CAN THE CONCEPT OF 'JUSTICE' BE EMPLOYED IN NORTH-SOUTH TRADE TO SERVE THE INTERESTS OF THE SOUTH IN WAYS THAT SUSTAINABLE DEVELOPMENT CANNOT?

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Abstract

This paper examines the issue of how trade, environment and sustainable development has impinged on aspirations of the global South. The paper finds that the existing trade-related environmental measures, particularly several rules and principles of *GATT* and WTO agreements, such as the *GATT* Articles XX(b) and (g), and the WTO covered *Agreement on the Application of Sanitary and Phytosanitary Measures* are used by the Northern countries without considering the interests, concerns, abilities and the socio-economic conditions of developing countries. Against this backdrop, it is argued that any unfair and unbalanced trading system, without considering the capacity constraints of the global South is bound to perpetuate poverty and thus will hamper the advancement of developing countries. In a bid to bring a pertinent solution congruent with the interests of the global South this paper argues for the adoption of concepts of distributive, procedural and corrective justice in the global trade regime.

Keywords: sustainable development, GATT, WTO, global trade.

I INTRODUCTION

This paper examines the issue of how trade, environment and sustainable development has impinged on aspirations of the global South.[1] The nexus between trade and the environment is meaningfully considered in the Brundtland Commission Report, *Our*

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1 In this paper, the terms 'North' and 'South' have been used several times. The term 'North' indicates wealthy and industrialised countries such as Australia, the United States of America, Canada, New Zealand and the member states of the European Union. This author has also used the term 'developed country' or 'rich country' instead of the term 'North'. On the other hand, the term 'South' is used to mean the less prosperous countries in Africa, Asia and Latin America. This author has also used the terms 'developing country' or 'poor country' in lieu of the term 'South'. Importantly, countries of 'the South' share some common characteristics. Southern countries experienced Northern political and economic domination that triggered these nations to work as a negotiating bloc (The Groups of 77 and China). They are hugely marginalised, disadvantaged and economically weaker. See Frantz Fanon, *The Wretched of the Earth* (Constance Farrington Trans, Grove Weidenfeld, 1963) 9-10 [trans of: *Les damnés de la terre* (first published 1961) and Carmen G. Gonzelez, 'Environmental Justice, Human Rights, and the Global South' (2015) (13), *Santa Clara J. Int'l L* 151.

Common Future. The report provides the oft-cited definition of sustainable development as 'development that meets the needs of present generations without compromising the ability of future generations to meet their own needs'.[2] The Brundtland Commission, for the first time, wanted to reconcile environmental protection, economic growth and social equity in a single concept of sustainable development.[3] This reconciliation attempt is explicit when the report declares '[w]hat is needed now is a new era of economic growth — growth that is forceful and at the same time socially and environmentally sustainable'.[4] Following the report, the United Nations Earth Summit manifested a global consensus that 'it is no longer possible to treat ecology and [the] international political economy as separate spheres'.[5]

However, the interface between trade and the environment has given rise to acute tensions between the international trade regime, which seeks the general elimination of trade barriers, and the international environmental regime, which imposes barriers to trade products produced in an environmentally harmful way.[6] The relationship between trade and the environment has also generated anxiety for the nations of the global South that believe the trade and environment nexus is hampering their ability to pursue economic development and consequently**,** they are not able to reap the full benefits from international trade.[7]

International trade is regulated under the World Trade Organisation (WTO)[8] regime.[9] The successive rounds of *General Agreement on Tariffs and Trade* (*GATT*)[10] and the establishment of the WTO have created enormous opportunities for developing countries to access the Northern market more easily.[11] The Uruguay Round and Doha Ministerial Mandate[12] also stressed the enhancement of market access by bringing a balance between

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2 World Commission on Environment and Development (WCED), *'Our Common Future*' (Oxford University Press, 1987) 5 (*Our Common Future*).

3 Sam Adelman, 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar Pub, 2018) 15, 24.

4 Ibid 23.

5 Andrew Hurrell and Benedict Kingsbury, 'The International Politics of the Environment: An Introduction' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment: Actors, Interests, and Institutions* (Oxford University Press, 1992) 3.

6 See generally Alice Palmer, Beatrice Chaytor and Jacob Werksman, 'Interactions between the World Trade Organisation and International Environmental Regimes' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance : Synergy and Conflict among International and EU Policies* (MIT, 2006) 181, 181.

7 Bernhardt Thomas, 'North-South Imbalances in the International Trade Regime: Why the WTO Does Not Benefit Developing Countries as Much as It Could' (2014) (12) *Consilience: The Journal of Sustainable Development* 123, 123.

8 *Marrakesh Agreement Establishing the World Trade Organisation,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

9 Oberthür and Gehring (n 6).

10 *General Agreement on Tariffs and Trade,* opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) (*'GATT'*).

11 Murali Kallummal, Aditi Gupta and Poornima Varma, 'Exports of Agricultural Products from South-Asia and Impact of SPS Measures: A Case Study of European Rapid Alert System for Food and Feed (RASFF)' (2013) 8(2) *Journal of Economic Policy & Research* 41, 41.

12 *Doha Ministerial Declaration*, WTO Doc WT/MIN (01)/DEC/1, [13]–[14], [16], [27]–[28].

the reduction of tariffs and the Non-tariff Barriers (NTBs).[13] However, the establishment of a trade-environment nexus in international trade, through the emergence of the concept of sustainable development, has created a new concern for the South. Several rules and principles of *GATT* and WTO agreements, such as the *GATT* Articles XX(b) and (g), the WTO covered *Agreement on the Application the Sanitary and Phytosanitary Measures* (*SPS Agreement*)[14] and the *Agreement on Technical Barriers to Trade*[15] have become the centre of concerns of the global South.[16] It is alleged that by virtue of the *GATT* and WTO trading system, the Northern countries, in the name of environmental protection, are imposing lofty environmental standards on developing countries' products such as labelling requirements, compositional and quality standards and food safety regulations.[17] Developing countries do not have sophisticated environmentally friendly technologies to implement the Northern standards. Resultantly, the Northern countries impose trade barriers when developing countries fail to achieve their imposed standards.[18] Developing countries argue that such trade barriers frustrate developing countries' products from being accessed in the Northern market.[19] These environmental Non-tariff Barriers (NTBs) as a trade policy creates a trade imbalance favouring developed countries, given their technological capabilities. This unexpected trade imbalance results in the problem of the balance payment in Southern economies and works as a substantial impediment in achieving their sustainable development.[20]

Against this backdrop, this paper finds that the use of the *GATT*/WTO article XX and the SPS measures by developed countries, without any global coordination, raises the question of equity and fairness in the North-South trade. It is frequently argued by the South that the existing trade-related environmental measures are used by the Northern countries without considering the interests, concerns, abilities and socio-economic conditions of developing countries.[21] The paper argues that any unfair and unbalanced trading system which does not consider the capacity constraints of the global South is bound to perpetuate poverty and thus hamper the development of developing nations. Such an unfairness in the global trade will eventually frustrate the objectives of the WTO. This paper, in a bid to bring a pertinent solution thereto, conceives of the incorporation

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13 Sungjoon Co, 'Doha's Development' (2007) 25 *Berkeley Journal of International Law* 165, 170.

14 *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on the Application of Sanitary and Phytosanitary Measures'*) [496] ('*SPS Agreement'*).

15 *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('Agreement on Technical Barriers to Trade') arts 2.1, 2.2 ('*TBT Agreement'*).

16 Spencer Henson and Rupert Loader, 'Impact of Sanitary and Phytosanitary Standards on Developing Countries and the Role of the SPS Agreement' (1999) 15(3) *Agribusiness* 355, 357–9.

17 Shawkat Alam, 'Trade-Environment Nexus in GATT Jurisprudence: Pressing Issues for Developing Countries [2005] (Issue 2) *Bond Law Review*, 21 ('Trade-Environment Nexus in GATT Jurisprudence').

18 See generally ibid 20, 21.

19 Emeka Adibe, 'World Trade Organisation (WTO): Trade Rules/Agreements and Developing Countries' [2013] *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 121, 134.

