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A “Fair” Trade Law of Nations, or
A “Fair” Global Law of Economic Relations?

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I. Intro

Our conference focuses on a particular international trade dispute – actually a series of inter-related cases – known as the *Softwood Lumber* dispute, and the institutions we have created to manage such disputes: international economic law, the WTO, NAFTA, and national courts.² In particular, we are being asked to consider how this dispute reflects, and contributes to, the larger debate between those who advocate free

¹ Professor, Boston College Law School. The author would like to thank Russell Miller and Rebecca Bratspies for the invitation to deliver this address, and the conference participants for their many insightful comments. Particular thanks go to Tomer Broude, Chi Carmody, Jeffrey Dunoff and Joost Pauwelyn for their very useful comments on earlier drafts of this essay, and to Matthew Hoisington and Daniel Blanchard for exceptional research assistance. Portions of this essay are adapted from an earlier essay on globalization and legal theory, *Globalization and the Theory of International Law*, 11 INT’L L. THEORY 9 (2005). Both essays are drawn from a larger ongoing project on globalization, available in draft form as “Globalization, Global Community, and the Possibility of Global Justice,”

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=661564.

² See Chi Carmody, *Softwood Lumber Dispute (2001-2006)*, 100 AM. J. INT’L L. 664 (2006). The WTO cases considered are, in order, Panel Report, United States--Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, WT/DS236/R (Sept. 27, 2002), Appellate Body Report, United States-- Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R (Jan. 19, 2004), Appellate Body Report, United States--Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004), and Panel Report, United States-- Investigation of the International Trade Commission in Softwood Lumber from Canada, WT/DS277/R (Mar. 22, 2004). The NAFTA cases considered are, in order, In re Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel Aug. 13, 2003, June 7, 2004, Dec. 1, 2004, May 23, 2005, Oct. 5, 2005, & Mar. 17, 2006), In re Certain Softwood Lumber Products from Canada, Final Affirmative Antidumping Determination, USA-CDA-2002-1904-02 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel July 17, 2003, Mar. 5, 2004, & June 9, 2005), In re Certain Softwood Lumber Products from Canada, Final Affirmative Threat of Injury Determination, USA-CDA-2002-1904-07 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel Sept. 5, 2003, Apr. 19, 2004, & Aug. 31, 2004), and In re Certain Softwood Lumber Products from Canada, Order, ECC-2004-1904-01USA (NAFTA Ch. 19 Extraordinary Challenge Comm. Aug. 10, 2005).

trade, and those who advocate fair trade.³ In this essay, I propose to offer the largest possible context I can in which to examine this dispute and this question, and what they both mean for the evolution of these institutions. That context is globalization.

But first, a word about the question I pose in the title of this essay. Behind the debates over free versus fair trade, it is generally assumed that the object of the inquiry is the fairness of any one state's position vis-à-vis another state. This is certainly a legitimate and important inquiry. However, I think this debate also reflects a deeper underlying assumption about the nature of trade law, economic relations, and global social relations generally. This has been called the "society of states" model of international relations, and it has been the dominant contemporary account of the social basis of international law for over three hundred years.⁴ In this view, international law exists to order a community in which states are the members.

This is where globalization comes in. The phenomenon of globalization has been widely studied in recent years, and I will say more about it shortly. Let me just suggest at the outset that as a social process in which space is essentially eliminated as a factor in social relations,⁵ globalization is altering the nature of global social relations. By lifting relationships out of the strictly territorial into the "global" or meta-territorial, globalization is subjectively altering our inter-personal experience, and shifting regulatory processes away from the nation state, both of which are contributing towards

³ On the "free trade" versus "fair trade" debate, see, e.g., PATRICK LOW, *TRADING FREE* 27–30 (BROOKINGS INSTITUTION 1993) (discussing calls for "fair trade" as a search for reciprocity and a demand for unilateral government intervention).

⁴ See CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 67-123 (PRINCETON UNIVERSITY PRESS 1979) (overview of the society of states model of international relations, superseding earlier Realist paradigm).

⁵ See, e.g., ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* (STANFORD: STANFORD UNIVERSITY PRESS 1990) p. 64 (globalization as interdependence without differentiation of time and space); DAVID HARVEY, *THE CONDITION OF POST-MODERNITY* (OXFORD: BLACKWELL PUBLISHERS 1988) p. 240. Held?

the emergence of something that could be called global society, and perhaps even global community.

