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JUST TRADE UNDER LAW: DO WE NEED A THEORY OF JUSTICE FOR INTERNATIONAL TRADE RELATIONS?

The panel was convened at 2:45 p.m., Friday, March 31, by its chair, Joost Pauwelyn of Duke University School of Law, who introduced the panelists: Christian Barry of the Carnegie Council on Ethics and International Affairs; Susan Esserman of Steptoe & Johnson LLP; and Frank Garcia of Boston College Law School.

INTRODUCTORY REMARKS BY JOOST PAUWELYN[†]

Thabo Mbeki, the president of South Africa, recently described today's international distribution of wealth as "global apartheid." The accident of birth is not to be born black instead of white, but to be born in, for example, Africa instead of Europe or the United States.¹

Zooming in on the specific field of international trade relations, there can be no question that, with the advent of the WTO and over 300 preferential trade agreements, we do have a lot of "law." Yet is the notion of "justice" relevant? Does it make sense to apply the general theme of this year's ASIL conference—"A Just World Under Law"—to the field of international trade? Is it relevant when people say that developed countries have a "moral" obligation to end agricultural export subsidies or to open their markets to goods from poor countries?

For most people, trade "law" is simply the result of state-to-state bargaining, that is, politics. Yet, when crafting trade agreements or settling trade disputes, does "justice" matter? Does it have an influence in the process or outcome? Should we take the notion of "fair" trade seriously, or is it a weak excuse for rich country protectionism?

If justice matters, that is, if there is scope for a theory of justice for international trade, be it in negotiations or in dispute settlement, then we might learn from domestic theories of justice. The question then, however, is whether it is appropriate to transplant those theories to the international sphere.²

International trade has long been dominated, first, by economists (who tell us about the *effects* of trade) and, second, by lawyers (who tell us how trade is, or could be, *regulated*). One piece traditionally missing in this puzzle is philosophers: they can inform us about how trade *ought* to be structured for it to be just or fair. For example, when we negotiate a new trade agreement, settle a trade dispute or simply engage in trading, should we opt for utilitarianism, that is, trade is "just" for as long as it increases overall global welfare? Or, rather, should the benchmark be that even if overall global welfare increases, we can only move when not a single nation is made worse off (Pareto-optimal)? Looked at from a different angle, is trade "just" only if the poorest of this world, wherever they live, are made better off? Or should we go further and take account also of relative gains: if so, it would not be enough to create welfare for the poorest, we should then also compare their gains with the gains made by the rich and, where necessary, redistribute between people. Put differently, should the WTO only be in the business of creating welfare (make the pie larger) or also

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¹ Joel P. Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid,"* 6 J. INT'L ECON. L. 3 (2003).

² Joost Pauwelyn, *Book Review: Just Trade,* 37 GEO. WASH. INT'L L. REV. 559 (2005).

redistribute (fairly share the pie)? In sum, does “just trade” simply mean “go ahead and trade as much as you can” or does it mean something more, as in “just” or “fair” trade?

It is too easy to laugh away the notion of justice and trade as quaint or purely academic. Yet governments, the main actors in trade negotiations, are made up of people, and elected by people. As ethical and moral obligations play a role for many individuals, they must necessarily reflect also on government decisions; if not in formal trade negotiations or before WTO panels, then at least in the court of public opinion.

WHY TRADE LAW NEEDS A THEORY OF JUSTICE

*By Frank J. Garcia**

I. DOES TRADE LAW NEED A THEORY OF JUSTICE?

I'd like to begin by noting what today's question itself might imply. It may suggest to some that trade law does not already have a theory of justice, and to others perhaps even that it does not need one. Both implications would be mistaken. In my remarks I would like to make four points: first, that trade law necessarily involves theories of justice; second, that while the notion of trade and justice can raise several objections, these objections can be answered; third, that contemporary trade discourse reveals that in fact we already have a dominant theory of trade justice, utilitarianism, which needs to be “outed” as such and seriously re-examined; and finally, to illustrate the kind of work that is going on, and needs to go on, if we are going to take justice seriously in trade law.¹

Let me take a first casual pass at our question by juxtaposing a different one: does our federal income tax law or health care delivery system need a theory of justice? To this question we generally answer yes. Our income tax and health care systems are both fundamental social institutions involving significant resources, and both systems involve decisions about how those resources are allocated. In such cases we intuitively want to know if those decisions are fair.

