The WTO and distributive justice."Need for the radical improvement of the WTO regime"

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Abstract

The fundamental weakness of the WTO regime is the absence in it of a dominant distributive- justice principle. To that end, it outlines the nature and variety of developing countries' complaints, as voiced by them and by commentators. The proposition follows that these complaints, all be they capable of justification; do not constitute the essential critique of the WTO regime. Nor is it fertile to propose that the WTO be scrapped, and a new trade organization take its place. What is needed is a normative framework capable of discerning fairness and justice in international trade law. The pertinent remarks of Rawls, Nozick, Garcia and Pogge are considered, and the conclusion is abstracted that in order for the WTO regime to become valid international law, it must espouse a principle of distributive justice. There is no attention to outcome-related fairness in the WTO regime, for not even procedural fairness obtains there for developing countries: there is no fairness in a procedural context that gives equal status to patently unequal participants. That is considered sufficient for the conclusion that developing countries' complaints are justified.
The critique is in that the WTO regime has no inbuilt agenda to enable development. Simple logic dictates that for the development of developing and least- developed countries to be possible, the principle of distributive justice must infuse WTO law.

Keywords: WTO, Distributive justice, International trade law, TRIPs, Developing Countries.

Introduction

The purpose of this Research Paper is to propound an argument to demonstrate that the fundamental weakness of the WTO regime is the absence in it of a dominant distributive- justice principle. To that end, it outlines the nature and variety of developing countries' complaints, as voiced by them and by commentators. The proposition follows that these complaints, all be they capable of justification; do not constitute the essential critique of the WTO regime. Nor is it fertile to propose that the WTO be scrapped, and a new trade organization take its place. What is needed is a normative framework capable of discerning fairness and justice in international trade law. The pertinent remarks of Rawls, Nozick, Garcia and Pogge are considered, and the conclusion is abstracted that in order for the WTO regime to become valid international law, it must espouse a principle of distributive justice. That distributive justice has to be an international distributive justice that allocates obligations (it does not re-distribute goods), because WTO law is a law of obligations. It is conceded that Narlikar successfully argues that there is no attention to outcome-related fairness in the WTO regime, for not even procedural fairness obtains there for developing countries: there is no fairness in a procedural context that gives equal status to patently unequal participants. That is considered sufficient for the conclusion that developing countries' complaints are justified. Their justifiability, however, is no more than itself, and is not the central consideration in the need for the radical improvement of the WTO regime. Radical improvement must take the form of principled revision, such that distributive justice becomes the WTO's core principle. This is peremptory, for the development of developing countries is not made possible without it.

Agreement Negotiation reservations of Developing countries:

The most common complaint is that developing countries must accept and adapt to rules and regulations that are generally not of their making. This complaint was voiced strenuously quite early in the WTO's life: At the Seattle Ministerial Conference of 1999, the African trade ministers protested about the style of negotiating agreements at WTO ministerial conferences:
There is no transparency in the proceedings, and African countries are being marginalized and generally excluded on issues of vital importance for our peoples and their futures. We are predominantly anxious over the stated purposes to

offer a ministerial text at any price tag, including at the cost of procedures intended to secure consensus and participation.[1]

Nothing had changed six years later. As Celso Amorim, Foreign Minister of Brazil, remarked, US and EU delegates often agree privately, then propose fait accompli agreements for developing countries to accept:

"In the lead-up to the Cancun Ministerial Conference in September 2003, the United States and the EU once again insisted on defending only their self- interests. The proposal they presented amounted to a consolidation of their existing policies – with very modest gains and even some steps backward. This practice of precooked deals between major trading partners was commonplace in the old days of the GATT. And in Cancun, developing countries were expected to accept the deal with only minor, cosmetic adjustments".[2]

Such 'ready-made' proposals might reduce the legal cost to developing countries of negotiation and the preparation of proposals. However, with their low levels of legal knowledge, expertise and proficiency, the delegates of developing countries often find themselves approving proposals of which the legal implications are not clear. This approach to proposals, typically of the US and the EU, was, however, rejected during the Cancun Round, when the delegates of developing countries insisted on a multilateral approach to their preparation.[3]

There is little doubt that the legal language, framework and proceedings of the WTO are derived from the legal systems of the US and EU, and that this creates legal challenges for developing-country delegates in WTO forums. It was nevertheless the delegate of St Lucia, one of the smallest countries and economies in the world, who actually led a significant reform of proceedings. Representing St Lucia as a third party to the EC Bananas[4] dispute, he insisted on being accompanied by a private foreign legal team, because he was unable to understand the legal terms and proceedings. At his insistence, this right was granted for the first time, and it has now become an accepted practice for developing country delegates.[5]

