

Addressing the global climate change problem in GATT/WTO Law:

The vision of a new international climate law based on international distributive justice

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INTRODUCTION

With the ever-increasing problem of global climate change, WTO law, as it stands now, seems to be quite inadequate to deal with it. Therefore, we propose that the principle of international distributive justice should replace the most favoured nation (MFN) treatment as the core principle of the WTO, and that it should be the foundational principle of a new international climate law that pursues the reduction of greenhouse gas emissions (GHGs). Before we outline the nature of the principle of international distributive justice, we venture to describe its theoretical basis in some detail. Mindful of the fact that our commendation of the international distributive justice principle constitutes a moral position, we proceed to justify it, and in that process, dispose of the view that it is neither necessary nor desirable to ground justification in the moral theory. We then advance empirical evidence in support of our thesis that in the WTO legal context, the MFN principle cannot deliver opportunity for economic development, and hence the appropriateness of its displacement by the international distributive justice principle, which can do that by relieving developed and least-developed member states of the crippling burdens of WTO Agreements. Then, from the premise that there is no clear relationship between multilateral environmental agreements (MEAs) and the GATT/WTO legislative scheme, we advance the view that there is a clear resonance between the MEAs' 'common but differentiated responsibilities' doctrine and the international distributive justice principle, and that, therefore, the means of constructing the coherence of the MEAs-GATT/WTO legislative scheme is in the devising of a new international climate law of which the core principle is international distributive justice.

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Finally, we demonstrate that in order for a new international climate law to become effective law for tackling the reduction of climate-change-inducing GHGs, the powers of WTO law and the MEAs must be bolstered by United Nations legislative intervention.

THE THEORETICAL BASIS OF THE INTERNATIONAL DISTRIBUTIVE JUSTICE PRINCIPLE

We develop our principle of international distributive justice from the starting points in John Rawls's 'differences' principle¹ and Chios Carmody's characterization of WTO law as a law of obligations.² But we depart radically from Rawls's view that the differences principle – the core of which is that social institutions must be designed such that they confer maximum benefit on the least socially and economically privileged – is applicable only domestically. We contend that distributive justice has a clear and urgent international application, most particularly in the WTO legal system, if that system is to facilitate development, and in any international agreement that is to emerge as a just climate law geared to arrest global warming. We depart also from Carmody's view that distributive justice obtains in the WTO because it is 'mandated by MFN'.³ And while we accept Carmody's view that the WTO's MFN principle distributes WTO 'expectations' *erga omnes partes* (equally among WTO member states), we do not accept his consequent view that the *erga omnes partes* distribution of WTO obligations delivers distributive justice. We do not accept this view precisely because such a distribution fails entirely to observe the Rawlsian 'differences' principle, and because that failure is demonstrably responsible for hindering the economic development of economically underprivileged WTO member states.

THE 'DIFFERENCES' PRINCIPLE HAS INTERNATIONAL APPLICATION

Laws that govern international trade, like any other laws that impose obligations on the global collective, must have a firm footing in a moral philosophy of justice. WTO law and climate law are both obligations-imposing laws. Both must, therefore, observe the 'differences' principle. This is the view of Frank Garcia⁴ and Thomas Pogge⁵ that we endorse entirely. Like Pogge, we fault Rawls for restricting the application of the 'differences' principle to the domestic context.

Garcia's admirable essay takes considerable pains to outline a moral philosophy of justice in international trade. Had he so chosen, Garcia might have proposed that this philosophy should underpin the legal principles by which the WTO lives. Somewhat

¹ Rawls, John, 1972, *A Theory of Justice*, Harvard University Press, p. 51.

² Carmody, Chios, 'A Theory of WTO Law', vol. 11, no. 3, *Journal of International Economic Law* 2008, p. 547.

³ *Ibid.*, p. 544.

⁴ Garcia, Frank J, Trade and Inequality: Economic Justice and the Developing World', vol. 21, *Michigan Journal of International Law*, 1999-2000, pp. 975-1049.

⁵ Pogge, Thomas W, 'Egalitarian Law of Peoples', vol. 23, no. 3, *Philosophy and Public Affairs*, 1994, pp. 195-224.

disappointingly, however, he limits his proposition to a recommendation that the US practise distributive justice in its trade relations with the developing world.⁶

At once the strength and weakness of the philosophy of Justice Garcia propounds is that he situates it in a discursive context in which he prefers the position of Rawls to that of Nozick:⁷ ‘strength’ in that a moral discourse is properly drawn from a well-discussed proposition and its counter-proposition, and ‘weakness’ in that his adoption of one proposition and rejection of the other necessarily turns on moral preference, given that moral proof is unattainable. Garcia’s moral position is, therefore, at best justifiable. It can even be considered compelling, but it cannot, *qua* moral position, be considered incontrovertible. Of course, Garcia is fully aware of this:

*If the developed “world’s economic relationship to the developing world is in fact governed by moral obligation, [italics added] and not simply by the instrumental calculations of the moment, then there must be a normative framework within which to articulate the implications of this inequality [i.e. the distribution of resources].*⁸

The normative framework he proceeds to construct begins with the proposition that:

... the principle of special and differential treatment, a key element of the developing world’s trade agenda, plays a central role in satisfying the moral obligations that wealthier states owe poorer states as a matter of distributive justice.⁹

Garcia sees fit at this point to call attention to the fact that his approach is not grounded ‘in the discourse of human rights, such as the right to development’.¹⁰ Instead, he turns to John Rawls’s *A Theory of Justice*, deeming it the ‘leading contemporary liberal analysis of the problem of equality’.¹¹ Garcia’s brilliantly succinct account of Rawls’s proposition about the relationship of ‘fairness’ and ‘justice’ is carried by his ‘central moral intuition’ that ‘the inequality in social primary goods’ is ‘not deserved’, since the possession of those goods is ‘deeply influenced by an underlying natural inequality untouchable by categories of moral responsibility and entitlement’. Therefore, Garcia requires:

... that a liberal theory of justice be ‘endowment sensitive’, in order to capture our intuition that we do not deserve in any meaningful moral sense the advantages or disadvantages that we enjoy as a consequence of the physical and social circumstances of our birth.¹²

He strives, and succeeds, to give as favourable an account of Nozick’s counter-proposition, developed in *Anarchy, State and Utopia*, as anyone can possibly give it. Quoting Nozick’s libertarian (a ‘libertarian’ position being the antithesis of Rawls’s ‘egalitarian’ one) opening gambit: ‘individuals have rights, and there are things no person or group

⁶ Garcia, note 4, p. 1036.

⁷ Nozick, Robert, 1974, *Anarchy, State and Utopia*, Basic Books and Basil Blackwell.

⁸ Garcia, note 4, p. 980.

⁹ *Ibid.*, p. 890.

¹⁰ *Ibid.*, p. 980.

¹¹ *Ibid.*, p. 981.

¹² *Ibid.*, p. 998.

may do to them without violating their rights', Garcia proceeds to tell us that this is a 'strong Lockean statement of the priority of individual rights' that 'leads libertarians like Nozick to approach the problem of distributive justice in negative terms' (that is, distributive justice cannot impinge upon Nozick's notion of individual rights). In Nozick's view, 'there is no room for the sort of distributive projects Rawls sees as central to the role of the state'.¹³

Presumably because he has declared himself unconcerned in this essay with 'human right to development' sorts of arguments, Garcia does not delve into what Nozick means by 'individual rights'. But it is worth noting here that, according to Nozick, not even the right to life is an individual right, for:

... a right to life is not a right to whatever one needs to live; other people may have rights over these other things. At most, a right to life would be a right to have or strive for whatever one needs to live, provided that having it does not violate anyone else's rights.¹⁴

In short, there are no Nozickian individual rights other than the right to acquire and hold property.¹⁵ And what is more, if property is 'justly' acquired (*e.g.* inherited) and freely traded, distributive justice obtains *ipso facto*, no matter what the resulting inequality of wealth and well-being for people generally or individually.¹⁶

As already noted, Garcia is as kind as he can be in his account of Nozick's position. But it is not clear why Nozick features at all, other than as a gainsayer of Rawls, for Garcia does not express the slightest interest in proposing that Nozick has something substantive to say that somehow weakens Rawls's philosophical position. Perhaps Garcia's Nozick allusion means to do nothing more than suggest that the US position regarding justice and fairness is in spirit Nozickian, and wrongly so. This reading of Garcia is certainly consistent with his legal point that 'WTO agreements as a whole' strive to accommodate 'the principle of special and differential treatment' of developing countries,¹⁷ and his criticism of US domestic legislation for the fact that its instruments:

... undercut the principle of non-reciprocity by conditioning the preferences [*extended to developing countries*] on assurances by the beneficiary that it will provide the US' market access to commodity resources, and by 'requiring that the beneficiary will not grant preferences to other developed countries which are found to hurt US commerce'.¹⁸

Given that it is now habitual for WTO Ministerial meetings to fail¹⁹ upon

¹³ *Ibid.*, p. 1008.

¹⁴ Nozick, note 7, p. 179.

¹⁵ *Ibid.*, p. 174.

¹⁶ *Ibid.*

¹⁷ Garcia identifies Article XVIII of the GATT as the provision that enables developing countries meeting its criteria 'to take advantage of market protection mechanisms', and Article XI as the provision against quantitative restrictions. He notes also that Part IV, Article AAXVII(8) exempts developing countries from expecting reciprocity for their 'tariff/NTB reduction commitments to developed countries': Garcia, note 4, p. 993.

¹⁸ Garcia, note 4, p. 1036.

¹⁹ The third WTO Ministerial Conference met in Seattle, US in 1999. It collapsed after only four days of fruitless discussion. The fourth WTO Ministerial Conference, which opened in Doha, Qatar, in November 2001, finally collapsed at the end of July, 2006. The 5th WTO Ministerial Conference in Cancun, Mexico, begun in mid-September 2003, collapsed in the same month. The sixth Ministerial Conference in Hong Kong, between 13 to 18 December 2005, reached agreement that the Doha round would be revived. That had not happened by June 2010.

developing countries' protests that their WTO participation, and their interests generally, are marginalised, it is a little worrying that Garcia is ready to accredit WTO agreements with sensitivity to the principle of special and differential treatment of developing countries. The provisions for them that he cites are few, and, strictly speaking, they are GATT provisions, the status of which is uncertain in the context of WTO Agreements. Specific WTO Agreements, such as the one that enabled the expiry of the Multi-Fibre Arrangement in 2005, demonstrate the very opposite of what might be considered a sensitivity to the principle of special and differential treatment. But this criticism aside, Garcia's core point: the moral justification of the need for distributive justice in the WTO regime, is well made and generally well taken.