Theories of justice play an essential role in answering that question. Tax law and health care are two areas in which academics and policy makers routinely refer to principles of justice in working out their intuitions about fairness, and in analyzing, criticizing, and proposing reforms for these institutions.

In a similar sense, I think we would be inclined to say that trade law also needs a theory of justice. The international trade law system (for example, the WTO) involves significant resources, and decisions about how those resources are allocated. So, as with tax law or health care policy, we intuitively want to know, is it fair?

However, to go beyond this immediate intuitive level and answer in a more rigorous way, we need to consider a few elements of political theory: what does justice involve? What does a theory of justice do? One way to understand the idea of justice is as “right order.” Through their decisions, social institutions produce some kind of social order, and we have many tools and disciplines with which to evaluate this order. The task of justice, in particular, is to ask whether these social decisions and institutional outcomes are “right” and consistent with a community's core values.

* Professor, Boston College Law School.

¹ Throughout these remarks, I summarize arguments which I make at greater length in my book on trade, justice, and the problem of inequality. See FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (2003).

How do we know if the inquiry of justice is relevant to a given situation? One way is to look at whether the situation involves public decision making about social goods. When people use social institutions to make decisions allocating social goods, this is the domain of justice. The decisions which these institutions make, and their method of decision making, are evaluated according to principles of justice.

Trade law is one such social system, part of what Rawls calls the “basic structure”—that set of major institutions, including economic arrangements, which together distribute fundamental rights and duties and determine the division of the advantages from social cooperation. If we think about the scope of WTO law, for example, we can see that trade law involves numerous decisions allocating social goods such as wealth, economic opportunity, trade-related knowledge, preferences, market access, etc.

To say that trade law does not need a theory of justice suggests that we need not consider the normative implications of this allocative system, that the question of fairness is irrelevant. We don't say that about any other social institution—why would we say that about trade law?

II. OBJECTIONS TO THE APPLICATION OF THEORIES OF JUSTICE TO TRADE LAW

There are several kinds of objections one can make to the idea of justice as applied to international institutions. To begin with, one can assert on a variety of grounds that global institutions lack the necessary underlying social predicate for the application of justice. If you are a realist or Hobbesian, for example, you can object that there is no international society that makes justice a coherent concept. Similarly, if you are a contractarian, you can object that there is no global social contract to make global justice binding. If you are a communitarian, you can object that there is no global community of the sort necessary to support obligations of justice. If you are a relativist, you can object that there is no global normative consensus giving rise to truly transnational norms of justice.

In my view, the first three objections share two common traits: first, they assume or assert that the social basis for global justice will be the same as the social basis for domestic justice. I am not sure this is correct, and it certainly needs to be argued. For example, taking the contractarian objection, it may be that for global justice we do not need a full-blown social contract on the domestic model. If there is enough cooperation to create new burdens and new wealth, and there is a need to decide how to allocate these burdens and this wealth, then this may well be enough for justice to apply, at least minimally.

Second, all three fail to take fully into account the effects of globalization. While the communitarian objection, for example, raises important theoretical questions about the nature and possibility of global justice, the world has changed while the debate continues. Within these space constraints I can suggest, but not argue,² that trade and globalization are changing the nature of global social relations such that the whole question of political community is transformed. The paradigm political community of justice—the nation-state—is no longer self-sufficient; its wealth distributions are fundamentally conditioned by transnational and global institutions. This means that even “domestic” justice cannot be fully understood without reference to global institutions, creating what might be called “limited community”—for example, in the global economy—and necessitating at least a limited theory of global economic justice.

² I am currently working on a fuller treatment of this phenomenon. A preliminary draft is available as *Globalization, Global Community and the Possibility of Global Justice*, BOSTON COLLEGE LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES No. 56 (Feb. 3, 2005), available at <<http://www.ssrn.com/abstract=661564>>.