20 Kallummal, Gupta and Varma (n 11) 41.

21 Shawkat Alam, 'Free trade and Sustainable Development Challenges Ahead' in Shawkat Alam (ed) *Sustainable Development and Free Trade Institutional Approaches* (Routledge, 2008) 205, 211.

of distributive, procedural and corrective justice in the global trade regime as a viable model for ensuring sustainable development.

The paper is organised into five parts in which Part II explores how trade and environment are inseparably embedded into the notion of sustainable development. Part III is dedicated to the textual rules that are invoked frequently in defence of environmental regulations, focusing on the *GATT* Article XX(b) and (g), the Article XX chapeau and the *SPS Agreement*. This part will demonstrate that the impact of Article XX and SPS measures, when applied vis-à-vis developing countries, can impede the development and trade of these countries. Part IV defines distributive, procedural and corrective justice taking into account the debates in the trade and environment discourse. This part discusses how distributive, procedural and corrective justice can offer a solution to the global trade and how the interests of the global South would be met. Part V sums up the analyses and draws a conclusion.

II TRADE-ENVIRONMENT NEXUS IN SUSTAINABLE DEVELOPMENT

The most ubiquitous, indispensable and contested concept of our time is 'sustainable development'.[22] The root of the concept goes back to 1971 when the Founex Report, 'Development and Environment', was released by a panel of experts convened by the Secretary-General of the United Nations Conference on the Human Environment.[23] With an eye on the Stockholm Conference, 1972, the report aimed to establish the relationship between economic growth, environmental protection and poverty.[24] Emerging from this conference, the Stockholm Declaration on the Human Environment emphasised that economic development and environmental protection are compatible and mutually reinforcing goals.[25]

This conceptual change in developmental and environmental thinking was clearly resisted by many developing countries of the global South.[26] They viewed environmental pollution as a result of industrialisation and therefore it should be a concern for the developed states only.[27] However, the resistance was proved to be futile.[28] The term 'sustainable development' was first publicly visible in 1980 when the World Conservation Strategy (WCS)[29] defined it as 'the integration of conservation and development to ensure modifications to the planet indeed to secure the survival and well-being of all

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22 Carlos J Castro, 'Sustainable Development: Mainstream and Critical Perspectives' (2004) 17(2) *Organisation and Environment* 195, 195 ('Sustainable Development').

23 Ulrich Beyerlin and Thilo Maruhn, *International Environmental Law* (Hart Publishing, 2011) 73.

24 Daniel Barstow Magraw and Lisa D. Hawke, 'Sustainable Development' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 614.

25 Beyerlin and Marauhn (n 23) 73.

26 Ibid 9.

27 Ibid.

28 See RP Anand, 'Development and Environment: The Case of the Developing Countries' (1980) *20 Indian Journal of International Law* 1, 10.

29 World Conservation Strategy (WCS) is a document prepared by International Union for Conservation of Nature and Natural Resources (IUCN).

people.'[30] This concept was refined and put on the international map in 1987 by the World Commission on Environment and Development (WECD or the Brundtland Commission). Its report, *Our Common Future*,[31] proposed the following concept of 'sustainable development':

> Humanity has the ability to make development sustainable – to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs. … The Commission believes that widespread poverty is no longer inevitable. Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes.[32]

The report further says, 'If large parts of developing world are to avert economic, social, and environmental catastrophes, it is essential that global economic growth be revitalised.'[33]

According to the Commission, reduction of poverty will reduce environmental degradation and developing countries need to pursue economic growth to reduce poverty. Achieving economic growth needs freer markets.[34] The report also says, in addition to freer markets, developed countries need to transfer knowledge, technology and capital to the underdeveloped countries which actually indicates that businesses 'will continue accumulating capital by selling expertise, capital, and technology to the countries of the periphery'.[35] The 1992 'Earth Summit', the UN conference on Environment and Development (UNCED), turned the notion of sustainable development into international prominence.[36] Though the summit did not produce any new ideas to deal with the environmental crisis, the summit carried more weight as the global leaders from 172 countries officially endorsed sustainable development as the development paradigm.[37] In institutional respect, Agenda 21 promoted sustainable development by establishing the UN Commission on Sustainable Development (CSD).[38] Since UNCED, a number of international instruments have included the concept of sustainable development.[39] The outcomes of UNCED also influenced the drafting of the preamble to the WTO.

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30 International Union for Conservation of Nature and Natural Resources (currently World Conservation Union) (IUCN), *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland, Switzerland: IUCN, 1980).

31 *Our Common Future* (n 2) 43-46.

32 Ibid 8.

33 Ibid 89.

34 Castro (n 22) 197.

35 Ibid.

36 See Marc Pallemaerts, 'International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process' (1995) 15 *Journal of Law and Commerce* 623, 630.

37 Bodansky, Brunnée and Hey (n 24) 615.

38 Christopher J. Koroneos and Dimitri Rokos, 'Sustainable and Integrated Development—A Critical Analysis' (2012) 4 *Sustainability* 141, 142.

39 See generally John Byrne and Leigh Glover, 'A Common Future or Towards a Future Commons: Globalization and Sustainable Development since UNCED' (2002) 3(1) *International Review for Environmental Strategies* 5, 5 ('A Common Future or Towards a Future Commons').

Despite sustained resistance from developing countries, the environment has entered the WTO through the preambular statement of the WTO.[40] The full reading of the preamble demonstrates that sustainable development in the WTO is not only linked to the optimal use of natural resources but also to the implementation of international trade.[41] However, the inclusion of trade-environment nexus through the concept of sustainable development is crucial for developing countries. Since exports of developing countries are mostly based on natural resources, their exports may be vulnerable to import restrictions, by the developed country, on the ground of environment.[42]

III TRADE-ENVIRONMENT NEXUS IN GATT/WTO: PRESSING CONCERNS FOR THE GLOBAL SOUTH

The *General Agreement on Tariffs and Trade* (*GATT*) was adopted in 1947 with a view to liberalising trade and tariffs and to stimulate economic recovery after World War II. At that time, protection of the environment was not a pressing issue.[43] The World Trade Organisation (WTO), established following the 1994 Uruguay Round, effectively transitioned the international community from the *GATT* to this historic agreement.[44] The WTO is an improvement on *GATT* in the sense that the WTO's framers placed priority on sustainable development, raising standards on living and environmental protection in the preamble.[45] The WTO also formally created a Committee on Trade and Environment (CTE) to promote sustainable development and to identify the entanglement of trade and environment.[46] Thus, the WTO has a dual commitment, on the one hand, it has commitment to ensure an equitable and non-discriminatory multilateral trading system and on the other hand, promotion of sustainable development and protection and conservation of the environment.[47]Article XX is one of the few provisions that explicitly raises environmental concerns.

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40 Konrad Von Moltke, 'Trade and the Environment- the Linkage and the Politics' (Paper prepared for roundtable on trade and the environment, Canberra, 25 August 1999) 1 <https://www.iisd.org/pdf/canberra.pdf>.

41 See generally Michael M Weinstein and Steve Charnovitz, 'The Greening of the WTO Essay' (2001) 80 *Foreign Affairs* 147, 147–8.

42 Scott Taylor, *Trade, Development and the Environment* (February 2004) Sida <https://www.sida.se/contentassets/2874d6290fc146838b1c06fb09bbaa27/trade-development-and-the-environment_1129.pdf>.

43 Nii Lante Wallace-Bruce, 'Global Trade and Sustainable Development: Two Steps Forward in the WTO?' [2002] (2) *The Comparative and International Law Journal of Southern Africa* 236, 238.

44 Jonathan Skinner, 'A Green Road to Development: Environmental Regulations and Developing Countries in the WTO' (2010) 20(1) *Duke Environmental Law & Policy Forum* 245, 246 ('A Green Road to Development').

45 Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton University Press, 2007) 213–4.

46 *GATT* art XX(b). See also Matthew A Cole, *Trade Liberalisation, Economic Growth and the Environment* (Elgar, 2000) 19.