The significance of globalization lies in its transformation and extension of social interactions beyond national boundaries. Thus globalization itself is creating the kinds of social relationships at the global level, which make justice both possible and necessary. This has fundamental implications for the nature of global social policy, particularly international law and international trade law, which brings me back to our subject today. The “fair” trade debate presupposes two independent contending foes, a “me” versus a “you,” a “mine” versus a “theirs.” If what I am suggesting about globalization is correct, then we are moving beyond such terms, into a realm of “us” and “ours.” When viewed in this light, the *Softwood Lumber* dispute in fact demonstrates how we employ shared institutions to help us determine what is best for our shared social space, and in the process contribute to the creation and definition of that space.

II. Beyond the Society of States

The dominant contemporary account of the social basis of international law has been the “society of states” model.⁶ In this view, to the extent that international law constructs an ordered social space (a claim contested since Hobbes if not before), it is a social space in which states are the subjects. In other words, international law exists to order a community in which states are the members.

This view of international law as regulating a society of states has two important normative implications, both flowing from the model’s core analogy of states to persons.

⁶ See generally BEITZ, *supra* note 4, at 67-123 (overview of the society of states model of international relations, superseding earlier Realist paradigm).

First, it asserts a strong view of state autonomy: like persons in domestic society, states in international society are viewed as autonomous sources of moral ends, immune from external interference.⁷ Second, there is no principle of distributive justice to which states are subject; they are presumed to be entitled to the resources they control.⁸ Taken together, this approach can be called the “morality of states” model of international justice.⁹

We can see this approach played out doctrinally in many key areas. For example, the core doctrines of non-intervention, self-determination and state responsibility treat the state as the primary locus of autonomy, self-realization, and rights, and are framed largely in view of the interests and needs of territorial states. Even international harms to individuals have been traditionally understood within a framework of harm to a state’s rights. In all cases, the analogy between states and persons controls, and it is the state’s liberty and rights which are defined as primary subjects of the law.¹⁰

Pressure to shift away from this model began in earnest in the mid-20th century, through human rights, international economic law, and the emergence of international civil society, all of which render the “society of states” model increasingly deficient both empirically and normatively. Criticisms of current international law and institutions point to the changing role of the state, the emergence of new actors and networks, the lack of democratic participation and legitimacy, the lack of distributive justice, and the lack of

⁷BEITZ, *supra* note 4, at 65-66.

⁸ Beitz has analogized this to 19th century liberalism at the international level: “a belief in the liberty of individual agents, with an indifference to the distributive outcomes of their economic interaction.” *Id.*

⁹ *Id.*

¹⁰ To cite just one example of the doctrinal pre-eminence of this view, the society of states model underlies the entire approach to international law taken in the Restatement of Foreign Relations Law. The Restatement asserts that “international law is the law of the international community of states,” and “states are the principal persons in international law.” All other entities with any personality (international organizations and natural persons themselves) derive their personhood, and the extent of their legal rights in international law, from grants flowing from the primary persons: states. Restatement p. 16-17, 70-1.

basic welfare rights and security for all individuals. All this points to the limits of the model, but what is to replace it?

III Globalization, Global Society and Global Community

The dominant contemporary project to reconfigure international law at the theoretical level emphasizes the fundamental moral status of individual persons, drawing on the work of Kant and others, and goes by the name “cosmopolitanism.”¹¹ Such efforts, however, run into a variety of theoretical problems, including important communitarian objections to the possibility of global justice, on the ground that justice is a virtue *within* political communities, not *between* them.¹² This objection fits well with the “society of states” model, freezes us in a bi-polar “fair” trade debate, and helps keep the justice conversation out of international law.

Globalization is, however, changing the nature of this debate. By effectively eliminating both time and space as factors in social interaction,¹³ globalization is changing the nature of global social relations, and creating the basis for both society and community at the global level. Viewed from the perspective of political theory, globalization is lifting relationships out of the strictly territorial into the “global” or meta-territorial.¹⁴ The political and legal significance of this change is immediate and fundamental: as the space in which we conduct our social relations changes, our manner

¹¹ See generally Charles Beitz, “Cosmopolitan Liberalism and the State System,” in *POLITICAL RESTRUCTURING IN EUROPE* (BROWN ED. 1994) (surveying contemporary cosmopolitanism).