The most valuable contribution to the conceptualisation of what a body of law with an international scope must do to pursue the attainment of justice and fairness comes with Pogge's 1994 work.²⁰ Pogge declares himself fully in sympathy with Rawls's three principles of *domestic* egalitarian justice as outlined in *A Theory of Justice*:²¹ (i) social institutions must observe political liberties by allowing persons of similar calibre and motivation roughly equal chances of gaining political office and/or influencing political decisions, their wealth and social class notwithstanding; (ii) those equal chances should accrue also to the obtaining of education and professional position; (iii) to observe these principles, social institutions must be designed to confer maximum benefit on the least socially and economically privileged.²² (The third stipulation is the core of Rawls's 'differences' principle.) However, Pogge faults Rawls for elaborating 'no egalitarian distributive principle of any sort' in the global arena (in his discourse on the subject)²³ that would satisfy his own demand that 'a plausible concept of global justice must be sensitive to international social and economic inequalities'.²⁴ Pogge is uncomfortable also with Rawls's concession that 'a just world order can contain societies that differ from his own' is qualified by the prescription that we demand of those different societies that 'their institutions secure human rights'.²⁵ Pogge is not sure that the concept of justice that sits well in the domestic law of some societies, particularly, a concept of justice of which the individual's need is the ultimate object, can be transported into the international context. He says:

Liberal concepts of justice may differ from Rawls's by being comprehensive rather than political ... or by lacking some or all of the three egalitarian components he incorporates.²⁶

Rawls does not recognise this, to Pogge's consternation. He quotes Rawls's assertion that:

There should be certain provisions for mutual assistance between peoples in times of

²⁰ Pogge, note 5, pp. 195-224.

²¹ Rawls, note 1, p. 51.

²² Pogge, note 5, pp. 195-196.

²³ Rawls, J, 1993, 'The Law of Peoples', in *On Human Rights*, Shute and Hurley (eds), Basic Books, pp. 41-82 and 220-230.

²⁴ Pogge, note 5, p. 196.

²⁵ *Ibid.*, pp. 196-197.

²⁶ *Ibid.*, p. 207.

drought, and, were it feasible, as it should be, provisions for ensuring that in all reasonably developed liberal societies people's basic needs are met,

then asks incredulously: 'Does he really mean ... that provisions are called for to meet the basic needs only in reasonably developed societies?'.²⁷ It then further disconcerts Pogge that Rawls will not let his 'difference' principle into the international domain in the way that it exists in the domestic domain: Rawls holds instead that this principle 'demands too much from hierarchical societies'. So, Rawls's differences principle in the international context takes a new form, to become 'a principle of redistribution',²⁸ and is no longer the necessary ingredient of egalitarian (distributive) justice that it is in the domestic context.

Turning this one and only time to Nozick, Pogge explains that: 'Nozick wants to make it appear that laissez-faire institutions are natural and define the baseline distribution'. Rawls calls for a revision of this 'redistributive transfers'. Nozick thinks the latter demands too much from the well endowed; Rawls thinks that the 'differences' principle in the international domain 'demands too much from hierarchical societies'. Pogge points out that 'Rawls's presentation of the issue is the analogue to Nozick's in the domestic case'.²⁹ This is indeed severe condemnation. Yet, Rawls deserves it. He did not deliver to the international context the distributive justice inherent in the 'difference' principle that he delivered to the domestic context.

Pogge's case rests on the premise that 'a plausible conception of global justice must be sensitive to international social and economic inequalities',³⁰ and that, therefore, a distributive principle of some sort must become operative in the international context. Rawls proposes a consumption tax as the means by which 'a property-owning democracy might satisfy the difference principle'. Pogge makes the same proposal for the international context. In that context, it is resource ownership that is to be the source of the tax: 'while each people owns and fully controls all resources within its national territory, it must pay a tax on any resources it extracts', those resources being oil reserves, agricultural land, *etc.* The 'differences' principle, however, is not redistributive, but distributive, because the tax burden is not borne by the owners of resources alone. Buyers of extracted resources pay more for those resources when the owner-extractors are taxed. There is, therefore, a distribution, not a redistribution, in the application of the 'differences' principle. This, then, is distributive justice, the answer in the international context to egalitarian justice in the domestic context.³¹ In the present writers' view, Pogge's moral position does not admit criticism. But it does have an implementation problem: Pogge proposes a system of taxing resource-rich countries for their exploitation of their resources, and their buyer countries for their consumption of them.

²⁷ Ibid., p. 209.

²⁸ Ibid., p. 209.

²⁹ Ibid., p. 212.

³⁰ Ibid., p. 196.

³¹ Ibid., pp. 199-201.

While we respect the taxation mechanism that would achieve distributive justice as Pogge proposes, and we agree that it is a distributive, and not a redistributive, mechanism, we consider that his mechanism is cumbersome. It would make necessary the devising of an appropriate international taxation method and law, and the establishment of a coercive body that would impose it. Nothing in WTO law anticipates such a body, and the creation of one would radically change the nature of the contract to which the present WTO member countries have acceded.

JUSTIFICATION LIES IN THE MORAL THEORY

Some object that the moral theory is no more than a theory, and is neither supportive of, or necessary for the uptake of a proposition such as ours, that is, that distributive justice must govern the imposition of legal burdens. We do not accept this position. In laws that emanate from agreement (consensus), the political element is always present, as it is in any social agreement. The reaching of social consensus is always a political process. We argue (with Rawls) that this process can be 'political in the wrong way' when it relies on consensus politics.

In Part v of his work, *Restatement*,³² Rawls advances the view that at least one kind of 'consensus politics' is 'political in the wrong way'. The game plan in consensus politics is to devise a policy in such a way that it will attract the support of a maximum of people at a particular time and in a particular place. The justification of that policy is not an issue. That is, it merely declares that 'x is just' and looks around for nods in agreement; it does not trouble to advise what makes x, and not y or z, the position worthy of being proposed as the just position. In other words, it eschews the need for justification, leaving it to the balance of power between the head-nodding and head-shaking (and otherwise reacting) groups to determine the decision. This sort of politics is 'political in the wrong way' in Rawls's sense precisely because it concerns itself with a means-to-an-end politics rather than with political relationships. Rawls makes these points thus:

For a political conception to avoid being political in the wrong way, it must formulate a free-standing view of the very great (moral) values applying to the political relationships. It must also set out a public basis of justification for free institutions in a manner accessible to public reason. By contrast, a political conception is political in the wrong way when it is framed as a workable compromise between known and existing political interests, or when it looks to particular comprehensive doctrines presently existing in society and tailors itself to win their allegiance.³³

Rawls's political liberalism requires that there be a theory of justice that enables the analysis of the situation in hand, and that the analysis proceed in terms of the theory that exists to evaluate it, because the theory exists and survives only if it can be applied as the moral analysis that shows itself capable of pointing to how the justice of a situation is

³² Rawls, John, 2001, *Justice as Fairness: a Restatement*, Harvard University Press.

³³ *Ibid.*, p. 188.

identified. Analysis in terms of a theory of justice is the mechanism of Rawls's justification requirement. But Rawls is far from blind to the 'political relationship' that his theory of justice must acknowledge if it is to reconcile individual freedom and the social necessity of the coercive authority that demands co-operation in the unequal distribution of benefits and burdens. If the terms of the social co-operation are fair, then, in Rawls's view, our freedom is not compromised by the coercion and inequality inherent in the political relationship, because we are a society, and, therefore, capable of generating the values that justify state authority. *Qua* a society, we are the agents of its justification.

The important point is that justification, on his scheme, is an inalienable duty of the proponent of a position as the just position. And justification relies on the theory of justice of which a society is aware.

Amartya Sen, in direct disagreement, argues that identifying perfect justice (as a theory of justice seeks to do) is neither necessary nor sufficient for evaluating the justice or injustice of particular proposals. He adduces an elegant metaphor to underline his point:

The possibility of having an identifiably perfect alternative does not indicate that it is necessary, or indeed useful, to refer to it in judging the relative merits of two other alternatives; for example, we may indeed be willing to accept, with great certainty, that Mount Everest is the tallest mountain in the world... but that understanding is neither needed, nor particularly helpful, in comparing the peak heights of, say, Mount Kilimanjaro and Mount McKinley.³⁴

Sen commends that instances of injustice be 'diagnosed' from 'plural groundings', and thus on multiple and conflicting 'evaluative criteria' (axioms).³⁵ His, it seems, is a 'social choice' theory that posits several capabilities: (i) individual 'inputs' of rational moral requirements can bring to light previously unsuspected 'social conclusions' (agreement); (ii) an estimate becomes possible of how many antagonistic 'inputs' preclude the possibility of the emergence of a 'social conclusion' about the justice/injustice of a proposal; and (iii) sets of axioms capable of agreement can be identified.

Where Sen is decidedly more than 'political in the wrong way' in Rawls's sense in that he proposes the need for education in order that we become better equipped with these three capabilities, and hence better-quality providers of 'inputs'. At this point, Sen is getting on better than Rawls anticipates with his description of the 'political in the wrong way' behaviour as one that frames a proposition 'as a workable compromise between known and existing political interests, or 'looks to particular comprehensive doctrines presently existing in society and tailors itself to win their allegiance'. Indeed, Sen wants to obviate the need for justification even in a small measure that it persists in the 'political in the wrong way' sort of pursuit of compromise. He wants an education that will brainwash us into conformity. That education is to be delivered by instances of

³⁴ Sen, Amartya, 2009, *The Idea of Justice*, Allen Lane, p. 102.

³⁵ *Ibid.*, p. 109.

public reasoning. These public performances would render us aware of the need to re-evaluate our personal axioms, then inspire us to go to war against parochialism with the new perspectives that our 'enlightenment' (the result of the instances of public reasoning from which we benefited) has given us. We should then not have to engage in the futile exercise of explaining why what we think just *is* just.

It is difficult to see how Sen's reader can avoid the feeling at this point that Sen has in mind an intellectual programming of us. It is not at all clear why our Sen-commended educated 'inputs' are to be preferred to our continued efforts to explain our convictions about what is a just situation. Indeed, it is quite disturbing to be asked to accommodate a proposal that we be rendered educated to the point that 'social conclusions' about what is just come so easily to us that we need not bother about justifying our perceptions of what is just. Sen's condemnation³⁶ of the 'insufficiency' of the 'transcendental' (theory based) approach to agreement on when a situation is just or unjust fails to persuade precisely because the alternative that he proposes is something as disconcerting as our educated 'inputs' that easily achieve 'social conclusions'/agreements. As already remarked, this is uncomfortably akin to a proposal that we be brainwashed into conformity.

Sen should nevertheless be credited with having pointed out that deviation among discrete societies from any 'transcendental' (theoretical) construct of justice is difficult to account for in terms of how a deviation from that construct is a deviation. Granting that there is such a difficulty, two concerns nevertheless remain: (i) how does the difficulty of an exercise invalidate that exercise, and (ii) what evidence is there that the difficulty of it is the most common, or even the significantly common, experience? That is, the existential import of Sen's observation is far from weighty. Had he been able to adduce empirical evidence that the difficulty he notes is somehow evidence that 'social conclusions' (agreement) about which situations in the world are just is frustrated by reference to a transcendental construct of justice, this observation of his would have been significant. But, despite the fact that his terrain is squarely empirical, given that it is populated by empirical concepts such as individual 'inputs', 'social conclusions', and 'education' that improves the quality of individual 'inputs'. Sen does not offer empirical evidence of any significant frequency of the 'difficulty' he identifies. Failing to do that, his criticism of the 'transcendental' construct of justice is decidedly lame.

Our justification of the justice inherent in the international distributive justice principle we propose is firmly moral-theory based, with reliance on selected positions of moral philosophers, as outlined above.