47 Sanford Gaines, 'The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 739, 739.

A GATT/*WTO Article XX*

There are two core principles of *GATT*: Article I (The Most Favoured Nation Obligation) which prohibits discrimination against any 'like product' of all contracting parties and Article III (National Treatment) which prohibits trade restrictions to discriminate 'like domestic product' with 'foreign products'. Article XX offers a general exception to these principles.[48]

Article XX allows states to restrict imports by employing trade measures. Article XX(b) and (g) permit environmental measures and allow 'countries to sidestep the normal trading rules if necessary to protect human, animal or plant life or health'[49] or 'related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.'[50] A defining and limiting chapeau attached to Article XX stipulates that in applying the aforesaid measures under Article XX (b) and (g), a party must satisfy that the trade measures are *'necessary'* and not a '*disguised restriction on international trade'*.[51] Furthermore, these 'trade measures cannot be applied to discriminate arbitrarily between countries where the same conditions prevail'.[52]

Succinctly, *GATT* Article XX(b) and (g) legitimise some non-tariff barriers if they are related to genuine environmental concerns.[53] However, we should not remain oblivious of the fact that Article XX has been controversial from its very inception especially within the North-South dynamic.[54] All the exceptions to Article XX, namely subparagraph (b), (d) and (g) were the proposals of the United States of America (USA) and were included due to their insistence.[55] Some nations from the global South, at that time, feared that developed countries, having the powerful and self-sufficient economy, would get a chance to manipulate the third world market .[56] The following examples will demonstrate that the scepticism, mistrust and fear of developing countries in this regard was justifiable.

In the case of *Tuna -Dolphin,*[57] the USA imposed trade sanctions on the importation of tuna products from Mexico claiming that the measures were justified under Article XX (b) as necessary to protect the life and health of dolphins. Article XX (g) was also invoked to show that the measures related to 'the conservation of exhaustible natural

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48 Yenkong Ngangjoh-Hodu, 'Relationship of GATT Article XX Exceptions to Other WTO Agreements' (2011) 80 *Nordic Journal of International Law* 219, 229.

49 Håkan Nordström and Scott Vaughan, *Trade and Environment* (World Trade Organisation Special Studies 4, 1999) 9.

50 *GATT* art XX(g).

51 *GATT* art XX.

52 *GATT* art XX.

53 Skinner (n 44) 253.

54 Brandon L Bowen, 'The World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade in Light of Recent Developments' (2000) 29(1) *Georgia Journal of International & Comparative Law* 181, 184.

55 Padideh Ala'i, 'Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalisation' [1999] (4) *American University International Law Review* 1129, 1136.

56 Bowen (n 54) 184.

57 Panel Report, *United States - Restrictions on Import of Tuna (No 1), GATT* Doc DS21/R (3 September 1991, unadopted) *GATT* BISD 39S/155.

resources'. The USA claimed that its measures should not be viewed as a disguised restriction on trades because the main goal was to conserve and protect the life and health of dolphins. Mexico argued that a contracting party could not simultaneously claim that its measure is compatible with the general rules of the General Agreement and invoked Article XX for the same measure.[58] In this case, the *GATT* Panel articulated that the measures, introduced through *Marine Mammal Protection Act 1972,*[59] are contrary to Article XI:1 and are not justified by Article XX(b) or Article XX(g).[60] Apart from other arguments, the Panel considered that 'a contracting party may not restrict imports of a product merely because they originate in a country with environmental policy different from its own.'[61]

In *Thailand-Cigarettes,*[62] Thailand, through the *Tobacco Act 1966,*[63] prohibited the importation of tobacco without the license of the Director General who had not issued any import licenses for cigarettes in the past ten years. Arguing against the USA, Thailand took recourse to Article XX (b), *inter alia*, stating that the main responsibility of the Government is the protection of public health. The Panel concluded that Thailand failed to satisfy the *GATT*-inconsistent test as there existed other measures which could be legally invoked. The findings of these two cases also reflect the determinations made in *Canadian Fisheries Case*.[64]

All these cases mentioned till now indicate that the *GATT* Panel did not tolerate the discriminatory trade practices although there existed some justification for health, environment and conservation grounds.[65] However, the following cases will demonstrate that the Appellate Body of World Trade Organisation (Appellate Body) showed reluctance to interpret Article XX narrowly and therefore embraced more expansive interpretation in *Shrimp-Sea Turtle*[66] and *Reformulated Gasoline*.[67]

In *Shrimp-Sea Turtle,* a United States regulation was challenged by several Asian nations. The American regulation required, before exporting into the United States, during harvest, a fisherman must use the Turtle Excluder Device (TED) where shrimp and sea turtles co-exist. In this case, the United States lost as it had discriminatorily applied environmental protection policy. Importantly, the Appellate Body in the instant case allowed the trading member to employ measures of flexibility in the protection of

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58 Ibid.

59 *Marine Mammal Protection Act* (USA) 1972 16 USC 1361.

60 Panel Report, *United States - Restrictions on Import of Tuna (No 1), GATT* Doc DS21/R (3 September 1991, unadopted) GATT BISD 39S/155.

61 *United States-Restrictions on Imports of Tuna*, *GATT* Panel Report *GATT* DOC. DS 21/R: *GATT*, 30 ILM 1594 (1991).

62 *Thailand - Restriction on Importation of and Internal Taxes on Cigarettes, GATT* BISD 38 Supp 200, 201 (1990).

63 *Tobacco Act of 1966* (Thailand) *quoted in GATT* Thailand-Cigarettes Report, para. 63.

64 Panel Report, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, Mar. 22, 1988, *GATT* B.I.S.D. Lf6268-35 S/98.

65 Janet McDonald, 'Greening the *GATT*: Harmonising Free Trade and Environmental Protection in the New World Order' [1993] (2) *Environmental Law* 397, 422.

66 Appellate Body Report, *United States — Import Prohibition of Shrimp and Certain Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [157] ('*US — Shrimp'*).

67 Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996) ('US — Gasoline').

endangered species. The Appellate Body acknowledged that shrimp could be differentiated on the basis of the TED.[68]

In *Reformulated Gasoline,* where Brazil and Venezuela complained against the United States, the Panel declared that the implementation of the *Clean Air Act,* 1990[69] by the United States was unjustifiable and discriminatory as the said Act mandated specific requirements of emission effects of gasoline from the foreign producers which is more stringent than that of domestic producers. However, the Appellate Body reversed the Panel decision calling it an 'error in law'. The Appellate Body held that the baseline requirement of gasoline fulfils the ingredients of Article XX (g) as the baseline can be considered as 'primarily aimed at' the natural resource conservation.[70]

The interpretation of Article XX by the Appellate Body in these two cases indicates that it takes 'the environment' more seriously than the 'trade liberalisation'.[71] It also indicates that 'it is no longer possible for the WTO to uphold the free trade goals of the *GATT* 1994, such as promoting market access, above all other goals and concerns-e.g., health, the environment, and the objectives of sustainable development.'[72]

Among the cases discussed above, this author agrees with the analysis and outcome of the *Tuna -Dolphin and Thailand-Cigarettes* cases. Though the upshot of these cases has been criticised by some environmentalists for failing to address the environmental outcome, it needs to be remembered that sustainable development does not include environmental protection only. Sustainable development also underpins economic and social considerations. Hence, this author disagrees with the outcome of *Reformulated Gasoline* and the *Shrimp-Sea Turtle* cases that allowed restrictive trade measures as the sole means of achieving environmental outcome. This author argues that sole reliance on trade measures for improving environmental outcome by the North, without considering the capacity constraints of the South, is incompatible with the two core principles of sustainable development: intragenerational equity and common but differentiated responsibility. This is not to say that other principles such as intergenerational equity must be relinquished. Rather, a more nuanced approach should be taken to promote fair trade system which encourages environmental and social outcomes eliminating structural outcome.[73]

It is submitted that the expansive interpretation of Article XX and the emphasis on the environment in the *Reformulated Gasoline* and *Shrimp-Sea Turtle* cases herald few messages to the global South, as follows.

