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Theories of Justice and International Economic Law

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“Theories of Justice and International Economic Law”

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I Introduction

Writing about the relationship between theories of justice and international economic law today requires that we begin with three preliminary points. First, by international economic law we mean the public international law of economic relations between states and, to an extent, between states, individuals and firms, together with the treaty-based institutions (such as the WTO, the IMF and the World Bank) created to implement, monitor and adjudicate this body of law. This field is dominated by legal regimes whose aim is trade liberalization, but includes international financial law and the international law of economic development also.¹ Second, by theories of justice we mean that branch of political theory (going back to Aristotle) that concerns itself with the allocative fairness of social institutions, i.e. how rights, resources, privileges and opportunities are divided among those with a share in the relevant community or enterprise.² And, finally, we note the essential and increasingly recognized relationship between the two: international economic law and its institutions are powerful engines of resource allocation,

¹See John Linarelli, *Introduction (THIS VOLUME)*; Steve Charnovitz, *What is International Economic Law?* 14 J. INT’L ECON. L. 3-22 (2011); Joel Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT’L ECON. L. 33 (1996); see generally, IGNAZ SEIDLE-HOEHENVELDERN, *INTERNATIONAL ECONOMIC LAW* (1999). For reasons of professional familiarity, the authors will primarily draw upon examples from international trade law, but the general issues apply, *mutatis mutandis*, to international economic law more broadly. See Frank J. Garcia, *Justice, the Bretton Woods Institutions, and the Problem of Inequality*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM*, (Chantal Thomas and Joel Trachtman eds. 2009)(hereinafter Garcia, *Bretton Woods*).

²For an overview, see Gillian Brock, *Theories of Global Justice*, (in this volume); See also SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* (2006).

between states and within states among various groups, entities, firms and individuals.³ That relationship is the subject of this chapter.

Given the scope of such an inquiry, why its urgency? There are three reasons why the relationship between justice and international economic law has become increasingly important (and studied). First, the stark figures on global poverty, with an undeniable (but contentious) connection to economic relations between and within countries, have highlighted the stakes involved in this relationship.⁴ Second, globalization and the global justice debates have brought to the fore the key role that international economic law and its institutions play in shaping the contours of the global economy and its opportunities, burdens and resources, putting international economic law and its institutions at the center of global justice.⁵ And, third, the

³ See generally GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW (Chios Carmody, Frank J. Garcia & John Linarelli, eds. 2011); RICHARD MILLER, GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER (2010); FRANK J. GARCIA, TRADE, INEQUALITY AND JUSTICE (2003); Aaron James, *Distributive Justice without Sovereign Rule: The Case of Trade*, 31 SOC. THEORY AND PRAC. (2005); Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement*, 1 LOY. U. CHI. INT'L ECON. L. REV., 209-247 (2004); Joost Pauwelyn, Frank J. Garcia, Christian Barry and Susan Esserman, *Just Trade Under Law: Do We Need a Theory of Justice for International Trade Relations?* 100 AM. SOC'Y INT'L L. PROC. 100, 375 (2006).

⁴ To take just one example, according to the UN Food and Agriculture Organization, there were 925 million undernourished people in the world in 2010, 88% of whom were in Sub-Saharan Africa and Asia and the Pacific; and, as many scholars and organizations have pointed out, the quantity and distribution of food supplies is much more a matter of human agency and regulation than it is of natural conditions. Food and Agriculture Organization, *The State of Food Insecurity in the World* (2010); see ROBERT BAILEY, OXFAM, GROWING A BETTER FUTURE: FOOD JUSTICE IN A RESOURCE CONSTRAINED WORLD, (2011) available at <http://www.oxfam.org/sites/www.oxfam.org/files/cr-growing-better-future-170611-en.pdf>; AMARTY SEN, DEVELOPMENT AS FREEDOM (2000); Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in FREEDOM FROM POVERTY AS A HUMAN RIGHT, 11-54 (Thomas Pogge ed., 2008); see also Chantal Thomas, *Poverty Reduction, Trade and Rights*, 18 AM. U. INT'L L. REV. 1399 (2003); Joel Trachtman, *Trade Law and Global Apartheid*, 6 J. INT'L ECON. L. 3 (2003). The precise nature of the connection between poverty and transnational economic relations is of course a highly contentious question. While scholars debate the nature of this connection, all agree (or better, none disagree) on the existence and importance of the connection. See e.g. Thomas Pogge, *Moral Universalism and Global Economic Justice*, 1 POL. PHIL. ECON. 29-58 (2002); Fernando Tesón and Jonathan Klick, *Global Justice and Trade* in GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW (Chi Carmody, Frank J. Garcia & John Linarelli, eds., Cambridge), (forthcoming) (hereinafter Tesón and Klick, *Global Justice*).

⁵ See, e.g., GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW (Chi Carmody, Frank J. Garcia & John Linarelli, eds., 2011); DAVID KINLEY, CIVILISING GLOBALIZATION (2009); RICHARD MILLER *supra* note 3. Anthony Anghie,

growth and proliferation of such institutions and their increasing agency have brought them into greater and much-needed scrutiny as a form of transnational governance, with respect to their normative underpinnings, legitimacy and allocative effects.⁶

In view of all this, what can theories of justice bring to international economic law and its institutions? First, theories of justice can help us determine the proper objective of international economic law and policy. To a large extent, of course, both domestic and international politics and national self-interest influence the objectives of specific treaties and institutions. But the social analysis of the ends and means of international economic law cannot end with an empirical study of the power and interests which shape it – we must also determine as best we can the proper aims for international economic law according to our understanding of what is helpful, fair and just (and therefore legitimate)⁷, as with any other area of law, policy and the public exercise of political power. And even diplomats, trade negotiators and bureaucrats are influenced by concerns over justice, fairness and progressive social outcomes, within the limits of their institutional mandate and the politics they work with.⁸

Time Present and Time Past: Globalization, International Financial Institutions, and the Third World, 32 N.Y.U. J. INT'L & POL (1999-2000); Frank J. Garcia, *Globalization and the Theory of International Law*, 11 INT'L THEORY 9 (2005); Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and "Constitutional Justice*, 19 EUR. J. INT'L LAW 769 (2008); Mathias Risse, *How Does the Global Order Harm the Poor?* 33 PHIL. & AND PUB. AFF. 349 (2005).

⁶ Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFFAIRS 405 (2006); Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?* 16 GOVERNANCE 73 (2003); Patricia Nanz, *Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory*, in CONSTITUTIONALISM, MULTILATERAL TRADE GOVERNANCE AND SOCIAL REGULATION (Christian Joerges & E-U Petersmann eds., 2006).

⁷ There is a necessary relationship between the legitimacy of transnational state action and its consistency with core political values such as justice, about which more will be said below. *See, e.g.*, LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989) (international acts require 'vertical legitimacy' or consistency with core constitutive political values); *see also* JOHN RAWLS, *A THEORY OF JUSTICE* 4-5 (Belknap Press: 1999)(1971) (hereinafter RAWLS, *THEORY OF JUSTICE*).

⁸ *See* Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347 (1998); James Bacchus, *A Few Thoughts on Legitimacy, Democracy, and the WTO*, 7 J. INT'L. ECON. L. 667 (2004); Robert Howse, *From*

Second, theories of justice can help us evaluate whether or not international economic law as a whole, and specific treaties, rules and institutions, are “fair” or “unfair” according to our various competing understandings of such principles. Amartya Sen has recently written persuasively about the two major differing approaches to such an inquiry: the “transcendental institutionalism” approach in which we seek a single comprehensive view of fairness; and the ‘realization-focused comparison’ approach in which multiple competing views of fairness (and unfairness) help us reach a decision to act against grave injustice according to a variety of reasons.⁹ More will be said about this below, but the essential point is that we need a rich multitude of critical views on fairness and unfairness in global economic relations if we are to persuasively and effectively address social injustice. And, as with any system of social allocation, we can’t afford to ignore questions of fairness and social injustice in international economic law, if for no other reason than that the risk of perceived unfairness and its social consequences is too serious.¹⁰

Third, theories of justice can help us evaluate whether international economic law institutions are legitimate. Legitimacy is implicated in and, in a sense, already underlies any discussion of justice, although the two concepts are distinct. Rawls calls justice the “first virtue

Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading Regime 96 A.J.I.L 94 (2002); but see Thomas Pogge, *Priorities of Global Justice*, 32 METAPHILOSOPHY 6-24 (2001)(characterizing the persistent failure to effectively address remediable global poverty as principally a political failure). Raj Bhala makes an interesting point about this with respect to the Doha Round. Insofar as the Round was initiated in part to address the poverty that contributed to terrorism in Islamic countries, negotiators were motivated to ameliorate, if not eradicate, such poverty through trade. However, as time passed, that motivation was abandoned and current negotiators have become less concerned with the initial aim, adopting a narrower (and more traditional) agenda of advancing domestic interests. *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism; Part One of a Trilogy – Agricultural Tariffs and Subsidies*, 9 U. St. Thomas L. J. – (2011)(forthcoming).

⁹AMARTYA SEN, *THE IDEA OF JUSTICE* 24-27 (2009).

¹⁰Frank J. Garcia, *Trade, Justice and Security*, in *TRADE AS GUARANTOR OF PEACE LIBERTY & SECURITY?* (PADIDEH ALA’I ET AL. EDS., 2006).

of social institutions”¹¹ because one of the problems in a democratic society is the imposition of the will of the majority, upon a minority.¹² Thus the only way to minimize that friction is to construct institutions that are just. As international institutions expand, they compete with national institutions for legitimacy, and thus justice becomes an important metric in how legitimate these international institutions are. Although an institution could conceivably be legitimate even when its aim is not the pursuit of global justice, this claim is less and less true at a time in which global public reason demands that international institutions pursue global justice at least to a certain degree.¹³

There are several ways through which the legitimacy of international institutions can be assessed. The most common way is to look to formal measures of legitimacy such as treaty ratification, or to institutional consistency with broad political values such as democratic participation. Another way to look at the problem of legitimacy that explicitly connects it to the

¹¹RAWLS, THEORY OF JUSTICE 3.

¹² *Id.*, at 319.

¹³ Even a critic such as Thomas Nagel writes of the minimal yet discernible (and meaningful) trajectory of justice in existing international institutions. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 146-7 (2005). See also Ernst-Ulrich Petersmann, *Human Rights and International Economic Law*, (in this volume) (manuscript at 12, on file with authors) (discussing constitutional and justice aspects of public reason with respect to international economic law). Joshua Cohen and Michael Sabel argue that global public reason play an important role in evaluating the legitimacy of international institutions and has seriously impacted the policies and behavior of international institutions. In contemporary global societal and informational infrastructure, international institutions can feel as close to private individuals as domestic institutions creating similar expectations of justice and legitimacy from such institutions in the same way as they do towards domestic institutions. Cohen and Sabel write:

“A transnational politics of movements and organizations—beyond the intergovernmental politics between states—now routinely contests and aims to reshape the activities of supranational rulemaking bodies. Those efforts work in part through protest, in part by representing interests to those bodies, and in part by advancing norms, values, and standards of reasonableness—that is, by suggesting potential elements of a global public reason that might serve as a common ground of argument in assessing the practices and performances in global politics.”