THE NATURE OF THE INTERNATIONAL DISTRIBUTIVE JUSTICE MODEL

On our international distributive justice model, obligations imposed by international law – particularly by the WTO Agreements and by a law that proposes the

³⁶ Ibid., pp. 98-101.

means of arresting global warming – are distributed in accordance with the capacities of WTO member states to bear them. The distribution metric is simple: The degrees of obligation to observe WTO law would range from ‘nil’ to ‘absolute’. ‘Absolute observation’ would be the obligation of the top developed countries, their position on the ‘nil to absolute’ obligation determined by the GDP per capita ranking. ‘Nil observation’ would be the obligation of the least-developed countries, and ‘reduced observation’ of the interim, or ‘developing’, countries. This ranking achieves a distinguishing of countries in terms of their resource-owning and trade-capacity differences, and the distribution of obligations along this ranking spectrum is consistent with the ‘differences’ concept central to the distributive justice theories of Rawls, Garcia and Pogge.

There is little point in taking account of denials that GDP is sufficiently descriptive of a country’s economic condition. For the purposes of our international distributive justice model, the distinctions ‘developed’, ‘developing’ and ‘least developed’ that countries’ GDP rankings yields are fully adequate. We agree with Joseph Stiglitz that:

... one of the features which distinguishes more developed from less developed countries is their higher gross domestic product (GDP) per capita ... Contrary to Kuznets’s contention, by and large, increases in GDP per capita are accompanied by reductions in poverty ... to some extent, the changes in society which may be called ‘modernization’ are as much a cause of the increases in GDP as a result.³⁷

This is a fulsome endorsement of the perspicacity of GDP as illustration of the state of an economy. It is interesting that not even Sen is prepared to deny this illustrative power of the GDP. He allows that it is the indicator of economic inequalities, but insists that economic inequalities are less important indicators of human freedom (which, he says, is the primary element of development) than are non-economic factors such as political freedoms, biological makeup, individual circumstances, gender, talents, pollution and local crime, etc.³⁸ For the purposes of our international distributive justice model, non-economic factors are of no interest.

The definition of ‘developing countries’ is not worth pursuing, we contend, beyond the one already achieved by the rank-ordering of countries in terms of their GDP per capita. On that ranking,³⁹ 55 countries come in at US\$ 20,000 and above; 43 countries (including Russia at US\$15,800) come in at between US\$10,000-US\$19,000, and the rest of all fall below US\$10,000, to the lowest point (Zimbabwe) of US\$200. The UAE is 12th in the list of the top 62 countries at US\$44,600; Brazil, 102nd on the list, falls just inside the US\$10,000-19,000 bracket at US\$10,200; China, 133rd on the list, is in the below-US\$10,000 at US\$6,000; in the same bracket, India,

³⁷ Stiglitz, Joseph E, ‘Towards a New Paradigm for Development’, 9th Raul Prebisch Lecture, United Nations Conference on Trade and Development, October 1998, <http://www.unctad.org/en/docs/prebisch9th.en.pdf>.

³⁸ Sen, Amartya, 1999, *Development as Freedom*, (2nd ed., 2001), Oxford University Press, pp. 51-53.

³⁹ See CIA World Fact Book 2009, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html?countryCode=#>.

167th on the list, is well below it at US\$2,900, and Bangladesh is 197th at US\$1,500. It is very simply inferable from this illumination that 55 of the world's 229 economies are highly trade capable, 43 are viable, and the rest are struggling against odds at best, or are non-viable at worst.

Consequently, all members of the below-US\$ 10,000 group *should be* considered LDCs, the US\$10,000-19,000 group the developing countries, and all above the US\$20,000 the developed countries. This claim, 'should be', is not vacuous. It is made on the basis that the trading strength of a country is fully revealed by its GDP per capita status. What accounts for that strength – be it geographical advantage or disadvantage, political stability or turmoil, or anything else – need not be considered for the purposes of ranking along the developed/developing/least-developed spectrum. It is trade strength that has to be supported in the case of developing countries, and bolstered in the least-developed countries. Failure to support or bolster (as the need is) is also a failure to promote development. The readiest means of supporting or bolstering trade strength is the distribution along the developed/developing/least-developed spectrum of the burdens of WTO Agreements. We, therefore, propose as follows: (i) all least-developed countries (on the definition tendered above: the GDP per capita 'below-US\$10,000' group) be absolved of all the burdens of the WTO Agreements but afforded all their benefits; (ii) the developing countries' (the US\$10,000-US\$19,000 groups') WTO Agreements obligations be modified such that these countries become exempt from obligations that would detract from their trading capacity; (iii) the developed countries (the US\$ 20,000 and above group) bear all obligations imposed by WTO Agreements. Obviously, the GDP per capita levels of countries do vary, so no country is fixed in the groupings proposed above. If a country's GDP per capita exceeds that of the developing or least-developed grouping that contains it, and remains in excess of it for a period of, say, four years, then that country can be considered to have entered the grouping above it, and capable of assuming its new group's WTO obligations.

Having outlined the spectrum along which WTO obligations are distributed on our international distributive justice model, we can proceed to show in what sense the distribution of obligations amounts to distributive justice.

THE CONCEPTUALISATION OF DISTRIBUTIVE JUSTICE AS THE DISTRIBUTION OF OBLIGATIONS

This conceptualisation of distributive justice that distributes obligations departs considerably from the classic conceptualisation, attributable to Aristotle, in which desirable things are the subjects of distribution. But that is of little consequence, once one has clarified one's 'distributive justice' usage. A 'distribution of obligation' approach to distributive justice is particularly suitable for a body of law such as the WTO's. That law is principally a law of obligations, and only incidentally a law of rights. Professor Chios Carmody expounds this view, which we endorse enthusiastically, in the course

of his admirable effort to construct a theory of WTO law.⁴⁰ Of particular interest for the defence of the international distributive justice model we propose is Carmody's following analysis:

The theory of WTO law put forward here ... recognizes that the system's principal concern is not with individual expectations per se, but rather with how collective expectations are distributed among the WTO membership as a whole. The prevailing model is therefore one of distributive justice. Distributive justice works to re-establish the arrangement of expectations according to the applicable metric of distribution, which in the case of the WTO Agreement is the equality mandated by MFN. When this can be done consensually, then the system is taken to work justly.⁴¹

Carmody's footnote 54⁴² informs that he is using his interpretation of Aristotle's sense of 'distributive justice', which is one that has nothing to do with expectations about the distribution of goods and everything to do with the imposition of obligations *erga omnes partes* that ensures the meeting of the expectations of the parties to the WTO treaty:

'collective expectations are distributed among the WTO membership as a whole' (see text quoted above). Carmody thus characterises WTO law as essentially a law of obligations that distributes expectations equally across the WTO membership, on the MFN-mandated metric.

Now, it is for the distribution of these very obligations in accordance with the 'differences' principle, and not equally *erga omnes partes* on the MFN metric, that our international distributive justice model calls. But this does not cause our model to cease to be a distributive justice model, for it retains the chief characteristic of the concept as it is used by Rawls, Garcia and Pogge: distribution on the principle that there are substantive 'differences' among WTO member states. If Carmody holds correctly that WTO law can be described as a law of obligations:

I have described WTO law as a law of obligations, something which is accurate as a preliminary description. This is because countries assume obligations towards other countries under the treaty, and these are extended to all other WTO members by virtue of MFN.⁴³

Then our proposed international distributive justice model hits its target: WTO obligations should not be obligations *erga omnes partes*. It is precisely because the WTO imposes obligations *erga omnes partes* that international distributive justice is absent from the WTO regime. *Erga omnes partes* obligations rest on the Aristotelian model of distributive justice as Carmody interprets it. Our international distributive justice model rejects that model of distributive justice, for it does not allow for differences in expectations born of differences in capacity. Our model distributes obligations on the 'differences' principle, such that some *partes* bear all treaty obligations, others some of them, and others still none of them. Importantly, unlike the distributive-justice theories

⁴⁰ Carmody, Chios, note 2, pp. 527-557.

⁴¹ *Ibid.*, p. 544.

⁴² *Ibid.*

⁴³ *Ibid.*, p. 545.

propounded by Rawls, Garcia and Pogge, our international distributive justice model distributes only obligations it does not distribute 'goods', nor does it allow that the expectations of a 'collective' as diverse as that constituted by the parties to the WTO treaty can have the same (equally distributed) expectations: (i) Should our model attempt to distribute goods, as, for instance, Pogge commends the distribution of benefits that accrue from certain nations' natural resources, objections such as those voiced by Caney⁴⁴ would work to undermine its legitimacy; (ii) should this model allow the tenability of the collective-expectations proposition, it would be open to refutation on simple empirical grounds. The level-playing field assumption that underlies the *erga omnes partes* distribution of obligations is not tenable: evidence of the substantive differences in the levels of that field is ample, and evidence of its being level is totally absent. That much is obvious in GDP illuminations alone. This wrong assumption must be corrected and compensated before the WTO legal system can become a fair one. Hence our commendation of the principle of international distributive justice as the principle that distributes obligations on the 'differences' principle, and thus the appropriate core principle of the WTO legal regime.

EMPIRICAL EVIDENCE THAT DISTRIBUTIVE JUSTICE SHOULD OBTAIN IN THE DISTRIBUTION OF WTO BURDENS

States such as Bangladesh and Burkina Faso are expected to assume all the burdens of WTO obligations that states such as the US and the UAE assume, however with an extension in time for achieving the conformity of their domestic laws with WTO regulations, being the sole concession to the economic weakness of Bangladesh and Burkina Faso (both least-developed countries). This WTO concession is nevertheless the sole concession to the fairness and justice of observing the 'differences' principle. And it is a very niggardly, indeed innocuous, concession. Worse, it not only fails entirely to support development in least-developed countries, but it actually hinders it. That becomes very obvious in that Bangladesh and Burkina Faso feel the weight of WTO obligations, whereas the USA and the UAE are unbothered by it. The General Agreement on Trade in Services (GATS) obligations illustrate this.

THE GATS: THE USA AND THE UAE

The USA needs no introduction. The United Arab Emirates (UAE), a Gulf Cooperation Council (GCC) country and a federation of seven states (Abu Dhabi, Dubai, Ajman, Fujairah, Ras al Khaimah, Sharjah and Umm al Qaiwain), acceded to WTO membership in 1996, and is, therefore, a signatory to the GATS. The GATS demands a level playing field for national and foreign investors: MFN treatment, Article II; and National Treatment, Article III. The GATS also demands fair competition

⁴⁴ Caney, Simon, 'Cosmopolitan Justice, Responsibility, and Global Climate Change', vol. 18, *Leiden Journal of International Law*, 2005, pp. 747-775.

pursuant to its Article VIII, such that no monopoly-service provision exists that is inconsistent with MFN treatment, and it demands transparency pursuant to Article III, such that all national laws, regulations, administrative guidelines and international agreements are fully disclosed.

The UAE has earned WTO praise for 'the openness of its trade regime', but also a measure of encouragement to:

... pursue its reforms, including further improvement of its multilateral commitments, with a view to enhancing the transparency and predictability of its trade regime, and its adherence to WTO principles.⁴⁵

The UAE is still to correct 'its limits on foreign equity participation', and 'the absence of competition legislation', and the possibility that its 'importing activities and distribution services' might have remained 'reserved for exclusive national agents'.⁴⁶ Despite this WTO chiding, it is a simple fact that the UAE's *Agency Law*⁴⁷ is not fully GATS-compliant: While the UAE was free under GATS Article II(3) to offer preferential treatment to GCC countries as part of a Regional Trade Agreement, it is no longer free to do so, for the 'grace' period for full compliance by developing countries expired for it in 2005. It can no longer, to be WTO-compliant, give preferential treatment to national agents in areas where foreign suppliers of services are also active. The Agency Law, which allows the preferential treatment of national agents in the services sector, has nonetheless not been modified. This is potentially actionable, but no WTO member state has brought the matter before the WTO's Dispute Settlement Body (DSB).

