

INTERNATIONAL JUSTICE IN AN AGE OF GLOBALIZATION

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Abstract

The topic of international justice has become, in the last two decades, a prominent part of political philosophy and an important subject for political philosophers to address. But there is yet a good deal of disagreement about the role that a conception of international justice should play in regulating the terms of international cooperation. Some argue that international justice has a limited role to play, specifying norms for state conduct for a rather narrow set of issues. Proponents of this limited view do not think that norms of international justice should include principles of distributive justice, which they take to be limited to domestic conceptions of justice. On the other hand, there are those who argue for a very robust conception of international justice, one that essentially replaces the domestic conception and calls for economic redistribution spanning the whole world. In the papers that follow, I engage with each of these positions on international justice, and sketch my own account of the right approach. I contend that it is a mistake to limit the role of justice, including distributive justice, to only the domestic sphere, arguing instead that it should be extended to transnational systems of cooperation. We have, I suggest, vast global economic interdependence as well as international legal coercion, both morally relevant phenomena that require the application of principles of distributive justice; for, as I point out, there is much that takes place on the international stage that eventually makes its way to the level of individual citizens and affects their prospects

in a significant way. I do not, however, go so far as to suggest that we simply replace domestic conceptions of justice with an international one. It is my view that both domestic and international conceptions of justice are necessary, each working to address the subject-matter specific to it.

BIOGRAPHICAL SKETCH

Greg Demirchyan was born in the city of Leningrad (now St. Petersburg) in the former Soviet Union. He immigrated to the U.S. with his family in 1980. His undergraduate degree in Philosophy is from the University of California at Berkeley, from where he also earned a J.D. Greg currently resides in Berkeley, California, where he works in the areas of human rights and the rule of law.

To my loving parents and spouse, who were always there for me.

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PREFACE

In the last two decades, international justice has become an important topic in political philosophy, and at the same time a deeply challenging one in the face of increasing globalization. Though globalization is a process that has been extant for centuries, its accelerating pace after the end of the second World War has left our world deeply commingled and entangled. Effects of the decisions made in a particular state, once localized, now often resonate throughout the world, reaching places that were insulated from them not too long ago. The complexity of a globalized world is relevant to political philosophy, not so much in virtue of the complexity itself, but because of the moral problems it generates, problems that, in my view at least, are best examined from the standpoint of justice.

One important question concerns the method we use to address the complexity of the globalized world. Should we simplify things as much as possible in order to formulate an abstract picture of the world, or should we confront the complexity head-on? The former strategy comes with the prospect of elegant solutions, and has been by far the dominant approach in political philosophy where questions of international justice are concerned. My own approach, however, hews closer to the second strategy.

The central issue in much of the literature on international justice concerns the role of justice in the international, as opposed to the domestic, sphere. One common position takes justice to have a very circumscribed role internationally, restricting the application of distributive principles in particular to the domestic sphere. An equally

popular account, in contrast, treats international justice as the primary normative ideal, superseding domestic conceptions of justice, which are treated simply as particular cases of the general international conception. Common to both of these approaches, however, is the method employed, which is to start with a more abstract conception of our complex, globalized world, with many of the actual details expunged. While this method allows us to evaluate the merits of the relevant accounts of international justice more or less on purely philosophical grounds, this comes at the cost of abstracting away many details that, in my view, are ultimately deeply relevant to answering the very questions about justice that the fact of globalization leaves us with. As I see it, the most serious problems with the accounts of international justice that favor such an abstract approach arise from the fact that they miss certain important details, especially with respect to the two issues most central to assessing the role of justice internationally: the level of international coercion and the extent of global interdependence.

The poor empirics underlying much of the work on international justice is in large part what led me to confront the complexity of a globalized world more fully and directly in my work. One of the papers in my dissertation is an attempt to give a more precise estimation of the extent of global economic cooperation, a task rarely attempted in the philosophical literature. I do this by adapting a set of methods used in econometrics to the problem of measuring how much the economic output of particular states depends on the economic activities that take place outside them. My results here suggest that the level of global economic interdependence is considerable. For example, according to my methods of estimation, roughly 50% of the total

economic output of South Korea depends on economic activities outside it; the number is even higher in the case of the Netherlands – around 70%. In my view, the sheer amount of global economic interdependence does make it morally significant with respect to questions of justice.

Another paper in my dissertation focuses on legal coercion. It is often argued that since legal coercion is a feature only of domestic societies – the laws of a state generally apply only within its boundaries – such coercion generates duties of justice only within domestic society. Even where legal coercion appears to operate internationally, the prevailing view has been to see it as playing so limited a role as not to generate significant duties of justice. (Indeed, even those who think that the duties of justice apply internationally tend to dismiss the role played by legal coercion in generating these duties, grounding them instead in economic interdependence or purely humanitarian concerns.) My approach to this issue is once again driven by an appreciation of the actual ways in which coercion operates. I focus on one particular case – the intellectual-property regime administered by the World Trade Organization – in an attempt to establish that legal coercion does prevail internationally and does generate significant duties of transnational distributive justice.

An approach such as mine, which focuses on the specifics of the ways in which our world is enmeshed, is likely to make us countenance a situation where any single individual is a member of overlapping coercive regimes or multiple systems of economic cooperation. The same individual might thus be encumbered with duties of justice concurrently imposed by different regimes or systems. There is no difficulty,

of course, if these duties can be fulfilled all at once, but in the likely scenario where they make competing demands on the individual, or where the totality of the demands imposed is too burdensome, the question of priority becomes important. Developing an account of how to prioritize competing demands of justice, though difficult, is not something I believe to be ultimately intractable. But these concerns I leave for my future work on justice.