Joshua Cohen and Michael Sabel, *Global Democracy?* 37 NYU J. L. & Pol., 763-797 (2005); for an analysis of global public reason see generally Sebastiano Maffetone, *The Fragile Fabric of Public Reason*, in *The Dialogue: Reason and Reasonableness* [sic] (Yearbook of Philosophical Hermeneutics), 407-440 (Ricardo Dottori ed., 2005).

conversation on justice, is by looking at the goals of these institutions (whether in their charter or ones they have come to assume gradually – both kinds can be found in the WTO) and assess to what degree these institutions are delivering outcomes consistent with these objectives. In this chapter we look at legitimacy from the point of view of what Aaron James has called “internal” approaches to justice, in which one looks either at the mandate and formal structure of an organization as well as its members’ expectations, or at core constitutive elements of the underlying social interaction (here the role of consent in trade as a human experience), and then evaluates the performance of the organization against those “internal” elements.

Theories of justice can also suggest alternative models and specific reforms to make international economic law more fair (and therefore more legitimate), if we decide that it is not particularly fair in whole or in part – our fourth point.¹⁴ It is part of the mandate of international institutions such as the WTO, the World Bank and the IMF that they pursue goals of global justice. Such institutions are controversial in part because of the idea (properly conceived or misconceived) that they are not doing enough in this respect, or that taken as a whole they are responsible for the stark imbalances in global wealth distribution.¹⁵ What theories of justice can offer in this discussion is a fundamental understanding of the role of justice in international economic institutions, which coupled with a close understanding of the operational structure of these institutions can help us formulate both new policy options and benchmarks or metrics for evaluating progress towards a more just arrangement.¹⁶

Finally, and in an overall sense independent of the substantive merit of particular views or institutions, theories of justice offer international economic law actors, students and critics a

¹⁴ An excellent recent example is GILLIAN BROCK, *GLOBAL JUSTICE*, *supra* note 2.

¹⁵ See, e.g., JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 18- 22 (2003); Douglas Arner, *Lending And...: Conditionality* (in this volume).

¹⁶ See “*Conclusion*,” *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW* *supra* note 5.

powerful normative language through which to articulate their goals for international economic law and policy, and their critiques of the system's existing mission, structure, operation and effects. Much as when in interpersonal communication we reach for the language of poetry and ritual to express the significance of a moment, in law we reach for the language of justice to express our deepest aspirations and disappointments with respect to the law itself.

This chapter aims to review the issues and opportunities that arise in the application of theories of justice to international economic law and its institutions, particularly within the context of the global justice debate. We will survey the basic avenues of approach to the subject, the technical and policy issues which arise in the undertaking, specific key topics of interest in this area such as the trade linkage phenomenon and its relationship to justice, and the major obstacles which must be addressed if one is to carry out a sustained normative critique of international economic law and its institutions.

II Justice and International Economic Law

The question of justice and international economic law is at heart nothing more (or less) than the question of fairness: are the rules, institutions and outcomes in transnational economic relations "fair" or "unfair?" However, it is deceptively simple to ask such a question, because the answers lead us into some of the most complicated and contentious issues of economic and political theory today.

Some of the topics and issues that come up when one seeks to answer this seemingly simple question are:

- *What is the proper objective of international economic law?*¹⁷ *Efficiency?*¹⁸ *Fairness?*¹⁹ *Equality?*²⁰ *And how is that aim achieved?*²¹ *Deregulation?*²² *An equal basic package?*²³ *Context-adjusted equality of opportunity?*²⁴ *Constitutionalism?*²⁵
- *What is the metric? How do we know we get there? Growth?*²⁶ *Development?*²⁷ *Poverty alleviation?*²⁸ *Aggregate wealth increases?*²⁹

¹⁷ See generally Ernst-Ulrich Petersmann, *The Future of International Economic Law: A Research Agenda*, EUI Working Paper LAW 2010/6, available at <http://ssrn.com/abstract=1698592>. See also THE FUTURE OF INTERNATIONAL ECONOMIC LAW (William J. Davey and John H. Jackson eds., 2008); THE POLITICS OF INTERNATIONAL ECONOMIC LAW (Tomer Broude, Marc L. Busch and Amelia Porges eds., 2011).

¹⁸ See e.g. Andrea Maneschi, *International Trade Theory and Comparative Advantage* (in this volume); Tesón and Klick, *Global Justice*; Michael J. Trebilcock and Robert Howse, *Trade and Investment*, in THE REGULATION OF INTERNATIONAL TRADE, 335-66 (Rutledge, 2nd ed. 1999); JAGDISH BHAGWATI, FREE TRADE TODAY (2002)

¹⁹ See AMERICO ZAMPETTI, FAIRNESS IN THE WORLD ECONOMY (2006); THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1998); Brian Barry, *International Society from a Cosmopolitan Perspective*, in INTERNATIONAL SOCIETY (David R. Mapel and Terry Nardin, eds, 1998); John Linarelli, *Principles of Fairness for International Economic Treaties: Constructivism and Contractualism* (2006); Barbara Stark, *Distributive Justice and the Limits of Economic Law*, 30 B. C. THIRD WORLD L. J. 1 (2010).

²⁰ See generally, FRANK J. GARCIA, TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE (2003) (hereinafter, GARCIA, TRADE, INEQUALITY AND JUSTICE); RAWLS, THEORY OF JUSTICE; Richard J. Arneson, *Equality*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY, 593-611, (Robert E. Goodin, Philip Pettit, and Thomas Pogge eds. 2007); Gillian Moon, *Trade and Equality: A Relationship to Discover*, 12 J INT'L ECON. L. 617 (2009).

²¹ See e.g., Gillian Brock, *Taxation and Global Justice: Closing the Gap between Theory and Practice*, 39 J. SOC. 161-84 (2008). On the distributive role of international institutions see e.g. CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979) (hereinafter BEITZ, POLITICAL THEORY); Wilfried Hinsch, *Global Distributive Justice*, 32 METAPHILOSOPHY, 58-78 (2001).

²² Tesón and Klick, *Global Justice*.

²³ See Frank J. Garcia, *The 'Fair' Trade Law of Nations, or a 'Fair' Global Law of Economic Relations?* 45 ALBERTA L. REV. 303 (2007); Ernst-Ulrich Petersmann, *Human Rights and International Trade: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier, et. al, eds., 2005).

²⁴ See Daniel Butt, *Global Equality of Opportunity as an Institutional Standard of Distributive Justice*, in GLOBAL JUSTICE, *supra* note 16.

²⁵ See. e.g., ENST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991); Ruth Buchanan, *Legitimizing Global Trade Governance: Constitutional And Legal Pluralist Approaches* 57 N. I. LEGAL Q. 654-672 (2006); Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 INT'L J. CONST. L. 326 (2010).

²⁶ See Stark, *supra* note 17. See also Ravi Arvind Palat, *A New Bandun? Economic Growth vs. Distributive Justice Among Emerging Powers*, 40 FUTURES, 721-734 (2008).

²⁷ See e.g., AMARTYA SEN, INEQUALITY RE-EXAMINED, (1992)

- *What role should human rights play in achieving economic fairness?*³⁰
- *What normative conclusions can we reach about international institutions current or future, and how would those conclusions impact their effectiveness and legitimacy?*³¹
- *What do we do at the international level about distributive problems within states – and the attendant problems of intervention, intrusiveness, kleptocratic regimes and inadequate domestic institutions.*³² *What is the proper role of domestic institutions versus global ones in alleviating poverty and inequality.*³³
- *How is the relevant community of justice constituted where global economic relations and global economic institutions are concerned?*³⁴ *Is it everyone (cosmopolitanism or human rights)*³⁵, *the nation state (communitarianism)*³⁶, *treaty*

²⁸ See e.g., JEAN DRÈZE AND AMARTYA SEN, HUNGER AND PUBLIC ACTION (1989); Onora O'Neill, *Lifeboat Earth*, in INTERNATIONAL ETHICS, (Charles R. Beitz, ed., 1985).

²⁹ See ADAM SMITH, THE WEALTH OF NATIONS (Penguin, 1999) (1776); Teson and Klick, *Global Justice*.

³⁰ See e.g., Ernst-Ulrich Petersmann, *Human Rights and International Economic Law* (in this volume); SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE (2010); HILLEL STEINER, AN ESSAY IN RIGHTS (1994); Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and Constitutional Justice*, 19 EJIL (2008).

³¹ See e.g., Ernst-Ulrich Petersmann, *International Economic Law, "Public Reason", and Multilevel Governance of Interdependent Public Good*, 14 J. INT'L ECON. L. 23-76 (2011); Ruth Buchanan *supra* note 25; Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?* 16 GOVERNANCE 73-94 (2003)

³² See e.g., John Rawls, *The Law of Peoples*, in THE LAW OF PEOPLES WITH THE IDEA OF PUBLIC REASON REVISITED (4th ed., 1999). See also, ETHICS AND FOREIGN INTERVENTION, (Deen Chatterjee and Don Scheid, eds., 2003); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF., 257-296, (2001).

³³ RAWLS, THEORY OF JUSTICE. See e.g. Blake *supra* note 32.

³⁴ See e.g., J. Mandle, J., *Distributive Justice at Home and Abroad*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY, (Thomas Christiano and John Christman, eds., 2009); Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT'L L. J. 1-26, (2008).

³⁵ See e.g., CANEY *supra* note 2. Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, in THE RIGHTS OF MINORITY CULTURES, 331-349 (Will Kymlicka, ed., 1995).

³⁶ See e.g., DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE (2007); but see Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in GLOBAL JUSTICE, 12-66 (Ian Shapiro and Lea Brilmayer, eds., 1999); KOK-CHOR TAN, JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM (2004).

parties (positivism),³⁷ participants in a cooperative scheme for social benefits (contractarians³⁸), all affected individuals (utilitarianism³⁹)?

As a starting point, it is useful to divide approaches to these questions into two basic groups: the “external” approach and the “internal” approach. As will be seen, each plays a vital role in our attempts to answer the questions, and each has its own methodologies, strengths and limitations.

A External versus Internal Approaches to Justice and International Economic Law

The essential characteristic of all external approaches (and most current approaches are external) is that they take a particular normative theory and apply it to a body of law.⁴⁰ They are “external” because the theory underlying the analysis is not “legal” in a positive sense, but comes from moral theory, political theory, or some other branch of social theory that concerns itself with fairness.⁴¹ Put this way, there is nothing exotic or unique about the external approach – it is what we do all the time, every day, when we critique law and its effects.