(a) The determinations of the *Reformulated Gasoline* and *Shrimp-Sea Turtle* cases have opened the door for the North to impose unilateral trade restrictions, in the name of environmental requirements and environmental protection. Article XX can be used to constitute a disguised protectionism to block the South from accessing Northern

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68 Shawkat Alam, *International Environmental Law and the Global South* (Cambridge University Press, 2015) 303.

69 *Clean Air Act* (USA), Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

70 Ala'i (n 55) 1158.

71 Ibid 1131.

72 Ibid.

73 Alam, *International Environmental Law and the Global South* (n 68) 303.

markets. Almost all recent cases about environmental NTBs under Article XX (b) and (g) show that the North has been significantly pushing environmental NTBs on the South.[74]

(b) The North can even impose trade-related environmental measures on a test basis. Northern countries' environment NTBs would survive if it is not challenged, and the North knows their unilateral trade barriers would rarely be challenged by the Least Developed Countries in the Dispute Settlement Bodies (DSB). Gregory Shaffer showed that from January 1, 1995 to May 10, 2005, complaints filed by developing countries was roughly 30 to 39 per cent. The percentage would certainly go down if Brazil and India are excluded. Out of the 104 WTO's developing country members,[75] 84 members have never filed a complaint before WTO.[76] Most developing countries have never taken part in the WTO judicial system to defend their interests as either a party or third party in a WTO case.[77] Two main types of constraints are found in the academic literature for holding back participation in the WTO system: 'capacity constraints' meaning lack of skilled human resources and the shortage of finance for employing outside legal assistance, and 'power constraints' implying fear of economic and political pressure.[78]

(c) Developed countries can even impose *unjustified* unilateral trade-related environmental measures on developing countries. As there is no initial filtering mechanism to justify such measures, developing countries must initiate a case and wait until the case is decided to prove that such measures unjustified. This is a waste of time and procedure. For example, according to a consumer advocacy organisation, out of 40 cases in the WTO system that had invoked the general exception under Article XX, only one case: *EC- Asbestos*[79] satisfied all conditions for application under the Article. All other cases failed to satisfy either the subject matter or scope or chapeau threshold and proved to be unjustifiable or arbitrarily discriminatory in the measures.[80] If there was a sifting mechanism to justify such measures initially, those case may not have arisen.

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74 Ibid 304. See e.g. (Brazil – Retreaded Tyres) Appellate Body Report, Brazil –Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 Decembern2007, DSR 2007: IV, p. 1527.

75 The figure of developing countries was based on World Bank income criteria as of June 2005. See categories of World Bank County Groups <http://www.worldbank.org/data/countryclass/classgroups.htm>.

76 Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining' (based on paper prepared for WTO at 10: A Look at the Appellate Body Sao Paulo, Brazil, May 16-17, 2005) 8.

77 Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003) 160–163.

78 Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' [2006] (2) *World Trade Review* 177, 177. See also J Nzelibe, 'The Case Against Reforming the WTO Enforcement Mechanism' [2008] (1) *University of Illinois Law Review* 319, 350.

79 Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products,* WTO Doc WT/DS135/AB/R (5 April 2001) [161].

80 Public Citizen, 'Only One of 40 Attempts to Use the *GATT* Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception'(Working Paper No 202/546-4996), Public Citizen, Washington <https://www.citizen.org/sites/default/files/general-exception.pdf>.

Similar instances of inconsistencies are also noticed in actions taken under the *SPS Agreement*.

B *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures*

The *Agreement on the Application of Sanitary and Phytosanitary Measures*[81] enables member states to adopt the appropriate level of protection (ALOP) through taking SPS measures such as labelling requirements, compositional and quality standards, and food safety regulations to protect life and health of humans, animal and plants.[82] The agreement limits the freedom of member states prescribing that the measures must be necessary and based on scientific evidence.[83] Additionally, the agreement authorises ALOP only when they are not inconsistent, protectionist or discriminatory in nature.[84] A 2018 report says that the SPS measures are proliferating in the international trade, and over 18,000 SPS measures were notified in the last 20 years.[85] Albeit, SPS measures provide member countries an opportunity to protect their interest in crucial issues like health and hygiene, it is widely recognised that SPS measures in the developed countries explicitly or implicitly act as a barrier to trade like the quantitative restrictions.[86] In this context, the exports of developing countries have been found to be more vulnerable to SPS measures compared to developed economies.[87]

The *SPS Agreement* stipulates that domestic standards can be more stringent than those of international standards if they are justified by scientific evidence.[88] These provisions are discriminatory because developed countries can take advantage of them. Kallummal and Gurung showed by empirical evidence that this dual standard regime harms developing countries as they typically fix their national standard following international standards while developed countries impose stricter ones.[89] Furthermore, the South does not have the technological skills and capacity to fulfil Northern standards or to challenge Northern standards even if they constitute protectionism.[90] By imposing stricter standards, the Northern countries restrict access of the Southern countries to Northern market and thereby deprive the Southern countries of the resources essential to

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81 *SPS Agreement* (n 14).

82 WTO, The WTO Agreements Series: Sanitary and Phytosanitary Measures (Switzerland, 2010) 27.

83 *SPS Agreement* (n 14) Art 2.2.

84 *SPS Agreement* (n 14) Art 5.5.

85 Hanna Schebesta and Dominique Sinopoli, 'The Potency of the SPS Agreement's Excessivity Test the Impact of Article 5.6 on Trade Liberalisation and the Regulatory Power of WTO Members to Take Sanitary and Phytosanitary Measures' (2018) 21(1) *Journal of International Economic Law* 123, 124.

86 David Vogel, *Trading up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 1995) 187–189.

87 Jacob Wood et al, 'The Economic Impact of SPS Measures on Agricultural Exports to China: An Empirical Analysis Using the PPML Method' (2017) 6(2) *Social Sciences (2076-0760)* 1, 3 ('The Economic Impact of SPS Measures on Agricultural Exports to China').

88 *SPS Agreement* (n 14) Art 2.3 and 3.3.

89 Kallummal Murali, & Gurung Hari Maya, 'Sanitary and Phytosanitary Measures and Analysis of Systemic issues: Trends based on the Online Database of CWS- 1995 to 2010' (WTO Newsletter**,** 2011).

90 Alam, *International Environmental Law and the Global South* (n 68) 307.

achieve sustainable development.[91] For example, to reduce the health risk of 2.3 deaths per billion, the European Union implemented higher aflatoxin standard (2 ppm) which is more stringent than international standard (9 ppm). This standard has decreased African exports by about 64% or US$670 million since African nations lacked the scientific capacity to comply with EU standard.[92] In the context of cost, the reduction of the health risk of 2.3 deaths per billion seems miniscule when in the European Union the number of deaths by liver cancer is about 33,000 per year.[93]

Furthermore, a more stringent standard is sometimes intentionally set to favour some nations and to deprive others.[94] This practice is against the spirit of the *SPS Agreement*, and such stringent standards setting mostly puts hurdles for Southern countries. For example, the Council of the European Union (EU Council) on 26 April 2012, officially approved a tariff rate quota (TRQ) for importing 'high-quality fresh, chilled or frozen beef' into the European Union (the EU) market.[95] Interestingly, the TRQ is open to all countries supplying beef. However, the definition of 'high quality beef' is constructed in such a way in the implementing regulation, that clearly indicates that it is established to favour US and Canadian exports. 'High quality beef' is defined as 'beef cuts obtained from carcasses of heifers and steers less than 30 months of age which have only been fed a diet, for at least 100 days before slaughter, containing not less than 62% of concentrates and/or fed grain co-products on a dietary dry matter basis'.[96] The definition technically excludes beef supply from the Southern countries especially in South Asia and Latin America where grass-feeding is followed.[97]

Southern countries also suffer when Northern countries set a different Appropriate Level of Protection (ALOP) even if there exists a lack of scientific concurrence.[98] It happened in *EC-Hormones,* where EU banned beef imports that applied animal hormone in their process of production. The United States contested, claiming the ban was not based upon scientific evidence. The Appellate Body (AB) determined that the *SPS Agreement* was not violated by setting a different ALOP as to the use of hormones, though the EU's ban was not resting on adequate scientific evidence.[99] Thus, Southern countries have no option except keeping themselves aloof from Northern markets since it is challenging for the Southern countries with limited resources to comply with the Northern environmental requirements, let alone challenge their trade ban based on advanced scientific evidence.