CHAPTER 1

Overview and Introduction

International justice has received a good deal of attention from several prominent political philosophers in recent years, but it is a field that is still in its early stages: the types of problems that arise within the international sphere and have to be dealt with from the standpoint of justice is a subject that is still being articulated, and there is no consensus at this point about what the overall problematic, in the Kuhnian sense, should be.¹ Nevertheless, I think two distinct approaches or ways of thinking have emerged that have predominated recent work on international justice. Both approaches owe their origin to John Rawls's writing on conceptions of justice for domestic society.² The impetus behind them is the idea that Rawls's work on domestic society should serve as the starting point and a model for how we ought to deliberate about international justice. The first approach to international justice essentially tries to replicate what Rawls does for domestic society, but on a much larger scale, where the entire world comes into play. This way of thinking basically assumes that there ought to be a conception of international justice and that we have

¹ By the problematic I mean the core set of problems that political philosophers agree should be dealt with when doing international justice.

² See John Rawls, *A Theory of Justice*, Cambridge: Harvard University Press, 1971; see also John Rawls, *Political Liberalism*, New York: Columbia University Press, 1993.

duties of distributive justice that extend beyond what we owe to our compatriots. What remains to be done is to work out this conception and explain how it fits in with the other social demands placed on us: does it replace the domestic conception so that our terms of cooperation are regulated by a single global conception, which posits one and the same duty of distributive justice owed to compatriots and non-compatriots, or does it adduce duties of distributive justice to both compatriots and non-compatriots, but where these duties differ in their content -- duties owed to our compatriots being much more demanding? The second approach, on the other hand, takes a rejectionist view to international distributive justice by drawing a sharp distinction between the domestic and international spheres. Proponents of this approach argue that distributive justice should be applied within domestic society and that internationally egalitarian justice simply has no place.

In the three papers, I examine the writings of political philosophers who embrace international justice and of those who reject it. In all three papers, I also try to carve out my own view of international justice and adduce what I think is owed to the global poor. The first paper is devoted to the work of Charles Beitz and Thomas Pogge, who favor a very strong position on international justice.³ In the second paper, I discuss the writings of Thomas Nagel and Michael Blake, who come out against having a conception of distributive justice apply internationally. The paper is mostly critical in tenor, and I maintain that a basic assumption made by Nagel and Blake is

³ It must be noted that this is the case with the early writings of Pogge. Pogge in his later writings abandons the Rawlsian approach to doing global justice in favor of examining how we in the West harm the global poor and the obligations that follow from this. See Thomas Pogge, "Severe Poverty as a Violation of Negative Duties" in *Ethics and International Affairs* 19/1 (2005), pp. 55–83.

not borne out by empirical evidence. In the third paper, I offer a case study that illustrates why I think Nagel and Blake are wrong about their conception of the international realm. The case study deals with the intellectual property regime administered by the WTO, and I use it to establish two fundamental claims: that the global poor are deeply affected by this regime; and in light of this, there are duties of justice that transcend state borders. Below I explain in detail what I do in each of the three papers.

Paper One

Charles Beitz and Thomas Pogge are two important political philosophers who are proponents of a robust notion of international justice: they call for extending Rawls's liberal conception of justice to the rest of the world.⁴ Beitz and Pogge argue that the world is essentially a single system of cooperation in the way that Rawls imagines domestic society to be: a cooperative venture that encompasses terms of cooperation and generates a pattern of entitlements. But if this is in fact the case, according to Beitz and Pogge, the world qua system of cooperation has to be regulated by a liberal conception of justice in the same way as domestic society. In fact, for Beitz and Pogge, the world qua system of cooperation has absorbed domestic systems to such an extent that, according to them, we ought to think of the world as being

⁴ Charles Beitz, *Political Theory and International Relations*, Princeton NJ: Princeton University Press, 1999; Thomas Pogge, *Realizing Rawls*, Ithaca NY: Cornell University Press, 1989.

permeated by a single global system to which a liberal conception of justice should apply and a purely domestic conception be done away with.

In the first paper, I examine Beitz's and Pogge's arguments for extending Rawls's special conception to the world as well as their criticisms of Rawls for not doing this himself. In *A Theory of Justice*, Rawls employs a conception of domestic society that takes it to be independent and insular. Beitz and Pogge criticize Rawls for conceiving domestic society in this way. I claim that there is something right about their criticism of Rawls, but I also maintain that the criticism has to be restated if it is to avoid getting Rawls wrong in an important way. In fairness to Rawls, it has to be noted that the assertion about domestic society is a product of his method of working out regulative ideals for different cooperative regimes – a method that moves in stages, from subject-matter to subject-matter.⁵ Once Rawls is done with domestic society, he dispenses with the conception that domestic society is independent and insular. If Beitz and Pogge are suggesting that Rawls is making an empirically false assertion about domestic society, then their criticism is without merit -- Rawls does

⁵ Indeed, this is how Rawls proceeds: first, he develops a conception for domestic society and only later a conception for what he calls a society of decent peoples – though the latter consists of a set of norms specifying how peoples should conduct themselves, and hence is not a conception of justice meant to regulate terms of cooperation among individuals. John Rawls, *The Law of Peoples*, Cambridge: Harvard University Press 1999, pp.11-30 and also pp.62-74. For Rawls, in order to construct a conception for domestic society, we have to focus exclusively on this subject and abstract away the rest of world – hence the need to conceive domestic society as independent and insular. But once we move on to the international arena, we bring the world back in. The problem with Beitz's and Pogge's criticism of Rawls, I suggest, is that they are less charitable to Rawls than they should be – the nuance about methodology is not given enough credit. Nevertheless, the methodological maneuver of abstracting away the rest of the world when designing a conception of justice for domestic society is still empirically problematic, because even when we are thinking about how to regulate terms of domestic cooperation, we have to think about how such cooperation is connected with the rest of the world.