However, the external critique of international economic law is somewhat less developed than for most domestic law, for a variety of reasons. First, most political theory is developed in a domestic context, which means it must be adapted to an international social context. Moreover, this adaptation/extension must be justified – the fact that the relevant social and economic relations occur across national boundaries raises specific issues with respect to arguing for

³⁷ See Terry Nardin, *Legal Positivism as a Theory of International Society*, in INTERNATIONAL SOCIETY 17-35 (DAVID R. MAPEL AND TERRY NARDIN EDS. 1998).

³⁸ John Linarelli, *What Do We Owe Each Other in the Global Economic Order: Constructivist and Contractualist Accounts*, 15 J. TRANSNAT'L & POL'Y 181 (2005-2006),

³⁹ Robert E. Goodin, *Globalizing Justice*, in RESHAPING GLOBALIZATION: A PROGRESSIVE APPROACH, (David Held and Mathias Koenig-Archibugi eds., 2003)

⁴⁰ See, e.g., Gillian Brock's contribution to this volume.

⁴¹ A wide range of social theory concerns itself with justice and is therefore relevant to the inquiry. See KARL R. SCHERER, JUSTICE: INTERDISCIPLINARY PERSPECTIVES (1992).

transboundary moral obligations, which we inevitably must do with an external critique of a transnational system of law such as international economic law. Finally, for many years the normative critique of the field was dominated by economic theory, which from the perspective of this taxonomy is really just another external theory. However, economists and mainstream trade scholars tended to obscure this fact (willfully nor not) and operate as if economic theory held a privileged place in the analysis of international law independently of these issues.⁴²

In contrast, internal approaches to the question of international economic law and justice begin with a radically different starting point: within the system or phenomenon of economic relations and their regulatory structure, and not outside of them.⁴³ For example, internal approaches to trade and justice (and we discuss two here – James’ structural equity approach and an approach based on consent) begin with trade as an experience or trade law as a system, and seek to articulate those principles inherent in each, which must be respected if trade is to be trade, and if trade law is to function optimally to achieve its social purpose.

Both of these approaches – the external and internal – have unique methodological approaches and will illuminate distinct aspects of both international economic law in general and our specific question of the fairness of the trade law system. We will now discuss in turn both approaches with respect to trade law, illustrating them as we proceed with examples of how each approach works.

B. Engaging International Trade Law through Political Theory

⁴²GARCIA, TRADE, INEQUALITY AND JUSTICE, 14-19.

⁴³ The relevant comparison here is to Fuller’s epochal book *THE MORALITY OF LAW*, in which he sought to develop an alternative approach to the question of law’s morality distinct from the dominant natural law theories which were clearly external in the sense discussed here. Fuller asked of law in general the same question which internal approaches seek to ask about trade law: what are the principles inherent in the system which must be respected if the system is to operate as a system of law, and fulfill its ordained social purpose? These principles are the “internal” morality of law. *See* LON L. FULLER, *THE MORALITY OF LAW* (1964).

In order to develop an external normative critique of trade law, one must first offer a general account of the relationship between trade law and political theory. At first glance, it should seem obvious that trade law raises normative issues and should itself be subject to normative critique by political and moral philosophy. However, it is not in fact so obvious, at least it has not been in contemporary mainstream Anglo-American trade scholarship.⁴⁴ Moreover, the fact that we are dealing in transnational normative obligations gives rise to unique challenges. Therefore, the first step is to develop a general account of the relationship between trade law and political theory that accounts for the possibility of normative claims within international economic law.

1. Engaging Trade and Justice Generally

There is a range of possible avenues through which to establish a basis for normative obligations within international trade law. One approach to the relationship is Lea Brilmayer's "vertical thesis," which treats this as a question of the legitimacy of state action. For Brilmayer, "governmental coercion that extends across international borders is governmental coercion nonetheless,"⁴⁵ and must be justified by reference to some form of political theory, or it will lack legitimacy. Thus, the authority for transboundary state action is ultimately derived from its justification in traditional political morality.⁴⁶ Such justification is "vertical," in that it is drawn "upwards" from the political norms regulating the underlying relationship between the individual and the relevant political institution, rather than "horizontally" according to a notion of ethics between co-equal state actors.⁴⁷ Brilmayer's theory is thus a powerful argument for the moral

⁴⁴ See Joost Pauwelyn, *Book Review: Just Trade*, 37 GEO. WASH. INT'L L. REV. 101-114 (2005) (current scholarly orthodoxy eschews any normative analysis of international economic law).

⁴⁵ BRILMAYER, *supra* note 7, at 11.

⁴⁶ *Id.* at 16-17.

⁴⁷ *Id.* at 2.

coherence of state action: the legitimacy of *all* state acts, both domestic and international, derives from the state's observance of the same set of core political principles.

Another way to ground an external critique of the fairness of trade law is to base the relationship between political theory and trade law on the functional characteristics of trade law as a social institution. The primary impetus towards justice, according to Rawls, is the fact that social cooperation gives rise to certain benefits and burdens, which need to be allocated. For that cooperative social scheme to be just, those benefits and burdens should be allocated according to some relevant idea of what is 'right.'⁴⁸ In Beitz' words, "the requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place."⁴⁹

International economic relations satisfy this condition, because they lead to increases in individual and national wealth through the operation of comparative advantage and principles of efficiency in general. It is through international trade law that the terms of such cooperation are established. Justice is therefore relevant to the operation of the social institutions that effectuate the international allocation of the benefits and burdens of international economic cooperation, principally international trade law and the WTO.

⁴⁸ RAWLS, *THEORY OF JUSTICE* 4-5. Rawls himself did not extend his theory of Justice as Fairness across national boundaries, although many of his followers have. See GARCIA, *TRADE INEQUALITY AND JUSTICE*, supra note 20 at 119-146; see also infra note 69 and accompanying text.

⁴⁹ CHARLES BEITZ, *POLITICAL THEORY* 131. Barry objects to the extension of justice as fairness obligations to international society on the basis of such economic relations, questioning whether such relations are in fact sufficiently reciprocal and dependent. See Brian Barry, *Humanity and Justice in Global Perspective*, in *NOMOS XXIV* 219, 232-34 (J. Roland Pennock & John W. Chapman eds., 1982). As Beitz has since clarified, however, he is not arguing for the necessity of such obligations on the grounds of such relations, but merely for their relevance. See Charles Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 *J. PHIL.* 591 (1983).

Additional alternative approaches to the relationship between trade law and normative political theory could include a cosmopolitan or capabilities approach emphasizing trade law's impact on individuals' life prospects,⁵⁰ or a human rights approach emphasizing trade law's impact on fundamental rights.⁵¹ Naturally, political theories will articulate this relationship in the distinct terms relevant to that theory.⁵² All of these alternatives perform the same conceptual function, namely to articulate the relationship between trade law and normative theory as a general matter, before proceeding to apply a particular theory to trade law.

2 Level of Obligation: Duties between States versus Duties between Individuals

A second preliminary issue involves determining at which level to locate the claims and duties of justice: the state or the individual.⁵³ In other words, does international justice create claims on individuals, or on states?

Traditionally, international law has followed the society of states model, in which the level of analysis is the state, instead of the individual. Thus moral duties, if they exist at the international level, exist between states as moral actors. While more consistent with orthodox

⁵⁰ See e.g. CANEY, *supra* note 2, at 102-47. See also Priscilla Schwartz, *Development in World Trade Law*, J. INT'L. COM. & TECH. 50-60, (2009) The most prominent theory on the relation of international economics and human development is the capabilities approach developed by Amartya Sen with Martha Nussbaum and others. For an overview of the capabilities approach see generally Ingrid Robeyns, *The Capability Approach: A Theoretical Survey*, 6 J. HUM. DEV. 93-117 (2005).

⁵¹ See e.g., Carol C. Gould, *Approaching Global Justice Through Human Rights: Elements of Theory and Practice*, in GLOBAL JUSTICE *supra* note 5; SARAH JOSEPH, *supra* note 30; Gillian Moon, *The WTO-Minus Strategy: Development and Human Rights under WTO Law*, 2 HUM. RTS. & INT'L. LEGAL DISCOURSE, UNSW Law Research Paper No. 2008-10, available at <http://ssrn.com/abstract=1392057> (2008).

⁵² Utilitarian or libertarian approaches would, for example, focus on the utility effects of trade rules or their impact on individual liberty and property rights. See GARCIA, TRADE, INEQUALITY AND JUSTICE 43-53.

⁵³ See generally Gillian Brock, *supra* note 39. *supra* note 5 (sections 3-5, manuscript on file with authors)

international legal theory, this approach is no longer adequate given the post-war human rights revolution, and leads to the sorts of problems raised by critics such as Beitz.⁵⁴

The leading contemporary alternative is cosmopolitanism, which locates all international moral obligations at the level of the individual.⁵⁵ However, cosmopolitanism depends upon a view of international society as composed of persons, not states, which strikes many as empirically unjustifiable, given the many deep political and social divisions among the world's people.⁵⁶

One can also attempt to follow something of a compromise approach, in which the role of justice in international economic relations is a function of our *individual* moral commitments, carried out in the international arena through the state as our moral *agent*. Where individuals cannot effectively act to address moral questions, the moral obligations create a case for moral agency at the collective level: the state.⁵⁷ The obligation to do justice applies to the government of State X as *the agent* of its citizens, stemming from the moral obligations of its citizens, the nature of justice, and the functions and powers of the state. The moral responsibility remains ultimately our own, even if the acts are taken at the collective agency level.⁵⁸

⁵⁴ The state-moral person equation leads among other things to some of the abuses associated with an absolute sovereignty doctrine. See CHARLES BEITZ *supra* note 38, 71-83; see also FERNANDO TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 40-41 (1998).

⁵⁵ CANEY, *supra* note 2.

⁵⁶ This is the standard communitarian objection to the possibility of global justice. However, it can be argued that globalization is changing the nature of global social relations such that the cosmopolitan view of global social relations is increasingly tenable; indeed, in some areas and to some degree, global social relations may even meet more stringent communitarian requirements for justice. See Frank J. Garcia, *Globalization and the Theory of International Law*, 11 INT'L LEG. THEORY 9, 12-21 (2005).

⁵⁷ See e.g. ROBERT E. GOODIN, UTILITARIANISM AS A PUBLIC PHILOSOPHY 28-44 (1995) (discussing the state's responsibility to act as our moral agent, in particular where individual action is barred or inadequate).

⁵⁸ *Id.* at 34-35. Pogge characterizes this as a second-order responsibility, insofar as the principles of justice apply to institutions and not directly to the conduct of persons. Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 50 (1992). Nevertheless, he acknowledges that we still retain responsibility, albeit indirect, for the justice of institutional practices we participate in. *Id.*

3 The Problem of Transboundary Moral Obligation

Our aim in the preceding section was to illustrate approaches to the overall relationship between justice as a general matter and international trade law. Now, we turn to a broad category of objections raised *against* the affirmative relationship between trade and justice, again on a general level, namely objections to the possibility or coherence of transboundary justice at all.⁵⁹

a. Territorial Boundaries and Moral Obligations

The objection that territorial boundaries circumscribe moral obligations may simply express an initial assumption that moral ties must involve relationships “closer to home” than in international society at large.⁶⁰ On more substantive grounds, one might question the possibility of transboundary moral obligations on the basis of the nature of moral obligation itself.

