

5-30-2018

Concluding Chapter: Theories of Justice and International Trade Law

Frank J. Garcia

Boston College Law School, garciafr@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>



Part of the [International Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Frank J. Garcia. "Concluding Chapter: Theories of Justice and International Trade Law." In *International Trade Law*. Giovanni Di Lieto and David Treisman eds., Sydney: Federation Press, 2018.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

International Trade Law (Federation Press 2018)

Giovanni Di Lieto & David Treisman

Monash University

**Concluding Chapter: Theories of Justice
and International Trade Law**

Frank J. Garcia

Boston College Law School

I Introduction

Why does a textbook on trade law end with a chapter on justice? By justice I 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 participating in the social enterprise.¹ Why, indeed, has the relationship between justice and international economic law become an increasingly urgent subject of academic and policy debate? I hope now that you've worked your way through this book you've formed a few of your own answers to these questions, but let me offer a few here.

First, it has been increasingly recognized that international economic law and its institutions are powerful engines of resource allocation, establishing patterns of distribution for market access, subsidies, IP, investment capital, rights of establishment, dispute resolution—in short, everything you've been studying so far—between states and within states, and among various groups, entities, firms and individuals.² So, we

¹ For an overview, see Gillian Brock, *Theories of Global Justice*, in RESEARCH HANDBOOK ON GLOBAL JUSTICE AND INTERNATIONAL LAW (John Linarelli ed. 2013); see ALSO SIMON CANEY, JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY (Oxford: Oxford University Press, new ed. 2006).

² See generally JAMES CHRISTENSEN, TRADE JUSTICE (Oxford 2018); OISIN SUTTLE, DISTRIBUTIVE JUSTICE AND TRADE LAW (Cambridge 2017); FRANK J. GARCIA, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES (Cambridge 2013); AARON JAMES: FAIRNESS IN PRACTICE: A SOCIAL CONTRACT FOR A GLOBAL ECONOMY (Oxford 2012); MATHIAS RISSE, ON GLOBAL JUSTICE (Princeton 2012);

must then ask ourselves, “What kind of distributive pattern is international economic law making, and what do we think of it?” The stark figures on global poverty and political instability around the world, with an undeniable (but contentious) connection to the structure of economic relations between and within countries, have highlighted the stakes involved in this relationship.³ So too have the globalization debates, putting the distributive effects of international economic law and its institutions at the centre of global justice.⁴

This means that trade law must now confront some very difficult questions, for some very urgent reasons. Consider for example the following examples of the kinds of questions that come up when we set out to evaluate trade law’s fairness. To start with, what is the proper objective of international economic law?⁵ Efficiency?⁶ Fairness?⁷

CHIOS CARMODY, FRANK J. GARCIA & JOHN LINARELLI, EDs., *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW* (Cambridge: Cambridge University Press, 2012); RICHARD W. MILLER, *GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER* (Oxford: Oxford University Press, 2010); FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE* (Leiden: Brill, 2003).

³ See generally Leif Wenar’s hard-hitting book, *BLOOD OIL: TYRANTS, VIOLENCE AND THE RULES THAT RUN THE WORLD* (Oxford 2015). 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, *GROWING A BETTER FUTURE: FOOD JUSTICE IN A RESOURCE CONSTRAINED WORLD* (Oxford: Oxfam, 2011) available at <http://www.oxfam.org/sites/www.oxfam.org/files/cr-growing-better-future-170611-en.pdf>; AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (Oxford: Oxford University Press, 2000); Thomas Pogge, “Severe Poverty as a Human Rights Violation,” in *FREEDOM FROM POVERTY AS A HUMAN RIGHT* 11–54, (Oxford University Press, Thomas Pogge ed. 2008); Joel Trachtman, *Trade Law and Global Apartheid*, *J. Int’l Econ. L.* 6 (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, non-disagree) on the existence and importance of the connection. See, e.g., Thomas Pogge, *Moral Universalism and Global Economic Justice*, *Pol. Phil. Econ.* 1 (2002): 29-58; Fernando Tesón & Jonathan Klick, *Global Justice and Trade*, in *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW*, *supra* note 2.

⁴ See, e.g., *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW*, *supra* note 2; DAVID KINLEY, *CIVILISING GLOBALIZATION* (Cambridge University Press, 2009); Miller, *supra* note 2. Anthony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, *N.Y.U. J. Int’l & Pol* 32 (1999–2000); Frank J. Garcia, *Globalization and the Theory of International Law*, *Int’l Theory* 11 (2005); Ernst-Ulrich Petersmann, “Human Rights, International Economic Law and ‘Constitutional Justice’”, *Eur. J. Int’l Law* 19 (2008); Mathias Risse, “How Does the Global Order Harm the Poor?” *Phil. & Pub. Aff.* 33 (2005).

⁵ 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 William J. Davey & John H. Jackson, *The Future of International Economic Law* (2008); *THE POLITICS OF INTERNATIONAL ECONOMIC LAW* (Tomer Broude, Marc L. Busch & Amelia Porges eds. 2011).

Equality?⁸ And how is that aim achieved?⁹ Deregulation?¹⁰ Assurance for everyone of an equal basic package of rights and goods?¹¹ Context-adjusted equality of opportunity?¹² Constitutionalism?¹³

As if all of that isn't hard enough to answer, how will we know when we get "there," or whether we are succeeding in moving the world closer towards justice? In other words, what is the appropriate metric for justice? Growth?¹⁴ Development?¹⁵

⁶ See, e.g., Andrea Maneschi, International Trade Theory and Comparative Advantage, in RESEARCH HANDBOOK ON GLOBAL JUSTICE AND INTERNATIONAL LAW (John Linarelli ed. 2013); Tesón & Klick, *supra* note 3; Michael J. Trebilcock & Robert Howse, "Trade and Investment," in Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, (Oxford: Routledge, 4th ed. 2012): 335–66; Jagdish Bhagwati, *Free Trade Today* (Princeton: Princeton University Press, 2003)

⁷ See Americo B. Zampetti, *Fairness in the World Economy* (Cheltenham: Edward Elgar, 2006); Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1998); Brian Barry, "International Society from a Cosmopolitan Perspective", in David R. Mapel & Terry Nardin eds., *International Society* (Princeton: Princeton University Press, 1999); John Linarelli, "Principles of Fairness for International Economic Treaties: Constructivism and Contractualism" in Ala'i, Broude & Picker (2006); Barbara Stark, "Jam Tomorrow: the Limits of Economic Law," Carmody, Garcia & Linarelli (2012).

⁸ See generally, GARCIA, TRADE, INEQUALITY AND JUSTICE, *supra* note 2; John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, rev. ed. 1999); Richard J. Arneson, "Equality," in *A Companion to Contemporary Political Philosophy* (Robert E. Goodin, Philip Pettit & Thomas Pogge eds., 2007); Gillian Moon, "Trade and Equality: A Relationship to Discover," *J. Int'l Econ. L.* 12 (2009).

⁹ See, e.g., Gillian Brock, "Taxation and Global Justice: Closing the Gap between Theory and Practice," *J. Soc.* 39 (2008): 161–84. On the distributive role of international institutions, see Charles Beitz's classic *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979); see also Wilfried Hinsch, "Global Distributive Justice," 32 *Metaphilosophy* (2001) 58–78.

¹⁰ Tesón & Klick, *supra* note 3.

¹¹ 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 Thomas Cottier, Joost Pauwelyn, & Elisabeth Bürgi eds., *Human Rights and International Trade* (Oxford: Oxford University Press, 2005).

¹² See Daniel Butt, "Global Equality of Opportunity as an Institutional Standard of Distributive Justice," in Carmody, Garcia & Linarelli (2012), *supra* note 2.

¹³ See, e.g., Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: Fribourg University Press, 1991); Ruth Buchanan, "Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches," *N. I. Legal Q.* 57 (2006): 654–672; Vlad Perju, "Cosmopolitanism and Constitutional Self-Government," *Int'l J. Const. L.* 8 (2010).

¹⁴ See Stark, *supra* note 7. See also Ravi Arvind Palat, "A New Bandun? Economic Growth vs. Distributive Justice Among Emerging Powers," *Futures* 40 (2008): 721–34.

¹⁵ See, e.g., Amartya Sen, *Inequality Re-Examined* (Oxford: Oxford University Press, 1992).