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91 Ibid.

92 T Otsuki, JS Wilson and M Sewadeh, 'Saving Two in a Billion: Quantifying the Trade Effect of European Food Safety Standards on African Exports' (2001) 26(5) *Food Policy* 495, 510 ('Saving Two in a Billion').

93 Ibid 511.

94 Eugenia Laurenza, 'Latest Developments in the Implementation of EC-Hormones II' [2012] (3) *European Journal of Risk Regulation* 408, 409.

95 Ibid 408.

96 See Annex I to COMMISSION REGULATION (EC) No 620/2009 of 13 July 2009 providing for the administration of an import tariff quota for high-quality beef. <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:182:0025:0030:EN:PDF>.

97 Eugenia Laurenza (n 94) 409.

98 Alam, *International Environmental Law and the Global South* (n 68) 307.

99 Appellate Body Report*, European Communities -Measures Concerning Meat and Meat Products (Hormones),* WTO Doc WT/DS26/AB/R; WT/DS48/AB/R (16 January 1998).

Even when the exporters of developing countries possess the ability to comply with Northern standards, the compliance costs of product redesign, testing and certification are enormous.[100] For example, in 1997 when the European Commission banned the import of Bangladeshi frozen shrimp products, Bangladesh spent $17.6 million between 1997 to 1998 to upgrade sanitary conditions of the plants. It was estimated that Bangladesh would have to spend $225,000 per annum only to maintain hygiene standard.[101] In another example, between 1980-2000, to improve the level of export, Argentina spent more than US$80 million to upgrade its equipment and processes.[102]

Furthermore, developing countries need to incur considerable cost in building their technical capability necessary to participate in international standards-setting bodies. Engaging expert international lawyers is costly for the developing countries' budget.[103] All these issues contribute to the overall increase of concern for the global South.

C *Identifying the Reasons of Concerns of the Global South*

The aforesaid discussion clearly indicates that both the *GATT* Article XX (b) and (g) and SPS measures have created avenues for imposing environmental non-tariff barriers.[104] The realisation of environmental objectives through trade-related environmental measures leads to discrimination since such measures are imposed without considering the socio-economic conditions of the countries.[105] The global South countries fear that Northern countries can impose higher environmental standards which would act as a trade barrier for them and exclude them from any comparative advantage.[106] Further, developing countries argue that the Northern countries are trying to dictate the domestic policy of developing countries by exerting their economic power. For developing countries, it is eco-imperialism.[107] Unfortunately, the Northern countries are frequently using these measures to restrict trade from the Southern countries.[108] Consequently, the developing countries of the South are substantially losing their export markets in the North. Statistics show that there is a sharp decline of South Asian exports of agricultural products to the EU market, although trade liberalisation promises an increase in trade. The South Asian

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100 Spencer Henson and Rupert Loader (n 16) 359.

101 Spencer Henson and Rupert Loader, 'Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements' (2001) 29(1) *World Development* 85, 90 ('Barriers to Agricultural Exports from Developing Countries').

102 J Michael Finger and Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge / Implementation of Uruguay Round Commitments: The Development Challenge* (The World Bank, 1999) 525 ('*Implementation of Uruguay Round Commitments*').

103 Constantine Michalopoulos, *Developing Countries in the WTO* (Palgrave, 2001) 94.

104 Alam, *International Environmental Law and the Global South* (n 68) 303.

105 Shawkat Alam, 'Trade-Environment Nexus in GATT Jurisprudence' (n 17) 20.

106 Jagdish Bhagwati, 'On Thinking Clearly about the Linkage between Trade and the Environment' [2000] (4) *Environment and Development Economics* 485, 494. Cited in Shawkat Alam, 'Trade-Environment Nexus in GATT Jurisprudence' (n 17) 20.

107 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 2011) 1189.

108 Kallummal, Gupta and Varma (n 11) 52.

share of exports to the EU was 62 percent in 1962.[109] It was close to about 30 percent from 1980 to 1995. In 2000, the total agricultural exports dropped to 22 percent, and the decline remained till 2010. The report also showed that this unexpected decline is due to the technical *ex-ante* trade barriers such as SPS measures by the EU market.[110]

Developing countries believe that the existing recurring problems in the international trade regulation is due to the absence of a theory of justice in the international trade regime. Though some academics claim that 'justice' is already embedded in the existing trade regime,[111] other academics strongly oppose the standing. For example, Albin, by using discursive evidence, argues that present international trade negotiations have been facilitated by the principles of justice.[112] Lisa M. Samuel critiques Albin's argument claiming that Albin does not consider the concern, interests and participation of developing states. According to Samuel, if Albin had considered the interests of developing countries, she would have arrived a different conceptualisation of justice.[113] Similarly, Thomas Frank doubted the existence of the notion of justice in the trade regime, arguing that though international economic law claims that it conforms with the notion of distributive and procedural justice, it is not clear whether it provides sufficient provisions to address the differences in the course of pursuing justice.[114] It is true that dispute settlement bodies works for ensuring justice, but it is limited because judges are responsible for applying and enforcing the existing law, they cannot create a just and fair trade regime.[115] Samuel and Frank find there is an absence of justice since the WTO regime fails to address the needs of developing countries. That is why Stiglitz and Charlton comment justice can be achieved in trade, but it needs to be redesigned to accommodate the interests of developing countries from a distributional point of view.[116] They argue that in international trade agreements, the focus should be given to the development of the poor countries and the participation of those countries in the international trade regime.

Given these circumstances, this paper has pointed out that the WTO trading arrangement is plagued with fundamental inequality.[117] This paper only addresses two identifiable areas where the inequality exists. Due to inherent inequality, the WTO's commitment to development, as manifested in its preamble, among developing countries has not been achieved yet.[118] In this endeavour, this author finds that the following three

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109 See generally Francois, J. Francois, McDonald Bradley, & Nordstrom Hakam, 'The Uruguay Round and the Developing Countries' in Martin Will and Winters L. Alan (eds), *The Uruguay Round and the Developing Countries* (Cambridge University Press, 1995) 140, 150-3.

110 Kallummal, Gupta and Varma (n 11) 46.

111 Cecilia Albin, *Justice and Fairness in International Negotiation* (Cambridge University Press, 2001) 24-30.

112 Ibid 24–30.

113 Lisa M Samuel, 'When Negotiating Trade Means Negotiating Difference: WTO Insights' (2015) 64(2) *Social and Economic Studies* 91, 116.116.

114 Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon, 1997) 8, 19, 22.

115 Samuel (n 113) 116.

116 Joseph E Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press, 2005) 127–9.

117 Adibe (n 19) 134.

118 The preambular declaration of the WTO Agreement is 'there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development'.

reasons are primarily responsible for creating inequality and unfairness for the global South.

1. Trade-related environmental measures are not considering the needs, concerns and the limitations of the global South. These measures are unilateral and unregulated. Such measures raise questions of fair trade.[119]
2. The WTO has failed to establish level playing field in the international trade regime. Presently, the international trade system is inequitable. For example, under the existing system, the major players like the USA and EU can carve out exceptions which enable them to continue subsidies in their agricultural sectors. It is unfavourable to developing countries which should have a comparative advantage in this sector. For example, until 2003, one study reveals, the developed world furnished $350 billion per year as subsidies in agriculture which is greater than the gross domestic product (GDP) of sub-Saharan Africa.[120]
3. Developing countries do not have desired representation and active participation in the international trade negotiations, international standards-setting institutions and in the dispute settlement procedures established by the WTO. As a result, the interests of the developing countries are rarely reflected in the decisions of the institutions.[121]

These three problems can be resolved if we can address the following three potential areas.