Proponents of this view may, for example, object on communitarian grounds, rooting justice in communal relations of sufficient depth as to preclude such obligations across national boundaries.⁶¹ More ominously, such objections might instead merely mask baser motives such as bigotry, selfishness or insensitivity to others.⁶²

⁵⁹ See generally Samantha Besson and John Tasioulas, *Introduction*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 13-19 (BESSON & TASILOULAS EDS. 2010)(surveying traditional objections to the possibility of a robust normative critique of international law); GARCIA, *TRADE INEQUALITY AND JUSTICE*, supra note – at 86-96 (on which the present survey is based). We do not discuss the broader but related objection to international law’s status as law at all. See *Id.* at 96-102; Besson and Tasioulas 6-13.

⁶⁰ This reaction has deep roots in the Western tradition. See Jon Mandle, *Globalization and Justice*, 570 *ANNALS AM. ACAD. POL. & SOC. SCI.* 129-30, (2000). (“outsiders” were often denied moral standing in early European political thought).

⁶¹ See, e.g., MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 53 (1982); MICHAEL WALZER, *SPHERES OF JUSTICE* supra note 13. As will be discussed below, the social basis of this objection is, however, changing through globalization, such that meta-national obligations of justice may be justifiable even on communitarian grounds. See Frank J. Garcia, *Globalization and the Theory of International Law*, 11 *INT’L LEGAL THEORY* 9 (2005).

⁶² See Samuel Gorovitz, *Bigotry, Loyalty and Malnutrition*, in *FOOD POLICY* 129 (Brown & Shue, eds. 1977).

Under both deontological and consequential approaches to justice, territorial boundaries need not preclude the possibility of transnational moral obligations – quite the opposite.⁶³ Under the deontological approach, the obligation to do justice is founded on a duty one owes to all persons by virtue of their status as human beings⁶⁴. There is no room in this theory for limitations based on the contingent circumstances of national boundaries.⁶⁵ If one has such a duty, one has it absolutely to all persons everywhere.⁶⁶ Therefore, national boundaries may affect our choice of instrumentalities and our overall effectiveness, but they do not affect the nature of the obligation itself.

In a consequentialist approach such as utilitarianism, the fact that one finds oneself separated by a boundary from the object of one’s moral inquiry may affect one’s utility calculus in a material way. The difficulties associated with determining the utility effects of a given act or practice are well-known, and interposition of a national boundary may well make that more difficult.⁶⁷ It may also be even more impractical or expensive to maximize the utility of persons

⁶³ Deontological ethics focus on the nature of acts regardless of the effects of such acts. What is important here is that the act conforms with some moral maxim or norm (e.g. Kant’s categorical imperative). An alternative approach is consequentialism, in which approach territorial boundaries could be considered important because one’s surroundings and circumstances bear on how we morally evaluate an act. GARCIA, TRADE, INEQUALITY AND JUSTICE at 77-82.

⁶⁴ See, e.g., GILLIAN BROCK, GLOBAL JUSTICE *supra* note 2.

⁶⁵ This is most prominently represented by the cosmopolitan strand of justice theory, and has been reflected in the work of prominent international legal theorists for some time. See Gillian Brock, Theories of Global Justice: A Survey (in this volume); see generally Anthony D’Amato & Kristen Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1011, 1042 (1988) (stating that “a national boundary is an artificial, as well as a morally irrelevant, boundary with respect to moral obligations”); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 82-83 (1992) (stating that “[t]he contingent division of the world into discrete nation-states does not transform political freedom from an ethical imperative into a mere accident of history”).

⁶⁶ See Will Kymlicka, *Territorial Boundaries: A Liberal Egalitarian Perspective*, in BOUNDARIES AND JUSTICE 337 (Miller and Hashmi eds. 2001) (one cannot justify borders whose effect is to privilege some groups at the expense of others); see also ONORA O’NEILL, BOUNDS OF JUSTICE (2000). For opposing views, see WILLIAM AIKEN & HUGH LA FOLLETE, WORLD HUNGER AND MORALITY (1995).

⁶⁷ See, e.g., Russel Hardin, *Efficiency*, in COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY, *supra* note 12, at 463-69 (surveying difficulty with interpersonal comparisons of utility, among other difficulties).

across national boundaries, especially if there are corresponding utility costs to others closer to home.⁶⁸

These contingent reasons, however, should not be confused with any necessary formal barrier to the inclusion of the preferences or interests of people across boundaries into such utility calculations. Even if introducing the preferences of foreigners make utility calculations more difficult, it does not alter them in kind. On the grounds of such objections, one might decide against espousing utilitarianism, but one could not on this basis justify utilitarianism at home and something else abroad.

b. Justice as a Function of Specific Social Relationships

Contractarians and communitarians assume that justice is not a general obligation for all people, but is limited to persons in particular types of relationships.⁶⁹ In response to contractarians, it has been argued that such objections are in fact an artifact of social contractarian arguments for political morality, rather than a general limitation inherent to moral obligations by their very nature.⁷⁰ The response to communitarians is more complex, as their objection goes to the nature of justice itself.

⁶⁸ On the debate surrounding Peter Singer's famous (and famously demanding) utilitarian account of global justice in "Famine Affluence and Morality," see Brock, *supra* note – at – (page 4 of her chapter in MS); see generally Tan, *Justice Without Borders* 41-43 (discussing the historical limits of utilitarian approaches and its evolving role in the global justice debate through institutional utilitarianism).

⁶⁹ Theorists as disparate as Rawls and Walzer find common ground in this objection to transnational justice, much to the chagrin of an army of Rawlsians. See, e.g., Leif Wenar, *Contractualism and Global Economic Justice*, 32 *Metaphilosophy* 79 (2001) (critically reviewing Rawlsian and Scanlonian contractualism and their anemic responses to global injustice, and suggesting alternative approaches); *but see* John Linares, *What Do We Owe Each Other in the Global Economic Order? Constructivist and Contractualist Accounts*, 15 *J. TRANSNAT'L L. & POL'Y.* 181 (2006) (suggesting a stronger Scanlonian contractualist account of global justice obligation). On the communitarian objection, see MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (2006).

⁷⁰ Kymlicka, *supra* note 55. For this reason I disagree with Caney (*supra* note 2 at 105-106) that Rawlsian accounts of global justice represent an "institutionalist" cosmopolitan approach, since transnational obligations on this view depend upon contingent circumstances rather than universal obligations.

At an intuitive level, there is a certain plausibility to the assertion that for justice to be possible, there has to be a minimum level of the sort of institutional community Aristotle referred to as “having a share in the constitution.”⁷¹ Accepting for the moment Aristotle’s contention that the applicability of justice is limited to conditions in which social goods are allocated in a context of mutual political and legal relationships, the relevant question is whether international society is such a community. The dramatic evolution of the treaty-based international economic system and the social and economic interconnectedness characteristic of globalization suggest that we may be seeing at least elements of a transnational community of justice emerging at least within certain spheres, such as among the parties to significant global socio-economic treaties.⁷² One could argue, then, that for participants in this regulated global economic order, international economic relations in the contemporary global system satisfy the minimum contractarian or communitarian requisites for a consideration of the claims of justice, namely that allocation of the social goods created by the treaties in question (rights, privileges, advantages and obligations) proceeds according to shared understandings of economic justice informed by the treaties themselves.

c. International Order or State of Nature? Hobbes and Transboundary Justice

Perhaps the most persistent argument against the possibility of transboundary moral obligations is an essentially Hobbesian one: international society is best characterized as a state of nature, in which states independently and aggressively pursue their own interests.⁷³ There is

⁷¹ ARISTOTLE, *NICHOMACHEAN ETHICS*, 402, bk. V, ch. 2.

⁷² See, e.g., Andrew Hurrell, *Global Inequality and International Institutions*, 2 *METAPHILOSOPHY* 34-57 (2001); Frank J. Garcia, *Globalization, Global Community and the Possibility of Global Justice*, B.C. L. SCH. FAC. PAPERS, Paper 33 (2005).

⁷³ See BEITZ, *POLITICAL THEORY* at 4. In the words of one proponent of this view, Stanley Hoffman, devising principles of justice: “is practically meaningless in the international milieu, because...in a milieu where self-help is the rule and where force can always be used by each agent, there is no guarantee whatsoever that these principles

no political authority powerful enough to ensure the security of the actors concerned, nor to guarantee them the means to a satisfying life. Cooperation, if it occurs, is *ad hoc* and unstable, and competition is the order of the day.

In this view, domestic notions of moral obligation have no place in the war “of every man, against every man.”⁷⁴ Under such circumstances as states find themselves in the international arena, it would be irrational to submit oneself to moral obligations in the absence of a government with the power to reward compliance and punish noncompliance.⁷⁵ Consequently, under such conditions “nothing can be unjust. The notions of Right and Wrong, Justice and Injustice, have no place. Where there is no common power, there is no Law; where no Law, no Injustice.”⁷⁶

Whatever its accuracy in the 17th century, the Hobbesian account of international relations is empirically untenable today.⁷⁷ As has been well documented by regime theorists and other critics of international realism, global cooperation, interdependence, and law-based compliance are the new facts of the international arena.⁷⁸ While law-breaking continues to be a fact of international relations, it is law-breaking and not anarchy, a key distinction. In this respect, international society is no different from domestic society, in which law-breaking

would ever stick for very long.” STANLEY HOFFMAN, *DUTIES BEYOND BORDERS* 4 (1978). Thomas Nagel carries this objection forward and restates it in a more sophisticated contemporary form in his Storrs Lectures, published as “The Problem of Global Justice.” Thomas Nagel *supra* note 13.

⁷⁴ *Id.* at 88

⁷⁵ *Id.* at 96.

⁷⁶ *Id.* at 90.

⁷⁷ Beitz identifies four key features of the state of nature that would have to obtain in international relations if Hobbes were to be descriptively correct, and finds that none of the four in fact hold. Those features are: (1) that states are the only actors in international relations; (2) that they have relatively equal power; (3) they are independent in the sense that they can order their internal affairs independently of each others’ policies; and (4) there are no reliable expectations of reciprocal compliance with the rules of cooperation. BEITZ, *POLITICAL THEORY*, at 36. Beitz argues that in important respects the contemporary international system does not resemble this portrait. *See id.* at 36-48.