Potentially actionable, too, was the USA's position in the Dubai Ports World Company showdown. A furore erupted in the USA when the UAE's Dubai Ports World Company, having bought the British-owned Peninsular and Oriental Steam Navigation Company (P&O) as of 2 March 2006, acquired control of the facilities of six US east-coast ports. Technically, *vis-à-vis* the GATS, the UAE was in a position to refer to the WTO DSB, on NT and MFN heads of action, any US discrimination against it as a buyer of P&O and the attendant rights, particularly since most US foreign ports are foreign operated.⁴⁸ That, however, has not happened. Instead, Dubai Ports World voluntarily turned over the operation of the ports in question to a 'US entity'.⁴⁹ (Incidentally, another US occurrence of political uproar in the face of a prospective foreign purchase happened when the Chinese company CNOOC made a bid to purchase the US oil company UNOCOL.)⁵⁰

Despite their MFN violations, it is unlikely that either the USA or the UAE will see

⁴⁵ WTO, Trade Policy Review: United Arab Emirates (UAE)', 24-26 April, 2006, http://www.wto.org/english/tratop_e/tp_r_e/tp263_crc_e.htm.

⁴⁶ Ibid.

⁴⁷ *Commercial Agencies Law* (Federal Law No. 18 of 1981, as amended by Federal Law No. 14 of 1988).

⁴⁸ Kaplan, Eben, 'The UAE purchase of American port facilities', *Council on Foreign Relations*, 21 February 2006, <http://www.cfr.org/publication/9918/>.

⁴⁹ Alfano, Sean, 'Dubai Company Gives Up On Ports Deal: Move Comes As GOP Leaders Warn Bush that Congress Will Block Takeover', *CBS News*, 9 March 2006.

⁵⁰ 'News Analysis', *Business Week*, 4 August 2005.

WTO DSB action against them: these affluent economies have a way of settling their disputes amicably, and that enables them to violate WTO law with impunity. But GATS obligations are far less easy on developing and least-developed countries. However, how the USA and UAE settled the MFN violation that is central to the Dubai Ports World showdown is not known. But it is known that MFN violations have a fully legal mechanism. It is known as Free Trade Agreements (FTAs): Joost Pauwelyn⁵¹ points out that WTO obligations tend to be bilateral rather than *erga omnes partes*:

The bilateral nature of WTO obligations is also demonstrated by the fact that GATT and GATS concessions can be *re-negotiated* as between a limited number of WTO Members with a substantial trade interest in the product or sector concerned (pursuant to GATT Article XXVIII and GATS Article XXI).⁵²

He adds:

Unlike breaches of, for example, human rights obligations, a breach of TRIPS, SPS, TBT or GATS obligations may (and can) still single out one or more WTO Members without affecting the individual rights of all other WTO Members.⁵³

That, of course, makes possible the 'GATS+' kinds of bilateral obligations that countries conclude between themselves as FTAs. Yet, Article XXIII(1) of the GATS seems to give standing to any WTO Member in any event of a GATS breach:

If any Member should consider that any other WTO Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

It is not clear how this can have effect. Not even the MFN principle will infuse Article XXIII(1) of the GATS with a 'collective obligation' strength, for its Article V states, with specific reference to the MFN principle, that GATS obligations do not prevent WTO members' concluding of *inter se* agreements that further liberalise trade. At what point, therefore, is the MFN principle violated pursuant to the GATS? Or, does the GATS here create, as Pauwelyn posits,⁵⁴ a *lex specialis* under which breaches of WTO obligations (one of which is founded on the MFN principle)⁵⁵ are in fact permitted? On a view such as Pauwelyn's, WTO Agreements are treated as 'a bundle of bi-lateral relations', and so WTO obligations are subject to the Vienna Convention on the Law of Treaties and the Articles on State Responsibility. Pauwelyn makes an admirable case for the view that the DSU is disposed to think likewise.⁵⁶ One would have to conclude, adopting Pauwelyn's view, that, given a *lex specialis* status, a provision of a WTO agreement that appears to breach a WTO obligation is, in fact, not such a breach. Despite the obvious excellence of the position Pauwelyn makes out, it remains worrying that even academic positions are contributing to the disappointment of the quite natural expectation that

⁵¹ Pauwelyn, Joost, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', vol. 14, *European Journal of International Law*, November 2003.

⁵² *Ibid.*, p. 932.

⁵³ *Ibid.*, p. 939.

⁵⁴ *Ibid.*, p. 947.

⁵⁵ Article 1 of the GATT.

⁵⁶ Pauwelyn, note 51, p. 945 and p. 949.

the very purpose of there being a WTO is that it will establish collective (*erga omnes partes*) trade obligations rather than tolerate special, bi-laterally cornered ones.

Carmody⁵⁷ does a valiant job of arguing that WTO obligations are meant to be collective ones. But it does appear that their bi-lateral determination is already in effect, given the proliferation of FTAs. That must be difficult to reverse. Parties to FTAs, therefore, find it easy to side-step WTO obligations. Developing countries do not, as the effects of the Doha Ban illustrate.

THE DOHA BAN, E-COMMERCE, AND THE DEVELOPING AND LEAST-DEVELOPED COUNTRIES

Paragraph 34 of the Doha Ministerial Declaration, adopted on 14 November 2001, is unequivocal about the general WTO ban on the taxation of goods and services delivered as e-commerce:

We declare that members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.⁵⁸

Like the GATT classification system's 'Harmonised System', the GATS classification system, 'Services Sectoral Classification List' (W/120) lacks a clear guideline for classifying digital products. The Fifth Session of the Ministerial Conference left the Doha moratorium in place precisely because of the lack of an agreement among WTO members as to what constitutes a 'service' in e-commerce, and what a 'good'. The WTO has issued this briefing note:

Participants in the dedicated discussions hold the view that the examination of these cross-cutting issues is unfinished, and that further work to clarify these issues is needed.⁵⁹

This is well and good for the affluent economies. But it has a serious consequence for the small West African state, Burkina Faso, and for other least-developed and developing countries. Scott Budnick attempts to diminish this effect,⁶⁰ concluding that though Burkina Faso has some cause for concern about the fact that it is losing tariff revenue to the tax-exempt e-commerce trade, that revenue loss is almost inconsequential:

Although in percentage terms the present WTO ban results in larger revenue losses for Burkina Faso relative to percentage losses of developed countries, the amount of online business conducted by Burkina Faso dictates that these losses comprise at best a marginal share of total government tax revenue.⁶¹

⁵⁷ Carmody, Chios, 'WTO Obligations as Collective', vol. 17, *European Journal of International Law*, 2006, pp. 419-443.

⁵⁸ Doha Ministerial 2001, WT/MIN(01)/DEC/1, 20 November 2001, WTO website, http://www.wto.org/english/thewto_e/minist_e/min01_e/minded_e.htm#electronic.

⁵⁹ 'Electronic Commerce: Work continues on issues needing clarification', Cancun WTO Ministerial, 2003: Notes, WTO website, http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief15_e.htm.

⁶⁰ Budnick, Scott, 'Internet Taxation and Burkina Faso: A Case Study', vol. 10, no 549, *ILSA Journal of International and Comparative Law*, 2004.

⁶¹ *Ibid.*, p. 568.

In the same breath, he makes a rather startling claim that:

[t]he potential loss of related tariff, surcharge, and consumption revenue stemming from the WTO ban as a percentage of total tax revenues amounts to less than 1%. This percentage does not lead to the conclusion that the ban's continuance will irreparably harm national internal development. These numbers suggest that developing countries will not necessarily be harmed in the future by current international policy.

This is a surprising conclusion, for he has conceded that:

[g]enerally, the internal tax structure of a developing economy differs from that of a developed economy in the sense that import tariffs and taxes comprise the majority of government revenue...⁶²

and that:

The UNCTAD study, based largely upon the work of Dr Teltscher, lists Burkina Faso's total revenues stemming from tariffs on digitised products at \$3,567,000 (U.S.). According to the IMF's Statistical Annex for Burkina Faso, the average exchange rate listed for Burkina Faso in 1999 was 614.9 CFAF per U.S.\$. Accordingly, in US dollars, these same receipts translate to 2,193,348,300 CFAF in losses for Burkina Faso. For the same year, the IMF lists total tax revenues generated by Burkina Faso at 220,744,000,000 CFAF. Thus, to place these lost tariff revenues into context, simple math indicates that they total less than 1% (.0099%) of Burkinabe tax inflows.⁶³

This data seems to anticipate the conclusion that Burkina Faso loses quite significantly as a result of the WTO ban on levying tariffs on the import of digitised products. It is, therefore, difficult to account for Budnick's actual conclusion to the effect that the loss is negligible for Burkina Faso. Can a 1 percent loss in taxation revenue be negligible in any society, let alone in one where 'the majority of tax revenue' is generated from the taxation of imports? One must doubt it. And what does Budnick mean by his claim that 'these numbers suggest that developing countries will not necessarily be harmed in the future by current international policy'? Not only does he generalise, without the least attempt at justification, his Burkina Faso statistics to the whole group of 'developing countries', but he also tenders the decidedly cryptic prognosis: 'will not *necessarily* be harmed'. One cannot, surely, dismiss 'harm to the economy' as the necessary consequence of the loss, for the foreseeable future, of 1 percent of a state's revenue base.

Budnick's none-too-trivial attempt here, as he admits by reference, is to diminish the impact of Susanne Teltscher's work⁶⁴ on this issue. Teltscher notes four very important things: (i) that 'the main players in the debate on e-commerce taxation have been the United States, the EU and the OECD'; that (ii) 'developing countries have participated little in these debates', and 'OECD countries have given little consideration to developing countries' concerns'; that (iii) before the WTO ban, 'the ten countries

⁶² Ibid., p. 562.

⁶³ Ibid., p. 568.

⁶⁴ Teltscher, Susanne, 2000, 'Tariffs, Taxes and Electronic Commerce: Revenue Implications for Developing Countries', United Nations Conference on Trade and Development, Policy Issues in International Trade and Policies, Study Series No. 5, http://192.91.247.38/tab/pubs/itcdtab5_en.pdf.

levying the highest tariff rates on digitisable products are Bangladesh, India, Pakistan, the Solomon Islands, Egypt, Burkina Faso, Morocco, Tunisia, Congo, and Thailand'; that (iv) the majority of countries most affected by tariff revenue losses come from the developing world, for government revenues from import duties account for only 2.6 percent in developed countries, but for 15.8 percent in the developing countries.

And this is just one illustration of how obligations imposed *erga omnes partes* harm the development prospects of developing and least-developed states, but impact either not at all or negligibly on the economies of the rich developed states. Also, should the countries on the economies of which the Doha Ban impacts adversely decide to set the Ban aside (like the US and the UAE set aside the GATS MFN and NT obligations when they are inconvenient), there would certainly be adverse WTO DSB consequences for them. This is because it is, as Sacha Wunsch-Vincent⁶⁵ points out, a distinct and identifiable US trade policy that services 'that can be delivered across borders electronically' be non-taxable.⁶⁶

Now, having outlined the nature of international distributive justice and demonstrated the need for its deployment in WTO law, we can proceed to demonstrate that it is just as necessary to deploy it in the framework of a new international climate law constructed to combat climate change. We, therefore, advance a model international climate law to serve that purpose.