(a) We should espouse a sense of fairness which will be central to market allocation. It is the fairness which can create equality in opportunity and a level playing field emphasising a condition where no competitor enjoys an unfair advantage over other.[122] A sense of trade fairness addresses the existing economic inequality and development needs of the global South to secure overall welfare.[123] Fairness in trade imposes a moral obligation on the rich countries to favour the economic growth of developing countries.[124] One potential way of doing this is removing unnecessary obstacles to trade that impede developing countries' access to the Northern market.

(b) There may arise some situations where even fairness or justice might yield some disadvantages to a particular state. In such a situation, they should have a mechanism to redress those disadvantages. The redress may take the form of monetary compensation or other types of compensation.

(c) In the existing trading system, the participants (developing countries) differ greatly in their economic capacities and bargaining skills. Developing countries, as weaker

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119 Shawkat Alam, *Sustainable Development and Free Trade Institutional Approaches* (Routledge, 2008) 82, 83.

120 Fabian Globalisation Group, *Just World: A Fabian Manifesto* (Zed Books, 2005) 84 ('*Just World*').

121 See generally Amrita Narlikar, 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO' (2006) 29(8) *World Economy* 1005.

122 Oisin Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation* (Cambridge University Press, 2018) 254.

123 Ibid.

124 Andrew G. Brown and Robert M. Stern 'Fairness in the WTO Trading System' in Amrita Narlikar, MJ Daunton and Robert Mitchell Stern (eds), *The Oxford Handbook on the World Trade Organisation* (Oxford University Press, 2012) 677, 683.

participants, accept the outcome 'that leaves it worse off than before'.[125] Thus as a matter of fairness, developing countries need to increase capacity building. For building capacity, they need effective economic, scientific and legal institutions and expertise. They also need to improve the capacity to effectively participate in WTO negotiations, international standards-setting bodies and dispute settlement bodies.

In this paper, this author argues that these three potential areas of international trade require principles of justice. Now the question arises as to why the principles of justice are relevant here. One way of answering the question is when people use social institutions to allocate social goods, this is the domain of justice.[126] According to Rawls, international trade law such as the WTO law, is a 'basic structure' which distributes rights and duties and allocates social goods such as market access, preferences, economic opportunity and trade-related knowledge.[127] So, it is submitted that in order to consider the normative implications of the allocative system in the WTO, this trade law needs a theory of justice. A prominent academic, Shue, also commented that the issues of justice are to be brought at the international level because existing distribution of the wealth displays moral arbitrariness at best and 'systemic exploitation at worst'.[128]

This paper argues that the present concerns of the developing countries can effectively be addressed if the notion of distributive justice, corrective justice, and procedural justice is incorporated in the WTO regime. As a part of this submission, it is argued that the above-mentioned areas in items (a) and (b) can be addressed by employing distributive and corrective justice respectively and the area in item (c) is subject to procedural justice.

IV HOW THE CONCEPTS OF 'DISTRIBUTIVE, PROCEDURAL AND CORRECTIVE JUSTICE' OFFER A SOLUTION

A *Distributive Justice*

Distributive justice is an 'umbrella' term and has no universally accepted definition.[129] Some academics use the term 'economic justice' instead of 'distributive justice'.[130] To Professor Kaswan, distributive justice addresses unfair distribution, unfair treatment and the systemic history of inequality that have given birth to current disparities.[131] John Rawls has given two principles of distributive justice.[132] The relevant second principle is 'social

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125 Ibid 685.

126 Frank J Garcia, 'Why Trade Law Needs a Theory of Justice' (2006) *American Society of International Law Proceedings* 375, 377.

127 Ibid.

128 Andrew Hurrell and Benedict Kingsbury (eds.), *The International Politics of the Environment: Actors, Interests and Institutions* (Oxford University Press, 1992) 386.

129 Ethan B Kapstein, *Economic Justice in an Unfair World: Toward a Level Playing Field* (Princeton University Press, 2008) 3.

130 See especially Stephen Nathanson, *Economic Justice* (Prentice Hall, 1998) 93.

131 Alice Kaswan, 'Distributive Justice and the Environment' (2002) 81 *North Carolina Law Review* 1031, 1031.

132 Broadly, the first principle of Rawls relates to political liberty such as the right to vote and freedom of speech. See generally John J Flynn and Piero Ruffinengo, 'Distributive Justice: Some Institutional Implication of Rawls' A Theory of Justice' (1975) 1975 *Utah Law Review* 123, 131-132.

and economic inequalities are only then permissible if they are to everyone's advantage'.[133] Rawls argues that in the principle of justice 'no one is advantaged or disadvantaged' and 'the principles of justice are the result of a fair agreement or bargain'.[134] Both Kaswan and Rawls emphasise on equality and fairness. Helen Hodgson rightly observed equity, equality and fairness are intricately related with distributional justice.[135] The attributes of distributive justice given by John Rawls, Professor Kaswan and Helen Hodgson lead this author to conclude that distributive justice ensures (a) equality in opportunity (b) fair trade (c) reciprocity for mutual benefit (d) mitigation of historic inequalities and (e) development, considering the economic and social ability of all participants.

Equality in opportunity has a long tradition in WTO Agreements. The principles of fair competition and non-discrimination in the WTO are the manifestations of the equality of opportunity. However, the problem is these principles are losing their practical significance in North-South trade relationship. Unilateral trade restrictions, bilateral trade agreements and deliberated impositions of stricter environmental requirements on importing products are eroding the established norms of non-discrimination and detracting equality of opportunity. Unfortunately, such trade restrictions do not care about greater good. This purposeful disregard for fairness is clearly revealed in North-South trade where powerful nations are imposing conditions which are not conducive to the trade of poorer nations. This can be termed as injustice. Distributive justice ensures the right of equal opportunity and global institutions to redress such a right. The history of distributive justice encourages people to raise a voice against such injustice and fairness.

Fairness in trade promotes equitable standards while goods are exported from the global South to global North. Fair trade is defined as 'a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalised producers and workers –especially in the South'.[136] From the point of view of fairness, the aim of the WTO structure is the removal of barriers which leads to overall welfare. The welfare gains of both developing and developed countries lie in the facilitation of trade and investment.

Distributive justice would encourage richer countries to assist the poorer countries. It is not dignified for developing countries always to desire foreign aid. Furthermore, international trade is not a mechanism for transferring aid too.[137] So, foreign *trade*, instead of foreign *aid*, should be encouraged. In such cases, distributive justice patently requires an arrangement for the promotion of reciprocal commercial relations for mutual benefit.[138]

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133 Peter Koller, 'The Principles of Justice' in Otfried Höffe (ed), John Rawls*, A Theory of Justice* (Brill, 2013) 37, 41. See also Urs M. Lauchli, 'What is Distributive Justice - The Legal Theories of Rawls and Nozick' (1994) 4 *Tilburg Foreign Law Review* 169, 173.

134 John J Flynn and Piero Ruffinengo, 'Distributive Justice: Some Institutional Implication of Rawls' A Theory of Justice' [1975] *Utah Law Review* 123, 128.

135 Helen Hodgson, 'Theories of Distributive Justice: Frameworks for Equity' (2010) 5 *Journal of the Australasian Tax Teachers Association* 86, 90.

136 Cephas Lumina, 'Free Trade or Just Trade - The World Trade Organisation, Human Rights and Development (Part 1)' [2008] (Issue 2) *Law, Democracy and Development* 20, 26.

137 Narlikar, Daunton and Stern (n 124) 683.

138 Ibid.

In this context, the rich countries can provide developing countries the access to foreign markets by specially favouring them considering their socio-economic conditions. This flexibility may contribute to the economic betterment of the South.