not in fact think that domestic society is independent and insular. I contend, however, that the objections put forward by Beitz and Pogge can also be viewed as attacking Rawls's actual method for working out a domestic conception of justice. For Beitz and Pogge, it does not make sense to go from the domestic case to the international; there is just one system of cooperation, and that system is global. Seen in this light, as an attack on Rawls's approach to justice, their criticism, I suggest, does have merit: prying society away from the rest of the world, even when this is done for a methodological reason, is still problematic. However, I also claim that Beitz and Pogge go too far in positing a single global system of cooperation. That, I argue in the paper, is simply not the case -- the world just isn't one global system, but has a much more complicated structure.

My take on what is happening in the international realm is that globalization has transformed the world into something that is structurally very complicated, and there is unfortunately no way to avoid dealing with this complexity when discussing international justice. If we look at the last sixty years, we see a remarkable proliferation of supranational agents that have been endowed with political authority and certain powers, and as a result individual states have had to negotiate control over their domestic affairs with these agents. But to sweep everything into a global catchall, as Beitz and Pogge do, is a mistake – it is this complexity that exposes their view of the world as overly simplistic. We have different regimes of cooperation. States can be construed as systems of cooperation, but so can the international trade regime regulated by the WTO, the European Community, the Organization for Economic Cooperation and Development (OECD), various regional trade blocs.

These cooperative regimes, in many cases, interact and mutually reinforce one another's cooperative activities. But from the standpoint of justice, it is important to distinguish them because, as I will try to show, some of the regimes that have an international presence and reach generate outcomes that affect the wellbeing of individuals, much like states.

Nevertheless, Beitz and Pogge are on to something that I think is right and has important implications for international justice. What I think is correct about their position is that the world has gone global, but it has done so with respect to *economic* cooperation. It is important to separate economic cooperation from other forms of cooperation: if we generalize too much and construe cooperation as cooperation *per se*, then it would not be right to say that the world has gone global and that states as distinct systems of cooperation are a thing of the past. However, if we limit our construal to economic cooperation, then I think there is an identifiable global system of cooperation and one that is increasingly absorbing individual states to a point where economic activity that takes place in China or Germany is more properly characterized as involving this global system, rather than China or Germany viewed as separate systems of economic cooperation. It is for this reason that Rawls's method is problematic, since by separating domestic society from the rest of the world, Rawls is implicitly treating economic cooperation as domestic.⁶

⁶ In his *The Law of Peoples*, Rawls makes it much clearer that he regards economic cooperation as something that for the most part takes place inside domestic society and among fellow citizens. See his, *The Law of Peoples*, pp. 35-43.

Having specified what I think is right about the Beitz and Pogge position, I argue that a conception of justice should apply to this global economic system. But I do not believe that this eliminates the need for a domestic conception of justice, since the state still remains a system of cooperation in an important sense and as such has to be regulated by justice. To this extent, I am in agreement with Rawls that conceptions of justice have to be worked out in stages. Yet, for my argument to be at all convincing, it is essential that I be able to make a case that there is indeed a global economic system of cooperation. And so, much of my first paper is devoted to establishing this.

I try to do this in two ways: one is conceptual, the other quantitative. First, I suggest that if we look at the production history of a good or service, which we consume as Americans, we are bound to find a foreign input in its production chain. In other words, the production of a good or service at some point involves a factor of production – in the form of labor, capital, or land – that originates outside the US. And without the foreign input either that type of product would not exist for us to consume, or if it did it, it would have a different economic value. Because so many of the products we consume are generated under similar conditions, I suggest that we can generalize inductively that much of what we consume involves foreign contribution. The genesis of the foreign component as well as its integration into the production process constitute a form of international cooperation. By generalizing over so many products, we can say that there is plenty of transnational or international economic activity taking place. But moreover, because a similar thought experiment can be carried out by going from country to country, a case can be made that what is

occurring is both global and vast, thereby suggesting the presence of a global economic system.

Of course, the conceptual approach has certain drawbacks, and so to be more precise, I offer another argument for a global economic system that is more quantitative in nature. To make my case for a global economic system, I use an econometric method called input-output analysis. The method allows for an estimation of how much of a country's total economic output depends on economic activity that takes place outside it. This is done by extracting the rest of the world and thus leaving a country in complete economic isolation, and then measuring the resulting loss in total output. I use data for ten member countries of the OECD to measure the decrease in their economic output. The results vary from a 22% to a 71% drop in output, and the average decrease for all ten states is 50%. If my calculations are correct, they show a remarkable degree of reliance by a state on the contributions made by the rest of the world for generating its national economic output.

It has to be noted, however, that from the study we may generalize that such dependence is likely to be exhibited by the rest of the OECD members and the advanced developing countries. This of course leaves out some of the poorest states in the world.⁷ Still, if we consider the OECD states and the eleven most advanced developing states, we are confronted by the fact that their combined GDP constitutes

⁷ Part of the problems is that there is lack of data on these countries, which makes it difficult to make any precise determinations about their level of dependence. But it is I think a reasonable conclusion that many poor states – though certainly not all – are not plugged into the global economic system.

92% of the world's total GDP. In other words, these countries, at least for now, are the engines of economic production. And if these states exhibit economic reliance on one another, we can still conclude that there is a global economic system – though not all countries are participants or participants to the same extent – and that this system is vast with a substantial economic output.

