to nationals of other member states the same treatment as its own citizens, enables that member and its courts to apply familiar laws. When complemented by the system of minimum rights, it tends to foster a degree of harmonization in national laws, at least to some extent.<sup>28</sup>

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<sup>24</sup> GATT Article III:8(A); GATT Article III:8(B)

<sup>25</sup> [https://www.wto.org/english/thewto\\_e/glossary\\_e/national\\_treatment\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/national_treatment_e.htm), Oct. 30, 10:00 AM

<sup>26</sup> Supra 15

<sup>27</sup> Ibid.

<sup>28</sup> U Loewenheim, *The Principle of National Treatment In The International Conventions Protecting Intellectual Property*, MPI Studies On Intellectual Property, Springer, 2009.

## PARALLEL IMPORT AND WTO

Parallel trade occurs when products, lawfully manufactured and protected by copyright, trademark, or patent, are sold in one nation and subsequently imported into another without the consent of the intellectual property rights owner in the first nation.<sup>29</sup> It is most effectively defined as international trade that is done without the manufacturer's consent. Under this arrangement, patent-protected goods are imported without the patent holder's permission.<sup>30</sup> The importer gets the benefit, and the loss is suffered by the patent owner. This idea is at times referred to as 'grey market'.

Regarding the grey market, The U.S. Court of Appeals for the Third Circuit pointed out that, "The term 'grey market' unfairly implies a nefarious undertaking by the importer, and the term parallel import accurately describes the goods and is, perhaps, a better term because it is devoid of prejudicial suggestion."<sup>31</sup>

The principle of parallel import is based on the notion that the owner of the IPR who is compensated once by the first sale is not authorized to further claim the right to overuse or resale the commodity in the market. Consequently, the inventors exhaust their rights to stop further resale.<sup>32</sup> For example, a trading firm can legally acquire quantities of prescription drugs in Greece and import them into Sweden without seeking approval from the local distributor who holds the licensed patent rights.<sup>33</sup> The products that are imported through the practice of Parallel import are genuine and are not forged. Although these products may have completely different packaging and may not provide the original warranty.

Countries are allowed to establish their preferred exhaustion rule for each type of intellectual property rights. If they are not constrained by an international agreement, nations are essentially free to choose whether to permit or prohibit parallel commerce. Nevertheless, no multilateral agreement or international convention on intellectual property rights has established a specific

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<sup>29</sup> Frank Müller-Langer, "Does Parallel Trade Freedom Harm Consumers In Small Markets?", Croatian Economic Survey Vol. 11, pp. 11-41, 2008.

<sup>30</sup> [http://www.who.int/medicines/areas/policy/doha\\_declaration/en/](http://www.who.int/medicines/areas/policy/doha_declaration/en/).

<sup>31</sup> Weil Ceramics & Glass, Inc. V. Dash, 878 F.2d 659, 11 USPQ2d 1001 (3d Cir. 1989).

<sup>32</sup> Carlos M Correa, Intellectual Property Rights, The WTO and Developing Countries, Zed Books 2000.

<sup>33</sup> Supra 29

regime for intellectual property rights exhaustion yet.<sup>34</sup>

Among other multilateral WTO agreements, the TRIPS Agreement specifically mentions the provision of national treatment in Article 6. American negotiators in the Uruguay Round specifically attempted to prohibit parallel trade meant to safeguard creative industries like the pharmaceutical industry and other industries like music and film by introducing a worldwide standard of national exhaustion into the TRIPS Agreement.<sup>35</sup>

The establishment of an international standard for national exhaustion proved challenging due to conflicting views on the benefits of parallel trade among different countries. As a result, reaching a consensus on this matter was not attainable. As an example, certain WTO members, like Switzerland and the U.S.A., sought to incorporate the principle of national exhaustion into the Agreement. Conversely, countries such as Australia, India, and New Zealand advocated for the principle of international exhaustion. This divergence in perspectives hindered the attainment of a unified approach within the Agreement.<sup>36</sup>

Thus, it appears that the ultimate agreement made in Article 6 is limited to maintaining the territorial monopoly for regulating parallel commerce while excluding the treatment of parallel trade from the dispute settlement process.<sup>37</sup> Furthermore, the Declaration on the TRIPS Agreement and Public Health<sup>38</sup> affirmed and supported this interpretation.

Since many developing nations viewed parallel trade as an effective means of addressing concerns about potential increases in pharmaceutical prices due to strong patent protection during the ratification and implementation of the TRIPS Agreements, the ability to allow it was undoubtedly very important.<sup>39</sup> Furthermore, several developing nations supported parallel commerce because it would enable license holders in those nations to access export markets for

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<sup>34</sup> Fink, Carsten, *Entering the Jungle of Intellectual Property Rights Exhaustion and Parallel Importation*, In *Intellectual Property And Development: Lessons From Recent Economic Research*, 177, Fink Maskus, Washington, 2005.