Most importantly, distributive justice recognises the North-South inequality arising from the colonial encounter and the development practice in the post-colonial period.[139] It is to be acknowledged that international law introduces norms of differential treatment designed to favour Southern countries. These differential treatments is a form of distributive justice as Professor Kaswan also addresses the issue of history of inequalities in her definition of distributive justice.[140] The existing WTO Agreement contains nearly 155 provisions relating to Special and Differential Treatment (SDT) of Developing Countries and Least Developed countries.[141] SDT clauses mainly deal with the flexibility of commitments, technology transfer, transitional time period and provisions relating to safeguarding the interests of developing countries.[142] These SDT clauses are also not free from unfair practices. For example, Hunter shows that developing countries acquire the three-quarters technology from the developed countries not as assistance but purely on commercial terms.[143] Furthermore, SDT provisions are crafted in a soft law language. As a result, developing countries are not able to seek redress potentially in the dispute settlement body of the WTO.[144] One prominent writer termed SDT clauses as a 'carrot-and-stick mechanism' that is used to promote liberalisation by the developing nations.[145] It is argued that such unfair practice develops because the international economic law does not address the root causes of the crisis. Distributive justice is the right framework to talk about, to seek an explanation for claiming one's right more prominently and clearly.

The inclusion of distributive justice in the WTO regime will also challenge the 'excessive mercantilist approach'[146] of the global North which does not pay heed to the development needs of the global South. The rich countries have left an impression that they are reluctant to allow equal access to the economic pie.[147] The disregard of the ability of developing countries and the hidden emphasis on the consumption of developed countries

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139 Carmen G. Gonzalez, 'Environmental Justice and International Environmental Law' in Shawkat Alam (ed), *Routledge Handbook of International Environmental Law* (Routledge, 2013) 77, 87.

140 Kaswan (n 131) 1031.

141 Manuela Tortora, *Special and differential treatment and development issues in the multilateral trade negotiations: The skeleton in the closet,* UNCTAD, WEB/CDP/BKGD/16 (2003) 8 <https://unctad.org/Sections/comdip/docs/webcdpbkgd16_en.pdf>.

142 Mehedi Hasan, 'Special and Differential Treatment in the WTO: Its Content and Competence for Facilitation of Development' (2016) 7 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 41, 48 <https://heinonline.org/HOL/P?h=hein.journals/naujilj7&i=50> ('Special and Differential Treatment in the WTO').

143 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 2011) 1188.

144 Olivares Gustavo, 'The Case for Giving Effectiveness to *GATT*/WTO Rules on Developing Countries and LDCs' [2001] (3) *Journal of World Trade* 545, 551.

145 Paola Conconi and Carlo Perroni, 'Special and Differential Treatment of Developing Countries in the WTO' (2015) 14 *World Trade Review* 67, 67.

146 Adibe (n 19) 134.

147 M. Halle, *Trading into the Future: Rounding the Corner to Sustainable Development,* GTI Papers Series Frontiers of Great Transition, no.6 (2006) 7.

are blatant unfairness.[148] The gap between the harsh reality and development rhetoric is frequently established at the negotiating table which provides credence that the North is 'kicking away the ladder' and preventing the South's sustainable development.[149] Such an approach is against the principle of distributive justice given by John Rawls as it leads to disadvantage and inequality for the poor nations.

The Northern countries, by enforcing lofty environmental requirements in trade, want to make the unequal equal. But they must know, to make unequal equal in itself is inequality. Therefore, this author strongly argues that this unfair treatment can only be redressed through the notion of 'distributive justice'. For example, if distributive justice had been incorporated in the WTO regulation, the WTO or the developed countries would have had to show to the world community that any measures taken will not negatively affect the interests of the developing countries.

In this section, it was argued that distributive justice requires an arrangement of world trade regime where the interest, concerns and abilities of developing countries will be considered. It was also argued that the idea of distributive justice will challenge the excessive mercantilist approach of the global South. Now the question is, in a world where it is said 'all is fair in love, trade and war'[150] – why would the rich country agree to ensure distributive equity? This author argues that there are at least three reasons: (a) if distributive justice is persistently violated, the world trade regime will be undermined, threatened and finally collapse because existing trade systems rests on the idea of cooperation, (b) distributive justice can yield benefits for all trading parties, and (c) it is the moral obligation of the richer countries to assist the poorer countries because the existing disparities, arguably, are the result of the systemic history of inequality and exploitation during colonialism by the North.

Further, historic injustices can also be redressed by the theory of corrective justice. Apart from it, in the next section it will be argued that in any area where distributional justice seems disadvantageous, there should be a mechanism for corrective justice, meaning compensation for the more disadvantageous states.

B *Corrective Justice*

Corrective justice ensures compensation for historic inequities[151] and retribution for violating legal rules.[152] It addresses the damage inflicted on individuals or communities.[153] The question of corrective justice in trade arises when no viable option remains open to be adopted. For example, trade liberalisation creates market inequality because it always looks for aggregate production and tries to increase economic efficiency through

148 Ibid 7-8.

149 Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem, 2005) 19–51.

150 Lisa M Samuel, 'When Negotiating Trade Means Negotiating Difference: WTO Insights' (2015) 64(2) *Social and Economic Studies* 91, 115.115.

151 Shawkat Alam (ed), *Routledge Handbook of International Environmental Law* (Routledge, 2013) 79.

152 Kent Greenawalt, 'Punishment' (1983) 2 *Journal of Criminal Law and Criminology* 343, 349.

153 Robert R Kuehn, 'A Taxonomy of Environmental Justice' (2000) (9) *Environmental Law Reporter* 10681, 10693.

international competition.[154] In this globalised world, it would be impracticable to go against trade liberalisation. But as a matter of justice, if a policy is preferred under trade liberalisation to serve a particular goal, although there may be sufficient reasons for rejecting such policies, there should be a mechanism for compensation for those who are adversely affected by these policies.[155] Thus, when reduction of agricultural protections in developing countries undermines the farmer's ability to compete with big agribusiness firms of the rich countries, then such policy should be rejected if there is no provision for compensation for those poor farmers.

Darrel Moellendorf states that the present trade is full of systemic injustices having no mechanism to redress present, past and future inequities.[156] He said the developed world, in pursuing development, systematically protects their infant industries.[157] But presently they are not allowing developing countries to protect their vulnerable industries. Developed countries neither paid for their past protectionism nor made any mechanism to compensate for the loss and damage caused to developing countries due to the reduction of protectionist policies in developing countries.[158]

In our context, the use of unilateral environmental non-tariff barriers by the developed countries constitutes a clear case of injustice. Absent distributive justice, the developed countries should compensate those countries whose interests are adversely affected by such barriers. Jagdish Bhagwati, a leading economist, argued:

> You could certainly compensate the country whose trading rights (i.e. access to your market) are being denied or suspended by offering other concessions or having the other country withdraw some equivalent concessions of her own to you or, better, through cash compensation for the gains from trade lost by the country.[159]

This approach is not free from limitation. It will allow countries to impose measures inconsistent with WTO rules by paying compensation. It may be adjudged immoral to pay compensation to continue illegal measures.[160] However, there may be very few areas where distributive justice may not produce the desired result, in such cases corrective justice can be the second-best available option. Furthermore, the issue of compensation may not arise if the decision is taken in a transparent manner where all those affected by a decision can participate in the decision-making process in the true sense of the term. This fair decision-making procedure is a matter of procedural justice.

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154 Darrel Moellendorf, 'The World Trade Organisation and Egalitarian Justice' [2005] (1/2) *Metaphilosophy* 145, 152.

155 Ibid.

156 Ibid.

157 Darrel Moellendorf (n 154) 152.

158 Ibid.

159 Vinod Rege, 'GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries.' (1994) 3 *Journal of World Trade* 95, 118.

160 Ibid.

C *Procedural Justice*

Procedural justice encompasses an open, inclusive, representative and communicative decision-making process.[161] Aristotle evaluates procedural justice as a status where each has 'an equal share in ruling and being ruled'.[162] Professor Kaswan emphasised the political dynamics of procedural justice so that all groups are treated fairly in decision-making processes.[163] In light of the North-South dimension, another qualification of procedural justice needs to be added. It is 'equal status, in terms of skills, among decision-makers'. The justification is if an equal status is not ensured, there is a chance of manipulation or coercion from the part of stronger participants.[164] Thus, 'procedural justice' includes: (a) all those who can be affected by a decision should have an opportunity to be heard; (b) equal status among decision-makers in terms of skill and knowledge; (c) equal opportunity of influencing decisions; and (d) a fair procedure so that the outcome can be just.[165]

In our context, there are two areas- the decision-making procedure of the international standard-setting institutions, and the dispute settlement bodies of the WTO, where developing countries are experiencing procedural injustice.

