Debunking *'Choices'* in International Trade: Contextualising National Treatment through the Tort Law Paradigm

By

Devarshi Mukhopadhyay*

Abstract

One of the basic assumptions that tort law theorists make, is that the law always takes a decision that is prone towards achieving both efficiency as well as the overall reduction in social costs. Given such an assumption, the issue, however which has been the topic of long lasting argumentative discourse, is the constant dilemma which legal institutions face, with regards to whether it is the 'rights based' formulation/interpretation/ application of the law that must prevail531 or whether the maximization of economic welfare/efficiency should be the larger paradigm for a proposed legal system. In addition to drawing and examining such a distinction in international trade law, through the eyes of the torts model, this paper reviews an alternate line of reasoning propounded by Mark A. Geistfeld, (a faculty member of the International Law Department at the New York University School of Law), through his contribution in Theoretical Foundations of Law and Economics (Cambridge University Press, 2010). Through his model of analysis, Geistfeld reflects upon the possibilities of the co-existence of both approaches, namely those of being 'rights based' as well as 'allocatively efficient', thereby paving way for an overall clarity of 'choice' in the legal system.

* Student of IVth Year, B.A.LL.B(Hons.), NALSAR University of Law Hyderabad.

The central hypothesis of the above-mentioned analysis model is to prove how the system of tort law that he proposes has the potential required to fulfill the conditions of being fair, while significantly reducing the social costs of accidents. The primary purpose of the author therefore, shall be to debunk falsities of nomenclature related to the National Treatment Principle in international trade law in the WTO regime, in a bid to show how the problem of choice continues to plague policy processes, and which can be countered through the balance of such 'choices' in trade. Such questions shall be addressed with special reference to Prof. Upendra Baxi's 'third worldism' paradigm, in the context of developing and underdeveloped countries and the role played by normative and existential contradictions therein. Given the nature of several artificial trade barriers which exist today, which are antithetical to the primary intent of the New Economic Order, the larger objective of the author's research is to bring about the constant dichotomy that prevails in the trading realities of the globalizing world, in the garb of public policy and the legitimate 'choice' that evidently works to the detriment of a unified economic system.

1.0 TOWARDS *LEX FERENDA*: EXPLORING THE DIFFICULTIES OF *'CHOICE'* IN LAW AND POLICY

The last quarter century has been witness to a sporadic rise in scholarly literature, dealing specifically with the increase in the policy analysis of the international economic and tort law systems.[532] One of the primary reasons as to why such theoretical perspectives have become crucial to a contemporary understanding of the international paradigm of economic law[533] is the fascinating manner in which a policy analysis of 'law' in its relations with policy is undertaken, in order to provide a platform for suggesting additional models of academic interpretation.[534] Unlike several other areas of legal interpretation, the policy analysis of international economic law, more often than not, tries to look at law as an efficient yet existent domain[535] of international trade relations, rather than trying to define what the law *should* be.(similar to the distinction drawn between *lex lata* and *lex farenda* by Akehurst)[536] In fact, one of the basic assumptions that tort law theorists make, is

532 John Moorehouse, Andrew Morris and Robert Whaples, 'Economics and the Law: Where is there consensus?' (1999) 43(2) The American Economist, 84-86.

533 Hanoch Sheinman, 'Tort Law and Corrective Justice' (2003) 22(1) Law and Philosophy, 21-73.

534 Ibid.

535 N.G Reid, 'Statistical Reasoning in Law and Public Policy' (1990) 153(3) Journal of the Royal Statistical Society, 411-173.

536 Richard Lewis, 'The Politics and Economics of Tort Law: Judicially Imposed Periodical Payments of Damages' (2006) 69(3) The Modern Law Review, 397.

that the law always takes a decision that is prone towards achieving both efficiency as well as the overall reduction in social costs.[537]

Given such an assumption, the issue, however, which has been the topic of long lasting argumentative discourse, is the constant dilemma which legal institutions face, with regards to whether it is the 'rights based' formulation/interpretation/ application of the law that must prevail[538] or whether the maximization of economic welfare/efficiency should be the larger paradigm for a proposed legal system.[539] In addition to drawing and examining such a distinction in international trade law, through the eyes of the torts model, this paper reviews an alternate line of reasoning propounded by Mark. A Geistfeld, (a faculty member of the International Law Department at the New York University School of Law), through his contribution in *Theoretical Foundations of Law and Economics* (Cambridge University Press, 2010).[540] Through his model of analysis, Geistfeld reflects upon the possibilities of the co-existence of both approaches, namely those of being 'rights based' as well as 'allocatively efficient', thereby paving way for an overall clarity of 'choice' in the legal system.