Specialized legal expertise is not the problem only of developing countries: Awareness of the shortage of legal experts on WTO-related matters in Japan put so much pressure on the government that it is paying serious attention to establishing an institution for training WTO-law experts.[6] The problem, as far as most developing countries are concerned, is that WTO rules are 'disciplines' imposed on government policies. That is, developed and powerful countries identify their interests, use the legal framework of the WTO to propose new rules, then put those rules to work in developing countries, even though they are often alien to those countries' own legal systems.[7]

WTO Push's Developing countries into Non-Trade Related issues

There are repeated efforts by the WTO to impose legal obligations that are not related to trade on developing countries. One example is the effort by developed countries to push issues such as transparency, corruption and government procurement (the famous 'Singapore issues') onto the WTO agenda. These issues, developing countries claim, are domestic issues, and hence, a matter of internal sovereignty and national law. Proponents of the inclusion of these issues argue, however, that these are issues related to trade.

Specifically, it matters to international trade if the bidding and tendering systems in a country favor certain classes of company and disfavor others. Developing countries respond by pointing out that creating legal obligations with respect to these issues means that the WTO will have the ability to interfere in the internal affairs of governments, forcing them to change their legal systems, and more seriously, to redefine the nature of relationships between their administrations and bureaucracies.[8] For example, some EU countries have considered the possibilities of requiring

[1] Narlikar, Amrita, 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO', vol. 29, issue 8, World Economy, 2006.

[2] NPQ website, 16 August 2004, http://www.digitalnpq.org/global_services/global%20viewpoint/08-16- 04amorim.html.

[3] Amorim, C, 'The new dynamic in world trade is multipolar', Financial Times, 4 August, 2004.

[4] European Communities — Regime for the Importation, Sale and Distribution of Bananas, WT/DS16,September 1995.

[5] Ierley, D, 'Defining the factors that influence developing country compliance with and participation in the WTO Dispute Settlement System: Another look at the dispute over bananas', vol. 33, no. 4, Law and Policy in International Business, 2002, p. 618.

[6] Kawase, Tsuyoshi, 'WTO Safeguard Agreement', RIETI Report No.045, July 27, 2004, http://www.rieti.go.jp/en/rieti_report/045.html.

[7] Charnovitz, S, 'Triangulating the World Trade Organization', vol. 96, no.1, The American Journal of International Law, January 2002, p. 29.

[8] McCrudden, C and Gross, SG, 'WTO government procurement rules and the local dynamics of procurement policies: A Malaysian case study', vol. 17, no.1, The European Journal of International Law, 2006, pp.151-185.

trading partners to eliminate the death penalty, and of demanding the improvement of human rights and labor standards. In all such cases, developing countries have found themselves under pressure to accept Western standards.[9]

The Dispute Settlement Mechanism Challenge

The Dispute Settlement Mechanism (DSM) has fascinated legal scholars and practitioners for being the unique legal development in international trade law that provides a forum for litigation among WTO member states in the event of the violation of any clause of a WTO agreement. According to Butler and Hauser:

> **The WTO's litigation procedures differ not only from dispute handling within the old GATT, but in fact from any previous dispute settlement mechanism at any international level.**[10]

Yet the very fact that the DSM is an unprecedented leap in international law is in itself a major challenge for most developing countries. One of their problems is that it is based on Western legal concepts and traditions. Though developing countries constitute more than three quarters of WTO membership,[11] their contribution to the development and formation of the DSM was minimal. The insignificant participation of least-developed countries in the process of setting up the legal framework of the DSM has been justified on the ground that the majority of these countries simply did not have the legal expertise and tradition that would have enabled them to participate.[12] That, however, does not alter the fact that the access to the DSM of poor developing countries and least-developed countries is very restricted. Since the inception of this body, the number of cases in which the least developed countries have participated as complainants, respondents or even third parties is insignificant:

> **The poorest countries in the WTO system are almost completely disengaged from enforcement of their market access rights through formal dispute settlement litigation.**[13]

Given that least-developed countries are often the objects of unfair practice by developed countries, it is at least odd that the majority of the least-developed countries are reluctant to approach the DSM, even as third parties. (WTO members who join a litigation as third parties are those affected by, but not directly involved in, an instance of violation that a country brings before the DSM as a complaint. Third parties attach themselves to a litigation process by joining the complainant in a 'next friend' capacity, with the intention of supporting the complainant's position.)