The GATT/WTO Article XX implicitly requires the standard setting of products.[166] The *SPS Agreement* is also going to balance SPS measures with international standards through recognising international standard-setting bodies.[167] Presently, the role of the Codex Alimentarius Commission is gaining prominence in setting international standards. However, the standard setting is mainly based on scientific evidence and the South does not have the scientific capacity and the governance structure to participate in the creation of standards effectively.[168] Consequently, at present, the South is notoriously under-represented there.[169] For example, at the 64th Joint FAO/WHO Expert Committee on Food Additives (JECFA) meeting, it was found that all JECFA Secretariat representatives are from developed countries.[170] At the International Organisation for Standardisation (ISO), a similar situation prevails.[171] Codex is also criticised for the under-representation of developing countries.[172]

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161 Ibid.

162 RM Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 273.

163 Alice Kaswan, 'Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"' (1997) 47 *American University Law Review* 221, 233 ('Environmental Justice').

164 Luke Tomlinson, *Procedural Justice in the United Nations Framework Convention on Climate Change: Negotiating Fairness* (2015) 120 ('*Procedural Justice in the United Nations Framework Convention on Climate Change*').

165 Ibid 9, 85, 70,110.

166 See Cora Dankers, 'The WTO and environmental and social standards, certification and labelling in agriculture' (FAO Commodity and Trade Policy Research Working Paper No. 2, Food and Agriculture Organisation, March 2003) 1-2.

167 Panagiotis Delimatsis, 'Global Standard-Setting 2.0: How the WTO Spotlights Iso and Impacts the Transnational Standard-Setting Process' [2018] (2) *Duke Journal of Comparative & International Law* 273, 275.

168 See generally Marion Jansen, 'Developing Countries, Standards and the WTO' (2010) 19(1) *Journal of International Trade & Economic Development* 163, 180.

169 Ibid.

170 Ibid.

171 Ibid.

172 See especially Mariëlle D Masson-Matthee, *The Codex Alimentarius Commission and Its Standards* (T.M.C. Asser Press, 2007) 241–245.

On the other hand, the Northern states having sophisticated scientific capacities are dominating the standard setting institutions. According to some observers it is 'techno-imperialism'.[173] The de facto limited representation of developing countries and over-representation of the Northern countries in the standard-setting process seriously raises the question of procedural justice and legitimacy.

Another area of procedural injustice is the dispute settlement procedures in the WTO. Disputes settlement procedures require specialised legal expertise to argue a case which poses a serious disadvantage to the global South since many poorer countries can hardly afford such legal expertise.[174]

As a matter of fairness, it is the demand of procedural justice that developing countries should participate in standard setting bodies so that the developed countries might not distort trade by setting a stricter international standard which would be costly for developing countries to implement.[175] They need to participate to convey their interests appropriately. Developing countries should also get the opportunity to engage in dispute settlement procedures so that they can seek redress if they believe their fellow members are in violation of their rights.

Now we need to determine what procedural justice would serve the interest of the South. Procedural justice entails that the decision-makers should get equal opportunity to shape or regulate decisions. The challenge is to identify the means of ensuring equal opportunity to influence decisions. Luke Tomlinson shows two viable ways of ensuring equal opportunity: by political equality and by equalising the actor's capabilities.[176]

In our context, equalising the actor's capabilities is more important than political equality. Political equality means voting rights, having equal time to speak and participating in the discussion. But these opportunities are not able to exert much influence in decision-making in the North-South dimension. Unlike the participants of the developing nations, the decision-makers of the developed countries are equipped with skill, knowledge and eloquence. If the representatives of the global South do not understand the process of hazard analysis, risk analysis, verification procedures and critical control point identification,[177] what would be the value of their physical participation in standard setting decision-making bodies? So, in such cases giving equal time to discuss will not serve the interest of South. However, if the ability of the representatives of the global South can be upgraded, then an equal opportunity of participation can be utilised by them through advancing their interests independently. Thus, the WTO should ensure that the participants from the global South are equally equipped with knowledge, skills and resources. This is the true demand for procedural justice. Promoting education in the global South to enable expert representation can be one option. But it is a long-term procedure. The short-term option is knowledge, skill and technology transfer in terms of

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173 Uche U Ofodile, 'Import (Toy) Safety, Consumer Protection and the WTO Agreement on Technical Barriers to Trade: Prospects, Progress and Problems' [2009] (2) *International Journal of Private Law* 163, 163.

174 Narlikar, Daunton and Stern (n 124) 691–693.

175 Jansen (n 168) 180.

176 Tomlinson (n 164) 120.

177 David Demortain, 'Standardising through Concepts: The Power of Scientific Experts in International Standard-Setting' (2008) 35(6) *Science & Public Policy (SPP)* 391, 391 ('Standardising Through Concepts').

assistance. Apart from assistance, developing countries also require a considerable level of investment by the developed countries. The rationale behind these transfers should be based on procedural justice, not the redistribution. Such investment would encourage developing countries to participate in the international negotiation processes to have their interests considered.

Both the WTO and *SPS Agreement* can play a vital role in ensuring procedural fairness. The *TBT Agreement* can be a good example which establishes the standards of impartiality, consensus, transparency and openness. The *TBT Agreement* has also paid attention to the concerns and interests of developing nations.[178]

V CONCLUSION

Koenig's model[179] demonstrates the sustainable development agenda of the global South as goals of overcoming poverty, achieving a high standard of living and conserving the local environment.[180] There is a significant body of literature showing that trade plays a central role in achieving economic development, poverty eradication and environmental protection.[181] Both the South and the North need each other for economic growth and global environmental protection. The countries of the global South are the most vulnerable and are socially and economically marginalised. Unfortunately, they are further marginalised in terms of the trade-environment interaction.

In this context, this paper has argued that a distributive trading system requires a differentiated and nuanced approach to integrate developing countries within the system on a fairer basis. Furthermore, no trade policy should be taken in isolation of the socio-economic conditions and the abilities of the global South. Any policy which adversely affects the global South and worsens the situation of poverty should be reformed or rejected to meet the demands of distributive justice and fairness. This paper has also argued that there should be provisions for compensation where there is a chance of violation of rights. It was also argued that mere participation of developing countries in the decision-making process at the international trade regime might not ensure procedural and substantive justice. Concepts of procedural justice require the participation of all trade actors on a level playing field. Hence, the participants should be of reasonably equal

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178 Marceau Gabrielle and Trachtman Joel P., 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organisation Law of Domestic Regulation of Goods' [2002] (5) *Journal of World Trade* 811, 840 ('The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade'). See also Committee on Technical Barriers to Trade, 'Decision of the Committee on Principles for the Development of International Standards Guides, Recommendations with relation to Articles 2, 5 and Annex 3 of the TBT' G/TBT/9, July 2000, Annex 4, 24.

179 Koenig's model portrays the differential agendas of the North and South. It is a tabular representation. According to Koenig, the countries of the North focus on the safeguarding of their monetary interests, affluence, lifestyle and prevention of an environmental catastrophe.

180 OP Dwivedi and Dhirendra K Vajpeyi, *Environmental Policies in the Third World: A Comparative Analysis* (Greenwood Press, 1995) 5.

181 Slike Steiner, 'Global Poverty and Sustainable Development-Challenges addressed by the EU's Renewed Sustainable Development Strategy' in Duncan French (ed), *Global Justice and Sustainable Development* (Martinus Nijhoff, 2010) 291, 295.

status in terms of skills, technology and knowledge. For the sake of procedural efficiency, developing countries need capacity building support, knowledge and technology transfer. The incorporation of distributive, corrective and procedural aspects of justice is not only essential to the participation of the global South in the trade system but also necessary for a fair and just trade regime.