The central hypothesis of the above-mentioned analysis model is to prove how the system of tort law that *he* proposes has the potential required to fulfill the conditions of being fair, while significantly reducing the social costs of accidents.[541] Therefore, at the level of policy making, alternate deconstruction provides for a new model of analysis, by working out the most plausible of the existent models of analysis which have been the issue of extensive discourse in the past.

The primary purpose of the author, therefore, shall be to debunk falsities of nomenclature related to the National Treatment Principle in international trade

537 Danielle Citron, 'Mainstreaming Privacy Torts' (1998) 98(6) California Law Review, 1808-1815.

538 Ibid.

539 John Murphy, 'Rethinking Injunctions in Tort Law' (2007) 27(3) Oxford Journal of Legal Studies, 508-509.

540 This particular piece of theory/analysis has been found in the paper titled 'Efficiency, Fairness and the Economic Analysis of Tort Law', authored by Mark Geistfeld in the book titled *Theoretical Foundations of Law and Economics*, (Cambridge University Press, 2010).

541 Geistfeld proposes a line of reasoning that is rather different from existent tort law scholarship, which has been dealt with in detail in the later section of the paper.

law in the WTO regime, in a bid to show how the problem of choice continues to plague policy processes, and which can be countered through the balance of such 'choices' in trade. Such questions shall be addressed with special reference to Prof. Upendra Baxi's 'third worldism' paradigm, in the context of developing and underdeveloped countries and the role played by normative and existential contradictions therein. The reason as to why Baxi's theoretical propositions are of importance to us is to enhance our understanding of the practical shortcomings of the current 'global' trade regime. Given the nature of several artificial trade barriers that exist today, which are antithetical to the primary intent of the New Economic Order, the larger objective of the author's research is to bring about the constant dichotomy that prevails in the trading realities of the globalizing world, in the garb of public policy and the legitimate 'choice' that evidently works to the detriment of a unified economic system.

2.0 EXAMINING POSNER'S ALLOCATIVE EFFICIENCY MODEL: IS THERE A NEED TO NORMATIVELY JUSTIFY THE OPERATION OF 'LAW'?

Richard Posner, through his paper titled 'The Economics of Justice', propounds how the system of tort law should essentially aim at the maximization of wealth through the minimization of accident costs.[542] The basis on which Posner advances such a line of argument flows from the idea of legal entitlements (in terms of what the law should or should not define as right or wrong, and what liberties are to be granted by the State) not requiring a normative justification, and that legal provisions should be looked at in isolation, through an economically 'efficient' model. Geistfeld rejects this line of thinking at the very beginning of his paper, where he vehemently opposes Posner, stating that 'the substantive content of any legal rule depends on the normative justification and not economic analysis'.[543] Interestingly, while the contemporary theoretical foundation of such a proposition was laid down by Posner, Kaplow and Shavell further embarked upon the idea of the mutual exclusivity of fairness and wealth maximization,[544] by contending

542 Richard. A Posner, *The Economics of Justice* (Harvard University Press, 1981). Also see William Landes and Richard Posner, *The Economic Structure of Tort Law*, (Harvard University Press, 1987).

543 Ibid.

differently, that a 'fair' system of tort law would stand as Pareto inefficient, and should therefore not be adopted.[545]

Reflecting upon the pool of opposition that such ideas faced in the aftermath of this proposed model,[546] the most potent, as Geistfeld rightly points out, was that of corrective justice.[547] Scholars critiquing the Kaplow Shavell model argue that achieving economic efficiency and the maximization of wealth is only a secondary concern[548] as far as legal formulation is concerned.[549] What is to be the topmost priority of lawmakers is the statutory recognition of a certain legal obligation and the consequences of disobedience to the same.[550] The natural inference (although not explicitly expressed) of such a line of reasoning, is that a modification in the rationale of tort liability in favour of making it one that recognizes individual rights, should be given larger preference in relation to one that favors welfare maximization.