> **The insignificant use of the Dispute Settlement Mechanism (DSM) by the poorer developing countries is unfortunate, for this mechanism can often gain more ground than the consensus process of the negotiations. A landmark case exists to verify this: In US– Upland Cotton[14], Brazil, a developing country, filed a complaint against the US, and eventually won. The Dispute Settlement Body (DSB) brought down a ruling against the US, deeming that US subsidies had put Brazilian cotton growers at an unfair disadvantage.[15]**

What makes this case even more significant is that for the first time during the more than ten years of the formation of the DSM, two least-developed countries participated as third parties. They were the sub-Saharan African states of Chad and Benin, both cotton growing countries. Both had joined the Brazilian action on the basis that their exports

[9] Bagwell, K, Mavroidis, PC and Staiger, RW, 'It's a question of market access', vol. 96, no.1, American Journal of International Law, January 2002, p.75.
[10] Butler, M and Hauser, H, 'The WTO Dispute Settlement System: A First Assessment from an Economic Perspective', vol. 16, no.2, Journal of Law Economics and Organization, October 2000, p.504.
[11] de Jonquieres, G, 'Wealthier countries no longer call all the shots', Financial Times, 24 June 2004.
[12] Zunckel, Hilton, 2008, 'An African Awakening in US-Upland Cotton: Lessons from LDCS', in WTO dispute settlement: an African perspective, Hartzenberg, Trudy, (ed.), Cameron May, p. 106.

[13] Bown, Chad P and Hoekman, Bernard M, 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough', vol. 42, no 1, Journal of World Trade, 2008, p.182
[14] United States – Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil, WT/DS267.
[15] Ibid. 31 August 2009.

and access to the global cotton market suffered unfair loss as a result of the US subsidies.[16] This case revealed the extent of the challenge that WTO members inexperienced in DSM procedure face as third parties. None of the members of these two African legal teams had any legal experience in this forum. As a matter of fact, they were literally practicing proposal writing and submission, and hoping for the best. Without previous experience or technical training in this field of litigation that is like no other in any legal system, the Chadian and Beninese legal teams had to go through considerable difficulty just to learn the most basic steps of procedure. They were required to support their proposals with statistical evidence that pertains not only to the cotton trade in their respective countries, but also to that of the complaining country, Brazil, and to that of the entire global cotton market.[17]

After the lack of technical legal knowledge and expertise, the single most formidable challenge to participation in the DSM is the cost of the legal process. In US–Upland Cotton, litigation commenced in 2002 and was not concluded until 31 August 2009. On average, a low-complexity case would incur about US$90,000 in legal expenses, and a high-complexity case about US$250,000. The additional expenses of data-collection, economic analysis and experts' fees easily add a further US$100,000 to US$200,000 to costs. Still more cost accrues as travel expenses, accommodation, communication, paralegal and secretarial salaries, which easily accumulate another US$500,000 of cost.[18] Although the final-cost figure may seem insignificant even for a poor developing country, other costs are also incurred in the pre-litigation investigation processes.

Given all these complicated and costly requirements of the legal framework of the DSM, it is not difficult to explain why the majority of developing countries, especially the smaller and poorer ones, have not contributed to, or participated in, the structuring of the DSM's legal framework, nor derived benefit from it. This situation, however, can be corrected, according to Albashar and Maniruzzaman,[19] and should be, for the sake of the betterment of the DSM and the capacity-building of developing/least developed countries. To this end, the third parties rights of developing countries should be extended, endowed with legal certainty and assisted financially. These authors note that:

> **Developing countries are suffering from a lack of financial means to bring a dispute. They are also handicapped by a lack of legal experts on WTO law. Participating as third parties would be fundamental to overcoming such weaknesses. Third party involvement is vital for developing countries in this respect. Through this participation they will significantly develop their knowledge regarding the process of the dispute and the functioning of the DSM, in a way that would not be possible by being passive members.[20]**

They corroborate the importance of developing countries' third-party participation in the DSB process with reference to the same opinion of a former Appellate Body member: developing countries should not hesitate to take up this role in appropriate conditions, because their familiarity with the inner workings of the system will stand them in good stead.[21]

They cite also, among other kindred observations, Mataitoga, who says that:

> **Capacity development in the area of international trade law, international economic and public international law must now be a priority area for all developing country Members of the WTO, if they are to have a fighting chance of protecting their rights under the multilateral trading system,[22]**

And Qureshi, who thinks that the participation of developing countries in the DSB process is indispensable in the obtaining of fairness in procedural justice in the WTO:

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[16] Ibid.