<sup>35</sup> *Supra* 29

<sup>36</sup> Gervais, Daniel, *The TRIPS Agreement: Drafting History and Analysis*, Sweet & Maxwell, 2003.

<sup>37</sup> *Ibid*

<sup>38</sup> Paragraph 5(D) Of the Declaration on The TRIPS Agreement And Public Health, "The Effect Of The Provisions In The TRIPS Agreement That Are Relevant To The Exhaustion Of Intellectual Property Rights Is To Leave Each Member Free To Establish Its Own Regime For Such Exhaustion Without Challenge, Subject To The MFN And National Treatment Provisions Of Articles 3 And 4."

<sup>39</sup> Keith E. Maskus *Parallel Imports in Pharmaceuticals: Implications For Competition And Prices In Developing Countries*, Geneva, Final Report To The World Intellectual Property Organization, 2001.

high-tech goods like pharmaceuticals.

Moreover, parallel importing firms typically acquire a product in one country at a price lower than the selling price in the second country.<sup>40</sup> Specifically, the regulation of parallel trade in the pharmaceutical sector has emerged as a significant concern in the global trading system, given that the welfare effects of parallel imports of pharmaceuticals are generally uncertain.<sup>41</sup>

There is a tension between the two main objectives of public policy. Granting patents to pharmaceutical companies for their breakthroughs is one of the main, long-term goals in encouraging research and the development of new medications. More specifically, the higher pricing of patented medications benefits pharmaceutical companies by allowing them to defray significant research and development (R&D) expenses. However, public policy also seeks to guarantee that, at least temporarily, existing medications are widely accessible and reasonably priced. As a result, there is a trade-off between maintaining higher (monopolistic) drug pricing that acts as incentives for long-term R&D efforts and facilitating short-term access to affordable medicines.<sup>42</sup>

Patents are very important to the pharmaceutical industry, which does a lot of research. Strong patent protections for novel pharmaceuticals are backed by international legislation that forbids parallel commerce.<sup>43</sup> Representatives from the pharmaceutical industry, for instance, contend that allowing the parallel importation of drugs will obstruct the development of novel drugs.<sup>44</sup>

Many developing-country policymakers, however, advocate an open parallel trade regime. A greater emphasis has been assigned to drug affordability than to international R&D promotion. For instance, they maintain that it's critical to have access to the most affordable suppliers of medications. Naturally, pharmaceutical corporations in industrialized nations are the ones

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<sup>40</sup> Keith E Maskus, and Yongmin Chen, "Parallel Imports in A Model Of Vertical Distribution: Theory, Evidence, And Policy", *PACIFIC ECONOMIC REVIEW*, Vol 7 No.2, pp. 319-334, 2002.

<sup>41</sup> Müller-Langer, Frank, "An Analysis of The Welfare Effects Of Parallel Trade Freedom", Berkeley Electronic Press, German Working Papers In Law And Economics, Vol 9, 2008, available at <http://www.bepress.com/gwp/default/vol2008/iss1/art9>.

<sup>42</sup> Ibid.

<sup>43</sup> Ganslandt, Mattias and Keith E. Maskus, "Parallel Imports and The Pricing of Pharmaceutical Products: Evidence from The European Union", *JOURNAL OF HEALTH ECONOMICS*, Vol 23 No. 5, 1035-1057 (2004).

<sup>44</sup> Ibid.

responsible for the great majority of new inventions in the globe today.<sup>45</sup>

The majority of developing nations resist parallel trade restrictions due to concerns that such restrictions could lead to price discrimination, resulting in elevated domestic pharmaceutical prices.

Economically speaking, a monopolistic pharmaceutical producer's ability to engage in third-degree pricing discrimination is limited by the parallel trade of pharmaceutical products.<sup>46</sup> Third-degree price discrimination occurs when a monopolistic pharmaceutical manufacturer offers its products to different consumers or market segments at different prices, yet the price per unit of output is the same for members of the same segmented market or group.<sup>47</sup>

Parallel import can be said to be the best example of the presence of the principle of distributive justice. Parallel import has helped the developed, developing and the least developed countries.

## THE CASE FOR COUNTRIES

In 2004, 5 million Africans were living with AIDS, and that number was increasing. Five million individuals, about 11% of the population, became infected with the AIDS virus in South Africa alone. Most patients struggle to pay about Rd 850 (\$110) every month that antiretroviral medication costs.<sup>48</sup>

It was therefore appropriate to allow generic versions and parallel importation of ARV medication, even though the government hesitated quite some time to acknowledge the true scope of the pandemic.

In Mozambique, Bayer offers the medication ciprofloxacin for \$740 (US dollars) per 100 units, yet due to local generic competition, the same medication is only marketed for \$15 in India.<sup>49</sup>

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<sup>45</sup> Alan O Sykes, "TRIPS, Pharmaceuticals, Developing Countries, And the Doha "Solution", Chicago Journal Of International Law, Vol. 43 No. 1, pp. 7-68, 2002.