Within the larger paradigm of international economic law and cross border party transactions, lies the question of 'choice', which seems to have occupied a more pivotal role to policy processes in the trying times of economic slowdown. The National Treatment Principle, vital to most trade and treaty regimes, includes the similar treatment (through rights and benefits) of both local as well as foreign goods within the market. As was observed in the *Japan Taxes* case, as well as in *EC-Asbestos*, the principle of law envisaged in the National Treatment Principle is structurally similar to that of the tort law paradigm. Making the 'allocatively efficient' choice in terms of what is best suited to the needs of a recessionary economy, may often fall within statutory exceptions, but often becomes a problematic choice even when economic slowdown is not observed. For instance, if one notices the manner in which American or British policy decisions are taken at an international level, especially in the backdrop of the likes of internationally

544 O.W Holmes, *The Common Law* (1881).

545 Peter Newman, 'Wealth Maximization' 3 The New Palgrave Dictionary of Economics and the Law, 679.

546 Geistfeld (n 10).

547 Geistfeld (n 10).

548 Geistfeld (n 10).

549 Stephen Sugarman, 'Doing Away with Tort Law' (1985) 3(3) California Law Review, 556.

550 Murphy (n 9).

imposed obligations such as the Kyoto Protocol, it becomes fairly pertinent that irrespective of the current economic condition in the country, reservations to the GATT or the GATS regime work as detriments to that which the international law regime seeks to achieve in facilitating cross border transactions and the prevention of discrimination based either on origin or otherwise.

3.0 FROM JAPAN-TAXES TO CHILE-TAXES: WHY THE POLICY OPERATION OF ARTICLE 3 OF THE GATT LEADS TO 'SERIOUS PREJUDICE' TO THE NATIONAL TREATMENT OBJECTIVE

We begin by examining the second paragraph of Article III of the GATT. Paragraph 2 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The second sentence of this particular article also has an interpretative note which reads as:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.[551]

If one notices the wording in Article 3.2, one may infer that a party alleging a violation of this particular clause may have two routes to argument. First, to contend that the domestic and the foreign products are 'like' and that the degree of taxation, in terms of what the consumer has to pay for them, incident upon the latter is greater in magnitude than that on the former and secondly, that the two

551 *Supra n.* at 2

products in question are directly competitive and also not similarly taxed and that the purpose of this dissimilar taxation is the protection of the domestic industry of that particular country.

To understand the situation analogously to previously decided cases, three cases are of particular importance to us. In the *Japan-Taxes on Alcoholic Beverages* case,[552] the locally produced Japanese alcohol '*sochu*' received the benefits of a Japanese tax law which made customers liable to pay a lesser sum as taxes on it than certain Western alcoholic beverages imported into Japan. While it was an established fact that '*sochu*' was in fact a 'like product' to those originating in the Western countries, the question of de facto discrimination remained. Similarly, in the *Korea-Taxes on Alcoholic Beverages* case,[553] the beverage in question was the diluted '*soju*'. Now, it is interesting to note that the beverages imported were of a distilled nature, not a diluted nature. It was on the basis of this particular difference that Korea argued that these were not 'like products', neither were they DCS (Directly Competitive or Substitutable). Similarly, in the case of *Chile-Taxes on Alcoholic Beverages*,[554] the product in question was the '*pisco*' which again was not taxed to the extent of the imported products. In all three cases, it was found that such policy measures were in contravention of Article 3.2, on grounds of de facto discrimination, that is not explicitly based on origin.[555] The 1992 *Malt Beverages* Report, laid down the fact that a 'like' product is determined by how consumers would respond to a particular product.[556] However, it is not quite as simple as this. In the 1994 *Gas Guzzler Report,* the test of 'likeness' was not in terms of prevailing market perceptions, but on the basis of the 'aims and effects' test.[557] The reason why this particular report is of immense importance to us is because this also happens to be the last case decided in the context of Article III in the

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553 Korea- Taxes on Alcoholic Beverages, WTO Dispute DS75.

554 Chile- Taxes on Alcoholic Beverages, WTO Dispute DS87.

555 John Walley, 'Non- Discriminatory Discrimination: Special and Differential Treatment for Developing Countries under the GATT' (1990) 100(403) The Economic Journal.

556 United States - Measures Affecting Alcoholic And Malt Beverages, WTO Dispute DS23.

557 Henrik Horns and Petros Mavroidis, 'Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case law on Tax Discrimination' (2004) 15(1) European Journal of Int'l Law, 39-69.