[17] Bown, Chad P and Hoekman, Bernard M, 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough', vol. 42, no 1, Journal of World Trade, 2008, note 40, p. 179.

[18] Ibid. p. 185.

[19] Albashar, Faisal ASA and Maniruzzaman, AFM, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives', vol. 11, no. 3, The Journal of World Investment & Trade, 2010, pp. 311-374.

[20] Ibid., p. 321.

[21] UNCTAD/EDM/Misc.232/Add.17, (2003). Available online at http://www.unctad.org/en/docs/edmmisc

[22] Mataitoga, Isikeli 'The World Trade Organisation [WTO] Dispute Settlement Mechanism: a Developing Country Perspective', available online at http://documents.ag.gov.fj/wtoDisputeResolution-mataitoga.pdf.

> **Procedural justice relates to fairness in terms of participation in the dispute settlement system at all levels and forms, including particularly the consultation, Panel, and Appellate processes. This involves, for example, the need to sanitize the consultation process from possible external linkages; the need to strengthen third party rights; being able to join as a co-respondent; and generally ensuring that all parties have similar rights of participation.[23]**

Albashar and Maniruzzaman ground their case that participation as third parties in the DSM has distinct advantages for developing countries, and for the credibility of the DSB generally, on the above-cited views and others. In summary of the advantages for developing countries, they say:

> **The advantage for developing countries acting as third parties is that allowing them to access all the stages of the panel, including the interim review process, would give them first-hand experience of the function of the DSM step-by-step, without their being restricted to a certain aspect of the panel procedure.[24]**

Still better advantage exists in the fact that, as participating third parties, developing countries can be instrumental in the shaping of DSB policy, which, it is sometimes said, exceeds its DSU mandate to make law rather than merely implement it. A complaint of developing countries is that they are excluded from this law-making activity. Third-party participation can rectify this exclusion. Albashar and Maniruzzaman rate the contribution as third parties of Benin and Chad in the Upland Cotton[25] case very highly, noting that these states:

> … **realized that the WTO dispute settlement system could be used as an effective tool to impose a trade-related agenda. They went through both the legal channel (represented in the DSM by being third parties) and the political channel, by putting the issue on the trade talk agenda, which was one of the main reasons behind the failure of the Cancun ministerial conference in 2003, making their views known to the public and to decision-makers. This use of the WTO dispute settlement system gave West Africa a stronger political position in the trade negotiations with regard to cotton subsidies, which was one of their key demands. In addition, as regards the political channel, they brought strong and convincing arguments against the US cotton subsidies, which were considered vital elements in the winning of the case.[26]**

These authors demonstrate that there is broad agreement among WTO member states on the shape that reform of the DSU rules regarding third-party participation should take. The proposal for reform that attracted most members' interest was put forward by Costa Rica. This member proposed that 'third parties

(i) ought to have access to all proceedings, hearings and information provided to the panel and the AB by the parties or third parties involved in a dispute;'
(ii) 'ought to have a right to intervene in the appeal process even if they had not participated in the panel stage', and
(iii) should have access to the interim review stage'.[27]

The authors note that some of the members who participated in the discussion of the Costa Rican proposal 'fully agreed with the proposal. Others agreed in the main whilst holding some reservations', and only Australia 'raised strong concerns about the enhancement of third party rights'.[28]

These authors' analysis of the nature of third-party participation in the DSB is interesting particularly for their demonstration that the DSB is not hostile to developing countries' participation, but its implementation of DSU rules regarding third-party participation, and the rules it devises itself, both at panel and appeal stage, is uneven. The

[23] Qureshi, Asif H, 'Participation of Developing Countries in the WTO Dispute Settlement System', vol. 47, no. 2, Journal of African Law, 2003, p. 174.
[24] Albashar, Faisal ASA and Maniruzzaman, AFM, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives', vol. 11, no. 3, The Journal of World Investment & Trade, 2010, note 46, p. 357.
[25] United States – Subsidies on Upland Cotton, panel report, WT/DS267/R, 8 September 2004; Appellate Body report, WT/DS267/AB/R, 03 March 2005.