Poverty alleviation?¹⁶ Aggregate wealth increases?¹⁷ What role should human rights play in this evaluation? In achieving economic fairness generally?¹⁸

As if the fairness issues *between* states weren't challenging enough, the domestic distributive effects of trade law are increasingly recognize, leading us to have to consider what has to be done at the international level about distributive problems *within* states.¹⁹ Any such efforts raise attendant problems of intervention, paternalism, colonialism, intrusiveness, kleptocratic regimes and the inadequacies of domestic institutions.²⁰ Moreover, we have to sort out more difficult questions, such as what is the proper role of domestic institutions versus global ones in alleviating poverty and inequality, and where should we focus our efforts?²¹

For some this inquiry is not just about the rules themselves—the growth and proliferation of international economic 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.²² What normative conclusions can we reach about international institutions

¹⁶ See, e.g., Jean Drèze & Amartya Sen, *Hunger and Public Action* (Oxford: Oxford University Press, 1989); Onora O'Neill, *Lifeboat Earth*, in Charles R. Beitz ed., *International Ethics* (Princeton: Princeton University Press, 1985).

¹⁷ See Adam Smith, *The Wealth of Nations* (London: Penguin, 1999) (1776); Tesón & Klick, *supra* note 3.

¹⁸ See, e.g., Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2010); Hillel Steiner, *An Essay in Rights* (Oxford: Blackwell, 1994); Petersmann, *supra* note 4.

¹⁹ See, e.g., James, *supra* note 2.

²⁰ See, e.g., John Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 4th ed., 1999); see also, Deen Chatterjee and Don Scheid, eds., *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003); Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Phil. & Pub. Aff.*, 30 (2001): 257–296.

²¹ Rawls, *supra* note 8. See, e.g., Pietro Maffetone and Ryan Muldoon, "Two Views of Assistance," 43 *Phil & Soc. Crit.* 998 (2017).

²² Allen Buchanan & Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & Int'l Affairs* 20 (2006); Robert Howse & Kalypso Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?," *Governance* 16 (2003); Patricia Nanz, "Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory," in Christian Joerges & Ernst-Ulrich Petersmann eds., *Constitutionalism, Multilateral Trade Governance and Social Regulation* (Oxford: Hart, 2006).

current or future as a form of governance, and how would those conclusions impact their effectiveness and legitimacy?²³

In view of all this, what can theories of justice bring to our understanding of international economic law, its institutions, and their effects on society? First, and most importantly, 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 what fairness means (never a simple subject). The economist and philosopher Amartya Sen has 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.²⁴ More will be said about this below, but the essential point is that the simple diversity of views on justice is no reason to ignore questions of fairness and social injustice in international economic law, which we can ill-afford to as the risk of perceived unfairness and its social consequences is too serious, as today’s contentious politics remind us.²⁵

In a related sense, theories of justice can also help us determine the proper objective of international economic law and policy. To a large extent, of course, both international politics and national self-interest influence the objectives of specific treaties and institutions, as is the case with any law. But the social analysis of the ends

²³ See, e.g., Ernst-Ulrich Petersmann, “International Economic Law, ‘Public Reason,’ and Multilevel Governance of Interdependent Public Good,” 14 *J. Int’l Econ. L.* 14 (2011): 23–76; Ruth Buchanan (2006); Robert Howse & Kalypso Nicolaidis, *supra* note 22.

²⁴ Amartya Sen, *The Idea of Justice* (London: Allen Lane, 2009): 24–27.

²⁵ Frank J. Garcia & Timothy Meyer, *Restoring Trade’s Social Contract*, 116 *Michigan Law Review Online* (2017); See also Frank J. Garcia, “Trade, Justice and Security,” in Padideh Ala’i, Tomer Brode & Colin Picker eds., *Trade as Guarantor of Peace Liberty & Security?* (Washington DC: American Society of International Law, 2006).

and means of international economic law cannot stop merely 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)²⁶, 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.²⁷ Thus theories of justice can help keep law (and those of us charged with creating, interpreting and applying law) pointed towards the right direction.

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 of social institutions”²⁸ because one of the problems in a democratic society is the imposition of the will of the majority, upon a minority.²⁹ 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

²⁶ 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* (Ithaca: Cornell University Press, 1989) (international acts require “vertical legitimacy” or consistency with core constitutive political values); *see also* John Rawls, *SUPRA* note 8.

²⁷ *See* James Bacchus, “A Few Thoughts on Legitimacy, Democracy, and the WTO,” *J. Int’l Econ. L.* 7 (2004); Jeffrey L. Dunoff, “Rethinking International Trade,” *U. Pa. J. Int’l Econ. L.* 19 (1998); Robert Howse, “From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading Regime,” *Am. J. Int’l L.* 96 (2002). *But see* Thomas Pogge, “Priorities of Global Justice,” *Metaphilosophy* 32 (2001): 6–24 (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. Raj Bhala, “Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism; Part One of a Trilogy – Agricultural Tariffs and Subsidies,” *U. St. Thomas L. J.* 9 (2011).

²⁸ Rawls, *supra* note 8, at 3.

²⁹ *Id.* at 319.

legitimacy, and thus justice becomes an important metric in how legitimate these international institutions are.

Theories of justice can also help us address difficult “trade and ___” issues, in which there is a conflict between trade law and other important areas of social policy, usually domestic in nature. In discussing linkages such as “trade and development,” “trade and labour,” “trade and the environment,” and “trade and human rights,” we are delving deeply into the nature of the relationship between trade and justice under the guise of doctrinal disputes about conflicting rules and systems.³⁰ These issues are difficult in part because they arise in a context of conflict over fundamental values. Each “trade and _” debate fundamentally involves a series of questions about justice.³¹ 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.³²

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 linkage conflicts in an analytic framework that draws out their underlying normative commitments and implications. Theories of justice thus serve both to put the

³⁰ On the linkage between international economic law and human rights see, e.g., Kinley, *supra* note 4; on the relationship between trade and labour see, e.g., Brian Greenhill, Layna Mosley & Aseem Prakash, “Trade-based Diffusion of Labor Rights: A Panel Study, 1986-2002,” *Am. Pol. Sci. Rev.* 103 (2009): 669–90; for an overview of the trade-environment linkage see, e.g., Jagdish Bhagwati, “Thinking Clearly About the Linkage Between Trade and the Environment,” in Parth J. Shah & Vidisha Maitra eds., *Terracotta Reader: A Market Approach to the Environment* (New Delhi: Academic Foundation, 2005), 425–436.

³¹ This discussion updates and extends an earlier treatment of this issue by the author. See Frank J. Garcia, “Linking the Trade Linkage Debates,” *U. Pa. J. Int’l Econ. L.* 19 (1998).

³² 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 Phenomenon: An Interdisciplinary Approach,” *U. Pa. J. Int’l L.* 19 (1998).

quest for efficiency – so central to contemporary trade discourse and so often at stake in the linkage debates – within a larger normative context at key moments when efficiency conflicts with another key social goal, and helps us 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.

Theories of justice can also suggest alternative models and specific reforms to make international economic institutions and their rules fairer (and therefore more legitimate), if we decide that it is not particularly fair in whole or in part.³³ 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 perception (justified or not) 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.³⁴ In this context, theories of justice can offer 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.³⁵

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 powerful normative language through which to articulate their goals for international economic law and policy, and their critiques of the system's

³³ An excellent recent example is Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009).

³⁴ See, e.g., Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton & Co., 2003): 18–22.

³⁵ See GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW, *supra* note 2.

existing mission, structure, operation and effects, in the largest possible frame of human wellbeing. 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 presents an overview of the role of justice in addressing the issues and opportunities that arise in international economic law and its institutions today. I will survey some of the basic avenues of approach to the subject, some of the policy issues that come up in the process, and offer several illustrations of how such principles and approaches can be applied to diverse areas of trade law such as market access, dispute resolution, and the trade linkage phenomenon.

II Theories of Justice

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, as I intimated above.

But before we get to the answers—or to the possible answers, for there are many—we need to properly understand the question. What do we mean when we ask of a particular rule, practice, decision or outcome, whether it is fair?

A The Tasks of Justice

The problem of fairness is fundamentally what theories of justice exist to help us with: understanding what we mean by fairness, and what makes a certain rule, decision or outcome fair or unfair, and what it takes to correct an unfair situation or outcome. In

the West, thinking about justice has its roots in the early classical period, specifically the thinking and writing of Plato and Aristotle.³⁶ One way Plato expresses the idea of justice is as “Right Order” – as a set of social relationships organized around the fundamental values of a community.³⁷ When we ask if a given situation is “fair,” we are asking whether that particular bit of social ordering is consistent with our notions of what is “right,” in this case “who should get how much of what.”