GATT era. As per the 'aims and effects' test, the particular policy measure was seen to have the 'aim' of providing protection when an analysis of the circumstances provided that the protection was indeed a desired outcome and not merely a co-incidence. In the *Korea-Taxes on Alcoholic Beverages* case, a further clarification regarding 'like' and DCS products was made. The report went on to say that directly competitive products are those who have a *common end use*. It would be extremely interesting for us to note, that in the abovementioned cases, an 'exceptional' situation was not contended. In all three cases, parties pursued independent policy objectives as economic measures and were not specifically designed to combat a societal threat.

What we may therefore see, is that through the operation of policy tests such as the 'aims and effects test' or the 'likeness' test, serious prejudice is often caused by domestic trade and tax policies, to trade from beyond national territory. As one can well imagine, it becomes increasingly difficult to exactly determine what the real aim of a particular policy measure is, even when understood within context unless and until the legal structure itself provides for a mechanism whereby offenders are automatically recognized. A similar problem prevails while trying to unearth the 'likeness' of two products, especially considering the nature of several protectionist regimes across the globe. Evidently, this cannot be done. It is submitted that through the operation of such policy assessment measures, whether customary in the international legal system or not, the policy process sees the allocation of choice based on the real needs of the economy. Consequently, countries, instead of downrightly belittling/dismissing the spirit of the National Treatment Principle, focus of justifying discriminatory domestic policies within the domain of international legal provisions.

Clearly, the 'choice' making debate is highly misconceived, but we shall continue to examine if policy mid points do exist in international economic law, for the purposes of global trade and commerce.

While on one hand, one may contend that exceptional situations as contemplated by such countries and as effected through reservations in international treaties and agreements ensure that the allocation of 'choice' is efficient, can we dismiss the contention that the normative justification of the international economic system in cross border trade treatment is pivotal to the existence of the National Treatment

Principle as a treaty and as a customary norm under international law? Let us explore the question in the following section of this paper.

4.0 THE NEED FOR *'RELATIVE INTERPERSONAL PRIORITY'* IN THE BALANCING OF INTERNATIONAL TRADE INTERESTS

A rights-based model of tort law arises out the constant conflict of interests that are created by societal elements, which often result in physical damage to one, or even both parties.[558] If one considers the example of driving speed limits that the law imposes, the driver of large vehicles is mandated by the law to drive within a legally specified limit, which stands as a limit to his or her liberty, in the sense that the reckless exercise of choice is not legally permissible.[559] On the other hand, adopting the viewpoint of the pedestrian who is likely to be physically as well as mentally injured as a result of the driver breaking the law, jaywalking (acts of recklessly crossing roads etc) is also forbidden. What may therefore be observed is that legislations such as the Uniform Vehicle Code (1992), in the United States of America,[560] significantly reduce the available exercise of liberty to the pedestrian as well.[561] The point where the law steps in is to mediate such conflict of interests. Now, the ideological difference between the two approaches is simply this: that a tort law principle which is designed to be 'fair',[562] prioritizes the physical security of the pedestrian over the liberty of driving at any speed, (something that the author calls a greater 'relative interpersonal priority') not necessarily taking into concern the resultant wealth maximization.[563] A compensatory tort right therefore stems from the burden that the law imposes on the subordinate liberty interest of the driver:[564] an obligation to put the physical interests of the pedestrian before his or her own. An important distinction however, is that the nature of this priority is not absolute.

558 Ames, 'Law and Morals' (1908) 40(2) Harvard Law Review.
559 Ibid.
560 The Uniform Vehicle Code, 1992, Government of the United States of America.
561 Geistfeld (n 10).
562 Schofiled, 'Theory of Contributory Negligence' (1890) 3 Harvard Law Review.
563 Geistfeld (n 10).
564 Jenny Steele, *Tort Law: Text, Cases and Materials* (Oxford University Press, 2010).

As Geistfeld mentions, in the context of legal precedent, 'most of the rights of property, as well as of person, are not absolute but relative'.[565] Let us be reminded that the importance of defining the nature of such priority of physical interest over the driver's liberty is that a degree of relativity allows for the possibility of a tradeoff of the conflicting interests and in the determination of liability. In the context of economic law, the question to ponder is the possibility about such a methodology of enquiry. Within the international economic domain, even if we were to assume the preambulatory nature of the chapeau to be inspirational and *per se* non binding for the global trading community, is there a remote possibility that the subordination of first world trading interests within the commercial sphere can transform into reality?