Turning to the fourth, relativist, objection that, given the lack of global normative consensus, it is impossible to arrive at a shared/non-hegemonic theory of justice, I would offer two points. First, many scholars, including our panel chair Joost Pauwelyn, think international human rights law offers the soundest basis for a global theory of justice precisely because it offers a positive normative consensus.³ Second, even if you disagree with this view, and object to the whole enterprise on relativist grounds, it must still be admitted that we are required to apply our own theories of justice to our own policies and their effects on global trade. Relativism does not excuse us from our own moral obligations.⁴

Finally, there is another type of objection, which can be called the “egoist” objection, in which one may simply refuse to look at trade through the lens of justice, because one is currently in the winner’s position. This objection is closely linked to my third overall point, namely that there is in fact a dominant theory of justice in contemporary trade discourse, and it is utilitarianism.

Any account of trade law that is not purely descriptive already presupposes a theory of justice, even if it is never made explicit. As Joost Pauwelyn points out in his introductory remarks, if we look normatively at contemporary trade discourse, we see that in fact it already presupposes or embodies a theory of justice, namely utilitarianism. In its economic version, utilitarianism tells us that trade policy should be judged by its effects on efficiency and aggregate welfare. This is definitely *a* theory of justice, not *no* theory of justice; it is *a* view on the question of what qualifies as right order, and instructs social institutions how to make allocative decisions.

So in an important sense, the question is not “does trade law need a theory of justice?” but “why do we so often avoid discussing the question of trade and justice, and avoid making explicit the theory of justice already at work in trade discourse?” This gets back to the egoist objection. When looked at from this point of view, this objection appears to be in reality an assertion, namely that the current dominant utilitarian theory of trade justice works just fine for the objecting party. In other words, “I am in the winner’s position in the aggregate welfare calculus, so it is best to keep the whole conversation of justice off the table—it isn’t going to improve my position.”

Let me suggest that, whatever its normative shortcomings, this view is fatally short-sighted. Elsewhere I have written that the literature on the social psychology of justice sounds a warning note here: among human beings, the perception of injustice provokes the strongest possible emotional reactions.⁵ Put another way, we ignore perceptions of injustice at our peril—they lead to instability and social conflict of a sort which we see today both globally and in the efforts to resolve current trade policy issues in Doha.

III. CONCLUSION: TAKING TRADE JUSTICE SERIOUSLY

In conclusion, if we are going to take justice seriously in trade law, what do we do? A good starting point is to be explicit about our dominant utilitarian theory of justice, and engage the debate head-on concerning whether this is an adequate theory of justice. As a

³ Joost Pauwelyn, *Book Review: Just Trade* (reviewing TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE), 37 GEO. WASH. INT’L. L. REV. 101 (2005).

⁴ This is one reason why in my book, I try to suggest what just trade might involve for wealthy liberal states in particular. It has also been recently argued that the justice concepts of particularly influential states such as the U.S. have a disproportionate impact on the normative approach of multi-lateral institutions such as the WTO, Americo Beviglia Zampetti, *Fairness in the World Economy* (2006).

⁵ Frank J. Garcia, *Trade, Justice and Security*, in TRADE AS GUARANTOR OF PEACE, LIBERTY & SECURITY? (Padideh Ala’i et al., eds.) (ASIL Studies in Transnational Legal Policy, 2006).

theory of just trade, utilitarianism can be critiqued on several grounds. For example, one can argue that by focusing on efficiency and aggregate measures of welfare, utilitarianism is insensitive to distributive justice, and prejudicial to non-economic values. At the same time, we should continue to develop other models of trade justice. Let me close by outlining some of the work being done and yet to be done on this front.

First, there is increasing interest at the level of political theory on the question of global justice. This work is developing both at the private party/transaction level of justice, such as in the work of Christian Barry⁶ and Hillel Steiner;⁷ and at the level of public or structural principles of justice, such as in the work of Simon Caney,⁸ Luis Cabrera⁹ and others.