Aristotle, his student, developed a more nuanced and precise set of categories of thinking about Right Order that we still use today, 2500 years later. Aristotle distinguished between distributive justice, or the fairness of how we allocate social goods and resources, and corrective justice, how we redress a pattern of allocation that has become skewed by behaviour that violates community rules. You can easily see already how familiar corrective justice is to law – the criminal justice system, for example, is an entire branch of law whose rules and institutions are centrally preoccupied with corrective justice, as is the WTO Dispute Settlement Body. When we speak of “legal” justice we often mean corrective justice.

Distributive justice is not as commonly discussed in law, often because the assumption is made that distributive decisions are political, not legal, and of course that is partly right: legislatures make distributive decisions all the time, which they enact into law. However, the law itself is an institution with its own distributive effects, and which builds into legal institutions opportunities for distributive decisions, all of which need to be evaluated according to principles of justice as much as the political decisions that may lie behind them.

B Trade and the Tasks of Justice

³⁶ Of course, thinking about justice is not confined to the West – other traditions such as Hinduism, Confucianism and Islam also offer centuries of reflection on these issues. *See, e.g.*, Sen, *supra* note 24.

³⁷ See FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE* 46-48 (Leiden: Brill, 2003).

So, how do we begin the normative evaluation of trade law and its own relationship to distributive and corrective issues? One way to ground the justice critique of trade law is to base it on the functional characteristics of trade law as a social institution. The primary impetus towards justice, according to John Rawls, the leading 20th century philosopher on justice, 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.”³⁸ In Charles 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.”³⁹

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 institutions such as the WTO.

As an illustration of this relationship, consider the following example, drawn from work on Rawls and trade law.⁴⁰ The key normative assumption underlying a Rawlsian account of justice is that differences in natural endowments, which means for states such attributes as natural resources, geography, climate, basic soil fertility, etc.,

³⁸ Rawls, *supra* note 8, 4–5.

³⁹ Beitz, *supra* note 9, at 131.

⁴⁰ See, e.g., GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 2, at 82.

are morally arbitrary and hence unmerited—they represent the luck of the draw.⁴¹ However, this natural pattern inevitably affects resulting social patterns of allocation of social goods, when for example the climate or resource base influence the allocation of social resources as such as investment capital, legal rights or trade opportunities.⁴² The only fair response to all of this, according to Rawlsian theory, is to ensure that any differences in the social allocation that might be influenced by this arbitrary distribution of natural goods are justified according to their benefit to the least advantaged—the so-called ‘Difference Principle.’ The task of justice is to furnish principles that will serve as a guide to social institutions for making distributive allocations that will justify social inequalities along these lines.

One key site for making this translation between Rawlsian justice and trade law is market access, and the distributive effects of market access rules set and enforced by WTO rules and decisions. In this way trade law influence the terms of access to markets and thereby determine a great deal in terms of the relative opportunities of trading countries in terms of growth, employment, technology and access to capital. However, not all countries are equally positioned to take advantage of the relatively more open markets that result from the WTO’s trade liberalization—there is the ongoing problem of inequality and development, as you have seen in Chapter X.

As you have also seen, 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

⁴¹ Rawls, *supra* note 8, at 62–64. Rawls himself did not extend his theory of Justice as Fairness across national boundaries, although many of his followers have. *See, e.g.* GARCIA, TRADE, INEQUALITY AND JUSTICE, *supra* note 2, at 119–146, and sources cited therein.

⁴² Of course, many other social factors influence these decisions, such a state’s policy decisions (which are not arbitrary), and external factors such as colonialism and its legacy (but that is a matter for corrective justice). These are quite complex matters I am setting aside in this context, but many people are thinking about them.

technical assistance.⁴³ In key ways, each of these tools shifts the trade patterns between developing country markets and developed country markets in ways significant to both the parties involved and to the Rawlsian theory of justice. Applying Rawls' Difference Principle to trade law with an understanding of the role of the market access, suggests that market access would need to be established on terms that benefit the least advantaged, in order to help justify the inequalities between such countries and their markets. Since this means, among other things, ensuring preferential market access for least advantaged countries, and preferential trade is managed through special and differential treatment rules, the link between trade and justice can here be seen to result in a normative criterion for how special and differential treatment works in practice, namely that it meet the criterion of the Difference Principle. Thus the basis for a Rawlsian critique of special and differential treatment – and trade law in general – is set, an opportunity which I shall return to below.

Additional alternative approaches to the relationship between trade law and theories of justice could include a cosmopolitan⁴⁴ or capabilities⁴⁵ approach emphasizing trade law's impact on an individual's life prospects, or a human rights approach emphasizing trade law's impact on fundamental rights.⁴⁶ Naturally, each theory will articulate its relationship to trade law in the distinct terms relevant to that

⁴³ See also GARCIA, TRADE, INEQUALITY AND JUSTICE, *supra* note 2, at 31–38.

⁴⁴ See, e.g., Caney (2006), *supra* note 1, at 102–47.

⁴⁵ 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,” *J. Hum. Dev.* 6 (2005): 93–117.

⁴⁶ See, e.g., Carol C. Gould, “Approaching Global Justice Through Human Rights: Elements of Theory and Practice, in GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW, *supra* note 2; Joseph, *supra* note 18; Gillian Moon, “The WTO-Minus Strategy: Development and Human Rights under WTO Law,” *Hum. Rts. & Int'l. Legal Discourse*, UNSW Law Research Paper No. 2008-10, available at <http://ssrn.com/abstract=1392057> (2008).

theory.⁴⁷ However, all of these alternatives work along the same model, namely to articulate a relationship between trade law and justice theory as a general matter, before proceeding to apply the theory to trade law's particular issues and challenges.

In contrast, there is another approach to the question of international economic law and justice that begins with a radically different starting point: within the system or phenomenon of economic relations and their regulatory structure, and not outside of them.⁴⁸ What if we looked for principles of justice *within* the systems and institutions we are studying, instead of outside them?⁴⁹

This is the premise behind Aaron James' intriguing "structural equity" approach to global justice. In *Fairness in Practice: A Social Contract for a Global Economy*, 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.⁵⁰

Thus, instead of discussing justice in international trade from the point of view of external approaches (such as Rawlsian liberalism or cosmopolitanism), internal

⁴⁷ 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, *supra* note 2, at 43–53.

⁴⁸ 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 fulfil its ordained social purpose? These principles are the "internal" morality of law. See Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

⁴⁹ See, e.g., Miller, *supra* note 2, at 71 (distinguishing "deliberations with a goal of justice internal to the regime from deliberations with external goals.").

⁵⁰ James, *supra* note 2. 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.

approaches like structural equity 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,” for example, which dictates how gains and burdens are shared within a system,⁵¹ we can 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.” 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.

In the dispute settlement process, 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, since developing country markets are generally too small and weak to serve as an effective basis for sanctioning a developed country. Under these circumstances, structural equity tells us we are faced with an unjust result.⁵² It is a justice issue, because as Chios Carmody points out, WTO “[j]ustice is... about maintaining the distribution of expectations [of trade related behaviour] which is equal; the ethos is justice-as-equality.”⁵³ This is an “internal” justice issue because this failure reflects a frustration of member expectations through an ineffective means of dispute settlement, rather than a violation of an independent

⁵¹ *Id.*

⁵² *See, e.g.*, United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DE285).

⁵³ Chios Carmody, “A Theory of WTO Law,” *J. Int’l. Econ. L.* 11 (2008).

normative principle such as the Difference Principle. Thus, justice and fairness understood this way are an intrinsic part of the WTO because they are integral parts of the system itself.⁵⁴

Complementing James structural equity approach is another internal account of the morality of trade, focusing on “consent.”⁵⁵ Through an investigation into the nature of trade as a human experience, one can arrive at a view that suggests that consent is an intrinsic element of trade—it is what makes trade “trade” and not something else. By consent here I do not mean the concept of state consent in international relations theory.⁵⁶ I mean something more basic and direct: 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 could shape the nature of the trade regime in the long run towards greater fairness. However, not everything called “trade” is really trade – economic exchanges have also been used to dominate and exploit.⁵⁷ There are many types of

⁵⁴ 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. See Frank J. Garcia, “Global Justice, and the Bretton Woods Institutions,” *J. Int’l Econ. L.* 10 (2007): 461–81 (evaluating, but from an external viewpoint, the unequal access to development capital and trade currencies as an important element of justice).