5.0 UPENDRABAXI AND 'THIRD WORDLISM': GIVING THE 'MICROSCOPIC MINORITIES' A REINVENTED PLACE IN INTERNATIONAL TRADE DISCOURSE

As Prof. Upendra Baxi suggests, there is need for 'third worldism'. This particular form of ideological resistance to the hegemonic structures of the original actors in international law is also becoming increasingly relevant to the reformulation of occupying places in trade discourse, and the representation of interests of the developing and under-developed nations. The interests of these nations, for whom a major part of the GATT and the GATS regime is actually constructed, must be taken into account while implementing policy, so that the operation of tests such as the 'aims and effects test' or the 'likeness/DCS' test', do not work as mere lip service to the National Treatment Principle. As Baxi posits, the emergence of third worldism as an ideology that seeks to reformulate the boundaries and re-establish the extent of third world participation in international law, and international trade law specifically, is important to ensure that the 'microscopic minorities' (third world countries in international trade law discourse) are increasingly benefitted by the new world trade regime, in terms of reducing barriers to cross border trade. A fundamental basis of Baxi's academic proposition is the predefined role of the third world within international law discourse, and the current need to resist such processes of hegemonic generalization, through what he calls 'third worldism'. Within his ideas of compossibility also lies the inherent

565 Vivienne Harpwood, *Modern Tort Law* (Routledge, 2008).

need to relook the operation of global trade and questions of construction and validation of first world trade policy which cannot be divorced from the 'fractured constellation of the non European community'.[566] While on one hand, it is sufficiently established that the basis of trade principles such as National Treatment, flow from an international belief of the need to reduce cross border trade discrimination, we must appreciate the fact that the overbearing nature of increased global trade leads to what Baxi calls 'subaltern cosmopolitanism', in terms of the third world being cornered by first world practices.

It is submitted that this ideology functions through doctrinal conceptions of the National Treatment Principle, and whose functioning is necessary for developing and underdeveloped countries to be provided a platform for increasing cross border trade volumes, and an opportunity at better rates of growth. It is in fact inherently discriminatory to allow for reservations or domestic policies which prevent the realization of such economic goals, within the statutory legitimacy of the GATT and the GATS regime. From what we have previously widely observed, the operation of the 'aims and effects test' or the 'likeness test' have worked to defeat the object and the purpose of the GATT and GATS regime, in addition to reservations and disobedience of customary international law.

Speaking in the context of the torts model, the sharp distinction between the two approaches is also well observed by the weightage that each of them gives to this 'relative priority'.[567] From a purely economic standpoint, the conventional analysis will take the initial entitlement of the pedestrian into consideration only for the purpose of defining the right of the pedestrian, in terms of availability of a legal remedy. It does not give any further weightage to any pre decided notion of what a moral standard should or should not be. Instead, stemming from the fact that this model revolves around cost benefit analysis, it then goes on to include other elements of costs, such as the cost of injury, precautions, administrative costs, and others. If after the summation of all such costs, the burden of physical security stands to be greater than the social costs of accidents, then the pedestrian's interest may be compensated.[568]

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566 Upendra Baxi, 'What may the Third World expect from International Law' (1998) The Third World Quarterly.

567 Pigou, *The Economics of Welfare* (1932).

Vehemently opposing such line of reasoning, theorists of the rights based school criticize the apparent insensitivity[569] in the stand that the welfare school of thought takes, in giving much greater relative weightage to social expediency[570] over morally sound individual interests/duties/obligations.[571] In fact, their stance in the present matter is appropriately summed up when Perry says 'the main reason that personal injury constitutes harm is that it interferes with personal autonomy'.[572]

6.0 EXPLAINING KAPLOW AND SHAVELL THROUGH LAW, MORALITY AND PARETO INEFFICIENCY

The model proposed by Kaplow and Shavell on the other hand, is one which deals with redistribution of savings from the benefits of wealth maximization. As per the theory propounded by them, the trade off that takes place between fairness and economic welfare, while formulating the desired system of tort law, leads to a Pareto inefficient situation. This happens because as the concern for fairness of a tort law provision is given more and more weightage, some positive component of welfare is constantly sacrificed. They further contend that if the society were to adopt such a rule instead of one that is rights based, then it would be viable and perhaps, more profitable if the savings from the welfare approach could be redistributed free of cost to all the members of the society. A basic assumption to this theory is a case where individual differences are taken into consideration.[573] For instance, the welfare that is gained by moving from State 'f' (fair) to welfare State 'w' may not be the same for all individuals, thereby leading to a situation where this move to State 'w' is not necessarily Pareto efficient.