⁷⁸ *See e.g.* ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

continues to occur within what we would still acknowledge to be a domestic social order capable of justice. Given its empirical inaccuracy, the moral conclusions of a Hobbesian worldview are equally unsupportable.⁷⁹

4. Applying Political Theory to International Economic Law

In the preceding section we have sought to demonstrate how standard objections to transboundary normative obligations are not fatal to the relationship between trade and justice – far from it. One is free, therefore, to build upon one’s general account of the relationship between political theory and trade law, and proceed to adapt one’s specific theory to the social, political and economic context of international economic law and its rules, institutions and systems. Here one encounters the difference between abstract theory, often developed in a domestic social context, and the stubborn complex realities of transboundary social and economic relations and international politics.

a. Engaging Core Theoretical Elements with Core Institutional Realities

One of the most critical elements in a normative critique of trade law is to carefully articulate the specific nexus between institutional activity on the ground and the principles of the theory: how does the specific international, economic and legal character of the situation influence the suitability and application of the theory? Each political theory will have specific core assumptions and principles unique to that theory, which must be specifically engaged with

⁷⁹ I should qualify this to say, unsupportable at least in their strong Hobbesian form. Nagel presents a compelling account of the necessity for more effective transboundary political institutions, even at some cost to legitimacy, before we can meaningfully begin to talk about global justice, characterizing this view as Hobbesian in spirit if not in letter. Nagel, *supra* note 13, at 147. Even Nagel, however, concludes that we are on a positive path towards global justice, albeit on a perhaps more circuitous and less satisfying route than cosmopolitans would desire. *Id.*

the socioeconomic context of trade if the theoretical critique is to be trenchant, and not merely superficial.⁸⁰

As an illustration, we offer the following example, drawn from work on Rawls and trade law.⁸¹ The key normative assumption underlying a Rawlsian account of trade and justice is that differences in natural endowments, and any differences in the allocation of social goods stemming from these natural inequalities, are unmerited or morally arbitrary.⁸² The task of international justice is to furnish principles that will serve both as a standard for evaluating the social response to natural inequalities, and as a guide to social institutions for making distributive allocations that will justify social inequalities. The key to making this translation between Rawlsian justice and trade law lies in understanding the normative significance of markets, not as social mechanisms for resource allocation but as markers for the cumulative effects of natural and social inequalities. In other words, the relative size and strength of markets can indicate to us how many of the natural and social inequalities among states have translated into the relative strength of consumer markets and producer groups.

The primary doctrinal tools within trade law for addressing inequality problems are collectively referred to as ‘special and differential treatment,’ and consist of three main elements: market access, market protection and technical assistance.⁸³ In key ways, each of these tools shifts the relationship between developing country markets and developed country markets in ways significant to both trade patterns and the Rawlsian theory of justice. Applying Rawls’ difference principle to trade law with an understanding of the role of the market as a

⁸⁰ For a fuller discussion of the methodological issues attendant to justice theorizing concerning international economic law, *see generally* Carmody, Garcia and Linarelli, “Conclusion,” in *Global Justice*, supra note --.

⁸¹ GARCIA, TRADE, INEQUALITY AND JUSTICE 82.

⁸² RAWLS, THEORY OF JUSTICE 62-64.

⁸³ GARCIA, TRADE, INEQUALITY AND JUSTICE 31-38.

manifestation of economic inequalities, suggests that in a liberal theory of just trade, market access would need to be established on terms that benefit the least advantaged. Since preferential market access is managed through special and differential treatment rules, this imperative can also be understood as a normative criterion placed upon special and differential treatment law as a condition of the difference principle. Thus the basis for a Rawlsian critique of special and differential treatment – and trade law in general – is established.

C Internal Approaches to the Justice of International Economic Law

Taken together, external theorists operate through essentially the same basic structure: develop a broad, strong principle of justice within a given framework and then address the issues arising from its implementation through international law and institutions. External theorists superimpose principles of justice such as human rights or distributive principles on the present structure of international economic law institutions. Such principles are only loosely related to international economic law institutions as structured presently. The contribution of external theorists is to suggest mechanisms whereby the full application of these principles can be more gradual, nuanced and in keeping with institutional and political realities. However, the impact of such externally based theories of justice has been rather limited and the policy suggestions of such approaches have been criticized for being “at best, of second order concern and, at worst, counterproductive.”⁸⁴

However, there is a way to approach the relationship between principles of justice and international economic law from an entirely different perspective, one that does away with the need for such complex attempts at mediation. To begin with, what if we looked for principles of

⁸⁴ Tesón and Klick, *Global Justice* at 1.

justice *within* the systems and institutions we are studying, instead of outside them?⁸⁵ This is the premise behind Aaron James’ intriguing “structural equity” approach to global justice.

Alternatively, we can begin with our understanding of trade as a phenomenon, which contains within itself intrinsic elements of great relevance to a justice inquiry. This leads to an approach similar to that James, but focused on a phenomenological investigation of trade rather than on the deduction of principles of structural equity from the legal framework of the system. This investigation into the nature of trade as a human experience reveals that many aspects of current trade law and policy mix what is ostensibly trade with something else—exploitation, coercion, or predation. This has important normative and pragmatic implications for global trade policy, and offers us a radically different take on the possibility of and approach to global justice, as well as the institutions within the free trade regime.

1 Structural Equity

In “Global Economic Fairness: Internal Principles” Aaron James examines principles of fairness that are inherent within the global economic system by virtue of the structure of that system. These principles comprise “structural equity,” the manner in which an institution distributes its advantages and disadvantages in order to achieve equitable results.⁸⁶

⁸⁵ See, e.g., RICHARD MILLER, *supra* note 3 at 71 (distinguishing ‘deliberations with a goal of justice internal to the regime from deliberations with external goals.’).

⁸⁶ James distinguishes three principles of structural equity in trade relations. The first principle concerns the harms from trade, that is, certain individuals will be adversely impacted by free trade and measures should be taken by states to alleviate such impact. An example of this principle is the controversial Trade Adjustment Assistance that was attached to the bills of the FTAs between the US and Korea, Panama and Colombia in US Congress. The second principle requires that the gains of trade be equally distributed within a society, or in manner acceptable to all members of that society. The third principle is simply the second principle brought up on a global basis so that trading societies share equally in the gains of trade or distribute those gains in a manner acceptable to them all. Aaron James, *Global Economic Fairness: Internal Principles in GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW* *supra* note 5, (hereinafter James, *Internal Principles*).

Thus, instead of discussing justice in international trade from the point of view of external approaches (such as communitarianism or cosmopolitanism), internal approaches look at the system as it is already structured, and offer a prescriptive analysis rooted in the framework of the trade regime. Through the concept of “structural equity,” which dictates how gains and burdens are shared within a system⁸⁷, we can try to deduce standards of justice, which can be applied to international economic law as a means of evaluating policies and procedures, and offering policy recommendations.

The World Trade Organization can serve as an example. The aim of the WTO is clear: “to preserve the basic principles and to further the objectives underlying this multilateral trading system.”¹ The WTO agreements have established a series of rights and obligations for its members, and created a series of expectations in these members. The organization seeks to protect these expectations through various channels exemplified by the Dispute Settlement Understanding.

When an authorized suspension of concessions is an effective means to bring a party into compliance with its WTO obligation in a case brought by a developed country, but the same rule is not as effective when a developing country is awarded the right to suspend concessions, we are faced with an unjust result.⁸⁸ This is an internal issue because this failure reflects a frustration of member expectations through an ineffective means of dispute settlement. It is a justice issue, because as Chios Charmody points out, WTO “[j]ustice is... about maintaining the distribution of expectations [of trade related behavior] which is equal; the ethos is justice-as-equality.”⁸⁹

⁸⁷ *Id.*

⁸⁸ See e.g. United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DE285)

⁸⁹ Chios Carmody, *A Theory of WTO Law*, 11 J. INT’L. ECON. L. 527, 542 (2008).

Thus, justice and fairness are an intrinsic part of the WTO because they are integral parts of the system itself.

The existence of internal principles of structural equity in a system makes it easier to deduce standards of justice to evaluate that system. These standards of justice are connected closely with standards of legitimacy. Although legitimacy can be a purely formal concept, justice plays a significant role in determining if an institution is legitimate because, after all, principles of structural equity require some degree of internal consistency within an institution.

From the example above we can derive that equality between members is such a standard in the WTO. However, although equality is a broad concept, it is not the case that it is an intrinsic part of all international organizations, as for example in organizations such as the IMF in which certain members have *de jure* veto power. Further, different organizations and different regimes would have different standards derived from internal principles. Within the World Bank and the IMF, for example, access to funds is not formally equal: progressivity in the form of preferential and concessional lending to the least developed borrowers is an important internal operating principle, thereby making *inequality* an internal principle of justice in the service of fairness within such organizations.⁹⁰

2 Consent

In the case of trade we can go even further in our understanding of the internal principles controlling the regime. Complementing James' structural equity approach is another internal

⁹⁰ See Garcia, *Bretton Woods* (evaluating, but from an external viewpoint, the unequal access to development capital and trade currencies as an important element of justice); on lending conditionality in general, see Arner *supra* note 15.

account of the morality of trade, focusing on “consent.”⁹¹ Consent is an intrinsic element of trade; it is what makes trade “trade” and not something else. This concept is important in the present discussion because it frames our understanding of trade in terms of James’ “structural equity.”⁹² It not only supports a theory of justice in trade relations, it requires it.

By consent here we do not mean the concept of state consent in international relations theory.⁹³ In international law, consent is a formal principle of legitimacy. As such, this notion of consent is important to the extent trade law is part of international law, and trade agreements are instruments under international law. In the present discussion, however, we seek through “consent” to grasp an elusive quality in trade arising from social relationships formed through an exchange. Consent is the essential characteristic which makes such an economic exchange “trade,” rather than theft, coercion, exploitation, or the like, and thus helps us distinguish between what *appears* to be trade from what *is* trade in the real meaning of the word. When an act passes as trade but upon closer examination is not trade because it does not reflect consent, this act generates costs that impede the flourishing of trade, and thus undermine the subject of trade.

The concept of consent as an internal principle of trade is revealed through examination of aspects of our language, concepts, and cultural experiences of trade as a human phenomenon. Trade is a fundamental part of human experience. It encapsulates our relation to the world, our encounter with the world and our domination of the world. Trade is fundamentally an exchange of goods and services, an exchange of economic value. Through this exchange we come into

⁹¹ See Frank J. Garcia, *Three Takes on Global Justice*, 31 U. LA VERNE L. REV. 323 (2010); Frank J. Garcia, *Is Free Trade “Free”? Is it even trade? Oppression and Consent in Hemispheric Trade Agreements*, 5 SEATTLE J. FOR SOC. JUST. 505 (2007).

⁹² See James, *Internal Principles*.

⁹³ For an overview of consent in international relations and the role of consent as a legitimizing factor in international law see Matthew Lister, *The Legitimizing Role of Consent in International Law*, 11 CHI. J. INT’L. L. 663-91 (2011).

contact with different people and lands, cultures and ideas. We discover and create our own identity as we come into contact with others through trade. In this way, trade is a primal form of communication, expressing who we are, what we make, what we want and how we exchange.

Trade is fundamentally a voluntary, bilateral exchange of economic value. Individuals and peoples enter into trade relationships with the same fundamental motivation: to improve their condition. Thus in general people will enter into trade relations that they consider fair if they are free to make and choose their own bargains, and this shapes the nature of the trade regime in the long run.