A NEW INTERNATIONAL CLIMATE LAW MODEL

Multilateral environmental agreements (MEAs) oblige the construction of a new international climate law, for in the absence of one, there is no clear relationship between them and the GATT/WTO legislative scheme. Paragraph 31(i) of the Doha Declaration gives a *de facto* licence for its construction:

With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations are set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.

The 'specific trade obligations' referred to here cannot but raise the fact that there is no 'common but differentiated responsibility' value in the GATT/WTO scheme,

⁶⁵ Wunsch-Vincent, Sacha, 'The Digital Trade Agenda of the US: Parallel Tracks of Bilateral, Regional and Multilateral Liberalisation', *Institute for International Economics*, 2003, <http://www.iie.com/publications/papers/wunsch0303.pdf>.

⁶⁶ Wunsch-Vincent refers to a US domestic legislation that support this policy: the *Bipartisan Trade Promotion Authority Act*, which enables the Trade Promotion Authority, pursuant to its sections 2102(b)(2), 2102(b)(7)(B), 2103(d), 2102(b)(8) and 2102(b)(9), to seek to minimise the rise of barriers to e-commerce in international trade-negotiation fora like the WTO.

whereas that value has emerged in the MEAs as the normative value. Evidence of that is ubiquitous in MEAs. The following contexts are samples of it:

Principle 23 of the Stockholm Declaration:

... it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.⁶⁷

Principle 7 of the Rio Declaration:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.⁶⁸

Articles 3(1) of the UNFCCC:⁶⁹

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities,⁷⁰

and its Article 4(1):

All Parties, taking into account their common but differentiated responsibilities...⁷¹ (This is repeated verbatim in Article 10 of the Kyoto Protocol.⁷²)

The efforts that produced the UNFCCC, and eventually the Kyoto Protocol, advanced a number of excellent propositions in the name of the ‘common but differentiated responsibility’ value.⁷³ Nevertheless, we propose that the only ones of them that should become part of the new international climate law are those consistent with the principle of international distributive justice. The nature of applied international distributive justice is illustrated in the following discussion of elements of the UNFCCC and the Kyoto Protocol.

The preamble to the UNFCCC promises unequivocally that international climate-change combating remedies will take ‘full account the legitimate priority needs of developing countries’:

Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter,

⁶⁷ Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) 16 June 1972.

⁶⁸ United Nations Conference on Environment and Development: The Rio Declaration on Environment and Development, 14 June 1992.

⁶⁹ FCCC/INFORMAL/84, GE.05-62220 (E) 200705, <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁷⁰ United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84, GE.05-62220 (E) 200705, 9 May 1992, <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁷¹ Ibid.

⁷² The Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997.

⁷³ Maniruzzaman, A.F.M., “Climate Justice is What’s Needed for Copenhagen Success”, 79 *Amicus Curiae* (Autumn 2009), p. 1.

taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty ...⁷⁴

This undertaking is consistent with the international distributive justice principle in that it envisages the distribution of obligations on a sliding-scale that is akin to their distribution on an objective criterion, such as GDP status. In this case, the criterion is 'economic growth of developing/least-developed countries'.

Article 4(1) of the UNFCCC committed all parties to it to endeavour to reduce the impact of climate change, but Article 4(2) required only 'developed country Parties and other Parties included in Annex 1' to implement specific

... national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.⁷⁵

This too, is a realisation of the international distributive justice principle, for it imposes obligations on the criterion of capacity, which again is akin to distribution on a sliding scale according to an objective criterion, which is the equivalent of distribution of obligations according to GDP status.

Article 3(1) of the Kyoto Protocol realises a perfect application of international distributive justice. It does so by distributing the obligation to cap and reduce greenhouse gas emissions (GHG) such that only Annex 1 countries have an absolute obligation to do either:

The Parties included in Annex 1 shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

The developed country Article 4(3) committed developed countries to financing the developing countries' efforts to reduce their CO₂ emissions:

Parties and other developed Parties included in Annex 1 shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1.⁷⁶

Article 11 (2) of the Kyoto Protocol⁷⁷ is also firm on the point that the climate-change-mitigating costs of developing countries will be borne by the developed countries:

In the context of the implementation of Article 4, paragraph 1, of the Convention, in accordance with the provisions of Article 4, paragraph 3, and Article 11 of the Convention, and through the entity or entities entrusted with the operation of the financial mechanism

⁷⁴ Ibid., p. 3.

⁷⁵ Ibid., p. 6.

⁷⁶ Ibid., p. 8.

⁷⁷ Adopted in Kyoto on 11 December 1997 and entered into force on 16 February 2005. Of the Parties of the Convention, 186 had ratified its Protocol. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakech in 2001, and are called the 'Marrakech Accords'.

of the Convention, the developed country Parties and other developed Parties included in Annex II to the Convention shall:

(a) Provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of existing commitments under Article 4, paragraph 1 (a), of the Convention that are covered in Article 10, subparagraph (a); and

(b) Also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of advancing the implementation of existing commitments under Article 4, paragraph 1, of the Convention that are covered by Article 10 and that are agreed between a developing country Party and the international entity or entities referred to in Article 11 of the Convention, in accordance with that Article ...

This is not consistent with the principles of international distributive justice, because it envisages the redistribution of goods (finances, technology, etc.). International distributive justice distributes only obligations, not goods.

Notably, the UNFCCC and the Kyoto Protocol hold that developed countries are principally responsible for the current high levels of GHGs in the atmosphere because it is they that allowed the emission of those gases over more than 150 years of industrial activity. Both the UNFCCC and the Protocol place on them the burden of mitigating those emissions. They do so on the principle of 'common but differentiated responsibilities'.⁷⁸ On this position, the denotation of 'responsibility' is retributive. That is, developed countries are being 'made to pay' for what 'they' have done. This is not even a justifiable attitude, let alone an expression of international distributive justice. The progeny of misfeasors cannot be required to bear responsibility for their ancestors' misfeasance. Simon Caney is quite right on this point:⁷⁹ No equity or criminal justice principle would support the antithesis of this position.

Although the transfer of environmentally sound technologies to developing countries is a treaty commitment of the signatories to the Kyoto Protocol pursuant to Articles 10(c) and 11(2)(b), developing countries are very aware that no such transfer has occurred. A study by Dechezleprêtre and others confirms that:

The signature of the Kyoto Protocol does not seem to have had a significant impact on the international diffusion of climate mitigation technologies as compared to the overall trend in all sectors.⁸⁰

Yet an obligation of developed countries to transfer technology to developing countries, albeit capable of promoting GHG emissions reduction worldwide, is not justifiable on the international distributive justice principle. Environmentally sound technologies are goods, or, in TRIPS terms, they are 'intellectual property'. An obligation

⁷⁸ UNFCCC Web page, 'Kyoto Protocol', http://unfccc.int/kyoto_protocol/items/2830.php.

⁷⁹ Caney, Simon, 'Cosmopolitan Justice, Responsibility, and Global Climate Change', vol. 18, *Leiden Journal of International Law*, 2005, pp. 756-758.

⁸⁰ Dechezleprêtre, Antoine, Glachant, Matthieu, Hascic, Ivan, Johnstone, Nick, Ménière, Yann, 'Invention and Transfer of Climate Change Mitigation Technologies on a Global Scale: A Study Drawing on Patent Data', 2009, pp. 17-18, <http://ssrn.com/abstract=1414227>.

of some states to transfer them amounts to an obligation to redistribute goods. Redistribution should not be obligatory. It has to remain voluntary. All that can be done in the matter of technology transfer, in the name of international distributive justice, is to distribute the obligation to protect intellectual property along the 'nil to absolute' spectrum, such that non-Annex 1 countries have a 'nil' obligation to protect it.

However, there is a criterion available on the international distributive justice principle that justifies the bearing of the burden of climate-change mitigation by developed countries, and it is established on the objective criterion of the present-day GHG emission levels of countries: According to the World Bank, high-income countries emit CO₂ at 13 tonnes per year per capita, and middle and low-income countries no more than 3 tonnes for the same period. Also:

... developing countries like China, India and even Africa are expecting higher percentage drops in their CO₂ intensities than developed countries in future ... developing countries' future CO₂ intensities would remain, as in the past, much smaller than that of most developed countries by 2030.⁸¹

The available international distributive justice principle is that the greater burden of reducing emissions falls upon the grossest emitters, and graduates downwards to nil for the non-emitters.

UNFCCC AND KYOTO PROTOCOL DEFER TO GATT/WTO LAW

Overly and wrong-mindedly generous though both the UNFCCC and the Protocol sometimes are with 're-distribution of goods' propositions, neither proposes the possibility of amending the GATT Article XX(b) and (g) rights to border tax arrangements (BTAs). This is not logical. If the Annex 1 countries are not to bear GHG emissions-reducing obligations, then they should not bear those obligations when they are imposed as GATT-compliant non-tariff measures such as the BTA. Article 3(5) of the UNFCCC touches upon this issue:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

But the UNFCCC did not reach a point where it might be seen to have begun to tamper with BTAs sanctioned by GATT Article XX(b) and (g), although it is clear in the above-quoted text that it foresees the possibility that BTAs might be imposed as 'measures' to 'combat climate change'. It merely requires that those measures 'should not constitute a means of arbitrary or unjustifiable discrimination or a disguised

⁸¹ Timilsina, Govinda R, 'Atmospheric Stabilization of CO₂ Emissions: Near-term Reductions and Intensity-based Targets', World Bank Policy Research Working Paper 4352, September 2007, p. 17.

restriction on international trade'. In so doing, it does nothing more than restate the GATT Article XX chapeau provision that Article XX exemptions not be used to impose 'a disguised restriction on international trade'.

The UNFCCC missed an opportunity here to introduce international distributive justice into the GATT/WTO scheme by declaring unequivocally that GATT Article XX measures may not be enforced against non-Annex 1 countries as BTAs that object to their products on the ground that those countries have not put GHG emissions-reducing strategies in place. That means that despite the UNFCCC's provision that developing countries have no obligation to mitigate their GHG emissions, it has allowed that an obligation might be imposed on them in the GATT/WTO context.

Laura Nielsen makes a similar point in her discussion of the possible border carbon adjustments (BCAs) imposed unilaterally by 'capped' (Annex 1) countries to punish non-capped (non-Annex 1) countries that do not bind themselves in a post-Kyoto Agreement:

... whether it is decided in the Kyoto Protocol or the Post-Kyoto Agreement whether States under a cap can enact border carbon adjustments against parties not under a cap. This is currently not decided in the Kyoto Agreement.⁸²

If indeed it is accepted in a UNFCCC context that Annex 1 countries can impose BTAs against non-Annex 1 countries on the grounds of their GHG emissions-reducing status, then the 'common but differentiated responsibility' value (the 'differences' principle) is in jeopardy, and it no longer gives effect to the international distributive justice principle on which only Annex 1 countries have GHG emissions-reducing obligations.