However, the question on efficiency is answered by the construction of a completely new State entity, State 'r', where the total welfare remains the same as that in State 'w', and the welfare that is gained from the movement to this particular state, from State 'f', is further redistributed amongst all the members of the society,

568 Edward White, *Tort Law in America*, *an Intellectual History* (Oxford University Press. 2003).
569 Ibid.
570 White (n 40).
571 John William Salmond, *Salmond on the Law of Torts* (Sweet and Maxell, 1973).
572 Stephen Perry, 'On the Relationship between Corrective Justice and Distributive Justice' in *Oxford Essays on Jurisprudence* (Oxford University Press, 2000).

landing nobody in a 'worse-off' position. As a result of this, preference of State 'r', over 'f' is only rational decision making and a violation of the same would lead to a Pareto inefficient situation.[574]

One could possibly contend, that within the domain of international trade law, a constructive advantage arising out of the successful operation of the National Treatment principle, works in a similar manner as defined in the Kaplow Shavell model. Through increasing volumes of global trade and the generally higher productivity levels of the global trade market, cross border competitive disadvantages are likely to be much lower, alongside the successful benefits from international trade in rare and specialized commodities, many of which can be produced exclusively in developing and under developed countries. Howard Chang offers a radically different rebuttal to their models of analysis by arguing that fairness was to be given separate weightage with respect to welfare, and could therefore not be taken into consideration at all in case the legal rule that was being formulated would increase the welfare of all individuals in the society.[575] The concluding analysis of his model propounds the idea of this variable weightage *not* being Pareto inefficient.[576] Refuting such a theoretical proposition, Geistfeld is opposed to the idea that absolutely no unfair rule would be problematic as long as it reduced certain 'administrative cost savings, share per capita'. He further goes on to say that 'any theory that allows the fairness concern to become infinitesimally small under these conditions does not seem to be worth taking seriously'. Moreover, society would be witness to the growing occurrence of anarchy,[577] as nothing would essentially remain a duty at all, considering the little weightage that was to be assigned to certain moral standards of rights and obligations. As Richard Wright aptly points out, 'the aggregate risk utility test,

573 Calabresi, *The Cost of Accidents*, *A Legal and Economic Analysis* (1973).

574 Louis Kaplow and Steven Shavell, 'The Conflict Between Notions of Fairness and the Pareto Principle' American Law and Economics Review, 63-77.

575 Christian Lanstein, *Tort Law and Ethical Policy Making*, (2011) 103 Journal of Business Ethics, 87-94.

576 Geistfeld (n 10) 15. See Howard Chang, 'A Liberal Theory of Social Welfare: Fairness, Utility and the Pareto Principle' (2000) Yale Law Journal.

577 Paula Gilkier, 'Codifying Tort Law' (2007) 54(4) Harvard Law Review, 45-47.

which gives equal weight to security and liberty interests, cannot be reconciled with the principles of justice'.[578]

In the context of the international economic law paradigm, preference to the 'relative interpersonal priority' or to the Pareto efficient system (read: increasing volumes of global trade proportionally or less than that of domestic economic gains) may well involve questions of national policy, and may defer from one context to the other. The point however, is that irrespective of reservations to a treaty norm, if the manner in which the National Treatment works on a country specific basis, defeats the very essence of the international trade regime, then we must look for a balance between the two choices. One may make an academic but unpragmatic argument to say that perfect equilibrium of choice and resources may be reached in global trade and policy.

What we must therefore appreciate through the torts model, is that 'reduction of social costs' as witnessed by civil disputes, refers to the failure of the international legal paradigm if State policies, even during economic boom, curtail the operation of the National Treatment Policy. One must remember the propositions of Rosalyn Higgins as juxtaposed by Goldsmith and Posner when the debate over the construction of legal formulation as a means to achieve normative policy objectives ensues. The detailed examination of the theoretical propositions of the abovementioned scholar seems to suggest that the ultimate objective of law was to ensure that its integrated relationship with policy, by being the 'rational actor', is not disturbed so as to ensure the normative legitimacy of the system. How far such a proposition is even imaginable within the economic law domain is highly questionable. Therefore, for purposes of this paper, it is submitted that (a) the operation of the international legal system cannot be divorced from the policy objectives it seeks to achieve and (b) Goldsmith and Posner's rational actor theory stating the inability of States to act beyond their own realist objectives is not a misconceived debate and has well been established as customary State behavior.