¹² See generally DAVID MILLER, *ON NATIONALITY* (OXFORD: CLARENDON PRESS 1995), MICHAEL WALZER, *SPHERES OF JUSTICE* (NEW YORK: BASIC BOOKS 1983) (raising general communitarian objections to global justice).

¹³ For a comprehensive overview from a legal perspective of globalization as a phenomenon, emphasizing changes in the perception of time and space, see Heba Shams, “Law in the Context of ‘Globalisation:’ A Framework of Analysis,” 35 *INT’L LAWYER* 1589 (2001).

¹⁴ *Id.*; see generally *GLOBAL TRANSFORMATIONS* (HELD, ET AL. EDS 1999) (reviewing evolution of meta-state institutions).

of regulating those relations must change as well. To be effective, regulatory decisions must increasingly involve the meta-state level. Globalization thus requires a fundamental re-examination of social regulation and governance at the global level, leading to a system in which states may still have a preeminent role, but not the only role.¹⁵

For our purpose here, we need to understand how globalization is changing the nature of social relations, at the national and at the “global” levels, and paving the way for global society, global community, and for global justice, even on communitarian terms.¹⁶ This change has a fundamental impact on the possibilities open to international law, and on the way we understand and manage disputes such as *Softwood*.

A Globalization and the Conditions of Justice

First, as a threshold matter, it is important to understand how globalization is getting us to “society” before we consider how it might be getting us to “community.” In order to do this in a preliminary fashion, I will use Rawls’ concept of the circumstances of justice, and apply it to globalization.

Globalization is bringing about at the global level the conditions which make justice both possible, and necessary, at the domestic level, which Rawls calls the circumstances of justice.¹⁷ Rawls lists five circumstances: a moderate scarcity of resources, a shared geographical territory, a capacity to help or harm each other, and, subjectively, that people are both non-altruistic, and hold conflicting claims.¹⁸ These circumstances make it rational to cooperate for our mutual self-interest, and necessitate

¹⁵ See, e.g., ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (PRINCETON UNIVERSITY PRESS 2004); MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (BLACKWELL 1996).

¹⁶ My treatment here draws on a fuller exposition of these issues in my working paper on globalization. See *supra* note 1.

¹⁷ JOHN RAWLS, *A THEORY OF JUSTICE* 126-130 (Harvard Belknap 1971) (overview of circumstances of justice).

¹⁸ *Id.*

the elaboration of principles of justice, and institutions, through which to allocate the fruits of such cooperation.

The key point is that globalization is bringing about the same circumstances of justice at the global level, which Rawls described at the domestic level. To begin with, there is of course the same basic scarcity of resources at the global level. Through globalization, people are increasingly competing for the same resources on a global scale in a shared territory: our planet. That they are non-altruistic and assert conflicting claims over these resources does not need to be argued.

Because of globalization, we also now have the capacity to help and to harm each other at the global level as well, to an unprecedented degree. Through globalization, we increasingly find that we have a capacity to effectively respond to the needs and concerns of others beyond our boundaries, through the transnational mobilization of information, power, capital, or public opinion.¹⁹ Because of globalization, we also increasingly find that our state's policies, and our own political and consumer choices, are influencing the life prospects of others in direct and dramatic ways. The globalization of markets means that in many cases we are directly profiting from the economic and social conditions in other parts of the world. Thus, completing Rawls' basic conditions, we have the capacity to harm each other as well.

Together, these global circumstances of justice offer one kind of argument for global society, making justice both possible and necessary at the global level. A second,

¹⁹ CHARLES JONES, *GLOBAL JUSTICE* 9 (Oxford University Press 1999). Even David Miller, a communitarian critic of global justice, acknowledges that the "prosaic observation that the rich countries now have the technical capacity to transfer large quantities of resources to the poorer countries," makes a prima facie case that such transfers have become morally obligatory. "The Limits of Cosmopolitan Justice," in *INTERNATIONAL SOCIETY* 164 (MAPEL AND NARDIN EDS. 1998).

more ambitious argument is that globalization is going farther than creating merely global society, and is creating global community, at least to a limited degree.

B. Globalization and Community

For communitarians, concepts of justice depend upon the prior existence of social relationships, which create obligations of justice by defining the principles, subjects and objects of justice.²⁰ In other words, society is more than the field of application for justice: it creates justice itself. No society, no justice.