Having made a case for a global economic system, I maintain that distributive principles of justice should apply to it, and this is an important step in my argument.⁸ I hold this position because I argue that the market is simply incapable of generating a fair distribution of the cooperative product of this system. In the paper, however, I do not try to adduce what these principles should be and how the cooperative product should be divided – though I am inclined to think that they are going to be much less egalitarian than Rawls's difference principle.⁹ The reason for this reluctance is that before we are in position to put forward distributive principles, we have to delineate all the systems of cooperation to which justice as a social virtue is applicable and

⁸ This is an important step because the real question is what follows from this fact of economic interdependence, and I argue that what follows is that the product of a global system of economic cooperation has to be divided in accordance with principles of justice, though not the difference principle.

⁹ I think that these principles are not going to be as egalitarian as the difference principle because the demands placed by the economic system on the individual cooperator are qualitatively different from those generated by the state qua system of cooperation. It has to be acknowledged that legal coercion brings another moral dimension to large systems of cooperation and what it takes to make these systems just. Principles of distributive justice have to reflect this difference in the seriousness and scope of demands for cooperation, suggesting that we can't be egalitarians everywhere there is cooperation that affects individual economic entitlements. But this is not to say that the way to reflect this difference is by rejecting distributive principles where the demands on the individual cooperator are less comprehensive and all-encompassing than that of the state. We need different principles, though these principles are still distributive.

prioritize where the need for justice is the most urgent.¹⁰ And I think that this project is still incomplete.

Paper Two

As I mentioned earlier, Beitz and Pogge propose that a liberal conception of justice apply directly to the world. This is a pretty controversial and radical position, as I argue in my first paper. But there are those who think that justice has no place internationally. Thomas Nagel and Michael Blake are both proponents of such a position, and have put forward a view that restricts a liberal conception of justice to domestic society.¹¹ According to Nagel and Blake, Rawls is ultimately concerned with the presence of legal coercion in domestic society: his special conception is in fact a response that aims to justify such coercion to those subject to it, i.e. members of society. Both Nagel and Blake accept Rawls's premise that it is the presence of coercion that makes the application of a liberal conception of justice to society or the state necessary – otherwise, there is only pure coercion and that is morally unacceptable. They contend that the international sphere does not merit being regulated by a conception of justice because it is not coercive in the way that the individual state is. Both conceive international coercion in similar terms, as something that is not directed at individuals; rather, it is a phenomenon that explains state behavior, exercised by states against other states.

¹⁰ In the third paper, I suggest that the need is most urgent where there is an already existing injustice.

¹¹ Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs*, 33, no. 2 (2005): pp. 113-147; Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs*, 30, no. 3 (2002), pp. 257-296.

Nagel and Blake, however, differ about what it is about state coercion that calls for a liberal conception. For Nagel, as citizens, we live under a unified sovereign power and are subject to a system of laws and institutions that are coercively imposed. This system, which we can neither defy nor avoid, determines how well or badly our lives will go, and so a justification is owed, especially to those who do not fare particularly well under this scheme. For Nagel, the demand for justification is directed at fellow citizens because it is fellow citizens who are ultimately responsible for the imposition of this coercive system. That is to say, citizens are “participants in a collective enterprise of coercively imposed legal and political institutions.”¹² This collective imposition of coercive laws and institutions, according to Nagel, engenders a special relation among fellow citizens. The significance of this special relation is that it entails associative duties of justice toward one’s fellow citizens. For Nagel, it is these associative duties of justice that are meant to justify the imposition of coercive laws and institutions. Moreover, because the demand for justification is directed at our fellow citizens, who are in a sense complicit in our being coerced, duties of justice, if they are to provide adequate justification, would have to be quite robust. Nagel thinks that such duties would have to include duties of distributive justice that generate a fairly egalitarian distribution of economic entitlements. Nagel, however, does not believe that the same applies to the international sphere. The main reason for this is that despite the presence of certain forms of coercion, individuals as participants in a global enterprise are simply not socially connected by a special relation and are thus not bound to one another in a way that would require them to achieve social and

¹² Nagel, “The Problem of Global Justice,” p. 128.

economic equality. Whatever coercion there is internationally is conducted by states against other states, and so citizens of one state are not in any way implicated in the coercion of those in another. Consequently, for Nagel, the international realm remains a justice-free zone.

Blake's position on global justice is in many respects similar to Nagel's. His account is grounded in what he calls the liberal principle of autonomy.¹³ For Blake, the principle of autonomy entails that persons have a right to be autonomous agents and are entitled to circumstances or conditions that are necessary to make this possible.¹⁴ Blake thinks that persons can be denied their autonomy in a variety of ways. In particular, individuals may be denied their autonomy through outright coercion – though not all violations of individual autonomy involve coercion of one form or another, Blake insists. Acts of coercion, Blake writes, are “prima facie prohibited by the liberal principle of autonomy.”¹⁵ Of course, Blake takes coercive acts by the state for the sake of maintaining social order to be necessary. The issue for him is what in fact justifies these acts of coercion. Ultimately, Blake concludes that a justification for state coercion can only be achieved by applying a liberal conception of justice to a domestic basic structure. His conclusion is thus the same as Nagel's, though his rationale is different: for Blake, coercion has to be justified because otherwise it would violate the liberal principle of autonomy.

¹³ Blake, “Distributive Justice, State Coercion, and Autonomy,” p. 267.

¹⁴ *Ibid.*, p. 271.