There is a growing body of literature from within the legal academy applying principles of justice to economic law institutions. In my own work, I have tried to develop a liberal theory of just trade based on the work of John Rawls that subjects trade law to the strictures of the Difference Principle: are inequalities in trade working to the benefit of the least advantaged? If not, they are not just and need to be addressed.¹⁰ Other scholars are working with alternative liberal principles of justice. John Linarelli, for example, is working with contractarian notions of fairness, using the work of T. M. Scanlon and others.¹¹ James Gathii is taking a very different approach involving procedural fairness, looking at how to make the WTO fully responsive to all its members, as a condition precedent to substantive fairness.¹² It is especially important in this kind of work to draw on the kinds of insights which lawyers such as my co-panelist Ambassador Esserman, with experience within trade institutions, can bring to the theoretical enterprise.¹³

I would like to suggest four areas for further exploration. First, there is more work to be done applying other liberal theories of justice to trade law, such as Dworkin's equality of concern and respect. Second, there needs to be more work within the legal academy with non-liberal theories of justice (communitarianism, for example) and their implications for global institutional schemes and ambitions. Third, the basic work on trade and justice should be extended to other international economic institutions such as the World Bank and the IMF, in order to develop a comprehensive theory of justice in international economic relations. Finally, there is growing interest in using human rights instead of political theory as a platform for global justice, in the work of Joost Pauwelyn,¹⁴ Thomas Pogge,¹⁵ Ernst-Ulrich Petersmann,¹⁶ and others.

Whatever model of just trade you incline toward, the most important normative point to accept is that trade law operates within the domain of justice, and that nothing wholesome

⁶ See Remarks by Christian Barry, *infra* p. 380.

⁷ HILLEL STEINER, *Exploitation Among Nations* (manuscript on file with author).

⁸ SIMON CANEY, *JUSTICE BEYOND BORDERS* (2005).

⁹ LUIS CABRERA, *POLITICAL THEORY OF GLOBAL JUSTICE* (2004).

¹⁰ That is one way to understand the Doha agenda. See Frank J. Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT'L & COMP. L. REV. 291 (2004).

¹¹ John Linarelli, *Principles of Fairness for International Economic Treaties*, in *TRADE AS GUARANTOR OF PEACE, LIBERTY & SECURITY?* (Padidah Ala'i et al., eds.) (ASIL Studies in Transnational Legal Policy, 2006).

¹² James Gathii, *Fairness as Fidelity to Making the WTO Fully Responsive to All Its Members*, 97 ASIL PROC. 157 (2003).

¹³ See Remarks by Susan Esserman, *infra* p. 384.

¹⁴ *Supra* note 3, at 112-14.

¹⁵ Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT WHO OWES WHAT TO THE VERY POOR* (Thomas W. Pogge ed., forthcoming).

¹⁶ Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407 (2003).

can be gained by ignoring or concealing this fact. Taking trade justice seriously can have far-reaching consequences, perhaps costly in the short run, but leading to a more stable, as well as more equitable, global economic system.

REMARKS BY CHRISTIAN BARRY*

This panel asks “do we need a theory of justice for international trade relations?” To answer these questions sensibly, we need an adequate account of what the concept of justice means and whether it is applicable to international trade relations, suitably defined. My comment here does three things: (1) it briefly characterizes the concept of justice, indicating the ways in which it might apply to international trade relations; (2) it briefly examines some actual debates about the justice of international trade relations, indicating how difficult it often is to identify what the real sources of these disagreements are; and (3) it identifies four general issues that a comprehensive conception of justice in international trade relations must provide an account of.¹

I. JUSTICE AND ITS APPLICATION TO TRADE

The Concept of Justice

Justice and injustice are *core* ethical predicates, which are broad in applications, complex in structure, and morally deep in content. They are *broad in application*, since many different kinds of things are said to be just or unjust. We speak variously of persons *being* unjust, for example, when they typically fail to consider the feelings of others. We refer to the conduct of individual and collective agents (persons, firms, states, etc.) as *treating* others unjustly—such when these agents fail to deal with others evenhandedly or show them respect. We also sometimes claim that social institutions *affect* or *treat* persons, groups, or collective agents unjustly—for example, when they include rules that allocate scarce resources or valued occupations and positions of authority on the basis of such apparently ethically arbitrary characteristics as race, gender, or religious affiliation. Finally, we judge outcomes—such as the fact that some people are much worse off than others through no fault of their own, or perhaps that people whose conduct toward others is fair suffer terrible misfortunes while others who conduct themselves unfairly enjoy good fortune—as unjust.