To be more precise, communitarians speak of the absence of *community* at the global level, as something “deeper” than mere society. Communitarians maintain that although we may share a common humanity and mutual interests, we do not share obligations of justice unless we already share certain kinds of social relations, usually identified with the nation, and generally expressed in terms of shared traditions, practices and understandings.²¹ Put another way, communitarians might grant the existence of some kind of global society, consisting of associations for mutual self-interest, but distinguishable from true “community,” which requires something more, reserving “justice” for the latter.

That something more is generally expressed as a sense of common purpose, or solidarity.²² For Walzer, it is a society’s shared life which determines justice, and not the other way around. Justice therefore requires a prior community, in which all relevant distributive decisions take place according to shared traditions, practices and

²⁰ See, e.g., *supra* note 12; The communitarian critique of cosmopolitan global justice is only part of its larger critique of liberal justice, and liberalism generally. See Allen E. Buchanan, “Assessing the Communitarian Critique of Liberalism,” *Ethics* 99 (1989) pp. 852-82 (summarizing this critique).

²¹ Communitarian theorists differ on the precise nature of these necessary relations, and in general this aspect of communitarianism is under-theorized. See Buchanan, *supra* note 20, at 867.

²² *Id.* at 856-57 (community requires more than association – shared common ends).

understandings of justice. In Walzer's words, justice "is rooted in the distinct understandings of places, honors, jobs, things of all sorts, which constitute a shared way of life."²³

This is where globalization, once again, comes in. Essentially, my argument is that globalization itself is contributing to the emergence of such shared traditions, practices and understandings at the global level, making global justice possible even for communitarians.

One basis for global community is the globalization of knowledge. Through globalization, we know so much more, immediately and intimately, about the plight of people in other parts of the world. One specific type of shared knowledge important to globalization is the growing recognition of the risks we share as human beings on this planet, and our shared interest in addressing those risks. In this sense, globalization is creating what has been called a "community of risk."²⁴

Such knowledge satisfies a basic requirement for community – that we have the capacity to know another's needs, concerns and preferences. This kind of knowledge is the basis for creating solidarity, that leap of the moral imagination which says that your concerns are my concerns.

This community of knowledge and risk is also, increasingly, becoming a community of shared traditions, practices and understandings. These grow, both spontaneously and institutionally, out of our perception of shared needs and interests, of our capacity to help and to harm, and our awareness of each other's plight – in short, our understanding of globalization as interlocking our fates. Despite the reality of conflict

²³. See WALZER, *supra* note 12, at 314.

²⁴ Dirk Messner, "World Society – Structures and Trends," in GLOBAL TRENDS & GLOBAL GOVERNANCE 24 (KENNEDY, ET AL. EDS. 2002).

over social practices and values, we are increasingly a part of many sorts of global social networks.²⁵ Moreover, commentators suggest that at least at the political level, there is an emerging consensus, or shared understanding, around the importance of markets, democracy and human rights.²⁶

C. Globalization, Markets, and Meta-state Institutions

I would like to focus on two particular aspects of contemporary globalization, markets and the meta-state institutions which regulate them, as particularly relevant to a discussion of the implications of *Softwood*, and particularly indicative of global shared understandings and the emergence of global community, at least in their respective realms.

1. Market Society as a Set of Shared Practices

To the extent that globalization is creating a global market society, this in itself is a shared practice or set of practices, albeit quite complex, contributing to a community of interests. The advanced capitalist form of market society practiced by the most developed countries is not, of course, implemented in identical ways even in all market societies.²⁷ Nevertheless, market society has certain attributes – the need for bureaucratic regulation, recognition of private property, and functioning civil courts, to name a few – which by virtue of their significant spill-over effects contribute to the formation of shared

²⁵ Examples include multi-national corporations, NGO's and various organs of international scientific cooperation.

²⁶ This consensus can be seen at the level of positive international law, and also normatively, insofar as the world's leading religious and philosophical traditions can be said to converge around this triad. David R. Mapel, "Justice Diversity and Law in International Society," in David R. Mapel and Terry Nardin, (eds.) *INTERNATIONAL SOCIETY* (PRINCETON UNIVERSITY PRESS 1998) p.247. .

²⁷ Indeed, markets have been touted on instrumental grounds precisely because they can facilitate efficient transfers among people who do *not* share conceptions of the good. Jon Mandel, "Globalization and Justice" 570 *Annals Am. Acad. Pol. & Soc. Sci.* 126, 130.

interests among participants.²⁸ Not the least of these is an interest in developing institutions which supplement and mitigate the rigors of capitalism, compensating the “losers” through some form of wealth transfer.