[26] Albashar, Faisal ASA and Maniruzzaman, AFM, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives', vol. 11, no. 3, The Journal of World Investment & Trade, 2010, note 46, p. 319.
[27] Ibid., pp. 313 – 314.
[28] Ibid. p. 315.

authors identify the EC-Bananas[29] case as a 'a landmark dispute in WTO jurisprudence and the evolution of third party rights:' 'landmark' because The panel accepted the request for an extension of third party rights and allowed members of governments of third parties to observe the second substantive meeting of the panel with the parties. The panel also envisaged that observers would have the opportunity to make a brief statement at a suitable moment during the second meeting.[30]

Nevertheless, developing countries did not gain better third-party rights with this case, for they were not allowed to participate in it after the 'after the second substantive meeting of the panel', and 'their participation in the interim stage was declined', despite their 'very significant economic interest in the case'.[31] EC–Sugar[32] enhanced third-party rights 'by allowing developing countries who were third parties to review the descriptive draft of the interim stage. This was declined in the Banana dispute.'[33] Third-party rights for developing countries were the most enhanced in EC – Trade Preferences,[34] 'but the Panel in Sugar' granted them even fewer procedural rights' than they were allowed 'in the Banana III dispute'.[35] The authors note the legal uncertainty that this history of case law uncovers, and recommend its legal correction.

> The appeal process of the system almost certainly leads to significant delays that may extend the case for several years. The US–Upland Cotton case is witness to this. In this case, Chad and Benin benefited from the significant help of Brazil. This help had financial, technical and knowledge-based forms, for Brazil wished to boost its case by helping the third parties prove theirs. Even more importantly, they had the technical legal support of a private law firm, White and Case, on pro bono basis.[36] The participation of private attorneys, private law firms and NGOs on the side of the least-developed countries in initiating litigation against violators through the DSM is an important step toward enabling these countries to file more complaints in the future. However, so far, few law firms and NGOs have expressed interest in such initiatives.[37]

The Appellate Body (AB) has the power to suggest the manner in which the losing party might implement the recommendations, but the legal force of its suggestions is uncertain. AB suggestions are binding only with regard to decisions confirming violation. In the event that a defendant observes silence after an AB or Panel decision, and if the parties have not reached agreement on the rectification of the violation after twenty days of the expiration of a 'reasonable period of time', the plaintiff can petition the DSB to annul concessions. For instance, in the EC Bananas case, at the request of Ecuador, the Panel was reconvened on the basis that the EC implementation was in conflict with the Panel's ruling. Ecuador requested the Panel to advance explicit suggestions and recommendations as to how the EC might bring its system of importation of bananas into compliance with WTO rules.[38]

The problem remains that developing countries often lack the economic and political will to pursue the implementation of rulings in their favor, especially if the ruling is against a major economic power such as the US. The US–Upland Cotton dispute between Brazil and the US ameliorates only certain aspects of this problem: Should the US decline to comply with the DSB's decision, Hagstrom opines, Brazil is more than likely to find itself unable to force US compliance.[39] He is right, of course, or would have been, but for the fact that Brazil proceeded to obtain DSB

[29] European Communities – Regime for the Importation, Sale and Distribution of Bananas, panel report, WT/DS27/ECU, adopted on 22 May 1997; appellate body report, WT/DS27/AB/R, adopted on 5 September

[30] Albashar, Faisal ASA and Maniruzzaman, AFM, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives', vol. 11, no. 3, The Journal of World Investment & Trade, 2010, note 46, pp. 332 - 333.

[31] Ibid., pp. 333-334.

[32] EC Sugar, EC – Export Subsidies on Sugar, panel report (complaint by Thailand, Brazil and Australia), WT/DS/283/R, WT/DS266/R, WT/DS265/R, 15 October 2004; Appellate Body report, WT/DS/283/AB/R, WT/DS266/AB/R, WT/DS265/AB/R, 28 April 2005

[33] Albashar, Faisal ASA and Maniruzzaman, AFM, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives', vol. 11, no. 3, The Journal of World Investment & Trade, 2010, note 46, p. 336.

[34] EC – Tariff Preferences, Panel Report, WT/DS246/R 1 December 2003; Appellate Body, WT/DS246/AB/R, 20 September 2004.