The concepts of justice and injustice are complex in structure. Social institutions, such as laws governing what kinds of things can be owned, how they can be acquired, transferred, relinquished, and forfeited, the manner in which decisions concerning trade policy and the monetary system are made, and so on, can be judged to be *distributively* unjust—perhaps because they leave many badly off and a few very well off; *procedurally* unjust—perhaps because they systematically disadvantage some in economic competition; or *metaprocedurally* unjust—perhaps because these arrangements were first fixed when many who should have had some say in their content were excluded from voting or other forms of political participation.

The concepts of fairness and unfairness are also *morally deep* in content. To call an institution unjust is to claim that there are strong reasons to reform it, and to claim that a person is treating another unjustly is to claim that they have strong reasons to alter their

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¹ I have elsewhere tried to indicate what some of the requirements of justice in international trade relations are. See CHRISTIAN BARRY & SANJAY REDDY, *JUST LINKAGE: INTERNATIONAL TRADE AND LABOR STANDARDS* (forthcoming 2007). Draft and supporting materials are available at <<http://www.alternatefutures.org>>.

conduct. Indeed, unlike reasons to act charitably, beneficently, or kindly, reasons based on justice are usually taken to state quite stringent ethical requirements. This is perhaps particularly true with respect to the ethical assessment of social institutions. Reasons based on justice to reform some social rule, such as electoral procedures that exclude many competent adults within a country from voting for political representatives, for example, are generally taken to be not only stringent but *decisive* unless undertaking such reforms will likely bring about still greater injustice elsewhere in the social system.

Justice and International Trade Relations

International trade relations consist of: (1) the specific exchanges of goods and services between nations and the persons, firms, and other collective agents within them; and (2) the formal or informal rules and norms that govern the exchange of goods and services between nations and the persons, firms, and other collective agents within them.

Discussions of justice in international trade relations, then, may relate to three domains: (1) the conduct of nations (and those based within them) in their trading relationships with other nations (and those based within them)—the specific exchanges of goods and services in which they engage; (2) the formal or informal rules and norms that govern the exchange of goods and services between nations (and those within them); and (3) the outcomes brought about by specific exchanges and norms and rules governing them.² Those who deem considerations of justice to be applicable to international trade may nevertheless differ significantly with respect to the *content* and *scope* of the requirements of justice in this area. That is, they may differ not only about the *content* of conduct requirements—for example, whether bullying, coercion, and deception in trade relations are permissible—but also about whether outcomes of trading activity can be deemed just or unjust considered independently of the conduct that brought these outcomes about.

II. KINDS OF DISAGREEMENT ABOUT JUSTICE IN INTERNATIONAL TRADE

The WTO ministerial meeting in Hong Kong—the most recent of the Doha development round talks—confirmed the salience of the debate on trade, which has generally focused on the question of whether the evolving WTO system, which aims to liberalize trade in goods, capital, ideas, and (to a lesser extent) people within a multilateral and market-oriented framework, is fair or just. Some activists, academics, and policy makers have increasingly voiced concerns that the trade system is seriously unjust, or, at the very least, not as just as it might be. Others have rushed to its defense, arguing that even if this system is not the best of all possible trading systems, it is certainly the best that can be feasibly realized in the world today.

Disagreements about the justice of the WTO system are sometimes purely empirical, concerning only the best means to achieve shared ethical objectives. In such cases, advocates of opposing positions agree on the considerations that are relevant for determining the justice of these rules—they share the same *conception* of justice in trade—but nevertheless disagree about how these considerations apply to a particular case because they disagree on relevant facts. That is, we can have purely empirical disagreements about the justice of the WTO's

² I say “may relate,” since the position that there are no requirements of justice with respect to international trade relations is at least not incoherent. It may be argued, however implausibly, that in a competitive world of self-seeking nations such as our own, nations may do *whatever they wish* to further their interests in their trading relations with others.

agreement on intellectual property rules (the TRIPS agreement) because of divergent predictions of how TRIPS will serve the shared goals of ensuring access of poor people to life-saving drugs and protecting the property rights of those who create life-saving drugs.