NO RESCUE OF NON-ANNEX 1 COUNTRIES FROM GATT ARTICLE XX LICENCES THAT PERMIT THE IMPOSITION OF BTAS

It has to be admitted that our model international climate law cannot but submit to GATT Article XX. The GATT Article XX licences that permit border tax arrangements (BTAs) are:

the sub-section (b) measures

necessary to protect human, animal or plant life or health;

the sub-section (d) measures

necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

⁸² Nielsen, Laura, 'Trade and Climate Change', vol. 7, issue 1, *Manchester Journal of International Economic Law*, 2010, p. 11.

and the sub-section (g) measures

relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The provisions of GATT Article XX(b) and (g), inasmuch as they defend the sovereign right of states to put into practice their views, including their moral views, on what is appropriate protection of the environment, limit the scope of an international climate law. Whether this power to limit is itself moral must be decided on whether it is national sovereignty in the matter of environmental protection that overrides the importance of non-Annex 1 countries' free market access, or *vice versa*. But these are rival moral positions, and our international distributive justice model cannot arbitrate moral positions. It can do no more than distribute obligations on the 'differences' principle.

A cursory way of dealing with this would be to declare that once non-Annex 1 countries are absolved by the new international climate law of GHG emissions-reducing obligations, Article XX-based BTAs cannot be imposed against them on the grounds of their GHG emissions. Yet there is a serious awkwardness here. The 'no obligations' declaration might readily dispose of the GATT Article XX (d)-facilitated BTA, on the ground that (d) entitles a BTA that enforces a law, not one that works against a law such as the new international climate law.

We are aware that the literature does not view GATT Article XX(b) and (g) as the protector of countries' sovereign rights, that the GATT does not explicitly characterise it as such, and that DSB jurisprudence also does not take that view explicitly. But we propose nevertheless that the divergence that Condon observes⁸³ in that jurisprudence can be accounted for by the view that there is a tacit DSB reluctance to disallow BTAs based on GATT Article XX(b) and (g), so long as they are within the parameters of the chapeau. Condon argues that in *US Gasoline*,⁸⁴ a case 'involving paragraph (g) ... the Appellate Body found that a failure to negotiate led to a failure to comply with the non-discrimination requirements of the chapeau'.⁸⁵ In *US Shrimps-Turtles*,⁸⁶ however, "it was unclear whether the obligation to negotiate' stemmed not from paragraph (g) but from other factors, among them 'multilateral environmental documents'. Then he proceeds to argue that 'in cases involving paragraph (b)' – and he cites only one such case: *EU Asbestos*⁸⁷ – 'the Appellate Body has not found any obligation to negotiate'. He concludes on this basis, and citing 'the rules of effective treaty interpretation',⁸⁸ that the

⁸³ Condon, Bradley J, 'Climate Change and Unresolved Issues in WTO Law', *Journal of International Economic Law*, advance access copy published on 24 September 2009, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=bradly_condon.

⁸⁴ *United States – Standards for Reformulated and Conventional Gasoline*, (Appellate Body) WT/DS2/AB/R, 29 April 1996.

⁸⁵ Condon, note 82, p. 31.

⁸⁶ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998.

⁸⁷ *European Communities-Measures Affecting Asbestos and Asbestos Containing Products* (Panel) 2000, WT/DS135/R.

⁸⁸ Condon, note 82, p. 32.

divergence in jurisprudence here is attributable to the fact that paragraphs (b) and (g) must apply to different matters.

The 'different matters' point is sound, but that the divergence in jurisprudence is attributable to the different matters that (b) and (g) contemplate is less so, for it is attributable also to the DSB's inclination to engage some criterion, for instance, the presence of negotiation, when it will serve the interest of preserving a chapeau-compliant BTA against a challenger, and when the DSB feels an obligation to take account of MEAs. This is inferable from the fact that there is no DSB case that overturned a BTA on the basis of the absence of negotiation. This is as expected, since the chapeau does not oblige negotiation. But it 'looks good' when the DSB contemplates the 'negotiation' requirement of MEAs, and it contemplates them gladly when that serves also to preserve BTAs that respect countries' sovereign rights.

GATT Article XX(b) and (g), therefore, impose an a priori limitation on the scope of the international distributive justice principle in the new international climate law. Where that principle distributes a 'nil' obligation to non-Annex 1 countries in the matter of reducing GHG emissions, it might have to recognise the lawfulness of the indirect imposition of them by GATT Article XX(b) and (g) BTAs. This conclusion is impossible to avoid, because the right of the sovereign state to impose its own environmental and health safety measures is firmly entrenched in the GATT/WTO legal scheme. 'Environment' is referenced in no fewer than five WTO Agreements, none of which challenge the GATT Article XX(b) and (g) licence to impose BTAs: Paragraph 12, Annex 2 of the Agreement on Agriculture (AoA); Paragraph 2, Article 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS); Articles 2 and 5 of the Agreement on Technical Barriers to Trade (TBT); Article 27.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Article XIV (b) of the General Agreement on Trade in Services (GATS).

Furthermore, paragraph 6 of the Doha Declaration affirms the right of WTO member states to impose their own environmental standards:

We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.

The best the new international climate law can do to rescue the 'common but differentiated responsibility value', that is, the operation in it of the international distributive justice principle that keeps alive the UNFCCC/Kyoto Protocol position that non-Annex 1 countries have no emissions-reducing obligations, is to construct a provision that forbids the imposition of BTAs pursuant to GATT Article XX(b) and (g) that are not purely environment and human or animal life-and-health related in the

jurisdictions that impose them. That would be to ‘bite the bullet’ in the matter of withdrawing states’ sovereign rights to denounce the health destroying, human-and-animal-life destroying and environment-destroying process and production methods (PPMs) of other states. That Annex 1 countries can be persuaded to cede that sovereignty is, of course, not to be assumed. And whether an effort to persuade them to do so is itself moral is not at all clear. The better view, therefore, is to settle for the fact that the power of GATT Article XX(b) and (g) limits the application of the international distributive justice principle.

MFN AND NT PRINCIPLES FRUSTRATE EFFORTS TO CURB CARBON LEAKAGE

We contend that, like WTO law, a new international climate law must be built on the international distributive justice principle (as the Kyoto Protocol was in large part built), not on the MFN principle. We have already made out our case for this position in the foregoing discussion. We now add to that case the empirical argument that MFN can actually frustrate countries’ climate-law policies.

GATT Articles I and III, supported by the Agreement on Subsidies and Countervailing Measures (SCM Agreement), together frustrate the climate-change mitigating strategy commonly known as the prevention of carbon leakage. ‘Carbon leakage’ occurs when the taxation of the GHG emissions of installations in Annex 1 countries is so onerous that those installations relocate to non-Annex 1 countries that do not have emission-reduction commitments, and can therefore afford to impose either no taxes, or much less onerous taxes, on those installations. In this situation, there is no global reduction of GHG emissions, but merely the relocation of the emitting installation. The Intergovernmental Panel on Climate Change (IPCC) defines carbon leakage thus:

Carbon leakage is defined as the increase in CO₂ emissions outside the countries taking domestic mitigation action decided by the reduction in the emissions of these countries. It has been demonstrated that an increase in local fossil fuel prices resulting, for example, from mitigation policies may lead to the re-allocation of production to regions with less stringent mitigation rules (or with no rules at all), leading to higher emissions in those regions and therefore to carbon leakage.⁸⁹

Under Article I of the SCM Agreement, domestic subsidies can be challenged by WTO members if exports produced with the aid of state subsidies cause ‘serious prejudice’, or ‘nullify or impair’ another member country’s domestic industry. Therefore the EU practice (under the EU Emissions Trading Directive⁹⁰) of allocating

⁸⁹ IPCC, 2007, *Climate Change 2007: Mitigation of Climate Change*, ‘Mitigation from a cross-sectoral perspective: Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change’, Metz, B, Davidson, OR, Bosch, PR, Dave, R and Meyer, LA (eds), Cambridge University Press, para. 11.7.2.

⁹⁰ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

up to 100 percent of the total carbon allowances free of charge⁹¹ to the covered installations is open to challenge under the SCM Agreement, according, to Zeller⁹² and others, for being a form of tariff protection. It has to be conceded that Zeller's is a valid point.

The EU's rule against anti-competitive state subsidy (an MFN/NT analogue) can also work to disable a state's effort to provide against carbon leakage. That it can do this is unfortunate, for forestalling the 'carbon leakage' that would occur upon an installation's relocation to a non-Annex 1 country is a worthy activity. Nothing is done in the interest of repairing damage done by GHG emissions if an emitter relocates to a non-Annex 1 state to avoid meeting its emissions-reducing target. The new international climate-change law should seek the exempting of carbon credits from the SCM Agreement's tariff-protection category of behaviours. The task will not be an easy one, for that law will have to be drafted to make it impossible to distribute carbon credits with a tariff-protection purpose that are disguised as prevention of carbon leakage measures.

The SCM Agreement contains a series of determinations about when a state subsidy affects international competition or otherwise distorts trade. Pursuant to this Agreement, there are three classes of government subsidy: prohibited, actionable and non-actionable. Subsidies directly connected to export activity, or directly supporting domestic goods against imported ones, are prohibited. Governments can be required to remove prohibited subsidies. Actionable (through the DSB) subsidies are those that cause economic injury to foreign producers in competition with domestic producers, or adversely affect the world price of goods. Permission to impose countervailing measures against a member state that has actionable subsidies in place is available through the DSB.

It is possible that a case can be made to the effect that climate-related government subsidies are non-actionable subsidies. This is important with regard to carbon leakage prevention by way of cost-free government allocation of emission allowances to industrial installations and power producers. Like Zeller, Hufbauer and other⁹³ have posited that these allocations might constitute an actionable subsidy. Efforts should be made, in the construction of a new international climate law, to activate the SCM Agreement's non-actionable subsidy provision in a way that exempts government subsidies (by way of free carbon credits) that serve the purpose of preventing carbon leakage.

⁹¹ The EU ETS provides thus at Article 10: 'For the three-year period beginning 1 January 2005 Member States shall allocate at least 95 % of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90 % of the allowances free of charge.'

⁹² Zeller, Bruno, 'Systems of Carbon Trading', vol. 25, *Touro Law Review*, 2009, p. 917.

⁹³ Hufbauer, GC, Chamovitz, S and Kim, J, 2009, *Global Warming and the World Trading System*, Peterson Institute, pp. 60-64.

MFN IS ALREADY WEAKENED IN THE WTO LEGAL CONTEXT

The MFN principle should not be allowed to frustrate the emergence of an effective new international climate law. These principles, the intended core of WTO law, are already squandered in the WTO legal system by FTAs, as discussed above. It should also be kept in mind that the carbon credits issue is far less damaging than the carbon market, so attention should concentrate on the latter.