⁵⁵ See GARCIA, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES, *supra* note 2; Frank J. Garcia, “Is Free Trade ‘Free’? Is it Even Trade? Oppression and Consent in Hemispheric Trade Agreements,” *Seattle J. for Soc. Just.* 5 (2007).

⁵⁶ 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,” *Chi. J. Int’l. L.* 11 (2011): 663–91.

⁵⁷ 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* (Cambridge: Cambridge University Press, 2005): 68.

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. Parties are forced, coerced or exploited into accepting bad bargains because for a host of reasons they don't see better alternatives. This not only sets up a pattern of exchange that will benefit one party more than another over time (until it collapses, hurting both), but it also sets up a pattern that is not really trade at all, but something we might more accurately call predation, coercion or exploitation.

This insight has important normative and pragmatic implications for global trade policy, and offers us a radically different take on the possibility of global justice. When we examine trade law from the perspective of consent, we see that many aspects of current trade law and policy mix what is ostensibly trade with something else—exploitation, coercion, or predation. Although the applicability of consent theory in trade has only begun to be explored,⁵⁸ early work suggests consent can be a robust standard in evaluating justice and fairness in multilateral and bilateral trade agreements, investor-state dispute resolution and the generalized system of preferences, as I will illustrate below.

C Objections to Evaluating Trade from a Justice Perspective

An overview of the relationship between trade and justice would not be complete without an introduction to the several kinds of objections one can make to the idea of justice as applied to international economic law institutions. To begin with, one can assert on a variety of grounds that global institutions lack the necessary underlying social predicate for the application of justice. If you are a realist or Hobbesian, for example, you can object that there is no international society that makes justice a

⁵⁸ *But see* Miller, *supra* note 2, at 69–83 (positing an account of reasonable deliberations at the WTO that focuses on coercion and exploitation).

coherent concept. Similarly, if you are a contractarian, you can object that there is no global social contract to make global justice binding. If you are a communitarian, you can object that there is no global community of the sort necessary to support obligations of justice. If you are a relativist, you can object that there is no global normative consensus giving rise to truly transnational norms of justice.

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

Second, all three objections fail to take fully into account the effects of globalization. While the communitarian objection, for example, raises important theoretical questions about the nature and possibility of global justice, the world has changed while the debate continues. Within these space constraints I can suggest, but not argue,⁵⁹ that trade and globalization are changing the nature of global social relations such that the whole question of political community is transformed. The paradigm political community of justice – the nation state – is no longer self-sufficient; its wealth distributions are fundamentally conditioned by transnational and global institutions. This means that even “domestic” justice cannot be fully understood without reference to global institutions, creating what might be called “limited community” – for

⁵⁹ See Frank J. Garcia, *Between Cosmopolis and Community: Globalization and the Emerging Basis for Global Justice*, 46 N.Y.U. J. INT'L L. & POL. 1 (2013).

example, in the global economy - and necessitating at least a limited theory of global economic justice.

Turning to the fourth, relativist, objection that given the lack of global normative consensus it is impossible to arrive at a shared/non-hegemonic theory of justice, I would offer three points. First, there are many scholars who think international human rights offers the soundest basis for a global theory of justice precisely because it offers a positive normative consensus.⁶⁰ Second, the economist and philosopher Amartya Sen has written persuasively that even in a pluralist environment with many competing views of justice, we can nevertheless make progress towards justice through what he calls 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 that together may persuade a larger number of actors.⁶¹ Finally, even if you disagree with this view, and object to the whole enterprise on relativist grounds, it must still be admitted that we are required to apply our own theories of justice to our own policies and their effects on global trade, in order that we have basic coherence and our international positions have integrity.⁶²

Finally, there is another type of objection, which can be called the “egoist” objection, in which one may simply refuse to look at trade through the lens of justice, because one is currently in the winner’s position. In order to address this, let me first point out that trade law does not operate in a moral vacuum—there is in fact a dominant theory of justice in contemporary trade discourse, and it is utilitarianism.

⁶⁰ Joseph, *supra* note 18; Kinley, *supra* note 4. *See also* Joost Pauwelyn, *Book Review: Just Trade* (reviewing GARCIA, *TRADE, INEQUALITY, AND JUSTICE*, *supra* note 2), 37 *GEO. WASH. INT’L L. REV.* 101 (2005).

⁶¹ Sen, *supra* note 24, at 24–27.

⁶² Garcia *supra* note 2.

In its economic version, utilitarianism tells us that trade policy should be judged by its effects on efficiency and aggregate welfare—sounds familiar, doesn't it? This is the language of everyday debates on trade law and policy, and is definitely *a* theory of justice, not *no* theory of justice; it is *a* view on the question of what qualifies as right order, and instructs social institutions how to make allocative decisions.

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

Little need be said about the merits or fairness of this view, but let me at least suggest that, whatever its normative shortcomings, this view is fatally short-sighted. Elsewhere I have written that the literature on the social psychology of justice sounds a warning note here: among human beings, the perception of injustice provokes the strongest possible emotional reactions.⁶³ Put another way, we ignore perceptions of injustice at our peril – they lead to instability and social conflict of a sort which we see today both globally and nationally, which in the end hurts everyone.

III Evaluating Trade Law from a Justice Perspective

⁶³ *Trade, Justice and Security*, in *TRADE AS GUARANTOR OF PEACE, LIBERTY & SECURITY?* (PADIDEH ALA' I ET AL., EDS.) (ASIL STUDIES IN TRANSNATIONAL LEGAL POLICY SPRING 2006).

So, therefore, the way is clear to proceed to an evaluation of the fairness of trade law through a range of justice perspectives. As you well know from having worked through this textbook, trade law, and international economic law more generally, cover a vast range of topics, and I can only offer a sampling here of how various approaches to justice work in practice. Nevertheless, I hope what follows is both illuminating and inspiring towards your own efforts and critiques. There is much important work to be done.

A Trade and Inequality – Transnational and Domestic Aspects

The persistent problem of inequality and its relationship to trade law leads to a very basic question facing states in their international economic relations: given the fact of inequality and its adverse effects on the least advantaged (the smallest economies and the people living in them), how can the international economic system be restructured to ensure that such inequalities work to the benefit of the least advantaged?

Answering this question would naturally lead to a comprehensive review of the structure and operation of trade law from top to bottom, both its substantive rules and its negotiation and decision-making procedures, with this metric in mind. One could in fact understand much of contemporary trade law scholarship around topics such as development, fairness and legitimacy as explicitly or implicitly carrying out just such a review.⁶⁴ Here, I want to look only at two examples: first, between states, I want to continue my earlier examination of the special and differential treatment (S&D) rules you have studied in Chapter X, to illustrate how the application of Rawlsian theory can help us evaluate whether a given set of trade rules work fairly, and how we might

⁶⁴ See, e.g., SONIA E. ROLLAND, DEVELOPMENT AT THE WTO (2012); Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT'L ECON. L. 405, (2005).

improve them.⁶⁵ Second, turning to inequality within states, I want to look at one aspect of how we address the unequal domestic impacts of free trade, namely trade adjustment assistance.

1. Rawls and S&D – Justifying Inequalities

Through S&D, the international economic law system already incorporates laws, policies and social norms that can function as redistributive mechanisms and that in normative terms can therefore serve as the basis for liberal states discharging their duty to work towards a just international trade law. At the core of S&D is the practice of asymmetric trade liberalization, involving the terms on which states allow access to their markets and expect access in return.

S&D attempts to secure the benefits of social inequality in developed countries, in the form of the wealth and resources of their markets, for the least advantaged states, through preferential market access which is granted unilaterally under a multilaterally-approved exception to GATT/WTO rules.⁶⁶ That is, states with larger economies allow access into their wealthier markets to states with smaller economies, on terms that are both preferential and non-reciprocal. These terms are preferential in that access is on better terms than those received by other larger economies; they are non-reciprocal in that the larger economies granting the concessions do not expect equivalent concessions from smaller economies in return.

⁶⁵ See GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 2, at 155–162. S & D has been criticized as ineffective or worse. See Jeffery L. Dunoff, *Dysfunction, Diversion and the Debate Over Preferences: (How) Do Preferential Trade Policies Work?* in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 45 (Chantal Thomas & Joel R. Trachtman eds., 2009). Nevertheless, it represents the sole systematic effort within trade law to address the problem of inequality on a structural level.