However, the debate is often underlined by divergent views on more fundamental questions of principle. In such cases, advocates of opposing positions may agree on all the relevant facts but disagree about whether some arrangements are just. We may thus agree completely in our predictions of the likely effects of the TRIPS agreement, yet still disagree about its justice. This might happen because we attach different importance to the goals of ensuring access to certain medical treatments and protecting the property rights of those who create socially beneficial products.

It is often very difficult in practice to determine what kind of disagreements are really at issue. Consider, for example, two statements on the outcome from Hong Kong. Oxfam's spokesman Phil Bloomer commented: "Rich country interests have prevailed yet again and poor countries have had to fight a rearguard action simply to keep some of their issues on the table."³ In contrast, WTO's director-general, Pascal Lamy, described the WTO as a "healthy and democratic common institution" in which decision-making is "burdensome and cumbersome" yet "remains the best way to take decisions that impact directly the lives of billions of people."⁴ Lamy's rejection of Bloomer's diagnosis may be due either to the fact that he feels that rich country interests did not indeed prevail, or because their having prevailed is part and parcel of a healthy democratic institution, and therefore cannot be viewed as a serious ethical problem.

Even when it seems that fundamental disagreements of principle are at stake, their precise nature often remains unclear. This is in part because debates about global trade have been riddled with accusations of bad faith, and also because both sides have often opportunistically invoked principles that support their side of the argument, without thinking through their argument's broader implications—and perhaps purposefully ignoring them.

III. FOUR FUNDAMENTAL ISSUES

The previous section suggests that there is great need for reasoned debate about the principles that might be deemed relevant for evaluating the justice of global trade, and the modifications of the trading system (if any) that a plausible conception of justice in trade would demand. What might some of the different issues at stake here be?⁵

The first issue is that of the appropriate *domains* of trade. That is, what kinds of goods and services should be traded? It is widely held that some goods and services—those related to child prostitution, for example—should not be traded at all. And it is also often claimed that while some goods and services can be traded, they can only be traded for certain other types of things. Hence it might be argued that while a legislator may permissibly offer to lobby for and support an initiative that he might disfavor if the legislator sponsoring this initiative will make like efforts on behalf of future initiatives that the legislator now offering help will sponsor in the future, he may not offer such support in exchange for financial reward.

³ Emad Mekay, *Subsidies Concession Largely Symbolic: NGOS*, ONE WORLD SOUTH ASIA, Dec. 20, 2005, available at <<http://southasia.oneworld.net/article/view/124399/1/>>.

⁴ Pascal Lamy, Speech, Ministerial Conference, Sixth Session, Hong Kong (Dec. 13, 2005), available at <http://www.wto.org/english/news_e/sppl_e/sppl15_e.htm>.

⁵ Here I draw on joint forthcoming work with Sanjay Reddy.

The second issue is that of the *process considerations* relevant to trade. Three types of process considerations may be deemed important. The first focuses on the nature of particular trades (exchange of goods and/or services) themselves. A conception of justice in trade may claim that to be legitimate, trades must not involve bullying, coercion, or various forms of deception. The second focuses on the potential relevance of prior trading activity to present trades. However free of bullying, coercion, or deception a trade of some good may be, it may be deemed illegitimate if this good was previously stolen from its rightful owner, or if past transfers of this good involved bullying, coercion, or deception. The third focuses on the nature of the production process by which some good or service is produced. Goods that are produced through the use of slavery or the worst forms of child labor, or which arose from a process that caused grave harms to the environment, for example, might be deemed ineligible for trade. The first two types of these process considerations may be relevant not only to trades, but to systems of trade rules. That is, whether international trading rules have been agreed to as a result of bullying, coercion, or various forms of deception may be deemed relevant to their legitimacy. And even if some rules have indeed been agreed to in a way that has not involved such interactions, an account of justice in trade may nevertheless maintain that the legitimacy of these rules is seriously called into question if past interactions between countries making such agreements involved bullying, coercion, and so on.