<sup>46</sup> Richard Schmalensee, "Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination", AMERICAN ECONOMIC REVIEW, Vol. 71 No. 1, pp. 242-247, 1981.

<sup>47</sup> Joan Robinson, Economics of Imperfect Competition, Macmillan, 1933.

<sup>48</sup> Jacob Arfwedson, Re-importation (Parallel Trade) in Pharmaceuticals, Institute for Policy Innovation: Policy Report #182, July 2004. Available at <https://www.ipi.org/docLib/PR182-ParallelTrade.pdf-OpenElement.pdf>.

<sup>49</sup> Jackline I. Nyaga, Implementing Parallel Importation and Licensing Mechanism to Increase Access to Medicines In Kenya, (2009), (Unpublished PhD thesis, Stanford University).

India permits parallel importation and adheres to the principle of international exhaustion of rights.<sup>50</sup>

Parallel import shares in the German market are trending towards the ground, with a mere 4.9% in 2004. As with pricing policies that reflect Germany's status as a high-cost nation, the low incidence of parallel imports is reflected in policies regarding parallel substitution and the lack of incentives for it. Greece, on the other hand, is notable for being the most aggressive parallel exporting nation in Europe, accounting for 22% of the retail market.<sup>51</sup>

On the other hand, re-importation has always faced criticism in the United States, particularly regarding imports from Canada, where safety standards are far higher than in other source nations like Mexico, India, China, or Brazil.<sup>52</sup>

It was observed that almost immediately after local legislation was introduced in Kenya, parallel importation began, which helped to fuel the expansion of a pharmaceutical business worth at about 185 million.<sup>53</sup> Several stakeholders expressed their appreciation for the mechanism's functioning and emphasized its substantial potential benefits in improving pharmaceutical access, lending their support to it.

## CONCLUSION

The Idea of Distributive Justice has changed with time but the essence of it remains the same everyone should have equal opportunities and discrimination should not exist. In the modern world where every country wants to be a superpower and keep their National Interest above anything else, the principles of distributive justice are hard to be implemented at the international level. Even then the International Institutions have tried their best to keep every country together in the process of development.

The WTO is one such body that has vouched for equal and sustainable growth for every country. The WTO Agreement has principles of Distributive Justice enshrined in it. There have been some

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<sup>50</sup> Kapil Wadhwa V. Samsung Electronics, 2013 (53) PTC 112 (Del.)

<sup>51</sup> Anna Scheuermann, Parallel Import of Pharmaceuticals in the EU, (2006), (Unpublished Thesis, Lunds University).

<sup>52</sup> **Supra 48**

<sup>53</sup>Supra 51.

questions raised on the working of the Institution, but it has stood tall against discrimination.

The WTO mechanism for parallel import is sound and clear. The countries are to fulfil the obligation under the agreement. The WTO has principles of distributive justice enshrined in its work. The idea of parallel import has helped the developing and least developed countries. It was recommended in the UNCTAD<sup>54</sup> report of 2007 that the least developed countries should be helped to fully utilize the flexibilities under the TRIPS. It was also suggested that capacity building should be done of such LDCs that are not able to utilize flexibilities such as parallel import and compulsory licensing. The non-discriminatory principles such as the MFN rule and the National Treatment principle further affirm that the WTO stands for free trade with equal opportunities and protection for all countries.

The idea of parallel import and compulsory licensing has helped the least developing countries and the developing countries in obtaining life-saving drugs at minimum prices. It has been observed that pharmaceutical companies have always pressured the governments to protect their interest by banning the parallel importation of the drugs and to maintain their monopoly. The WTO through its dispute resolution mechanism has also helped the countries to import the essential drugs that have been protected by the intellectual property laws. The developing countries have also enjoyed growth under the aegis of the World Trade Organization. The parallel import has helped the countries in exploring the market and benefitting the consumers directly. The WTO mechanism has helped in the development and growth of the member countries together and without any discrimination.

It would be safe to say that the WTO has upheld the principles of Distributive Justice in the 21<sup>st</sup> Century. It has been possible even after having many Superpower countries indirectly controlling the international markets. There have been many questions raised on the working of the WTO, but the Institution has worked for the free market and for equal growth of all the nations.

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<sup>54</sup> The Least Developed Countries Report, 2007, UNCTAD/LDC/2007, available at [https://unctad.org/publication/least-developed-countries-report-2007#:~:text=The%20least%20developed%20countries%20\(LDCs,assets%2C%20and%20high%20economic%20vulnerability.](https://unctad.org/publication/least-developed-countries-report-2007#:~:text=The%20least%20developed%20countries%20(LDCs,assets%2C%20and%20high%20economic%20vulnerability.)