¹⁵ *Ibid.*

What is interesting about Blake is that his assertions about global justice once again resemble Nagel's. When Blake turns his attention to the international sphere, he sees violations of the principle of autonomy in the form of terrible deprivations – such as starvation, malnutrition, disease – that affect the global poor. He argues that we in the West have a duty to remedy these deprivations. But once the global poor enjoy circumstances that allow them to be minimally autonomous, our duty to them comes to an end and we have no further obligation to make the world any less unequal. And although Blake concedes there is coercion that pervades the international sphere, he maintains that such international coercion does not affect individual autonomy. For him, international coercion is something that affects only states, and never descends to the level of individual citizens, and it is for this reason that demands for distributive justice do not extend to the international sphere.

In the second paper, I undertake to closely examine the arguments against global justice put forward by Nagel and Blake. A common problem that I find with their views is that neither Nagel nor Blake get international coercion right: they simply don't look at international coercion carefully enough, and it is their superficial treatment of the subject that leads them to say that only states are affected. My criticism of Blake essentially comes down to this particular point. And it seems to me that were he to develop a more nuanced view of coercion, one that takes into consideration how international coercion affects individual wellbeing, his account would probably resemble mine in many respects, since we both take coercion as something that has to be justified by way of a liberal conception of justice.

However, my problems with Nagel run much deeper. In my mind, Nagel draws too close a connection between duties of distributive justice and his special relation. One basic problem, addressed at the beginning of the paper, is that Nagel is particularly unclear about how the special relation arises in a social context. He states that citizens are bound by the special relation when coercion exercised by the state is done in their name. But what does this mean? In the paper, I try to unpack this metaphor and suggest a more concrete explanation. I then offer a discussion of political legitimacy and how this concept is used by Nagel to make his case against global justice. Political legitimacy is important because, according to Nagel, the special relation is present where there is political legitimacy – and so, for instance, in a politically legitimate state, citizens are connected by the special relation and therefore owe a duty of egalitarian justice to one another. This suggests that, for Nagel, what makes a coercive social arrangement an appropriate site for distributive justice is that it is politically legitimate. Moreover, what also appears to follow is that the international sphere is not only not coercive in the right way, but that it lacks political legitimacy. Unfortunately, Nagel is not clear about what he means by political legitimacy, and so in the paper I suggest several interpretations of how political legitimacy may be understood and draw out certain implications that follow from each of these interpretations.

Specifically, I argue that restricting distributive justice to where there is political legitimacy and persons are linked by the special relation is much too strong. The view implies that there can be duties of distributive justice only where there is political legitimacy. The problem with this result is that we have no way to condemn

states that clearly appear to be economically unjust simply because they are not politically legitimate and where citizens are not connected by the special relation. If Nagel is right, then not only can we not say what makes a plutocratic state, where the majority is economically exploited, unjust, but we don't even have the conceptual resources to say that it is unjust in the first place. Before we can make that judgment, the plutocratic state has to be transformed so that it has political legitimacy. I argue that this result is so counter-intuitive that it makes Nagel's account of distributive justice simply untenable.

This is, however, not the end of what I think is wrong with Nagel's view. Another problem with his account is that we are prevented from aiming at justice *ab initio*. That is because we first have to aim at political legitimacy, since this is how the special relation comes into existence. Once there is political legitimacy only then can we aim at establishing a just regime. But I think this entirely misconstrues how we think about justice, for justice is the highest social virtue of a political arrangement and as such it functions as a political ideal. And we do not work our way up to thinking about the ideal in stages; we think about the ideal from the very start.¹⁶ How we get there is a different and an important question, but in answering it, we take the ideal as both our guide and ultimate destination. Nagel's insistence on the special relation and political legitimacy as factors of constraint on what we as citizens owe

¹⁶ This does not mean that the ideal can be worked out in a straightforward way. I think with respect to international justice, a conception of justice is something that is very hard to work out. But if we are in a position to construct a conception of justice, I think that we will treat it as an ideal and take it as our guide for how ultimately the international realm should be regulated.

one another as well as to others frustrates such thinking, which makes his whole approach to justice deeply unsatisfying.

In the paper, I try to be as charitable to Nagel as possible, and I supplement his account in several places to make it more convincing than it would otherwise be. In the end, however, there are simply too many deficiencies. That is not to say, however, that all conceptions of justice that construe duties of justice as associative are doomed, just the version put forward by Nagel.

At the end of the second paper, I suggest, but don't develop, an example of what I consider international coercion that affects individual wellbeing worldwide. The purpose of the example is to reiterate my criticism of both Nagel and Blake that they fundamentally misunderstand the nature of coercion that takes place in an international context.

Paper Three

In the third paper, I take the example mentioned in the second paper and turn it into a more developed case study on international coercion. The subject of the case study is the intellectual property regime administered by the WTO through the TRIPS Agreement. I argue that the proliferation of the Agreement's intellectual property requirements throughout the world has made access to essential medicines more difficult for the world's poor. Moreover, I claim that these standards are coercively enforced under any plausible view of coercion. The case study is meant to show that

Nagel and Blake are wrong in thinking that international coercion is somehow kept at the level of individual states. But in addition, it is also meant to illustrate the need for international justice because, as I insist, a justificatory response to the problem of access has to come in the form of justice.

The paper is organized into several parts. The first third of the paper is devoted to explaining the TRIPS Agreement. Here, I discuss the history of the Agreement and how it came to be. I then go on to explain the substance of the standards of intellectual property protection, and focus specifically on patent protection. Having done that, I examine what this means for individual member states if they wish to comply with the Agreement's standards on patent protection. I do this by looking at what India had to do to bring its national laws into alignment with TRIPS. After expounding what states must do to comply, I then discuss the consequences that a member state would face if it chose to eschew compliance. At this juncture, I argue that given these consequences, state compliance should be construed as a product of coercion enforced by the WTO. Finally, I delve into the various provisions in TRIPS that are meant to ease the burden of compliance on poor developing and least developed member states, and argue that they won't solve the problem of access and that the global poor will continue to see an increase in the price of many essential medicines.