578 Richard W Wright, 'Justice and Reasonable Care in Negligence Law' (2002) 47 American Journal of Jurisprudence, 145.

7.0 GEISTFELD AND THE PRAGMATISM OF CO-EXISTENCE: REACHING SETTLED SHORES?

Now, having established what is essential to Geistfeld's central model of analysis, let us look at how he proposes to execute a balance of both the rights based as well as the allocation based system of tort law. He begins by stating (in the context of the driver-pedestrian example) that 'the driver must purchase the right to expose the pedestrian to the risk of physical injury'.[579] In the very same example, which surprisingly is the backbone of his proposed model, Geistfeld considers the possibility of the pedestrian being killed as a result of the accident to be a hundred percent. Considering 'B' to be the cost/burden of the driver in avoiding the accident, the monetary cost of the risk is to be determined by the willingness of the pedestrian to face the *risk* of physical injury. Geistfeld further contends that it is this amount that the pedestrian is willing to accept for the risk that makes him or her indifferent between facing the risk and not being compensated and facing the risk and being compensated. Further, the amount of compensation that the pedestrian is willing to accept is the monetary benefit that compensates in exact amounts for the loss in welfare for the pedestrian.

Now, the assumption being made is pivotal to the practical application of this model. Geistfeld says that the efficient level of precaution (not the one set by the law for this particular example) is the summation of the costs of precaution and the initial compensatory payment to the pedestrian for facing the risk ('WTA', as he puts it). The allocation of resources would be considered efficient if the *precaution costs are less than the compensatory payment* or WTA. Further, the pedestrian has been adequately compensated before the risk actually materializes, thereby leading to a situation where the driver is absolved of any liability. Geistfeld concludes by saying that 'the agreement is allocatively efficient and satisfies the Pareto principle'.

579 Geistfeld (n 10) 21.

8.0 REJECTING GEISTFELD: OVER-SIMPLIFYING THE PROBLEM OF '*CHOICE*' IN LAW-MAKING

Geistfeld's attempts at 'establishing the existence of a class of plausible, rights based tort rules that do not violate the Pareto principle'[580] are commendable, but not analytically sound. It is imperative to point out at this juncture, that existent tort law scholarship deals with an array of models under the broad theme of reforming the current tort law regime. A significant part of this continuing debate is the balancing, rather, the mediation of the conflict of interests between a rights based and an allocatively efficient tort law system. In fact, the problem of choice, that policymakers keep facing, is an extremely difficult one, loaded heavily with problems of practicality. Geistfeld looks the problem of fairness and efficiency completely in isolation from whether or not such theoretical propositions can be transformed into practice.

> 'The fairness enquiry, therefore, must formulate the negligence rule in a manner that gives equal consideration to the welfare levels of the right holder and duty holder, an inquiry requiring economic analysis'.[581]

At the very first instance, where Geistfeld develops his model of analysis, he makes very clear boundaries between the driver of a vehicle, and the pedestrian whose interests in physical security are likely to be harmed as a result of the former over speeding and breaking the standards set by the law. It is in fact this assumption he makes between who the injurer is and who the victim is that may not be a practical reality. One of the fundamental reasons as to why tort law largely remains uncodified, through a uniform legislation, is because of the difficulty in assigning the legally defined roles of injurer and victim to those involved in an accident. Laws such as the Motor Accidents Compensation Act of 1999 in Australia, or the Accident Compensation Act of 2001 in New Zealand do contain a definition clause, but neither of the above-mentioned legislations defines who an injurer is or who a victim is. Further, Geistfeld contends that the potential injurer (which in his thesis is the driver) may exercise the option of compensating the possible

580 Geistfeld (n 10) 26.
581 Geistfeld (n 10) 42.

victim beforehand, and may thereby absolve himself of liability when the injury does take place, when he says that 'the pedestrian is fully compensated before she has been exposed to the risk, absolving the driver to pay any compensatory damages in the event of injury'.[582] While this particular proposition may be theoretically possible, its only real purpose is to show the economics of decision making. Geistfeld fails to drive the contention home by failing to provide for a practical model of the same. It would be more than unrealistically optimistic to expect a possible victim to accept such compensatory damages, and then actually stay indifferent to the mental and possibly permanently physical damages that an accident might entail. The relative numbers which have been used by the author to deduce the reduction in the willingness to accept early compensation is not something that can occur in reality. Moreover, Geistfeld does not consider the possibility of a situation where death (although even predicting this is problematic) is the most likely cause of the accident. In such cases, are we to assume that the potential victim would be indifferent between receiving this compensation and voluntarily facing the risk of death and not receiving the compensation at all? Further, are we to agree that there actually exists a possibility of communication in such cases?