[35] Albashar, Faisal ASA and Maniruzzaman, AFM, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives', vol. 11, no. 3, The Journal of World Investment & Trade, 2010, note 46, p. 337.

[36] Zunckel, note 39, p. 130.

[37] Bown et al. note 40, p. 196.

[38] Recourse to Article 21.5 of the DSU by Ecuador: Request for the Establishment of a Panel, WT/DS27/80, 26 February 2007.

[39] Hagstrom, J, 'Cotton council picks fight with WTO over March meeting', Congress Daily, 22 February 2007, p.6.

authorization for countermeasures under Article 22.2 of the Dispute Settlement Understanding[40] (DSU), and can now cross- retaliate against US trade by suspending its obligations under the TRIPs and GATS. This is likely to enable it to 'make free' with US pharmaceutical patents. The consequence of this would so dire for the US-based pharmaceutical companies that the US is unlikely to tolerate it. A press article[41] that reported Brazil's request, on 26 August 2008, for the resumption of arbitration in the matter of countermeasures made that much very clear.

> **However, at its meeting on 19 November 2009, the DSB did authorize Brazil to suspend the application to the United States of concessions or other obligations. On March 2010, Brazil notified the DSB that it would 'suspend the application to the United States of concessions or other obligations' under the GATT 1994 in the form of increased import duties', and under the TRIPS Agreement and/or the GATS, the form of the latter to be notified before implementation.[42] This is a very interesting, and to many, an unexpected, development**.

Justifiability of complaints of Developing countries:

That developing countries' complaints are justifiable by a demonstration of the failure of the WTO to deliver outcome-related justice does not, however, constitute the fundamental critique of the WTO. Rather, that critique, in the present Dissertation writer's view, is the one that points out the failure of the WTO regime to construct the possibility of member-countries' development beyond the development of their legal systems to WTO-compliant stage. It is no more than trite to note that both the categories 'developing' and 'least developed' presume upward mobility towards the category 'developed'. Thus the categorizations 'developing' and 'least-developed' presume the mobility, not the hierarchical stasis, of countries thus categorized. There is no doubt that the WTO member countries that elected to place themselves into the 'developing' category did so to avail themselves of the WTO concessions regarding the time requirements for the implementation of WTO Agreements into their legal systems. But it is also true that a developing country is not deemed in the WTO regime to have become a developed country once its legal regime is wholly WTO compliant. Nor does a least-developed country become a developing one by dint of its having built a WTO legal infrastructure. Having once self-elected into these categories, WTO member countries stay in them. This stasis is in itself demonstration that the upward-mobility of the developing and the least developed is not an assumption of the WTO regime. This demonstration amounts to the tacit admission that there is no WTO mechanism for development. Absent such a mechanism, what in the WTO regime can be seen to amount to fairness.

Conclusion

The author sought out the criteria appropriate for deciding whether developing country's complaints about their position in the WTO are justified. A list of those complaints was complied, followed by a discussion of the critics and supporters of the WTO's performance vis-à-vis developing countries. It was proposed that this sort of exercise achieves no more than 'finger pointing', so no conclusion about whether developing countries' complaints are justified can be drawn from it. The further proposition was that a theoretical underpinning is needed for reaching the conclusion sought, and that it is most likely to be found in the works of moral philosophers. A work of the state theorists Patterson and Afilalo was considered first, to indicate that it is not in state theory that à propos normative values are to be found. Rather, those values are propounded in the works of Rawls, Garcia and Pogge, for reason of their proposals on the nature of wealth-related justice and fairness, concepts that are inextricable from the concept 'trade law'. The position of each of these theorists was outlined, and it was concluded that that Pogge's sense of distributive justice provides the normative framework upon which the justifiability of developing countries' complaints can be decided. This Author attributed 'legitimate complainant' status to developing countries, citing Narlikar's successful denial that the WTO regime is concerned to deliver outcome- related justice, or even procedural justice. Vindication of the justifiability of developing countries' complaints, however, does not constitute the central critique of the WTO. Rather, that critique is in that the WTO regime has no inbuilt agenda to enable development.

[40] Annex 2 of the WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes.
[41] Klapper, Bradley S, 'Brazil seeks $4 billion in WTO sanctions on US', Associated Press, 26 August 2008.
[42] WTO, Summary of the Dispute to Date, 'Authorization to retaliate granted on 19 November 2009', http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

Simple logic dictates that for the development of developing and least- developed countries to be possible, the principle of distributive justice must infuse WTO law.