In the second part of the paper, I discuss why I think there is, first and foremost, a duty of justice to make essential medicines affordable to the global poor. In the process of making my case, I try to dispose of several objections that may be

made against my position. First, I argue that the problem of access undermines the assertion that international coercion affects only states. It is in some sense trivially true that states are affected by TRIPS, for they have to bring their national laws into compliance. But it is precisely this transition toward compliance that makes individual citizens subject to the WTO's intellectual property regime, though the regime is given expression by the national laws of a state. Second, I suggest that requiring individual states, especially those that are poor and developing, to deal with the problem of access on their own would be profoundly unfair. Finally, I address an objection put forward by Nagel that individual citizens as participants in a global regime are not related to one another by his special relation. I argue that the duty to assist the global poor in having affordable medicines does not require the presence of this special relation. What necessitates the duty makes it associative, but certainly not in the way that Nagel imagines it to be.

In the third and final part, I argue that what encumbers us as participants in the global trade regime, of which the intellectual property regime is a part, with a duty of justice is the fact that we are members of a collective, construed as a system of cooperation, that generates an unjust outcome. The basis of the duty is thus collective responsibility for the harms caused by the WTO's trade system. In making my case for collective responsibility, I rely on David Miller's considerable contributions to this area. Specifically, I employ his concept of outcome responsibility. I argue that outcome responsibility requires that we respond to the injustice generated by the trade system in the following way. First, we have to put an end to the ongoing injustice. This will mean making sure that the harm is no longer being generated and that past

victims of the injustice are compensated as much as it is practicable. However, making sure that the harm does not recur may require institutional changes. What may also be required is that the WTO be redesigned in such a way that the inaccessibility of essential medicines is no longer a product of its intellectual property regime. For this to happen, the TRIPS Agreement would have to be rewritten and member states would have to modify their laws to reflect these changes. In addition, certain other institutions would have to be created - i.e. those that would oversee economic assistance so that essential medicines are made affordable. Outcome responsibility, I claim, also requires that as participants in the global trade system we contribute toward the transformation of the WTO, a transformation that once in effect would eliminate the injustice of the inaccessibility of essential medicines once and for all.

Although I endorse outcome responsibility as a way to ground our duty to the global poor, I don't support the proposition that all individual participants in the global trade system should be held outcome responsible. There are I argue important exceptions to this rule. Miller himself offers two types of exemptions to outcome responsibility. In the paper, I offer a rather lengthy analysis of Miller's arguments for these exemptions. In the end, I find his rationale for them unconvincing; nevertheless, I think that Miller is right about one of his exemptions, though I offer my own defense for it. Furthermore, I suggest that there is yet another exemption to outcome responsibility, which Miller does not discuss. I then apply the exemptions that I think are right and propose which participants in the global trade system should be held exempt.

At the end of the third paper, I briefly discuss a more general worry that I think arises from the way in which the WTO administers the global trade regime. The WTO's basic objective is to liberalize trade, and its main line of argument is that this is economically beneficial for individual member states, specifically, because liberalization leads to economic growth. There are, I suggest, two problems with the WTO's embrace of liberalization. First, the empirical evidence does not support a simple nexus between a state's liberal trade policies and economic growth. Several influential studies supporting a link between liberalization and growth have recently come under heavy criticism. Other studies have been conducted that suggest that a rush toward greater liberalization can actually damage a state's economy. The WTO's trade policies can thus harm a state as it moves toward liberalization, and the risk of failure is much higher with respect to developing and least developed countries. This suggests a second problem with the WTO's trade policies: there is an uneven distribution of risk with the developing and least developed countries facing a higher probability of being harmed by liberalization. I argue that it is unjust to saddle already vulnerable states with a higher risk of failure when they are just as instrumental for the operation of global trade. Making the allocation of risk from liberalization more equitable would go a long way toward rectifying this injustice.

A great deal of research has recently been done that points to institutional quality as a causal factor for economic growth. And when combined with liberal trade policies, the goodness of institutions appears to lower the risk of a state suffering an economic downturn as it integrates within the global trade regime. I argue that one possible way for the WTO to correct for the uneven distribution of risk that stems

from its policies of trade liberalization is to assist individual members states in constructing better institutions. Of course, which institutions have relevance and how institutional goodness is to be measured are difficult questions and there are no generally accepted answers to them. So the approach to institutional quality, I propose, should involve some flexibility and room for individual states to experiment with institutional design. But, in addition, it should be incumbent on the WTO to keep up with the latest research in economics and revise its policies, if need be, to reflect real advances that have been made *inter alia* in theories of economic growth, economic development, and institutional design. In this way, the WTO would be in a position to impart such knowledge to states still struggling to see significant and sustainable gains from trade liberalization.