2. Shared Understanding of the Need for Meta-State Institutions

Perhaps the strongest force for, and evidence of, an emerging global limited community involves our shared need to look to institutions beyond the state in order to frame an adequate social response to many of the problems and challenges we face. In other words, the need for increased global governance is itself a shared understanding, and the reality of global governance by its nature constitutes a shared practice. The prominent role of meta-state institutions in *Softwood* is a particularly apt illustration of this trend.

Globalization’s many aspects are together pushing us towards increased cooperation at the meta-state level. In Rawls’ account of the circumstances of justice, our response to these circumstances is to enter into systems of social cooperation for mutual advantage. Through this cooperation we create the “basic structure,” the institutions which we employ to allocate resources and opportunities, and which thereby directly affect our life prospects. By leading us to create new institutions and shift responsibility for many social allocations to the meta-state level, globalization is creating a global basic structure.²⁹ Social allocation today is increasingly conducted through a complex partnership, consisting of states and their constituent units; international organizations;

²⁸ See e.g. Don Slater and Fran Tonkiss, *MARKET SOCIETY* (Cambridge: Polity Press 2001) pp. 92-116 (surveying range of institutions which markets require/are embedded in).

²⁹ For an interesting analysis of the issues presented by the possibility of a global basic structure, see Simon Caney, “The Global Basis Structure: Its Nature and Moral Relevance,” (Sep. 2, 2004) http://www.allacademic.com/meta/p58933_index.html (paper presented at the annual meeting of the American Political Science Association).

and non-state actors through mechanisms such as the market; all regulated or established through international law.³⁰ Through globalization we find ourselves in precisely the sort of cooperative venture for mutual advantage that is the subject of justice, and allocating the fruits of social cooperation (trade opportunities, for example), through meta-state institutions such as the WTO, NAFTA and the EU.

This move to the meta-state level could be seen as *merely* tending towards the creation of global society, which in the communitarian view does not entail global community. However, I would like to suggest three ways in which this shift towards the meta-state level has profound communitarian consequences.

First, this shift indicates that the communitarian assumption of bounded distributive communities no longer holds at the nation-state level, necessitating a shift to a “higher” or “more inclusive” level of community in which all relevant distributive decisions are taken – the global level. Walzer describes the political community of justice as one “capable of arranging [its] own patterns of division and exchange, justly or unjustly.”³¹ When a community is no longer capable of fixing its own patterns of division and exchange, it is no longer sufficient to analyze the justice of that community with sole reference to itself.³² In other words, unable to fix its own distributions entirely itself, it is not capable of delivering its own justice. We must therefore look to that

³⁰ The many players and institutions involved in *Softwood* – trade associations, national courts, regional institutions and multi-lateral institutions - dramatically illustrate this point. All of these institutions, both within their individual jurisdictions and in some sense together, were involved in allocative decision-making concerning fair or unfair lumber practices in the North American lumber industry. See *supra* note 2; see also JONES, *supra* note 19 (“The institutions and quasi-formal arrangements affecting persons life prospects throughout the world are increasingly international ones (citing as examples international financial institutions, multi-national corporations, the G-8 and the WTO)...”).

³¹ WALZER, *supra* note 12, at 31.

³² This also resembles the point raised earlier about the tenability of Rawls’ assumption of self-contained national distributive communities, in his analysis of domestic justice. See RAWLS, *supra* note 17.

further level of institutions which is affecting that community's distributions, and to its justice.

This is precisely the effect of globalization.³³ From a distributive perspective, globalization is revealing domestic society to be an incomplete community, incapable of securing the overall well-being of its members by itself, leading to a higher level of community as part of group efforts to secure well being.³⁴ This is exactly the pattern we see in *Softwood*, as participants are forced by evolving international legal obligations and the changing nature of the market itself, to seek definitive resolution of this issue beyond the national courts level, at the level of meta-state institutions. In a similar sense, the many anti-globalization protests focused on multilateral institutions indicates the growing awareness that these institutions are increasingly constraining allocative decision-making at the national level, as well as themselves engaging in positive distributive functions, through the allocation of trade benefits, critical currencies and development aid, for example.