However, not everything called ‘trade’ is really trade – economic exchanges have also been used to dominate and conquer.⁹⁴ There are many types of transactions that involve transfer of value, but they are not trade because the absence of consent undermines the requisite voluntary element of a trade relationship. In circumstances where, in the words of Simone Weil,⁹⁵ one seeks consent where there is no power of refusal, the result is not trade, but predation. In such cases, an economic benefit flows from one party to the other, but it is not mutual in any meaningful way.

The same can be said in cases of coercion, where there is some consent on the surface but the artificial restriction on the range of possible bargains makes consent a pure formality.

Further, exchanges that do not involve roughly equal value cannot be considered trade but are a

⁹⁴ For example, trading companies asserted sovereignty and extended the colonizing states’ dominion over vast territories the European states were not ready to administer directly. See ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 68 (2005).

⁹⁵ SIMONE WEIL, *Justice and Human Society*, in SIMONE WEIL 116, 123 (Eric O. Springsted ed., 1998)

form of exploitation when a potentially higher bidder has been excluded by the prevailing party, which is therefore exploiting the other in the resulting bargain.⁹⁶

Consent is a standard of justice. However, unlike equality, it is not derived from the structure of an institution but from a rather intuitive understanding of trade generally. Although the applicability of consent in a multilateral context such as the WTO has yet to be fully explored,⁹⁷ it is clearly a very robust standard in evaluating justice and fairness in other aspects of international economic law, such as bilateral trade agreements, investor-state dispute resolution and the generalized system of preferences.

3. Working with Internal Approaches – the case of DR-CAFTA

Applying internal approaches to actual international trade agreements illustrates the subtle but important forces at work in contemporary trade relations, particularly as they involve substantial inequalities in power among participating states. These inequalities and their structural consequences undercut global justice through their effects on the rules of the game, making it less likely that trade law and institutions will either meet members' legitimate expectations of equality, or establish rules supporting true consensual exchanges among market actors.

The use of consent as an internal principle of justice in trade law suggests that in matters of global rulemaking, which today means principally economic rulemaking through trade agreements, we should actually structure such negotiations to achieve and reflect the consent of their participants, aiming for substantive rules which protect and support consent at the private

⁹⁶ Hillel Steiner, *A Liberal Theory of Exploitation*, 94 ETHICS 225 (1983-84). See also RICHARD MILLER, *supra* note 3 at 60-62 (characterizing exploitation in international bargains as taking advantage of another's difficulty to secure agreements not otherwise possible).

⁹⁷ But see RICHARD MILLER, *supra* note 3 at 69-83 (positing an account of 'reasonable deliberations' at the WTO that focuses on coercion and exploitation).

party level. We do this not as a way of confining trade within a particular view, but as a way to promote its flourishing across the widest possible spectrum of individuals, transactions, and relationships.

First, this requires that we take the role of consent in trade negotiations seriously. If trade consists of voluntary, bargained-for exchanges, then the rules governing trade must preserve the possibility of bargained-for exchanges among private parties, and the rules themselves must be the fruit of such a bargain.⁹⁸ If the rules of the game are not mutually agreed to, then any bargains struck under those rules are not fully free because they are not fully agreed to.⁹⁹ Without consent, agreements structuring economic exchange will be a form of oppression, or worse, predation, which cause systemic disadvantages to certain players.¹⁰⁰

Consent must extend to difficult questions: whether the states have anything resembling equal bargaining power; whether a negotiating government speaks for the full range of affected citizens (or whether it speaks for its people at all); and whether a government has an adequate alternative to a negotiated outcome.¹⁰¹ Otherwise, we risk mistaking formal consent in the sense used in international relations theory, for that consent which makes trade, trade.¹⁰²

Some examples from the recent Central America Free Trade Agreement (DR-CAFTA), a 2004 regional trade agreement between the U.S., five Central American states, and the

⁹⁸ Frank J. Garcia, *Is Free Trade “Free”? Is It Even “Trade”? Oppression and Consent in Hemispheric Trade Agreements*, 5 SEATTLE J. FOR SOC. JUST. 507, 514 (2007).

⁹⁹ *Id.* We do not address here the important question of whether any degree of failure of consent at level one (inter-state negotiations) fatally vitiates the possibility of true trade at level two (private party contracts).

¹⁰⁰ *Id.* at 514–15.

¹⁰¹ In negotiation theory, the latter is referred to as a party’s Best Alternative To a Negotiated Agreement (BATNA). If a party has no BATNA, it is in a very weak position. BATNA “is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.” ROGER FISHER & WILLIAM URY, *GETTING TO YES* 97 (1981).

¹⁰² Similarly, Weil writes that in looking purely at the fact of voting, democratic theory mistakes true consent for a form of consent, which can easily, like any other form, be mere form. WEIL, *supra* note 73, at 126

Dominican Republic, illustrate the operation of an internal critique based on consent.¹⁰³ In DR-CAFTA, we see examples of what is ostensibly free trade, but in fact a form of coercion (no free bargaining), exploitation (no equivalent value), or predation (no consent).

With respect to the negotiation of the treaty, there are at least two issues: the problem of unequal bargaining power between states, and the question of legitimacy stemming from the problem of underrepresented groups. We cannot assume even in the United States, let alone most developing countries, that the government speaks for all affected sectors of society. This issue is of special concern throughout the Central American region, where governments have a history of capture by elites.¹⁰⁴ Lack of representation is particularly serious when fundamental economic decisions are being made, as in the CAFTA negotiations. In Nicaragua, for example, during the CAFTA negotiations, there was widespread ignorance among most affected groups regarding what CAFTA would do, and there were allegations of a campaign of disinformation on the part of the government.¹⁰⁵ Many sectors of society were concerned that the new government only spoke for and negotiated on behalf of the moneyed interests, despite a recent history of social revolution.¹⁰⁶ For these sectors, the treaty and its resulting economic activity are neither mutual, nor voluntary; the parties are not trading—something is being taken from them.¹⁰⁷ In consent theory terms, the treaty does not create trade between the parties. Rather it creates a form of theft or extraction.¹⁰⁸

¹⁰³ See generally Garcia, *supra* note 75, at 515; on RTAs generally see Chin Lim, *The Trade Agreements Regime: WTO and the RTAs* (in this volume).

¹⁰⁴ See THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 46 (2nd ed. 1989) (discussing exercise of political power by or for elites endemic to region).

¹⁰⁵ *Id.* at 516.

¹⁰⁶ *Id.* at 516.

¹⁰⁷ Garcia, *supra* note 75, at 516.

¹⁰⁸ *Id.*

Even if CAFTA is both mutual and voluntary, we must still consider whether it represents the full consent of the parties.¹⁰⁹ During the CAFTA negotiations, for example, it was often mentioned by the Nicaraguan government that the country did not have a real alternative to the treaty, due to the U.S. playing such a dominant role in the Nicaraguan economy as the principal source of capital and markets.¹¹⁰ Moreover, given the history of external domination of the southern hemisphere, both colonially and post-colonially, we must consider the possibility that other states in the region and elsewhere—states that might have offered more attractive alternative markets and sources of capital than the U.S.—may not have been able to do so.¹¹¹ The United States, for example, exercised its role as the regional hegemon during the last century by restricting regional and other states’ opportunities in the hemisphere, which has continuing economic effects today.¹¹²

Consent problems are not confined to the negotiation stage – they affect the substance of the treaty as well, ensuring that provisions arrived at nonconsensually through severely unequal bargaining will affect economic relations among market actors for the duration of the treaty. For example, the terms and timing of market access speak volumes about a weaker party’s capacity to protect its markets from external competition before local industry is ready. Moreover, when we look at which sectors are excluded by whom and why, we get a more complete picture of the weaker party’s ability, or lack thereof, to bargain for what it wanted and needed.

To take the agriculture sector as an example, CAFTA eliminates the protections in place for regional small-scale farmers and agricultural workers in several key sectors such as rice and

¹⁰⁹ *Id.* at 517.

¹¹⁰ *Id.* at 517.

¹¹¹ *Id.* at 517.

¹¹² SKIDMORE & SMITH, *supra* note 81, at 5-7 (asserting that historic external domination has both threatened sovereignty and restricted available policy choices). On the problem of elites appropriating wealth see also Leif Weinar, *Property Rights and the Resource Curse*, 36 PHIL. & PUB. AFF. 36 (2008).

yellow corn,¹¹³ exposing them to immediate competition from highly subsidized U.S. agricultural products.¹¹⁴ However, the United States assiduously maintained protection of sugar,¹¹⁵ one of its most sensitive sectors that had been of interest to Central American exporters.¹¹⁶ Moreover, in many of the sectors where CAFTA governments announced victories, their exports had either already enjoyed privileged access under the U.S. trade preference programs, or are effectively blocked by sanitary or phytosanitary measures.¹¹⁷

Such one-sided bargains offer evidence of the disparity in bargaining power that plagues the treaty.¹¹⁸ In order to understand the consent by Central American governments to such one-sided provisions, it may be helpful to employ the concepts of coercion and exploitation developed here. That such one-sided market access provisions were agreed to by Central American governments may suggest a coercive aspect to the negotiation, in which the United States relied on the Central American inequality in power to keep certain options (such as liberalization of the sugar market) off the table while pressing ahead for the concessions it wanted.¹¹⁹ Alternatively, or in tandem, Central American consent can be evidence of

¹¹³ Central America-Dominican Republic-United States Free Trade Agreement, Annex 3.3., Tariff Schedule of the United States Aug. 5, 2004, available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA].

¹¹⁴ Carlos Galian, *CAFTA: The Nail in the Coffin of Central American Agriculture*, in WHY WE SAY NO TO CAFTA 4 (Alliance for Resp. Trade 2004).

¹¹⁵ CAFTA, *supra* note 91, at 5; Annex 3.3, Tariff Schedule of the United States.

¹¹⁶ See Galian, *supra* note 92; see also Elizabeth Becker, *Costa Rica to Be 5th Country In New Trade Pact With U.S.*, N.Y. TIMES, Jan. 26, 2004, at A6 (reporting that the United States won its demand for opening Central American agriculture market to its exports while maintaining protection for sugar industry, of interest to the region).

¹¹⁷ Galian, *supra* note 92, at 6.

¹¹⁸ Editorial, *Harvesting Poverty: A New Trade Deal*, N.Y. Times, Dec. 22, 2003, at A30 (asserting CAFTA's terms reflect asymmetry in negotiating power between the United States and the Central American region). Such allegations have also been raised about the WTO agreements and the Uruguay Round. See J. Michael Finger & Julio J. Nogués, *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations* 3-4 (World Bank Policy Res., Working Paper No. 2732, 2001).

¹¹⁹ See James C. McKinley Jr., *U.S. Trade Pact Divides the Central Americans, With Farmers and Others Fearful*, N.Y. TIMES, Aug. 21, 2005, sec. 1, at 18 (reporting Central American negotiators lacked sufficient leverage to extract needed concessions from the United States, and faced implicit threat of loss of trade preferences). We will

exploitation, insofar as the United States relied on the absence of other states able to offer Central America more attractive terms in the “auction.” In either case, the one-sided nature of the market access provisions in agriculture suggests that the treaty may not truly reflect free trade, and is unfair in a manner quite relevant to the larger question of trade and justice.