The Three Papers Taken Together

The second and third papers naturally complement each other because they are both about international coercion and why justice should be our response to it. At the end of the third paper, I offer what I think would be a more just international trade system: it is one that, unlike the present regime, makes essential medicines accessible to the global poor. But that is simply a remedy of one particular injustice and so is hardly a conception of international justice. Of course, all along in the two papers I have been saying that the required response to international coercion that affects individual entitlements is a conception of justice, which includes distributive principles. Although my proposal at the end is much more modest, I firmly believe

that ultimately what is required is a conception of justice. The difficulty for a theoretician of international justice is that globalization has thrust the world into, what I call, a state of institutional or structural flux. In other words, the world is in the process of restructuring itself, moving away from a state-centered model to something much more structurally complicated. And this structure, with its multiple centers of power, is constantly evolving. Before the advent of the Uruguay Round, there was no legally enforceable international intellectual property regime, but now there is. And of course once intellectual property became internationalized, the kinds of injustices that could arise out of the WTO's trade regime also became more variegated and diverse. This makes it very hard to come up with a single conception that can address all these injustices. It seems to me that the best we can do presently is to deal with injustices that emerge in the international context in a piecemeal fashion until the world reaches a point of structural stability or equilibrium. When that happens, it will become easier to describe how the international realm is organized. Moreover, with structural stability, the pattern of individual entitlements will be more predictable. At this point, I suggest, we can say with greater confidence what would be the ideal way to regulate terms of cooperation within the international sphere, an ideal that would be embodied in a conception of international justice.

In the first paper, I face the problem of structural flux or instability once again. Of course, the concern there is not about coercion. Instead, it is about the distribution of the cooperative product of a global economic system of cooperation. I argue that the distribution has to be a just one. I maintain that the distribution has to accord with the appropriate principles of distributive justice because when it is left up to the global

market or even the contribution principle, individuals who are disadvantaged by the outcome have legitimate reasons to complain – a complaint which can only be assuaged by a *just* division of the cooperative product. However, in the paper, I don't venture to say in what such division would consist. The difficulty is that it is not clear what the global economic system will look like in ten, twenty, thirty years. It will probably be larger and more encompassing. But it may also be more rule-based and coercive. Furthermore, there are other cooperative regimes that generate their own particular harms, which have to be examined and prioritized in light of their seriousness. This complexity of global economic cooperation makes it very hard to construct a conception of justice that responds to current problems and anticipates future ones.¹⁷ And so, I think, once again the best we can do at this point is to confront egregious forms of injustice that prevail in the here and now and try to dismantle them one by one.

¹⁷ In other words, we don't yet have a fixed set of subject-matters for which we can work out conceptions of justice. That is because given the changes in global structure, we have individual subject-matters still in the process of formation and also new ones coming into existence.

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CHAPTER 2

Economic Globalization and International Distributive Justice¹

I. Introduction

In the last thirty years, political theory has offered an extensive examination of domestic society. By now the main problems of domestic justice are well understood and several conceptions of justice have been put forward as solutions. An account of the main problems that a theory of international justice should focus on, however, is still being debated. The theories of international justice that have been offered in political philosophy typically take as their starting point a certain independent conception of domestic justice and work outward from there. I suggest in this paper that there is something deeply problematic about this method. It is my contention that theories of domestic and international justice cannot be worked out independently of each other and, furthermore, that a conception of international justice must be given a certain kind of epistemic priority. I argue that before we can apply a conception of justice to domestic society, we must be in a position where we can specify what we owe to the rest of humanity, something we cannot do unless we have a conception of international justice already on hand.

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I arrive at this position by examining the economics of globalization, which has transformed domestic society and engendered a worldwide economic system that is supplanting individual society as the primary unit of economic cooperation. The provision of social and primary goods – and their subsequent conversion into capabilities – within domestic society depends to a large extent on the cooperative product of this international economic system. Each domestic society appropriates a certain share of the international product and uses it for its own internal cooperation, which in turn generates further social and primary goods that get distributed among its members in a certain way. There is a presupposition here that whatever share of the international product that a given society appropriates is something to which it is entitled. But I argue that we cannot simply assume this, and that we must first have a conception of international justice that applies to the intentional economic system, and see whether a society is in fact entitled to the share that it takes.

The paper consists of several sections. First, I discuss a certain conception of domestic society that was made prominent by John Rawls, and suggest how this conception should be interpreted by placing it within the context of Rawls's overall theory of justice. Next, I argue that even a more nuanced construal of Rawls's understanding of domestic society has been made obsolete by the process of globalization, and offer what I think is a more accurate account of society and its nexus to the rest of the world. I then proceed to explain how cooperation within domestic society exhibits a relation of dependence on the international economic system and why this has the result of giving international justice priority. I also bring up certain objections for my position and attempt to offer responses to them. Finally, I

suggest a quantitative way that dependence on the international economic system can be measured and draw certain conclusions based on the results obtained.

II.

In his *A Theory of Justice* (hereafter *ATJ*), John Rawls offers a certain conception of society that has been influential in political philosophy for quite some time.² The conception, however, has not been without its critics who have argued that Rawls has gotten it wrong in important ways. My aim in this section is threefold. First, I suggest that some of the criticisms directed at Rawls are based on a misreading of Rawls. I then claim that even with a more accurate reading of Rawls, he is still vulnerable to the objection that he presupposes a view of the world that is obsolete. Finally, I explain why getting a more accurate description of society is a critical task for global justice.

To simplify things, I will break Rawls's conception of society into three distinct claims – which I take to be about the basic features of society – and then discuss each of them in turn. First, society is supposed to be a system of cooperation for mutual advantage that generates a cooperative product.³ Second, it is seen as a

² John Rawls, *A Theory of Justice*, Cambridge: Harvard University Press, 1971, pp. 3-114.