The third issue relates to *what kinds of agents* can engage in trade or in making agreements on trade rules. It might be maintained, for example, that children or mentally incapacitated persons cannot engage in trades even of those goods that they rightfully own. It might also be claimed that certain types of governments, notably those that fail even to be minimally representative of the interests of their people, are not at liberty to trade its natural resources. Similar considerations may apply to the making of trade agreements. The rules of international trade are decided or agreed to by particular governments, and that particular government's decision is binding on all people in the country that live at present, as well as those who will live in the future. Because of that, we may wish to ask whether these governments ought to meet requirements in order to be deemed legitimate rule-making agents in international trade.

The fourth issue relates to *terms of exchange*. A conception of justice in trade may claim that, to be legitimate, an exchange of goods and services must not involve one of the trading partners getting less than equal value for what they provide to the other. Of course, conceptions often differ because they employ different notions of value. Proponents of "objective value," for example, might hold that a worker receives less than equal value for her labor if the costs of producing that labor cannot be covered by the amount that they receive for it. In contrast, proponents of "subjective value" maintain that the worth of some good or service is no more than the maximum bid it would receive in an auction. But, as Hillel Steiner has pointed out, even proponents of subject value may hold that a worker receives less than equal value for her labor even while embracing an account of "subjective value"—either because potential bidders who would have offered more than the amount received by the worker were forcibly barred from such bidding, or because their capacities to bid were unjustly undermined.⁶

All actors' positions with regard to international trade involve, implicitly at least, views about these issues. Yet they rarely realize that it is with respect to their views about these issues and the principles informing them in which their disagreements are rooted. Taking a

⁶ HILLEL STEINER, EXPLOITATION AMONGST NATIONS (manuscript on file with author).

step back and revisiting these questions is where the greatest potential lies for moving the debate forward in a more constructive way.

REMARKS BY SUSAN ESSERMAN*

The topic of our panel, “Just Trade Under Law,” is one of enormous complexity, both theoretically and practically. I am not a philosopher, but in the discussion on this panel I hear some familiar issues which are part of the trade policy discussion: Should we go beyond reliance on pure trade liberalization? Should we take measures to compensate for or avoid the adverse effects of trade liberalization? Especially, should we have special measures to help the poorest? These are the issues in the trade policy discussion and I going to talk about the topic from that vantage point.

The simplistic take is that free trade or trade liberalization is a silver bullet to achieve justice, because it promotes global welfare, or because it is often suggested that everyone benefits. Of course, we know that is not so, but the fallback position is that everyone benefits more than under other alternatives.

The history of the trading system—and our participation in it—suggests much broader goals than mere trade liberalization. Indeed, the original impetus and conception for the GATT, as one of three Bretton Woods institutions, was to promote world stability and peace, to rebuild Europe, and to boost the world economy—reflecting a moral and practical stake in the well-being of other countries. Trade liberalization and greater trade were not seen as an end in itself but, rather, as a means of promoting higher standards of living and progressive development.

The concept of justice in the trading system has evolved over the years. As developing countries joined and struggled to participate in the trading system, the concept of special and differential treatment and less than full reciprocity for developing countries was introduced. The Marrakesh Declaration, accompanying the founding of the WTO, called for sustainable development and a desire for a fair and more open multilateral trading system.

These broader values have been infused in the WTO system. However, the effectuation of these goals has been increasingly difficult, particularly with a membership of 150 countries with such a wide disparity in income levels and varying national experience. Consensus on substantive standards of justice is hard enough to achieve on the national level. Although not an exact parallel, we can look to our own domestic experience for ideas for an approach to justice in the international trading system.

The paradigm in the United States and other liberal democratic societies is that markets should be used where markets work. Those who lose as a result of the functioning of the market should be saved from falling below certain minimum standards. Where markets do not work, regulation should be used to avoid the negative consequences of monopoly.

Within such societies, there is often an attempt to tinker with the market, to inject some result that is different from the unfettered result because it is considered, in some sense, that this would be more just. On the plus side of this approach, there are no such things as perfect markets, so why not tinker with them? On the minus side, it is difficult to find a standard other than the market that everyone agrees upon. So in principle, while we sometimes tinker with the market, the main way to compensate for the side effects of market forces is to resort to other instruments, such as training, education, refundable tax credits for the working poor, welfare, small business loans, etc.