4 Methodological Reflections on the Internal Approach

As with the external approach, there are important methodological considerations when carrying out an internal normative analysis of trade law. However, as the internal approach is relatively more recent, the issue of methodology is less well understood. Nevertheless, drawing on the methodological issues in the more mature external approach, we can suggest some relevant considerations.

First, it is important to carefully identify the key internal features of the socio-legal system in question, and justify one’s selection. For example, why does James focus on the legal-theoretical framework of the trading system when seeking to identify trade’s internal principles of fairness? Why does Carmody focus on justice-as-equality for WTO Members in his theory of WTO law? Why is consent, among other core constitutive elements of trade as an experience, foregrounded in the consent approach to fair trade? One might call this the moral inductive move in developing an internal theory of fair trade. Paying careful attention to such questions is key to establishing a sound basis for the analysis and prescription to follow.

Second, and related, is a concern to carefully articulate the normative significance of these features. In other words, the persuasiveness and impact of an internal approach depends upon the clarity and cogency of the principles one draws from the system or underlying concept

not know the full details of the negotiations for some time, as all members of the CAFTA negotiations signed confidentiality agreements. *See* CATHOLIC RELIEF SERVICES, *Transparency and Participation in the Negotiations, in FAIR TRADE OR FREE TRADE? UNDERSTANDING CAFTA*, available at http://www.andrew.cmu.edu/user/mtoups/cafta_briefing_final_dec03.pdf (last visited Mar. 17, 2007)

under analysis. One could call this the deductive move in the internal approach, as one seeks to deduce from the socio-legal features one has identified, their normative implications.

Finally, it is important to sustain the analysis all the way through to the norms, institutions and dynamics of the legal system under review. A unique characteristic of internal approaches is that there is a strong interdisciplinary aspect to them. By looking at the legal theoretical framework of institutions of international trade, or trade itself as human experience, we take, and are obligated to take, into account discussions that traditionally would fall within the domain of political science, economics etc. In fact, the internal approach to trade is an attempt to bridge the gap between these disciplines and to overcome the disconnect between global justice theorists and the realities of the international trade regime.¹²⁰ Here the same issues of application and context raised above with respect to the external approach, apply equally to the internal approach. Ultimately, the value of any internal approach must be judged by the same standard: how effectively does it identify serious injustices in contemporary international economic law, and how effectively does it suggest how international economic law should be re-negotiated, reformed, etc.

Looking ahead, we can expect as the internal approach develops and matures, there will be other methodological issues to consider and new internal approaches with which to enrich our arsenal of justice tools. One interesting area for future work involves undertaking a more explicitly phenomenological approach to trade law.¹²¹ Another important area is to develop a more explicitly cross-cultural or anthropological study of trade as a human experience, testing intuitions developed from a Western view across the range of human experience.

¹²⁰ See e.g., Tesón and Klick, *Global Justice*.

¹²¹ See e.g., Teresa Goodwin Phelps & Jenny Ann Pitts, *Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 ST. LOUIS U. L. J. 353 (1985).

III Theories of Justice and the Trade Linkage or ‘Trade and...’ Phenomenon

The on-going trade linkage or “trade and ___” debate confronts us with the relationship between the rules and structures of trade law, and many serious contemporary problems involving gross economic inequalities, conflicting concepts of human dignity and environmental protection, and other heavily value-laden issues such as “culture” and “property.” In discussing linkages such as “trade and development,” “trade and labor,” “trade and the environment,” and “trade and human rights,” we are delving more deeply and perhaps even more problematically into the nature of the relationship between trade and justice.¹²²

A Justice and the “Trade and ___” Debate

Each “trade and ___” debate fundamentally involves a series of questions about justice.¹²³ They are questions of justice because they involve decisions as to the allocation of social goods and social burdens across national boundaries; they highlight the effects of our actions on the well-being and property of others across national boundaries; and resolving them will involve evaluating the propriety of certain gains and the correction of improper gain across national boundaries.¹²⁴

¹²² On the linkage between international economic law and human rights *see e.g.* DAVID KINLEY, *CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY* (2009); on the relationship between trade and labor *see e.g.* Brian Greenhill, Layna Mosley & Aseem Prakash, *Trade-based Diffusion of Labor Rights: A Panel Study, 1986-2002*, 103 AM. POL. SCI. REV. 669-690 (2009); for an overview of the trade-environment linkage *see e.g.*, Jagdish Bhagwati, *Thinking Clearly About the Linkage Between Trade and the Environment*, in TERRACOTTA READER: A MARKET APPROACH TO THE ENVIRONMENT (Parth J. Shah & Vidisha Maitra eds., 2005), 425-436.

¹²³ This discussion updates and further develops an earlier treatment of this issue by one of the authors. *See* Frank J. Garcia, *Linking the Trade Linkage Debates*, 19 U. PA. J. INT’L ECON. L 391 (1998).

¹²⁴ Dunoff writes that ‘trade and’ issues such as intellectual property highlight that interstate distributional questions are at the heart of international trade policy, challenging the common view that cooperation or collaboration, rather than distribution, is the key issue. *See* Jeffrey L. Dunoff, *Rethinking International Trade*, in Symposium, Linkage as

The relationship between poverty, inequality, development and trade is a paradigmatic example of the link between trade and justice. The distribution of social goods has always been a central concern in justice theory. The connection between the global economic system (of which trade and trade law are foundational elements) and the uneven allocation of wealth among states and among individuals is widely recognized, even if its precise nature is hotly contested.¹²⁵ Given this relationship, what obligations do we owe to developing states in structuring our trade relationships? To poor individuals in developing states? To the poor, as a group, in every state?

Whatever one's view as to the appropriate answer to these questions—utilitarian, egalitarian liberal, libertarian, communitarian, etc.-- simply understanding that the trade-development link is a justice issue involving the problem of inequality, implies that we are not free to govern our economic relationships with poorer people and states solely according to instrumental politics. Those seeking to establish a global economic order that does not consider the claims of less developed states and the poor must articulate a normative basis for this position. In other words, they must explain why such an order would be just, and why territorial political boundaries require or justify such an order.¹²⁶

The trade and environment linkage has been at the forefront of the linkage movement,¹²⁷ and raises its own variations of the basic justice questions. One set of issues concerns how best to

Phenomenon: An Interdisciplinary Approach, 19. U. PA. J. INT'L L. 201 (1998); *infra* notes 130-31 and accompanying text.

¹²⁵ See *supra* note 4 and sources cited therein.

¹²⁶ For an unequivocal statement of this challenge, see Pogge, *Priorities of Global Justice*, *supra* note 8.

¹²⁷ The trade and environment linkage has been actively in the public eye since the early 1990s. See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 268 (1997); Daniel Esty's *Greening the GATT: Trade, Environment and the Future*, 27 CORNELL INT'L L. J. 459 (1994). The 1990's also saw a series of GATT panel reports destined to have a significant impact on the trade and environment debate. See GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, GATT Doc. DS20/R (1994), *reprinted in* 33 I.L.M. 839; GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, Aug. 16, 1991 GATT B.I.S.D. (39th Supp.) at 155 (1993), *reprinted in* 30 I.L.M. 1594 (the Tuna/Dolphin decisions). With the Shrimp-Turtle decision, the GATT/WTO has come full circle.

balance one's ethical and legal obligations to the environment with competing economic interests and one's obligations under trade law.¹²⁸ Similarly, since environmental protection in one jurisdiction can manifest itself as merely an externality in another, we must always concern ourselves with how both environmental law and trade law allocate the burdens of environmental protection and environmental harm among states and among different groups within states.¹²⁹ All of these issues inevitably involve us in fundamental conversations about justice and the distribution of benefits and burdens.

The trade and human rights debate also raises difficult justice problems. The relationship between human rights and international economic law has become a central preoccupation of contemporary legal scholarship, rivaling the "trade and environment" literature both in its saliency and in its constitutive quality for both fields.¹³⁰ The trade and human rights linkage also rivals the trade and inequality linkage in the extent to which its questions are explicitly justice questions, insofar as they involve the allocation and protection of core legal rights, which in our tradition are perhaps the most highly valued of all social goods.

United States – Import Prohibition of Certain Shrimp and Shrimp Products adopted 12 October 1998, DS58/AB/R. See e.g. Scott Barrett, *Climate Change and International Trade: Lessons on their Linkage from International Environmental Agreements*, Thinking Ahead on International Trade (TAIT) – 2nd Conference *Climate Change, Trade and Competitiveness: Issues for the WTO*, June 2010, available at www.wto.org/english/res_e/reser_e/climate_jun10_e/background_paper6_e.pdf. See also Steve Charnovitz, *The WTO as an Environmental Agency in INSTITUTIONAL INTERPLAY: BIOSAFETY AND TRADE* 161-191 (Oran R. Young et al. eds. 2008) (re-conceptualizing the role of environment in international trade law from linkage debate to an approach based on the institutional nature and functions of the WTO).

¹²⁸ For an excellent recent investigation into these issues, see Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy and the Mexican Neoliberal Economic Reforms*, 32 U. PENN. J. INT'L L. 723 (2011).

¹²⁹ *Id.*; See generally Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597 (1996).

¹³⁰ Exploring the nature and ramifications of this linkage is a key part of both working out the substantive issues, and further refining both human rights and trade law as disciplines. SARAH JOSEPH, *BLAME IT ON THE WTO* (2011); DAVID KINLEY *supra* note 120; Gillian Moon *supra* note 20; Lorand Bartels, *Trade and Human Rights*, MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (R. WOLFRUM ET AL. EDS. 2011).

These issues are difficult in part because they arise in a context of conflict over fundamental values. A key aspect of Western conceptions of justice is respect for fundamental human rights. This commitment is the basis for the tremendous post-war development of human rights protection within public international law. But not all trading states share the same conception of human rights, whether within the Western tradition or outside of it, and not all trading states share the same view of how differences in human rights and the values they reflect should be ignored, accommodated or challenged in international economic relations.¹³¹ These conflicting views surface as debates over the place of human rights within international economic law;¹³² the compatibility or incompatibility with human rights of both specific trade rules and agreements, and the WTO system as a whole;¹³³ and over the most effective and appropriate responses within international economic law to human rights violations.¹³⁴

B Justice and the Resolution of Trade Linkage Issues

Recognizing the link between trade linkage issues and justice can help us resolve these issues in a more principled manner. We can evaluate techniques and options for resolving

¹³¹ See e.g., Sarah Joseph, *supra* note 129 at 32-46.