Second, the fact that globalization is forcing us to look to international institutions such as the NAFTA and the WTO for global policy solutions, has a community-building effect as well. The role played by common institutions sharing a common language in building polities out of disparate peoples has long been recognized in domestic politics as "nation-building."³⁵ For example, in the U.S. we reinforce our shared identity as a nation when we together look to the federal level for resource allocations and policy responses,

³³ See Alberto Tita, "Globalization: A New Political and Economic Space Requiring Supranational Governance", *Journal of World Trade*, June 1998, at 49 (globalization leads to internal pressures on states as traditional macroeconomic policy tools "become less and less capable of being determined at a national level by democratically elected governments.").

³⁴ See also Robert P. George, "Natural Law and International Order," in Mapel and Nardin, *supra* note 26, at 54-69.

³⁵ Will Kymlicka, "Territorial Boundaries: A Liberal Egalitarian Perspective," in D. Miller and S. Hashmi (eds.), *BOUNDARIES AND JUSTICE* (PRINCETON: PRINCETON UNIVERSITY Press 2001), p. 256.

as in the case of natural disasters or security crises. Similarly, our tendency to look at least in part to meta-state institutions for responses to global social and environmental problems reflects a shared understanding that such institutions play an increasingly prominent role in formulating or channeling social policy decisions and orchestrating social welfare responses, and that few states can act without them on any important social issue.³⁶ Even the many recent anti-globalization protests, by turning up on the doorsteps of the same international institutions again and again, emphasize the emergence of this shared understanding.

Third, this shift to meta-state institutions represents the emergence of a shared understanding with respect to regulating global social conflict. In domestic communities, one answer to the problem of conflict is to change the level of analysis to “understandings about understandings,” or “shared public cultures.” When responding to the fact of social conflict, particularly conflict over what are purportedly “shared” understandings, communitarians shift the level of analysis to a secondary set of practices and understandings, a system for managing conflicts over understandings and their application.³⁷

This suggests that communitarians are actually linking justice to a kind of shared institutional culture, rather than a true community of shared primary beliefs.³⁸ If so, this shift to meta-state institutions has profound consequences for global justice. In the development of new forms of meta-state institutional governance, we are also developing

³⁶ The public nature of the *Softwoods* dispute has contributed to a broader shared understanding of how regional trade and integration have linked U.S. and Canadian social policy and even politics.

³⁷ Walzer suggests that disagreements over the meaning of social goods – cases in which a given social understanding is controversial - trigger a sort of “second order” set of understandings concerning how disputes are to be expressed, managed and adjudicated. See WALZER, *supra* note 12, at 313.

³⁸ Perhaps what communitarians are identifying when they speak of the common good is really a commitment to this second-order set of understandings about disputes: the rules about rules, the public culture.

a new form of shared understanding, or rules about rules, at the global level. When global social relations involve conflicts between incomplete national communities of justice over allocative decisions, globalization bumps us up a level, invoking a new shared understanding that the meta-state level is the place to resolve this conflict, according to new understandings regarding appropriate distributions at the global level. Insofar as these global practices deepen and extend, we see stronger shared traditions and practices of global social policy formation and allocative decision-making.

Disputes like *Softwood* and the NAFTA panel process generally can thus be seen as forming part of the meta-state level of shared understandings concerning conflicting global claims. Both the dispute and the institutional processes which managed it are part of an emerging community involving Canada and the US. If so, then the dispute is in some important sense an *internal* one, which by its very nature reinforces and is constitutive of community.

IV. Implications of Globalization for International Law and for the Fair Trade/Free Trade Debate

I am not suggesting that at this point in our history global social relations *in toto* form the sort of full-blown political community which communitarians point to in domestic social relations as their exemplar. In my view, however, globalization is creating a third alternative: global society understood as containing “limited” degrees of community in specific functional areas.³⁹ If we disaggregate the notion of community,

³⁹ Moreover, the trend is towards increasing community. Bruno Simma and Andreas L. Paulus list Rwanda and Somalia as examples of a weak solidarity which can suggest that the concept of global community is either half-full, or half-empty. They decide it is half-full, asking “After all, who would have cared - and

we can see that globalization is creating certain *elements* of community at the global level, such as knowledge of inter-connectedness and the circumstances of the other; and creating true community in certain *areas* of global social relations, such as humanitarian relief and transboundary economic relations, by establishing that degree of social bond necessary to support justice. This means that global society taken as a whole may not rise in all cases to the level of community which communitarians posit, but has *enough* elements of community, and contains enough *pockets* of community, to support an inquiry into justice in at least in some areas of global social relations.