⁶⁶ *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) (establishing the Enabling Clause); *Generalized System of Preferences*, L/3545 (June 25, 1971) GATT B.I.S.D. (18th Supp.) at 24 (1972) (adopting the first GSP waiver). See, e.g., Donald H. Regan, *What Are Trade Agreements For? -- Two Conflicting Stories Told by Economists, With a Lesson for Lawyers*, 9 J. INT'L ECON. L. 951 (2006).

It is this asymmetry that enables S&D to play a key role in justifying inequalities in the international allocation of social goods.⁶⁷ By opening their markets to exports from smaller economies on a preferential basis, large economies in effect place the consumption power of their larger, richer consumer market at the service of the smaller economies, which can increase their exports and thereby strengthen their economic base.⁶⁸ Thus, preferential market access for developing countries allows the inequalities that manifest themselves in the form of wealthy consumer markets to work to the benefit of the least advantaged, thereby meeting the central criteria for liberal distributive justice.

Having determined this basic obligation, the stage is now set for a detailed normative analysis and review of existing trade preferences and multilateral trade laws, for their consistency with this mandate. This is the logical next step that this kind of normative analysis makes possible, and while such a review is beyond the scope of this chapter, the outlines of such an analysis will be sketched here.⁶⁹ While S&D as currently embodied in unilateral preference programs plays an important role in justifying inequalities, a Rawlsian analysis also reveals how much work still needs to be done to craft international trade rules which truly satisfy the core requirement of a liberal theory of justice; namely, that social inequalities work to the benefit of the least advantaged. In case after case, the details of the rules and how they operate actually

⁶⁷ Market access is managed through the two principal components of S&D: market access preferences and market protection mechanisms. In this chapter, I will focus on the market access branch of S&D. For an evaluation of market protection mechanisms, as well as the wealth transfer aspects of S&D, see GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 2, at 67–86.

⁶⁸ Frank J. Garcia. "Developing a Normative Critique of International Trade Law," *Bremen Working Paper* (2012), available at http://works.bepress.com/frank_garcia/60/.

⁶⁹ For a fuller treatment, see GARCIA, TRADE, INEQUALITY, AND JUSTICE, *supra* note 2.

subvert the normative purpose and basic framework of such rules, working to the benefit of the most advantaged states instead of the least advantaged.⁷⁰

Taking the US GSP program as an example, it is structured as a discretionary, unilateral program and not a binding obligation on the part of the US, as is the case with most GSP benefit programs. Instrumentally, extending trade preferences through unilateral programs is questionable on several grounds. To begin with, this format renders them inherently unstable because as programs they are subject to periodic renewal, and within each program the beneficiaries must continually re-qualify for the preferences. These uncertainties create problems for business and investment planners on both sides of the preference. The uncertainty surrounding both periodic qualification decisions and decisions concerning continuation of the program has also – understandably - led to criticism on the part of beneficiary countries that they remain in dependent relationships subject to the whim of the granting state.⁷¹

When looked at from the perspective of the Difference Principle, the unilateralism of existing trade preference programs is even more inappropriate. If a state has an obligation to justify its own social advantages, and the mechanism it chooses is to place the strength of its consumer market at the service of the least advantaged states through preferences, then it is difficult to justify the view that such an obligation should be effectuated through a discretionary mechanism at the sole will of the advantaged state. The structure of the policy is not consistent with its underlying normative purpose.

Moreover, the rules governing which goods are eligible for trade preferences (central to S&D) establish criteria which have more to do with the domestic industries

⁷⁰ *See id.* at 147–92.

⁷¹ *Id.* at 156–167.

and foreign policy goals of the granting state than they do the economic needs of the beneficiary state. To take just one example from US GSP practice, actual availability of the preferences at any given time is subject to a wide variety conditions imposed by the granting state, such as the disavowal of communism, cooperation with regional anti-narcotics efforts, and the offer of assurances by the beneficiary that it will provide the U.S. “equitable and reasonable access to the markets and basic commodity resources” of the beneficiary.⁷² Such conditions are normatively unjustifiable and have nothing to do with necessary accommodations of these policies to facts on the ground. Instead, the nature of these conditions suggests that the policy actually protects and advances the foreign policy agenda of the granting state, rather ensuring the benefits of inequality flow to the least advantaged, turning their normative justification on its head. To condition preferences on the basis of a failure to meet such conditions is to directly subvert the principle of justice which should on this approach inform the trade policy of liberal states, and turns the logic of the Difference Principle on its head: such GSP rules make trade inequalities work even more for the benefit of the most advantaged!

2. Domestic Inequalities – Adjustment Assistance and the Social Contract of Trade

Turning to domestic inequality and its relationship to trade, one place in which to examine this complex relationship is through the unemployment and economic dislocation which economic theory and our own experience tell us will come for at least some people as a consequence of trade liberalization. This implicates what I am calling the social contract of trade, which involves the commitments we make to these vulnerable groups within our own society who are at risk when we undertake as a

⁷² See e.g., DESIGNATION OF BENEFICIARY DEVELOPING COUNTRIES, 19 U.S.C. § 2462 (c)(4) (2011). For such reasons, Argentina is no longer a GSP beneficiary due to the Azurix arbitration award dispute – Argentinian courts did not enforce the award and the investor petitioned the president under Sec 301 of the Trade Act of 1974.

society to engage in free trade.⁷³ It includes the obligation to respect the political commitments made to secure consent—understood as consensus and not as unanimous agreement—to a free trade policy, in particular to compensate those within our polity who are vulnerable to trade’s downside risks.

The choice to enact a free trade regime forms part of what Rawls calls the basic structure of a society: a set of institutions, policies, and practices that fundamentally shape the allocation of social resources and the life prospects of a community’s members.⁷⁴ It is a choice towards a set of social arrangements that we hope collectively brings us the benefits of social and economic cooperation. Inherent in that choice, however, is the risk that these arrangements will also bring substantial costs, in the form of lost jobs or lost wages, for particular members of our society.

The social contract of trade consists of the obligations we undertake towards those workers to hold them free from harm, or more precisely, to ensure they are no worse off than they would have been had we not embarked on a free trade policy.⁷⁵ This obligation has deep roots in both liberal theory and the economic justifications for free trade, which I cannot go into here.⁷⁶ In this context, I want to look at how we meet this obligation through what is called trade adjustment assistance, and how much our efforts fail from the perspective of consent theory. In other words, we are committing ourselves as a society to a free trade policy that will hurt some, and then abandoning

⁷³ I discuss this more fully in a forthcoming book, FRANK J. GARCIA, *TRADE AND CONSENT: TRADING FREELY IN A GLOBAL MARKET* (Cambridge, forthcoming 2018).

⁷⁴ See JOHN RAWLS, *THE LAW OF PEOPLES* 42–43 (1999) (linking the trade regime to the social choice for markets, and the need for fair background conditions as part of the basic structure). On the relationship between free trade and Rawls’ earlier views in *A Theory of Justice*, see GARCIA, *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES*, *supra* note 2, at 70–95 and sources cited therein.

⁷⁵ Aaron James calls this the Duty of Collective Due Care, one of the three equitable principles he finds inherent in the collective social practice he calls mutual reliance on markets, or mutual market reliance for short. James, *supra* note 2, at 17–18.

⁷⁶ Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 *Michigan Law Review Online* (2017).

our commitments to help them once we have secured the deal we wanted. Once consent is betrayed, the trade that results is really a form of nonconsensual wealth transfer to the people we've betrayed, with the social and political consequences we are seeing today in the U.S., Brexit and elsewhere.

In an advanced capitalist society such as the United States, the social contract of trade is formed through the interaction of two legislative mechanisms, Trade Promotion Authority or TPA, through which Congress reaches agreement over trade policy priorities in the process of granting the Executive Branch negotiating authority; and Trade Adjustment Assistance, or TAA, shorthand for a package of enhanced benefits that OECD and other governments offer to workers who have lost their jobs as a result of trade. TAA is designed to support displaced workers as they face unemployment or underemployment, and the re-training and relocation often necessary for them to rebuild their lives and their communities.

What links together these two specific aspects of trade law—TPA and TAA—is their connection to consent: TAA was first invented, and since then has been consistently renewed, in connection with periodic Congressional negotiations over TPA and trade negotiations generally. In other words, TPA and TAA together embody the social bargain—the implicit commitments and structural principles—that together with other key social programs, constitute the social contract of trade. How we promise TAA, and fulfil—or not—our promise, is intimately connected with of securing, protecting or betraying consent in the domestic trade agreement process.