¹³² *Id.*; see also Petersmann, *supra* note 13. There is some consensus concerning a core of individual economic rights such as labor and employment rights, but no consensus as to how such rights should be taken into account in trade relationships. See *WTO Singapore Ministerial Declaration*, WT/MIN(96)/DEC/W (Dec. 13, 1996); 36 I.L.M. 218 (1997) (providing that the WTO affirms commitment to international labor standards but eschews jurisdiction over trade and labor issues, suggesting ILO as forum). There is even less consensus with respect to non-economic human rights and how such rights should figure into trade and integration systems. See Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL. 1, 1, 8-13, 39-40 (1996). Carlos Manuel Vasquez, *Trade Sanctions and Human Rights*, 6 J. INT'L ECON. L. 797 (2003). Andrew T. F. Lang, *The Role of the Human Rights Movement in Trade Policy-Making: Human Rights as a Trigger for Social Learning*, 5 N. Z. J. PUB. INT'L L. 77 (2007).

¹³³ Sarah Joseph, *supra* note 129; Gillian Moon, *Fair in Form, But discriminatory in Operation, WTO Law's Discriminatory Effects on Human Rights in Developing Countries*, 14 J. INT'L ECON. L. 553 (2011).

¹³⁴ Stirling notes that trade sanctions, paradoxically, are in principle the most effective, and, in practice, often the least effective means of enforcing human rights, as their use is often resented by the target state and is at the same time the subject of political manipulation by interest groups in sanctioning states. See Sterling *supra* note 130 at 2-3; see also Garcia and Jun, *Trade Based Strategies for Combating Child Labor*, in WESTON, ED., CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER (2005).

linkage conflicts in an analytic framework that draws out their underlying normative commitments and implications. Theories of justice thus serve both to put the quest for efficiency – so central to contemporary trade discourse and so often at stake in the linkage debates – within a larger normative context, and to supplement this line of inquiry with a more comprehensive framework for policy formulation. Working out these linkage issues is a key stage in elaborating a coherent and just set of global economic and social policies.

One practical implication of a justice analysis of trade linkage is that certain existing policies or practices now considered to be discretionary on the part of the implementing state may come to be seen as in fact obligatory, on the basis of that state's moral obligations to its trading partners. For example, in the trade and development area the principle of asymmetry or preferential treatment for developing countries is a key technique for managing inequality problems.¹³⁵ However, much of the trade between developed and developing countries is conducted under some form of discretionary unilateral trade preference program¹³⁶ which effectively structures preferences in favor of the granting state, rather than the recipient state.¹³⁷ One can argue from a variety of normative perspectives ranging from Rawls to feminist legal theory, that asymmetric trade relations are a normative obligation and not a political option on the part of wealthy states.¹³⁸ If so, then justice may require that such discretionary unilateral

¹³⁵ See generally ROBERT E. HUDEC, *DEVELOPING COURTIERS IN THE WTO LEGAL SYSTEM* (2011).

¹³⁶ In 1971, the GATT Contracting Parties approved a waiver authorizing, but not requiring, developed states to extend preferential tariff rates to developing country exports on a non-reciprocal basis for ten years. In 1979, the waiver for the resulting Generalized System of Preferences ("GSP") was made permanent. See *id.* at 362-63. Most developed countries have some form of GSP program, including members of the European Community and the United States. See, e.g., 19 U.S.C. § 2461 (2011).

¹³⁷ See generally GARCIA, *TRADE, INEQUALITY AND JUSTICE*.

¹³⁸ For example, under the Rawlsian difference principle inequalities are to be justified by their working to the advantage of the least favored, which would mean, in this instance, that preferential or unequal trade treatment must be structured to favor the interests of developing country exporters over developed country competitors. GARCIA, *TRADE, INEQUALITY AND JUSTICE* 128. The ethic of care articulated by feminist philosophers, as applied to

preference programs be re-cast in favor of the recipients, and supplemented by non-discretionary trade-related development aid and other ways of addressing inequality in trade relationships.¹³⁹

A second, related effect of a justice analysis is that certain existing linkage tools now considered legitimate, even attractive, might in fact be seen as unattractive or even unjust if normatively reevaluated. For example, one popular linkage tool in both the human rights and environment debates is the practice of trade conditionality, which in this context means linking trade preferences and other advantageous trade treatment with adherence to certain values as reflected in appropriate treaties involving the environment, human rights, etc.¹⁴⁰ In normative terms, this approach depends upon the view that liberalized trade is a policy tool that can be granted or withheld for instrumental reasons. However, if one comes to understand preferential trade, and free trade in general, as expressing a normative commitment under theories of justice, one is no longer free to condition such treatment for instrumental reasons on compliance with other extrinsic legal or political conditions.

international relations, might require a similar result. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L 613, 615 (1991); Hilary Charlesworth, *The Woman Question in International Law*, 1 ASIAN J. INT'L L. 1(2010); Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade*, 10 MELB. J. INT'L L 11 (2009).

¹³⁹ GARCIA, TRADE, INEQUALITY AND JUSTICE; *but see* Jeffrey L. Dunoff, Dysfunction and Diversion and the Debate over Preferences: (How) Do Preferential Trade Policies Work?, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM (Chantal Thomas and Joel P. Trachtman, eds., 2009). On the general relationship between the WTO and development, see S. ROLLAND, WTO AND DEVELOPMENT (2011).

¹⁴⁰ One example of this practice is the requirement that EU member and associated states be parties to the European Convention for the Protection of Human Rights and Fundamental Freedom. Therefore, if a state is to participate in European integration, it must recognize certain human rights norms. See LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS (2005); see generally Emilie M. Hafner-Burton, Trading Human Rights: How Preferential Trade Agreements Influence Government Repression, 59 I.O. 593 (2005) (arguing for the effectiveness of this approach); James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 808-09 (1994) (lamenting the failure to adopt conditionality in NAFTA as a lost opportunity); Steve Charnovitz, The World Trade Organization and Social Issues, 28 J. WORLD TRADE 17, 22 (1994) (citing conditionality practices with approval). A related issue involves unilateral state efforts to condition trade benefits on human rights protection and other social goals, which must survive WTO review (hence implicating the WTO in state-level conditionality practices through its response). See KRISTA NADAKAVUKAREN SCHEFER, SOCIAL REGULATION IN THE WTO: TRADE POLICY AND INTERNATIONAL LEGAL DEVELOPMENT (2010).

The trade and environment link in particular highlights a third area in which a justice perspective may have practical implications for trade law, namely the issue of determining the proper forum and decisional criteria for the institutional resolution of trade linkage conflicts.¹⁴¹ Institutional dispute settlement bodies confronted with linkage issues must be capable of making decisions that address the wide range of social values at stake, in a manner consistent with our commitments to procedural as well as substantive justice.¹⁴² Once such institutions are identified or established, a justice perspective requires careful analysis of the principles and criteria employed in decisions involving linkage issues.¹⁴³ Normative preferences which may well predetermine the outcome of linkage decisions are likely to be embedded in such criteria.¹⁴⁴ When viewed in this light the WTO, as the principal trade-based forum for handling linkage

¹⁴¹Environmentalists criticized the GATT decision-making process in the first Tuna-Dolphin case, *United States—Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991), in which the first explicit trade linkage issues was resolved in an international legal forum, for failing to take cognizance of environmental policy issues and for clumsily handling these matters in a piecemeal fashion. See, e.g., Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT’L L.J. 459 (1994).

¹⁴² As Joel Trachtman writes, “[N]o society can afford to make decisions in an unintegrated fashion.” Joel P. Trachtman, INTERNATIONAL ECONOMIC LAW AND THE RIGHT TO REGULATE 57 (2005). The risks for institutions such as the WTO in ignoring the fundamental values at stake in their decisions are highlighted by Philip Nichols in *Trade Without Values*, 90 NW. U. L. REV. 658, 702-07 (1996). In this respect, one key aspect already prominent in trade policy debates – and clearly foregrounded by linkage issues – is participation by interest groups in WTO dispute resolution, an issue with overtones of democratic theory. See Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT’L L.J. 699 (1994).

¹⁴³ See generally Joel P. Trachtman, “Trade and . . .” *Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT’L L. 32 (1997).

¹⁴⁴ See Nichols, *supra* note 128, at 700-01 (reviewing factors in GATT dispute settlement panel doctrine giving primacy to trade in conflicts with other values). For example, it has been argued that in the analysis of GATT dispute settlement involving trade-environment issues, certain criteria such as “proof of endangerment” mask utilitarian assumptions tending to favor pro-trade outcomes to such disputes. “Endangerment” implies that there is no harm short of dire peril that could justify interference with economically lucrative activity, ignoring the possibility that *any* harm, for example, justifies such interference. See Housman, *supra* note 131, at 1376-77 (challenging Stewart); see also Sonia Rolland, *The Precautionary Principle: Development of an international Standard*, 23 MICH. J. INT’L L. 429 (2002).

issues, still leaves much to be desired despite its clearly more socially progressive jurisprudence when compared to the earlier GATT.¹⁴⁵

IV Conclusion

Many critical accounts of the fairness of international economic law point in the end to some kind of transnational wealth redistribution, often considered the “third rail” of the global justice debate. Although we are accustomed to wealth redistribution in a domestic context, shifting the argument to a transnational one raises many complex issues. For example, there is a legitimacy problem: given the current state of transnational institutions, could transnational wealth redistribution ever be legitimate? Similarly, there is an effectiveness problem: could transnational wealth redistribution ever really work without unsustainably large and powerful global institutions?¹⁴⁶

To some extent, these problems are artifacts of an external approach to global justice, in which mandates are imposed (or allegedly imposed) upon trade from a normative perspective extrinsic to the framework of these agreements. However, it is important to point out that such an external approach is entirely consistent with how we critique any other form of law. Moreover, it is important to remember (and here a justice perspective is clarifying) that *wealth redistribution is already under way through existing international economic law institutions*, since they play an inescapably allocative role with respect to the rights, privileges, opportunities

¹⁴⁵ For a general overview of developing countries and WTO dispute resolution *see*, DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE (Gregory C. Schaffer and Ricardo Melendez-Ortiz eds., 2010); S. Rolland, WTO AND DEVELOPMENT, *supra* note 137.

¹⁴⁶ The issues of legitimacy and effectiveness are of course intertwined given the nature of institutions. *See* Hector R. Torres, *Reforming the International Monetary Fund –Why its Legitimacy is at Stake?* 10 J. INT’L ECON. L. 4430460 (2007); Lindita Ciko, *The WTO, Legitimacy and Distributive Justice* (unpublished paper on file with authors).

and burdens created by the laws they administer and the productive social relations they structure. In this sense, all that a justice perspective does is make explicit what is implicit in existing rules and institutions, and ask us if we are satisfied with what we see.

Nevertheless, the promise of internal approaches to trade and justice is that they do not suffer from this criticism – instead, they take the system as it functions and seek to clarify and deepen the principles inherent in its structure. In this sense, internal approaches to the problem of trade and justice have developed an important new approach complementing the significant work already underway in external approaches. However, there is much important work to be done in both external and internal approaches if international economic law is to fulfill its role within the larger quest for global justice.¹⁴⁷

¹⁴⁷ See e.g. “Conclusion,” GLOBAL JUSTICE, *supra* note 16.