A. International Law or Global Public Law?

If we look at international law as, not the law of nations, but as the law of an emerging global community, then we see two fundamental gaps: the absence of effective mechanisms for global wealth transfers at the scale necessary to support the global basic package; and the absence of effective political representation or voice at the global level.⁴⁰ How we get there, and in the process complete the transformation from international law to global public law, will require a profound re-examination of core international legal doctrines and institutions such as boundaries, sovereignty, legitimacy, citizenship, and the territorial control of resources.

Let me suggest as an example and a starting point, that we must re-think the role of territorial political boundaries. Territorial boundaries now serve as the frame on which we hang various concepts of distributive justice such as citizenship and the territorial control of resources, which profoundly influence the life prospects of all affected

how - a hundred years ago.” “The ‘International Community:’ Facing the Challenge of Globalization,” 9 EUR. J. INT’L L. 266, 276 (1998).

⁴⁰ Jay Mandle and Louis Ferleger refer to this as the need for institutional mechanisms for compensation and control, two fundamental elements of the regulation of global market society. “Preface: Dimensions of Globalization,” 570 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 16 (2000).

individuals. By privileging citizens over non-citizens in terms of access to basic rights, the political boundary of citizenship dramatically affects our life prospects on the basis of one of the most arbitrary aspects of our natural condition – the place we are born. In the words of one commentator, “Citizenship in western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one’s life chances.”⁴¹

Citizenship thus illustrates how the current “society of states” model of international law permits territorial boundaries to function at the global level as one of the main obstacles to the delivery of basic rights. If global community is possible, and emerging, as I have argued, then we have to re-think the discretion given states to use boundaries as primary determinants of global justice.⁴² We need to develop a model for the international delivery of the basic package – a concept of effective global citizenship if you will – in which the accident of birthplace, or the vagaries of naturalization law, do not fundamentally affect each person’s life prospects.

In order to do so, global public law needs to tackle distributive issues both between and within states. The “society of states” model put the question of justice outside the realm of international law. Globalization means that the problem of

⁴¹ Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders,” in KYMLICKA, *THE RIGHTS OF MINORITY CULTURES* (OXFORD UNIVERSITY PRESS 1995).

⁴² As things stand, there is a pernicious anomaly: free movement of capital but no free movement of persons, which could be seen as a deliberate attempt to keep labor costs from equalizing. A global economic space demands something approaching the free movement of persons, subject to some notion of carrying capacity or assimilation rate. The very idea conjures images of unsupportable mass migrations, which are not inevitable, nor are they the necessary result of changes in border policies. The primary reason for such shifts would be economic inequality, a subject which poses a central challenge to global public law.

inequality is a central problem of global social relations, in the same way it is a central problem of justice at the domestic level.⁴³

What should the role of the state be in a global public order? Global community demands a new view of this role, in which the state no longer holds a monopoly on the delivery of basic public goods, but must nevertheless play a central role in such delivery, including that of the guarantor of last resort.⁴⁴ However, this does not mean that global institutions must be modeled on domestic institutions: a sort of world state. Rather, we must see that, in normative terms, global institutions must be justifiable according to the same principles we apply in domestic political theory, whatever their shape. Their legitimacy can no longer rest entirely on their creation by states along duly authorized treaty lines, but will require some increased form of public participation, reflecting normative principles of political theory in the same way that domestic institutions must.⁴⁵

B. The Role of International Economic Law

As a field, international economic law needs to move beyond question of if or whether international economic law is a form of global governance and ask instead how and to what end we are governing? It is no accident that international economic law is *the* site for addressing questions of institutional design, legitimacy and distributive justice. This is so because regulatory globalization is central to globalization as a whole, and because it is in economic relations that we find the strongest international organizations today.

⁴³ See generally FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (Transnational 2003) (arguing a central role for inequality in contemporary international economic relations).

⁴⁴ Indeed, Manuel Castells has argued that globalization is bringing about a new form of nation-state, the “network state,” whose principle duty is to successfully manage on our behalf this web of networks. *THE POWER OF IDENTITY* 242-273 (BLACKWELL 1997).

⁴⁵ See LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (CORNELL UNIVERSITY PRESS 1989).