Geistfeld further fails to take into account the fact that more often than not; the 'victims' end up taking more precaution than the one which is efficient, and prescribed by the law. Having taken this into consideration, the co-existence of welfare as well as rights is not something that can be explained with the help of one simple example. Also, there is an inherent dichotomy within the model of precaution that has been proposed for the driver, by Geistfeld. While on one hand, he contends that a driver can maximize his wealth by associating the cost of precaution with the compensatory payment (he says that if the cost of precaution can be made less than the initial compensatory payments, then efficiency is achieved), he alters his line of reasoning in the case of the death penalty. It is in the case of fatal accidents that Geistfeld contends that since the possibility of damages after the death is not possible, the same amount should be invested in the form of greater precaution. At the level of principle, this is an excellent proposition. The problem however, continues to be one of translating principle into practical reality. The question here is, how can the driver remotely predict which accident would

582 Geistfeld (n 10) 23.

lead to death before it even takes place? Clearly, the balancing of priorities, as explained by Geistfeld, works with several unrealistic assumptions, in a similar manner in which the realist operation of National Treatment is likely to work within the contemporary recessionary period worldwide.

9.0 *CHINA-AUDIOVISUALS* AND SPECIFIC COMMITMENTS: THE REMOTE POSSIBILITY OF AN 'EFFECTIVE EQUALITY OF OPPORTUNITIES'

In order to reach a viable conclusion, let us employ the methodology of analysis adopted in the *China- Publications and Audiovisuals* case.[583] The primary allegation in this particular case was brought by the United States of America against China in relation to certain theatrical films and audiovisual products (such as DVDs) to be sold within the territory of China. However, the Chinese government in this case acted in a manner that went again certain specific commitments it undertook in its Schedule of Specific Commitments. The competitive opportunities given to the American products were held to be 'less favorable'. As per this case, two elements had to be examined in order to determine whether or not a violation has taken place. First, the extent of the specific commitments and limitations in the Schedule of Specific Commitments, and secondly, whether or not the treatment given was 'less favorable'. In the two well-known GATT panel reports – *US – Section 337* and *Italian Agricultural Machinery*, the meaning of the term 'no less favorable treatment' (as contained in Article XVII of the GATS as well as in Article III (4) of the GATT) has been explained to mean an 'effective equality of opportunities'.[584] Another question asked in the same report was whether or not a policy measure directly resulted in limiting the influence of a Foreign Service supplier within the domestic territory of another contracting party. It is submitted that the 'effective equality of opportunities' as explained at length in the abovementioned reports, works as mere lip service to the actual operation of the National Treatment Principle. Through the current flexibility of commitments mandated within the statutory framework of the GATT and the GATS, and the

583 China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WTO Dispute DS363.

584 WTO Panel Reports, paras 5, 11 for *US-Section 337* and para 12 for *Italian Agricultural Machinery.*

operation of the 'aims and effects' test or the 'likeness/DCS'test or even the 'favorability' test, National Treatment as a normatively justified trade premise to increase participation from developing and underdeveloped nations faces existential questions, especially during economic slowdown. It is submitted that although reservations or limited specific commitments are indeed an integral part of the statutory scheme of the GATT and the GATS, the progress realization of the National Treatment paradigm must not be compromised in a manner that defeats its very essence.

10.0 CONCLUDING REMARKS

The author, through this particular research initiative, has primarily worked to bring about the finer logistical impediments to international legal policy goals, which continue to remain the greatest hindrance to the effective realization of international law principles. As has been demonstrated in the substantive sections of this paper, the element of 'choice' in international economics has worked to the detriment of the attainment of a truly 'global' trading village in international economic systems. Therefore, the only plausible solution to the increasingly legitimate 'choices' in international hegemonic structures, is the advent of collective response, through third worldism and the questioning of the very basics of efficient 'choices' in international law.