The current political crisis in the U.S. has revealed that many view the process of formulating a consensus for trade as broken, and the commitment to deliver meaningful

trade adjustment assistance has been violated.⁷⁷ In the terms of consent theory, we have overlooked, neglected or actively betrayed the consent of the most vulnerable within our own polity, as we have pursued “trade” agreements that have similarly ignored, coerced or violated the consent of our trading partners. We have undermined consent both at home and abroad.

Since TAA was first created in the U.S. in 1962, the renewal of TAA has always been tied to new rounds of trade negotiations. Congress has renewed or extended TAA each time it has granted the President TPA or approved a new round of trade agreements, reinforcing the connection between decisions to trade and decisions to compensate at-risk workers, but underscoring its political vulnerability as well.⁷⁸ Once TPA is granted or the agreements ratified, TAA funding has tended to diminish, further reinforcing the many program defects inherent in the way TAA has been designed, and leading to widespread acknowledgment that TAA as currently constituted is a failure. All of this has had the effect of rendering TAA a political football rather than a social contract, and undermining the social contract of trade.

In the U.S., repairing the social contract of trade, and thereby honoring consent in our domestic trade policy, means reforming how trade adjustment assistance is designed and delivered. This means redesigning the program to more closely resemble more successful European models, to offer more effective job retraining, higher levels of wage and other support, and ensuring adequate funding for relocation assistance.⁷⁹

However, this would also require a deeper and more consistent commitment to funding,

⁷⁷ *Id.*

⁷⁸ *Id.* at 10–12.

⁷⁹ *Id.* These suggestions also have implications for other countries as they consider how best to design effective compensation programs. Tim Meyer has argued that for this reason the commitment to undertake domestic adjustment policies should itself be internationalized in the form of commitments within trade agreements, thus binding all parties to a collective decision to support the social contract of trade throughout the free trade zone they collectively create. *Saving the Political Consensus in Favor of Free Trade*, 70 *VAND. L. REV.* 985 (2017).

and here we find TAA's most spectacular failure. Overall, there has been no effort to link funding levels to data on levels of demand or need for the program.⁸⁰ As a result, TAA funding has consistently been set too low for program needs, and has fluctuated due to political trends rather than political commitments.⁸¹

Put in the terms of this inquiry, we can understand the shortcomings in domestic trade adjustment policies like those of the U.S. as an injustice, from a range of perspectives. First, from a Rawlsian point of view, the unequal impact of trade policy must be justified according to its benefit to the least advantaged, in this case the workers displaced by trade. Of course, they should be able to pay lower prices for the goods they need as a result of free trade, but that is no help when you have lost your job. Trade adjustment assistance is a key element in justifying trade's unequal effects, insofar as it ensures that free trade as a policy will at a minimum not leave workers worse off than before, and perhaps incrementally better when once one factors in lower prices, etc.. Put simply, without effective adjustment assistance, free trade as a policy cannot be justified because otherwise the least advantaged will be worse off.

Alternatively, the failure to honor trade's social contract can be critiqued as a domestic failure to respect consent, not only in the serious design deficiencies in adjustment programs, but also in the failure to follow-through with adequate funding necessary to make this essential promise a reality. A consent analysis helps us both

⁸⁰ Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT'L L. 797, 847–48 (2012).

⁸¹ For example, the most recent TAA reauthorization was in 2015, extending TAA through 2021 and capping the annual funding at \$450 million, a reduction from the amounts authorized in 2009 and 2011. U.S. DEP'T OF LABOR, SIDE-BY-SIDE COMPARISON OF TAA PROGRAM BENEFITS UNDER THE 2002 PROGRAM, 2009 PROGRAM, 2011 PROGRAM, AND 2015 PROGRAM 2 (Nov. 9, 2015), <https://www.doleta.gov/tradeact/pdf/side-by-side.pdf> [<https://perma.cc/3YA8-MNVA>]. In comparative terms, the United States is consistently near the bottom of all OECD countries in terms of adjustment spending, reflecting the fact that the United States is also near the bottom of all OECD states in overall labor market policy spending and in the relative percentage of that spending devoted to active labor market policies, the most effective component. Jun Nie & Ethan Struby, *Would Active Labor Market Policies Help Combat High U.S. Unemployment?* 2011 ECON. REV. 35, 41 (2011) (demonstrating that the United States is third from the bottom of 21 OECD countries studied).

recognize the costs of this failure in terms of the social contract of trade, and understand that restoring this contract must address concrete issues of program design, delivery and funding.⁸²

B WTO Market Access – the Fruits of Asymmetric Bargaining

Earlier we looked at how differential market access through S&D has been handled—and mishandled—through GSP-style programs enacted by WTO member states. Now I want to look more generally at how market access negotiations have been handled across the board by the WTO, to see how justice helps us understand where such negotiations may have gone astray.

A core function of the WTO system is to organize the process of multilateral negotiations around the reduction of tariff and nontariff barriers, towards increased market access for Members and progressive market liberalization. This was the essential function of the GATT Treaty of 1947 and its associated negotiation “Round” process, and has carried over into the WTO’s complex treaty structure, in which the GATT Treaty (now GATT 1994) constitutes a major part of “Annex 1,” the trade rules annex to the WTO Agreement.⁸³ A consent analysis of the way market access has been handled in WTO negotiations helps understand in concrete terms where trade law falls short from a justice perspective, and can also help explain why trade negotiations have broken down over such issues in the Doha Round and elsewhere.

The political philosopher Richard Miller has identified elements of coercion and exploitation in the ways the WTO system accomplishes this core goal. This is important

⁸² For some novel approaches to funding including a financial transactions tax, see Garcia & Meyer, *supra* note 76.

⁸³ WTO Agreement. The other Annex 1 agreements are the General Agreement on Trade in Services or GATS, and the Agreement on Trade-Related Intellectual Property Rights or TRIPS (I shall have more to say about this agreement in Section 4 below). Annex 2 consists of the Dispute Settlement Understanding or DSU (I shall have more to say about this in Section 3 below). Annexes 3 and 4 contain a trade policy review mechanism, and smaller agreements that not all WTO Members are party to.

in its own right, given the centrality of market access (now including both goods and services, as we have seen above) to most economies particularly developing ones. It is of particular concern when we recall that the WTO is much more than the GATT—as Miller points out, it is a global framework agreement creating a global regulatory institution. For any serious economy with development goals, there is simply no other game in town. Thus it matters a great deal how this institution accomplishes its regulatory purposes, through its own behavior and through the behavior its rules and norms facilitate in its powerful Members.

Miller analyzes the way major developed countries “take advantage” of the urgent need of developing countries for market access, to negotiate unbalanced agreements through what he deems “bullying.”⁸⁴ He cites numerous examples of U.S. behavior during the Uruguay Round negotiations that consisted of flamboyant threats of trade disputes, or threats to create alternative and exclusive regional or bilateral trade deals if the US did not get its way.⁸⁵ The result, in his view, is a framework that is seriously unbalanced against developing countries, in specific areas such as market liberalization, which is uneven due to a toxic combination of developed country agricultural subsidies and high tariffs against competitive exports from developing countries;⁸⁶ and in overall structural patterns such as the lack of free movement of labor when compared to goods and services.⁸⁷

Miller’s account of U.S. behavior against weaker states in a multilateral setting closely tracking the idea of coercion, and the concept of taking unfair advantage at the

⁸⁴ Miller, *supra* note 2, at 70.

⁸⁵ *Id.*

⁸⁶ *Id.* at 81. Such a combination can be disastrous, as when the Philippines opened its corn sector to increased foreign imports to comply with Uruguay Round commitments, leading to the loss of thousands of jobs and serious social dislocation in a country that could ill afford it, while US and European agricultural subsidies remained intact. *Id.*

⁸⁷ *Id.* at 77–79.

heart of our account of exploitation.⁸⁸ If an agreement is reached on the basis of “threats of exclusion and discrimination,” that would be an example of coercion, not trade. Similarly, Miller characterizes a trade regime achieved on the basis of concessions that countries would only make under conditions of need, as a case of “the strong taking advantage of the weak,” which we would call here exploitation. State behavior can certainly count as both, in the sense that a powerful state can seek to take unfair advantage of, for example, unjust background conditions such as the legacy of colonialism (exploitation), through bullying tactics that would count in themselves as coercion.