1 Global Justice and International Economic Institutions

If international economic law is a core part of the global basic structure for delivering economic justice, then we need to analyze, negotiate and structure it with reference to appropriate normative principles. Is international economic law facilitating the kinds of wealth transfers which global justice might require? Is it allocating social goods in a normatively defensible manner? Meeting this challenge has several implications.

First, we need to identify normative principles that are appropriate for application at the global level in a context of pluralism. There is increasing interest within political theory on the question of global justice, at both the private party/transaction level of justice, and at the level of public or structural principles of justice.⁴⁶

To complement this, there needs to be more work within the legal academy applying principles of justice to economic law institutions. There is an increasing interest in the normative aspects of the WTO.⁴⁷ 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.⁴⁸

2 The Effectiveness and Legitimacy of Global Economic Institutions

This converges with the need for increased attention to the legitimacy and effectiveness aspects of international economic law institutions. As lawyers, we have a

⁴⁶ See, e.g., Frank J. Garcia, “Why Trade Law Needs a Theory of Justice,” 100 ASIL Proc. 214, 379 notes 6-9 and sources cited therein (2006).

⁴⁷ Id. at 379 notes 10-12 and sources cited therein..

⁴⁸ See, e.g., Frank J. Garcia, “Global Justice and the Bretton Woods Institutions,” – J. Int’l. Econ. L. – (2007) (forthcoming); Robert Hockett, *From “Mission Creep” to Gestalt Switch: Justice, Finance, the IFIs, and Globalization’s Intended Beneficiaries*, 37 Geo. Wash. Int’l L. Rev. 167, 179-181 (2005).

special responsibility when it comes to such multilateral institutions, which we create to deliver basic public goods independent of nationality, even if still often administered through national units. The central questions in *Softwood* about how these various levels of institutional process should best interact with, defer to, or supersede each other, illustrate the kinds of questions we as lawyers are best equipped to address, particularly insofar as we understand them in the largest possible context.

I have argued in this essay that this context is globalization, and within this context such questions should be seen as the working out of meta-state governance systems for an emerging global community. If this is so, then our political tradition requires that the legitimacy of such institutions no longer rest entirely on their creation by states along duly authorized treaty lines, but depend upon some increased form of public participation, reflecting normative principles of political theory in the same way that domestic institutions must.⁴⁹ This is part of the constitutionalism debate currently carried out in international economic law.⁵⁰

V Conclusion

To summarize, I have argued that in global relations today we see, both inter-subjectively and at the regulatory level, the constitutive elements of a limited global community emerging. Globalization itself is a process of creating a new global identity, consisting of shared understandings, practices and traditions capable of supporting

⁴⁹ See BRILMAYER, *supra* note 45.

⁵⁰ On the constitutional and law-making function of trade institutions, and their shortcomings in this regard, see Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398 (1997); but see Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647 (2005) (arguing that Petersmann's account is descriptively inaccurate and normatively undesirable).

obligations of justice. Members of this new global space are increasingly aware of each other's needs and circumstances, increasingly capable of effectively addressing these needs, and increasingly contributing to these circumstances in the first place. They find themselves involved in the same global market society, and together these members look to the same organizations, especially those at the meta-state level, to provide regulatory approaches to addressing problems of global social policy. These organizations, in addressing such needs, are involved in allocating the benefits and burdens of social cooperation, such as rights, opportunities, privileges, membership and resources, activities that have been traditionally understood in the domestic sphere to make justice both relevant and necessary.

All of this is not to argue that global community has emerged fully formed, with the richness and force of the national community. However, taken together, these developments allow us to begin to speak in important ways of limited degrees of community, or "spheres of justice" to borrow Walzer's phrase, with respect to different issues, institutions or sets of social relations within the global social space. Thus we can speak of "limited global community" in the economic sphere, as embracing that level of "community" necessary to support relations of justice, even if it does not manifest that level of community necessary to speak of "global community" in the fullest communitarian sense.

Returning to *Softwood*, a globalization perspective allows us to see that the many private and institutional participants in the dispute, through pursuing their private agendas and public mandates, have been doing far more than resolving a particular trade dispute. They have been participating in, creating and defining a new trans-border community,

and elaborating the meta-state institutions which both mediate, and help constitute, such a community. In this sense, the dispute is not about ensuring that trade law is “fair” for the U.S. or for Canada, but that it is fair as the public law of an emerging transboundary community.