THE COUNTER-PRODUCTIVE CARBON-CREDITS MARKET

A major task of the new international climate law is to disable the counter-productive carbon-credits market. The Kyoto credits have inadvertently encouraged a financial industry the purpose of which is to enable investors in it to avoid making GHG emissions reductions by purchasing carbon credits. This new arm of the financial sector became apparent as early as 2002:

Rothschild Australia and E3 International are set to become key players in the international carbon credit trading market, an emerging commodity market that analysts estimate could be worth up to US\$150 billion by 2012. In a move that will re-shape the fledgling emissions trading market, Rothschild Australia and E3 International today announced their intention to launch the Carbon Ring Consortium – an investment vehicle that will provide companies in the Asia Pacific Region with an innovative way of learning about and understanding their risks in the new carbon market ... Richard Martin, the chief executive officer of Rothschild Australia said, 'With recent developments in international climate change policy, the question is no longer if, but when the global carbon trading market will emerge. Rothschild Australia, through Carbon Ring, intends to be at the forefront of this market, providing private investment vehicles to companies seeking to offset their greenhouse gas emissions liabilities ... *The Consortium should appeal to companies that are faced with a greenhouse liability and are significant users or producers of energy, such as electricity generators, heavy industrials, oil companies, major manufacturers or airlines, amongst many others [italics added].*⁹⁴

The italicised text of the above statement informs quite unequivocally that the worst emitters of GHGs, the 'producers of energy, such as electricity generators, heavy industrials, oil companies, major manufacturers or airlines', will be the very industries enabled by International Emissions Trading (IET), otherwise known as the 'carbon market', to avoid the need to reduce those emissions. Evidence that the emission-reductions avoiders are many, well financed and keen on supporting the carbon market exists in the size of that market:

The continued spectacular growth of the carbon markets shows no sign of holding back. From €22bn in 2006, to €40bn in 2007 and to an estimated €100bn in 2008. By some estimates, that figure could rise to €550bn by 2012 and, with the inclusion of the US, €3tr in 2020.⁹⁵

⁹⁴ PR Newswire on behalf of N M Rothschild and Sons, 'Rothschild Australia and E3 International to take the lead in the global carbon trading market', <http://www.prnewswire.co.uk/cgi/news/release?id=90090>; Reuters, 'Rothschild, E3 launch carbon credit investment fund' 3 September 2002. http://www.911omissionreport.com/rothschild_carbon_credit.html.

⁹⁵ Lewis, Dan, 'The great carbon credit swindle', The Institution of Engineering and Technology, 20 January 2009, <http://kn.theiet.org/magazine/issues/0901/carbon-swindle-0901.cfm>.

The supplier of the above figures notes also that at the same time:

... man-made carbon emissions are still going up; in the 1990s by 0.8 per cent per year, rising to 3.1 per cent from 2000 to 2006. In other words, a nearly 40 per cent increase from 6.2bn tonnes in 1990 to 8.5bn tonnes in 2007.⁹⁶

The inspiration of International Emissions Trading (IET), or the ‘carbon market’, was the introduction into the Kyoto Protocol of emissions trading as a ‘flexible mechanism’. Emissions trading, as set out in Article 17 of the Kyoto Protocol, allows countries that have emission units to spare – emissions permitted them but not ‘used’ – to sell this excess capacity to countries that are over their emissions targets. Before this mechanism was introduced, there were only two flexible mechanisms, both of them project-based: (i) the clean development mechanism (CDM), and (ii) joint implementation (JI) enables. Article 6 of the Kyoto Protocol outlines the JI, and Article 12 the CDM. JI enables industrialized countries to carry out joint implementation projects with other developed countries, while the CDM involves investment in sustainable development projects that reduce emissions in developing countries.

The JI was designed to help Annex 1 countries meet their emission-reduction obligations through joint projects with other Annex 1 countries. Investors (the government, companies, etc.) in one Annex 1 country undertake to participate in an emissions-reduction project in another Annex 1 country. This earns emission-reduction units (ERUs) from the host country, which can then be transferred to the investor country and added to its total allowable emissions.

The CDM allows an Annex 1 country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol to implement an emission-reduction project in developing countries. Such projects can earn saleable certified emission reduction (CER) credits, each equivalent to one tonne of CO₂, which can be counted towards meeting the implementing country’s Kyoto targets.

To earn credits under the CDM, the project proponent must prove and have verified that the GHG-emissions reductions are real, measurable and additional to what would have occurred in the absence of the project. One of the prime interests of developing countries in the CDM is its potential to facilitate the transfer of clean technologies. The UNFCCC anticipates that by 2012, China will have issued 45 percent of all CERs.⁹⁷

The severe problem with the flexible mechanisms is that it is carbon-credits trading, and not JI and CDM, that dominates the carbon market. That the European Union Greenhouse Gas Emission Trading System (EU ETS) has enabled emissions trading accounts in large part for its weaknesses.

⁹⁶ Ibid.

⁹⁷ UNFCCC, *Clean Development Mechanism*, Executive Board Annual Report 2009, Figure 5, http://unfccc.int/resource/docs/publications/cdm_annual_report_2009.pdf.

Article 1 of the EU ETS provides thus:

This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as the 'Community scheme') in order to promote reductions of greenhouse emissions in a cost-effective and economically efficient manner.

The primary purpose of the allocation of Kyoto credits is the economically efficient promotion of GHG-emissions reduction. And in this the EU ETS has failed demonstrably, according to several commentators. Robinson and O'Brien⁹⁸ remark that during the first phase of the EU ETS (2005-2007):

Huge over-allocation of permits to pollute led to a collapse in the price of carbon from €33 to just €0.2 per tonne, meaning that the system did not reduce emissions at all.⁹⁹

Concurring with these commentators, Skjærseth and Wettestad observe that the national allocation plans (NAPs) – Robinson's and O'Brien's 'permits to pollute' – of the first EU ETS phase, distributed to installations as member states saw fit, nourished an allowances-trading market, and to boot, one in which the level of uncertainty was high:

...a steep price drop of allowances (the carbon price) in the pilot phase – from a top level of around £30 per tonne CO₂ in late April 2006 down to around £12 in early May and further down in the spring of 2007, hitting a low of only £0.5 in the end of April 2007.¹⁰⁰

The aim of the EU ETS, obviously, is to provide installations with a less economically onerous means of meeting their emission-reducing targets, not to give rise to a volatile allowances-trading industry. The Commission, therefore, intervened in NAPs arrangements for the second phase (2008-2012) of the EU ETS. A new Directive¹⁰¹ obliged member states to develop NAPs for every five-year period, state the quantity of allowances they mean to allocate, and the purposes of the allocations. States were obliged also to outline their allocations criteria, guided by the criteria listed in the Directive, publish the NAPs thus constructed, notify the Commission and the member states of it, and take due account of responses to it from the public. The Commission reserved the right to reject a NAP that is not consistent with the Directive's criteria.

However, this Directive did not survive the first challenge to its decision based on it. In 2006, Poland and Estonia notified the Commission of their 2008-2012 NAPs. The Commission rejected them for being incompatible with the Directive's criteria, and decided that their annual quantities of emission allowances should be reduced, respectively to 26.7 percent and 47.8 percent. Poland (supported by Hungary, Lithuania and Slovakia) and Estonia (supported by Lithuania and Slovakia) brought actions for the

⁹⁸ Robinson, Hugo and O'Brien, Neil, 'Europe's dirty secret: Why the EU Emissions Trading Scheme isn't working', August 2007, *Open Europe*, pp. 2-54, <http://www.openeurope.org.uk/research/etsp2.pdf>.

⁹⁹ *Ibid.*, p. 5.

¹⁰⁰ Skjærseth, Jon Birger and Wettestad, Jørgen, 'The Origin, Evolution and Consequences of the EU Emissions Trading System', vol. 9, no. 2, *Global Environmental Politics*, May 2009, p.14.

¹⁰¹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

annulment of the Commission's decisions (the Commission was supported by the UK). The European Court of First Instance (Court) annulled the Commission's decision, deeming that the Commission had exceeded its powers, and infringed the duty to state reasons on the principle of sound administration.¹⁰²

The Court's decision that the Commission had exceeded its powers might well be fatal for the Commission's plans to constrain member states' NAPs such that they are 'supplemental to domestic action and domestic action will thus constitute a significant element of the effort made'.¹⁰³ That is, the Commission meant to ensure that NAPs alone would not be the satisfiers of emission-reduction targets; actual emission reductions would also have to occur. Since the Court's decision against it, the Commission is without what might have been a strategy to break the credits-accumulating culture that had established itself in EU ETS to evade actual emissions-reducing action.

The Commission's Linking Directive¹⁰⁴ enabled EU states to allow their operators to use carbon credits derived from the Kyoto Protocol mechanisms to meet their compliance targets under the EU ETS. Robinson and O'Brien claim that because the Linking Directive left member states free to decide the cap they would set on their Kyoto credits (CERS and ERUs) and imports, member states have imported about 1.3bn tonnes worth of Kyoto credits with which to meet their emission-reduction targets, which is more than the World Bank estimates as their emissions-reducing burden. All member states, except the UK, Spain, Finland and Italy, can now meet their reduction targets entirely on Kyoto credits.¹⁰⁵ This, as these commentators conclude, means that 'it is likely that a majority (if not all) of the "reductions" which are being made as a result of the system will take place outside the EU'.¹⁰⁶ In short, the Kyoto credits make it unnecessary to make emission-reduction efforts in EU countries. Robinson and O'Brien derive this point from WWF-UK:

WWF has assessed 9 of the plans (Germany, UK, Poland, Ireland, France, Spain, Netherlands Portugal and Italy) and estimates that between 88% and all of the emissions reductions required under the combined cap for these countries could theoretically take place outside the EU. This could have serious consequences for investment decisions made within the EU by heavy industry – including the power sector – potentially leading to a 'lock in' to high carbon investments and soaring emissions from these sectors for many years to come. This would fatally undermine EU emission reduction targets for 2020 and 2030.¹⁰⁷

¹⁰² Curia Europa, Press Release No. 76/09, Judgments of the Court of First Instance in Case T-183/07 and in Case T-263/07, *Poland v Commission and Estonia v Commission*, 23 September 2009, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-09/cp090076en.pdf>.

¹⁰³ Article 19, Directive 2003/87/EC, note 100.

¹⁰⁴ Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms text with EEA relevance.

¹⁰⁵ Robinson, Hugo and O'Brien, Neil, 'Europe's dirty secret: Why the EU Emissions Trading Scheme isn't working', August 2007, *Open Europe*, p. 6, <http://www.openeurope.org.uk/research/etsp2.pdf>.

¹⁰⁶ *Ibid.*

¹⁰⁷ WWF-UK, 'Emission Impossible: access to JI/CDM credits in phase II of the EU Emissions Trading Scheme', p. 3, http://assets.panda.org/downloads/emission_impossible_final_.pdf.

Why the linking of EU allowances and Kyoto credits was thought a good idea is usually explained thus:

Credits from CDM and JI projects have been historically cheaper than EU allowances, so allowing them into the EU ETS may make it less expensive for participating companies to meet their targets than it would otherwise have been.¹⁰⁸

But how, having bought those cheap Kyoto credits, are ‘participating companies’ meeting their targets? That is, what have they done, other than accumulate credits, to meet them? The unavoidable answer is ‘nothing’, if that is what they wanted to do, for they have bought their licences (carbon credits) to keep their emission levels as they are. And do the vendors of Kyoto credits do more than accept the price of them? Well, not necessarily; if they are non-Annex 1 countries, they have not had to commit to emission-reduction targets. A study by David Victor, a carbon trading analyst at Stanford University, has revealed that two-thirds of the supposed emission reduction credits earned on the CDM system saw no actual reduction of CO₂ emissions anywhere.¹⁰⁹ One must then wonder why all this carbon-credits trading is going on, if it is apparently not driving GHG-emission reduction. Clearly, the essential measure of the success of the EU ETS, and, of course, of the Kyoto emissions trading mechanisms, is whether emission-reducing activity is happening according to the target pledges of the signatures to the Protocol. Just as clearly, those mechanisms are condemned on that measure.