The alternative to such tactics, Miller writes, is instead to engage in “reasonable deliberations.” Put in the terms of a consent approach, one can understand Miller to mean that the alternative to exploitation and coercion in multilateral trade negotiations is to engage in negotiations towards a consensual agreement, what he calls “the willing acceptance of a shared commitment by all.”⁸⁹ This will not happen by itself. If we are to take consent seriously, we need to look at how consensual agreements can be reached within a context of steep asymmetries in power and negotiating capacity.

Negotiations among unequal parties, whether they involve explicit coercion or exploitation, need not always result in bad bargains—it all depends on how the negotiations are managed.⁹⁰ Powerful parties would do well to remember that while the immediate result of not taking consent seriously may seem like a better deal for them, game theory reminds us that insofar as trade is not a one-shot game, such behavior may well result in a poorer bargain over time, or no future bargains at all.

⁸⁸ *Id.* at 70.

⁸⁹ *Id.* at 70–71.

⁹⁰ JOHN O’DELL, NEGOTIATING THE WORLD ECONOMY 545 (2000).

Scholars analysing trade negotiations note a variety of strategies both “away from the table” and “at the table” which weaker parties can in fact pursue to attempt to offset this disadvantage. Taking full advantage of moves ‘away from the negotiating table,’ such as capacity building, coalition strategies and improving one’s BATNA, are critical to efforts at improving outcomes, since once one is at the table, many of the parameters of the negotiation are already set.⁹¹

Small states face huge obstacles to effective negotiation in the form of information and capacity asymmetries in relation to their negotiation counterparties.⁹² An important first step therefor is to build capacity, improve knowledge and reduce the strategic disadvantages of imperfect knowledge in trade negotiations. It is also critical that smaller states continue to take steps to improve their BATNA. It is a fundamental tenet of negotiation strategy that the more that weaker parties have anticipated, studied and developed alternatives to a negotiated outcome, the stronger their hand even against powerful states.⁹³ Recent well-documented examples support the importance and efficacy of this strategy in asymmetric trade negotiations. For example, Odell cites Mexico’s successful opposition to allowing U.S. access into the oil sector during the NAFTA negotiations, which depended on a range of efforts Mexico made to make credible contingency plans should the negotiations fail over this issue.⁹⁴

Finally, the importance of coalition building as a pre-negotiation strategy for smaller states is well-recognized.⁹⁵ Smaller states have been successful in using coalition strategies to improve their negotiation outcomes, both by using the coalition to mitigate capacity constraints and as a means to alter the incentive structure in

⁹¹ *Id.* at 552.

⁹² *Id.*

⁹³ *Id.* at 553.

⁹⁴ Odell, *supra* note 90, at 553.

⁹⁵ *Id.*

multilateral negotiations, forcing larger players towards concessions they might not otherwise make.⁹⁶

Once “at the table,” many aspects of the negotiation have already been set, but that does not mean that small states have no options. On the contrary, negotiation strategy during the negotiation itself can still be critical. Strategic options at the table can be usefully organized along a continuum between the purely distributive (strategies for claiming value and defending from losses) and the purely integrative (shared problem-solving along joint interest towards win-win outcomes).⁹⁷ For example, Jones cites Mexico’s exclusion of the oil sector in the NAFTA negotiations as a success, but rather in its effective use of defensive strategies such as offsetting in order to resist otherwise exploitative context of asymmetric bargaining power.⁹⁸ Mexico strategically offset U.S. refusal to liberalize its maritime trade liberalization, a highly sensitive sector for the U.S., against Mexico’s refusal to negotiate energy liberalization, thus avoiding minimizing pressure to make concessions while avoiding the appearance of being unilaterally intransigent.⁹⁹

While these strategies are far from perfect and the success stories are perhaps outnumbered by the failures, they are nevertheless a starting point.¹⁰⁰ Whatever approach or blend of approaches is ultimately employed, as Rolland points out, it is clear that careful attention to the link between substantive negotiation goals, the risks of negotiation, and the importance of negotiation over the negotiation design itself, can work to offset the disadvantages that weaker parties face in securing fair outcomes that

⁹⁶ *Id.* at 554.

⁹⁷ *Id.* at 555.

⁹⁸ Emily Jones, *Negotiating Against the Odds* 87–88 (2013).

⁹⁹ *Id.* at 88.

¹⁰⁰ *But see* ODELL, *supra* note 90 (cataloguing some of the success stories).

ultimately work towards everyone's benefit.¹⁰¹ The system as a whole also stands to benefit from more balanced, and therefore in the long run more successful, trade liberalization negotiations.

C WTO Dispute Resolution – Structural Equity and Exploitation

As you studied above in Chapter X, the WTO Dispute Settlement Understanding (DSU) governs the adjudication of disputes on alleged noncompliance and, if necessary, enforces obligations through an arbitral panel process that results, in the case of noncompliance, in the authorized application of unilateral sanctions (called the suspension of concessions). One of the most widely recognized shortcomings of the system, from the perspective of developing countries, is the time, money and human resources necessary to mount or defend against WTO cases.¹⁰² When developing countries win cases they bring against developed country Members, it is widely recognized as a significant achievement and a vindication, at least in part, of the strength of the dispute settlement system.¹⁰³ However, what is perhaps less readily visible, and certainly more common, is the pressure developing countries face to settle cases they bring or cases they are subject to, often simply because of resource constraints independent of the merits of the case.¹⁰⁴

An even more subtle, and perhaps even more damaging, shortcoming in the DSU system is the fact that it depends ultimately on the effectiveness of trade sanctions,

¹⁰¹ ROLLAND, *supra* note 64, at 80.

¹⁰² See Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 1S77 (2006) (surveying challenges to developing countries in dispute resolution). For this reason, the WTO Advisory Centre for Dispute Resolution, a kind of state-funded Legal Aid for developing countries, is a key element in helping lessen the effects of unequal background conditions on WTO dispute resolution. See, e.g., Roderick Abbott, *Are Developing Countries Deterred from Using the WTO Dispute Settlement System: Participation of Developing Countries in the DSM in the years 1995–2005* (ECIPE, Working Paper No. 01/2007, 2007).

¹⁰³ See Stephen J. Powell and Andrew Schmitz, *The Cotton and Sugar Subsidies Decisions: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture*, 10 Drake J. Agric. L. 287, 288–90 (2005).

¹⁰⁴ Shaffer, *supra* note 102, at 2.

which in turn depend on the relative market size of the sanctioning and sanctioned states and their respective capacities to absorb the economic effects of sanctions, which are felt by both the sanctioning and sanctioned states.¹⁰⁵ An authorized suspension of concessions is generally effective in bringing a party into compliance with its WTO obligation in cases brought by developed countries, with large markets that are significant to the sanctioned state and which can themselves absorb the effects of the higher costs of the sanctioned goods to domestic industry and consumers. However, the same mechanism is not as effective when a developing country, with its small and highly trade-dependent market, is awarded the right to suspend concessions against a larger noncomplying state, both because its consumers can ill afford the higher costs of the sanctioned goods, and the volume of trade with the noncomplying state is simply too small from that state's point of view for the sanctions to make any appreciable impact.

In the view of Chi Carmody and others, this is a failure of structural equity, because it represents a frustration of member expectations based in the agreements themselves, through a means of dispute settlement that is effective for some members more than others.¹⁰⁶ As Carmody points out, the WTO agreements establish a series of rights and obligations for WTO members, and create a series of expectations in these

¹⁰⁵ See, e.g., CHENG-YAN TUNG, CROSS-STRAIT ECONOMIC RELATIONS IN THE ERA OF GLOBALIZATION: CHINA'S LEVERAGE AND TAIWAN'S VULNERABILITY (2007). Philip I Levy, *Sanctions on South Africa: What Did They Do?* Economic Growth Center, Yale University, Discussion Paper No. 796 (1999) available at www.yale.edu/growth_pdf/cdp796.pdf. Brazil was recently authorized to cross-retaliate against the U.S. as part of the long-running Cotton case, but the two sides have suspended that course in order to further negotiations. See RANDY SCHNEPF, STATUS OF THE WTO BRAZIL-U.S. COTTON CASE 3 (2013), <https://fas.org/sgp/crs/row/R43336.pdf>; WTO, *DS267: United States - Subsidies on Upland Cotton*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

¹⁰⁶ Chios Carmody, *A Theory of WTO Law*, 11 J. INT'L. ECON. L. 527 (2008).

members, based on their formal equality. Fairness in the WTO “is... about maintaining the distribution of expectations which is equal; the ethos is justice-as-equality.”¹⁰⁷

The asymmetric nature of the effectiveness of the WTO remedy also suggests from a consent perspective that the WTO DSU can be said to facilitate exploitative behavior. In a system whose substantive principles operate on the basis of formal equality between parties, the dispute settlement system in practice achieves unequal outcomes due to background conditions of a structural nature: a sanctions-based remedy works unequally in practice when small economies are involved, and developing countries are not equally staffed or resourced when it comes to mounting or defending these cases.¹⁰⁸

Therefore, when a developed country pushes hard for seemingly balanced concessions (remember Miller), such concessions will not be truly reciprocal, insofar as they will not be equally enforceable by both sides against each other. Similarly, when a developed country violates existing agreements with respect to a developing country, it is doing so in a context in which the target state will often lack an effective remedy.¹⁰⁹

In either case, it can be said that the DSU is allowing developed WTO Member to exploit unfair background conditions. Understanding this from a justice perspective adds new urgency and sharpness to the calls for DSU reform currently stalled as a consequence of their being linked ill-advisedly to the Doha Round agenda.