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This approach—market-based but tempered by a safety net mechanism—should be at the core of a just trading system. It is essential that there be an effective adjustment mechanism to permit countries to adopt measures to assist industries adversely affected by trade liberalization. There must be frank recognition that international trade and the operation of the trading system create winners and losers within countries—at all levels of development. While the WTO itself, of course, cannot guarantee outcomes either on a country or sector level, the system must afford adjustment mechanisms for industries, companies, and workers who are adversely affected by trade liberalization. Even the drafters of the GATT recognized this by providing for a safeguard.

One of the regrettable results of a series of WTO panels and Appellate Body decisions has been the virtual decimation of the safeguard mechanism, leaving governments with much less room for maneuvering in providing adjustment aid. These tribunals have adopted a narrow reading of the safeguard agreement and function, treating it as an exception rather than integral to the working of the system. By requiring that imports be recent, sudden, substantial, and unforeseen in order to permit a safeguard remedy, the tribunals have essentially ruled out safeguards for industries facing longer term adjustment due to trade liberalization—a result I do not believe was intended in the GATT.

In this time of rapid change and intensified globalization, as developing countries are opening their markets for the first time, as developed and developing countries face severe dislocation from the emergence of major new players on the global stage, such as India and China, a viable safeguard mechanism is all the more essential. And without such a safety valve mechanism, there will be undue resorting to anti-dumping measures. It is imperative that we revive the safeguard mechanism, and safeguard rules should be renegotiated. The trading system should facilitate—not impede—adjustment at the national level to ease the pain of globalization. The facile characterization of the safeguard mechanism as “rich country” protection is short sighted.

Second, a just trading system requires measures to integrate the least-developed countries into the system. This necessitates an increasingly nuanced and differentiated approach. Capacity building, aid for trade, extended deadlines for meeting obligations, and lower trade liberalization requirements and formulas are all important elements.

We have begun and should continue to move away from a broad and undifferentiated dichotomy between developed and developing countries, in which all developing countries are lumped together in one group. Advanced developing countries, such as Brazil, India and China, should shoulder responsibility and open their market to the least developed countries. Further, advanced developing countries should be graduated and no longer receive special treatment. While politically difficult, this issue should be confronted in the trading system.

In this area, I commend to the audience an interesting study recently completed by the Carnegie Endowment for International Peace. The author, Sandra Palaski, suggests two principles that might be used to evaluate—and adjust—trade policy in light of adverse effects on trade policy and equity:

If a proposed trade policy change is likely to worsen poverty, it should be rejected or offset by changes that have a high probability of offering better opportunities to groups likely to be affected. Second, the international community should agree to apply the principal that trade policy changes that produce benefits that are likely to accrue to only

small numbers of firms and households while inflicting economic harm on larger number of firms, individuals, or households will not be adopted.

Just as in the domestic model, the objective cannot be to guarantee outcomes but, rather, to create the most equitable opportunity for countries to participate in the trading system. Nor can success be measured by reference to broad trade or macro performance, as governance, education, and peace and stability all may have greater influences on these macro outcomes than trade.

Third, a just international trading system requires that the trading system not undermine other social values, such as minimum or core labor or environmental standards. And ideally, wherever possible, we should seek to promote both trade liberalization and these broader goals. The *Shrimp/Turtle* decision is an example of how the system currently permits accommodation of both values.

Clearly, the WTO has a responsibility, but should not carry the whole load, on these social issues. Progress and implementation, however, are difficult, given the lack of consensus on these social values internationally.

Fourth, rule of law and transparency are also crucial to a just system. Rules, backed up by dispute settlement, level the playing field for the less powerful countries, enabling resolution of disputes based on the rule of law rather than power politics. Transparency can boost perceptions of legitimacy as well as enhance the ability of smaller countries with less resources to participate in the system.

These aspects of justice are essential to our participation in the system and to continued political support for the system. And, a broader and more equitable sense of purpose is vital to wider public support for the WTO.