The trade as it exists is directed by investors, given that CERS and ERUs and are now traded internationally along with all manner of IETs. One investor, the Shell Oil Company, freely admits this:

In the EU ETS and CDM/JI markets, the main products we buy and sell are EU Allowances (EUAs), Certified Emission Reductions (CERs) and Emission Reduction Units (ERUs). Additionally, we also trade UK Allowances (UKAs), RECs, GoOs, ROCs, AAUs and eventually EU Aviation Allowances, New Zealand Units, Australian Emissions Units and others.¹¹⁰

One can attribute the fact that CERS and ERUs are not working to bring about GHG emissions reductions to their consumption by international carbon-market traders and investors. That is not the purpose for which the Kyoto Protocol intended them. The solution is to incapacitate the international carbon market. The new international climate law can easily do this on the basis of GATT Article XI(1).

GATT Article XI(1) prohibits the maintenance of quantitative restriction measures, whether they be maintained as ‘quotas, import or export licences or other measures’. But it allows them to be maintained as “duties, taxes or other charges’. Furthermore, no

¹⁰⁸ Department for Business & Innovative Skills, ‘The EU Emission Trading Scheme’, <http://www.berr.gov.uk/whatwedo/sectors/ccpo/EUemissiontrading/page20668.html>.

¹⁰⁹ Victor, David, ‘Life After Kyoto’, Lecture delivered to the Burkle Centre for International Relations, UCLA International Institute, 4 March 2008.

¹¹⁰ Shell Company, FAQs, ‘Frequently Asked Questions about Environmental Trading Markets’, December 2009, http://www.shell.com/home/content/shipping_trading/environmental_trading_solutions/resource_centre/faq/.

WTO agreement prohibits export taxes. And *United States—Measures Treating Export Restraints as Subsidies*¹¹¹ confirmed that export taxes cannot be a state subsidy in the meaning of the SCM Agreement.

The obligation to eliminate specific export taxes has been imposed, as parts of their accession commitments, on countries acceding to WTO membership by existing members. Under the Dispute Settlement Understanding (DSU), such ‘WTO-plus’ commitments are considered enforceable like any other WTO commitment. This was established unequivocally in *China—Auto Parts*.¹¹² But no country has yet thought to impose a tax on the export of carbon credits. So, no country can have made a WTO-accession commitment to abandon it. Nothing, therefore, inhibits an international trade law that makes their taxation obligatory upon member states.

The new international climate law should require that all WTO member states impose an export tax on all carbon credits. The tax should be sufficiently heavy to make them unattractive commodities to traders. That will have two desirable outcomes: the international carbon market will peter out, and carbon credits will stay in the country to which they were issued, their only remaining use the one intended for them: GHG emissions reduction in that country.

The carbon-credits market is a major problem in the GHG emissions reduction effort. It can, fortunately, be resolved in the GATT/WTO context on the authority of GATT Article XI(1). Some equally big problems cannot.

THE EXTRA-WTO MISSION OF THE NEW INTERNATIONAL CLIMATE LAW

Trade law as it stands can constrain carbon-extracting multinationals only on the MFN and NT principles, and then only with regard to state subsidies, provided that such subsidies come to light. That is far less than enough to control those multinationals’ GHG emissions.

CONTROLLING CARBON-FUEL-EXTRACTING MULTINATIONALS

Oil companies must be bound by the standards of behaviour with regard to the environments in which they are operative. Most urgently, they must not be allowed to leave people without the means of moving themselves into an environment that is beyond the reach of the adverse effects of oil and gas extraction. Without a law to regulate them, GHG emissions will not be reduced in the very part of the world most sensitive to the effects of climate change.

The carbon-fuels extractor problem cannot be resolved in the WTO/GATT scheme.

¹¹¹ (Panel Report) WT/DS/194/R, 29 June 2001, para. 8.75–76.

¹¹² *China—Measures Affecting Imports of Automobile Parts*, (Panel Report) WT/DS/339–340–342/R, 18 July 2008, para. 7.740.

Carbon fuel extractors are inevitably multinational companies, and they are not subject to any international convention, for they are not states. Besides, the carbon trade is conducted independently of the WTO. The GHG emissions problem created by these multinationals can be resolved only with the intervention of the United Nations Organisation (UN).

It is, therefore, necessary that a part of a new international climate law be brought into being by UN legislation. The WTO is not a legislative body, and besides, the targets of the desired legislation, the carbon-fuels extracting multinationals, are beyond its jurisdiction, for they are not states. That law should require UN member states intending to allow oil-and-gas-extracting multinationals to operate on their territories to include it in the domestic legislative scheme. Its key provisions of that law should be that these multinationals are (i) subject to the supervision of the Intergovernmental Panel on Climate Change (IPCC), which is also the authority that issues their licences to operate. (ii) The granting of those licences is contingent upon their satisfying the IPCC that their extracting and refining procedures will deploy the best available 'clean' technology, and upon their undertaking that, where environmental degradation and air pollution are inevitable and unavoidable, local populations will be evacuated and relocated at the multinational's expense, and compensated adequately by it for loss of income as a consequence of that multinational's activities. Where a multinational company is already active, it will (iii) apply to the IPCC for a permit to continue that activity, which permit will be granted on the same grounds that a licence to begin operations is granted. (iv) Failure to comply with the provisions of this law will incur the penalty the IPCC sees fit to impose, which may range from an IPCC-imposed fine to referral by it to the International Criminal Court.

A firm UN law along these lines will put a swift end to unconscionable GHG-emissions of multinational carbon fuel extractors, and to their other kinds of destructions of the natural environment and the human and animal health and habitat.

The UN Security Council clearly has the requisite legislative power, in the light of its legislative moves with regard to the terrorism issue with Resolutions 1373¹¹³ and 1540.¹¹⁴ Acting under Article 48¹¹⁵ (a Chapter VII enforcement power) of the United Nations Charter, the Security Council adopted 1373,¹¹⁶ which required action by all states to prevent and suppress the financing of terrorist activities. In practice, this meant that all UN member states were obliged to include this, effectively a Security Council

¹¹³ *Threats to international peace and security caused by terrorist acts*, UN Doc. S/RES/1373 (2001), 28 September 2001.

¹¹⁴ *Non-Proliferation of Weapons of Mass Destruction*, UN Doc. S/RES/1540 (2004), 28 April 2004.

¹¹⁵ The two parts of Article 48 require all UN member States to implement UNSC Resolutions: '1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

¹¹⁶ *Threats to international peace*, note 112.

directive, in their national legislations. Resolution 1540,¹¹⁷ of which the subject is the non-proliferation of weapons of mass destruction, made the same demand.

The difficulty as to which Security Council member state would propose the requisite draft Resolution can be overcome by the IPCC's calling upon the UN Secretary-General to do so. Should it be objected that the climate-change issue is not a Chapter VII matter, for it is not a matter of the preserving of world peace, it can be counter-argued that the 'responsibility to protect' doctrine has acquired a Chapter VII status in the UN with the declaration of the Secretary General that the international community has a responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that the UN is 'prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII' to provide that protection.¹¹⁸ That the Security Council is now well on the way to acquiring an extra-Charter mandate to engage directly in the amelioration of the effects of GHG emissions to which climate change is attributed is now beyond doubt. Perhaps the most influential document to construct this mandate is UN General Assembly Resolution 63/281,¹¹⁹ which explicitly links the UN Security Council's Charter-conferred 'primary responsibility for the maintenance of international peace and security' and the General Assembly's own 'responsibility for sustainable development issues, including climate change', and calls upon 'the Secretary-General to submit to it a comprehensive report to the General Assembly at its sixty-fourth session on the possible security implications of climate change'. Should climate change be found to be a matter of international peace and security, the Security Council's Chapter VII powers are invoked. This enables the Security Council to take all necessary action to maintain world peace, including the use of force.

Muscular legislative intervention is essential to regulate the GHG-emitting activities of oil-and-gas-extracting multinationals. Assurances such as that of Frynas¹²⁰ to the effect that these multinationals are aware of their social responsibilities and are responding to them are well and good. But the present writers submit that a coercive element of the new international climate law that provides as outlined above will assure that theirs are prompt responses to substantive GHG emissions reductions, not mere public relations exercises. Indeed, a climate law that does not discipline oil-and-gas extractors would be feeble, given that this sector is one of the grossest emitters of GHG.

¹¹⁷ *Non-Proliferation of Weapon Mass Destruction*, note 113.

¹¹⁸ *Implementing the responsibility to protect, Report of the Secretary-General*, UN doc. A/63/677, 12 January 2009. It is arguably a crime against humanity to render the earth unable to sustain human life. The UN was able to incorporate the 'responsibility to protect' doctrine into the UN regime, despite the fact that there is no Charter basis for doing so. Having done that, there is no reason why it cannot now expand its current list of 'crimes against humanity' to include 'destruction of the habitable environment'.

¹¹⁹ *Climate change and its possible security implications*, UN doc. A/RES/63/281, 11 June 2009.

¹²⁰ Frynas, Jedrzej George, 2009, *Beyond Corporate Social Responsibility: Oil Multinationals and Social Challenges*, Middlesex University Press.

CONCLUSION

One objective of this paper was to make out our case that the international distributive justice model we advance would serve as a much better core principle of the WTO legal regime than does the MFN principle. We illustrated the fundamental unfairness of the MFN principle that distributes WTO obligations *erga omnes partes*, and thereby disregards the enormous differences in the capacities of WTO member states to bear those obligations. We illustrated also the visible propensity of the MFN principle to frustrate development rather than promote it, and we pointed to the fact that this principle is in any case much dissipated by FTAs, and by the wealthy developed countries' ability to set it aside when it suits them. We conclude that, in the light of the MFN weaknesses we have pointed out, and if we have succeeded to construct a persuasive model of international distributive justice, then we have attained this objective.

This paper's other objective was to devise a new international climate law that is suitable for achieving the task of reducing GHG emissions. We proposed that such a law is, like WTO law, necessarily a law of obligations, and, as with regard to WTO law, the obligations it imposes must be allocated on the international distributive justice principle. We demonstrated that the law we propose has the effect of forging the hitherto absent relationship between MEAs and the GATT/WTO legal regime, and that this law is fully compatible with the latter regime, so long as it concedes that it may not dislodge the GATT XX provisions that license the imposition of BTAs for life and environment protection purposes. Having outlined the components of that law, we argued that present arrangements for the disposal of carbon credits such as that of the EU ETS are not working, and the international carbon-credits market is counter-productive. We trust that this works as evidence that a new international climate law is necessary, and that our model for it has taken account of the problems that beset the current legislative schemes that control carbon-credit allocation, and corrected them. Finally, we demonstrated that the treaty powers of GATT/WTO are not in themselves sufficient to achieve an effective climate law because these treaties among states do not have jurisdiction over multinational carbon-extracting companies and private investors. That leads us to propose that the legislative power of the United Nations must be engaged to shape the new international climate law.

It has to be acknowledged that the serious debate on an international legal regime about global climate change is of recent vintage. Ideas to tackle the problems concerned are ever evolving with our increasing understanding of the climate change phenomenon and related new innovations of science and technology and planning of state interventions and interactions. It is still early days to come up with a comprehensive package of legal solutions or means to combat climate change that fare well for all living beings on this planet. Time will respond to that phenomenon as it unfolds before mankind!

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