D WTO and Domestic Law Reform – TRIPS and Coercion

¹⁰⁷ *Id.*

¹⁰⁸ See Shaffer, *supra* note 102, at 1. For this reason, the WTO Advisory Centre for Dispute Resolution, a kind of state-funded Legal Aid for developing countries, is a key element in helping lessen the effects of unequal background conditions on WTO dispute resolution. See Abbott, *supra* note 102.

¹⁰⁹ See, e.g., United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DE285).

Perhaps the most widely criticized of the WTO agreements is TRIPS, or the Agreement on Trade-Related Intellectual Property Rights. The TRIPS agreement sets out minimum standards on IP protection to which all WTO Members must conform, or else face WTO dispute settlement action. These minimum standards include the types of IP that must be protected under domestic law and for how long; and the legal mechanisms that must be available in domestic law to protect these rights.¹¹⁰ The TRIPS Agreement has been subjected to range of human rights critiques for its effects on public health.¹¹¹ A justice perspective can complement this analysis by illustrating on fairness grounds, independently of often-controversial economic and social human rights, why the TRIPS Agreement struck such a powerful chord among developing countries.

While at first glance such an agreement might seem unobjectionable, TRIPS represents the conclusion of an underlying, long-running, urgent and passionately argued debate over the proper role of IP protection in a post-colonial development process.¹¹² In this debate, the most advanced economies, holding the bulk of the world's IP then and now (and, not coincidentally, also the former colonial powers), argued not surprisingly for strong IP protection, whereas the developing countries argued on development and post-colonial justice grounds for looser standards.¹¹³ Moreover, the issue (and negotiations) came to a head during the global HIV/AIDS pandemic, in which pharmaceuticals were a critical weapon, and which illustrated painfully and dramatically the nature of the inequalities in both IP holdings and wealth (in the form of

¹¹⁰ See *supra* Chapter X (TRIPS Chapter).

¹¹¹ See e.g., Sarah Joseph, *Blame it on the WTO: A Human Rights Critique*, *supra* note 3.

¹¹² See generally Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, 72 *Chi. Kent L. Rev* 385 (1996-7).

¹¹³ *Id.*

social safety nets and health care resources), in a context (Africa) that had felt and continues to represent the full brunt of colonialism at its worst.¹¹⁴

The fact that we have a TRIPS Agreement clearly represents the victory of the developed country IP holders in this debate, which in itself would have assured enduring controversy around the Agreement. However, and even more to the point for the purposes of this chapter, many scholars consider the manner in which TRIPS was adopted to have been highly coercive.¹¹⁵ Thus the TRIPS agreement is an important site in which to evaluate how domestic law reform efforts (in this case, of developing country IP laws) are handled and mishandled when included in a multilateral trade negotiation.

Within the complex tangle of the Uruguay Round negotiations that led to the creation of the WTO (and the TRIPS Agreement), two elements stand out that are relevant to the coercive aspect of these negotiations. First, in the background of the negotiations we have the U.S. aggressively pursuing a policy of unilateral IP enforcement actions under Section 301 of its domestic trade law against individual high-profile developing countries, in order to enforce its more aggressive stance on IP rights.¹¹⁶ These actions, perfectly legal under pre-WTO law but deeply resented both in the context of the global IP debate and for their unilateralism, could lead to U.S. trade sanctions that developing countries could not afford or effectively counter, and deliberately intensified during the TRIPS negotiation period.¹¹⁷ Second, we have the decision in 1993 by the so-called Quad Countries (U.S., EU, Canada and Japan—again,

¹¹⁴ See Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 A.J.I.L. 317 (2005).

¹¹⁵ Donald P. Harris, *Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion*, 27 U. PA J. INT'L ECON. L 681, 732 (2006).

¹¹⁶ Harris, *supra* note 115, at 732–736.

¹¹⁷ *Id.* at 735.

not coincidentally including the major IP holding states) that the WTO should be launched as a “single undertaking,” in other words as a package of treaty obligations that every country had to accept *in toto* to become a WTO Member.¹¹⁸

Together, these two elements combined to create a highly coercive dynamic for developing countries in the IP area: accept the deeply resented TRIPS agreement, representing as it does the triumph of the developed country side of the IP debate, or face exclusion from the WTO (unthinkable in 1994 and even more so now), and the prospect of continued unilateral U.S. sanctions over IP policy. This illustrates precisely the same dynamic surrounding domestic law reform and trade negotiations that we saw in U.S. regional and bilateral trade agreements, with the same coercive effects. There seems to be little chance that a developing country will refuse a trade agreement with vital market access and other benefits, in order to resist even as deeply unpalatable a domestic law reform as the TRIPS Agreement.

For such reasons, Harris has made the interesting argument that TRIPS should be considered an adhesion treaty, under principles drawn from the private law of adhesion contracts.¹¹⁹ Harris cites the characteristics of a treaty that render adhesion theory relevant as follows: (1) one state, generally a developed country, had superior bargaining power; (2) the agreement has aspects or characteristics of a form or pre-formulated contract and was presented on a take it or leave it basis; (3) the receiving state, generally a developing country, lacked sufficient bargaining power to modify or reject the terms; and (4) the imposed terms are onerous or unfavorable and offend norms of distributive fairness.¹²⁰

¹¹⁸ See Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12 J. INT’L ECON. L. 835 (2009).

¹¹⁹ Harris, *supra* note 115.

¹²⁰ *Id.* at 724–38. The TRIPS negotiations meet all of these criteria, as many elements of the earlier regional and bilateral negotiations profiled above, which I will explore in greater detail in the next chapter.

In Harris' view TRIPS meets those criteria, but his larger goal is to argue for private law concepts of adhesion to be available to international tribunals as a general principle of law under Article 38 of the ICJ Statute, justifying an interpretation *contra proferentem*, or against the party responsible for the drafting, in favor of developing states.¹²¹

This is one example of how a justice critique can unlock powerful doctrinal tools for addressing structural issues once the problem is framed correctly as a fairness problem. Justice theory thus not only pinpoints where a system is failing from a fairness perspective, but also suggests important new avenues for redress by accessing other areas where law has similarly failed, all in the strong rhetorical language that justice theory offers.

IV Conclusion

In this chapter, we have looked at selected issues in trade law and policy involving market access, trade adjustment assistance, dispute resolution, and domestic law reform in the IP area, from justice perspectives as diverse as Rawlsian liberalism, the literature on adhesion contracts, asymmetric negotiation theory, structural equity and consent theory. While the selection of topics and theories is by no means exhaustive, I hope it has been both illuminating and inspiring, suggesting some of the work that needs to be done to make the trading system more fair and effective, and illustrating the kinds of critical, structural and advocacy tools that justice theory offers.

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

¹²¹ This principle of interpretation *contra proferentem* has been recognized by the European Principles of Contract Law, the UNIDROIT Principles, and the Restatement, 2nd, of Contracts, lending weight to Harris' argument. See Harris, *supra* note 115.

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?¹²²

However, 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 and burdens created by the laws they administer and the productive social relations they structure. In this sense, a justice perspective does merely makes explicit the distributive roles and patterns already at work within trade law, giving us a chance to ask ourselves if we are satisfied with what we see, and ideas for what we might undertake to change if we are not.

¹²² 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?” *J. Int’l Econ. L.* 10 (2007): 443–60.