³ The possibility of self-advancement for all through cooperation is of course what makes the formation of society rational in the first place. Cooperation is a constitutive feature of society and I do not dispute this. But making cooperation the central feature of society should worry us, for it leaves out so many other things that seem as important. By no means does cooperation exhaust all there is to society; plenty of other things happen in addition to cooperation. There is, for a start, plenty of non-cooperation – crime, for instance. And furthermore, we don't just cooperate, whatever that may be; we attend places of worship, go to work, protest wars, have children, see concerts, buy gifts for our loved ones, argue about the

system that has a coercive structure. And finally, it is supposed to be a system that is closed and self-sufficient.⁴

It is the last assertion that has generated most of the criticisms of Rawls's conception of society. Charles Beitz and Thomas Pogge, two noted political philosophers who advocate for a cosmopolitan approach to justice, have been especially critical of Rawls for assuming domestic society as closed and self-sufficient and for not extending his special conception of justice to the rest of the world.⁵ Both

rightness or wrongness of abortion, and so on. It would be misleading to say that all this is about cooperation.

There is also something else that happens within society that seems to transcend cooperation. We enter society in a rather vulnerable state. We have no choice but to accept that society will leave an indelible imprint on our identities, though there is no way to predict exactly what that imprint is going to be. There are no fixed identities that are handed to us. The number of elements that form them is large yet finite; their combination also finite yet larger. Which combination we're given is a matter of chance, but also something that is incomplete and not immutable. At some point, we can transpose the elements, add new ones to generate a new combination. Yet, we are to a great extent still dependent on society as the repository for these elements and an incubator for new ones. Society performs this function for us, but we would be hard-pressed to call it a matter of cooperation. Simply saying society is a system of cooperation does not quite capture this important dimension.

So it does seem that society is much more than just a system of cooperation. Many have rightly pointed out that to view domestic society as something that is only about cooperation for mutual gain sketches a rather narrow conception that leaves out important details that are constitutive of society and have nothing to do with cooperation. However, I don't think we can escape the fact that viewing society as a cooperative enterprise captures something very important. After all, society as we understand it is the locus of much of the cooperative activity in which we engage - though it is not, as I shall argue, the exclusive arena for such engagement. So I will try to work with this assumption, but qualify it by saying that it is only a conception that approximates what society is, and I will do this in order to suggest a certain problem that a theory of international justice has to address.

⁴ To anticipate things a bit, it has to be pointed out that this characterization of domestic society as being closed and self-sufficient is more a tactical assumption than anything else, reflecting Rawls's method for developing conceptions of justice for distinct subject-matters, and not in the end a substantive claim about the world. I develop this point later in the paper.

⁵ Charles Beitz, *Political Theory and International Relations*, Princeton NJ: Princeton University Press, 1999; Thomas Pogge, *Realizing Rawls*, Ithaca NY: Cornell University Press, 1989.

Beitz and Pogge contend that certainly now domestic societies are not closed or self-sufficient, and that probably -- with very few exceptions -- they have not been this way for a very long time.⁶ Societies, they suggest, have interacted with one another for a very long time in all sorts of interesting ways, and have become, especially now, remarkably interdependent and interconnected. In such an interconnected world, people participate in a cooperative system that extends beyond their own domestic society and encompasses much of the world, as the process of globalization becomes a permanent feature of our world. What this implies, for Beitz and Pogge, is that domestic society is no longer a distinct unit of cooperation, where principles of justice could be applied; to the contrary, a system of cooperation that a conception of justice should address is more global in scope, and any theory of justice that assumes otherwise has to be viewed with a great deal of skepticism.

Both Beitz and Pogge take a critical stand against Rawls because they think he embraces an empirically false view of the world, which leads him, incorrectly according to them, to put forward a conception of justice that ignores the rest of the

⁶ There are of course societies that try to be closed and self-sufficient. North Korea comes to mind at this point. But even North Korea is not entirely closed and it is certainly not self-sufficient. Its disastrous economic policies have left millions starving, and forced the government to ask for assistance from its traditional enemies, the U.S. and Japan. North Korea has also tried to export its military hardware and expertise to other states. This has been difficult to do because most of the world does not want North Korea selling its weapons to other states, especially to other rogue states. But it does suggest that it is willing to engage with others, even though the reasons for this are quite nefarious. Still it is hard to dispute that North Korea remains the most closed society in the world, but it is not a pure autarky. And this I think suggests just how difficult it is to be completely closed in the world today. Pure autarkies are certainly very rare, and even if we appeal to the past for examples, they are still the exception rather than the rule.

world.⁷ To the extent that this stand takes Rawls to be making a substantive claim about domestic societies, that they are closed and self-sufficient, their criticism is somewhat unfair to Rawls -- and there is some evidence that suggests that Beitz and Pogge do attribute this view to Rawls.⁸ The criticism is unfair because it fails to place the ostensibly problematic conception of domestic society in a proper context, given Rawls's particular aims in *ATJ*. Nevertheless, I do think that Beitz and Pogge are on to something important in their discussion of a cooperative system becoming global. Their key insight about the structure of the world still poses a problem for Rawls and his project of constructing a domestic conception of justice. But to explain why I think Rawls is vulnerable to the cosmopolitan challenge, coming from Beitz and Pogge, I have to clarify why Rawls assumes domestic society to be closed and self-sufficient, something that is obviously empirically false.

A more accurate reading of Rawls is that his characterization of domestic society as closed and self-sufficient is not meant as a factual claim, but rather as an approximation, assumed *ab initio* so as to make the project of constructing a conception of justice for domestic society more manageable.⁹ Rawls thinks that to have a complete theory of justice, one has to say something about international society as well. But once the constructivist project reaches that stage, domestic society would have to be described more accurately so as to reflect its relation to the rest of the

⁷ See Beitz, *Political Theory and International Relations*, pp. 143-153; Pogge, *Realizing Rawls*, Chapter 6.

⁸ See especially Beitz, *Political Theory and International Relations*, p. 170.

⁹ *ATJ*, p. 108.

world.¹⁰ Rawls doesn't himself do this in *ATJ* because there he is preoccupied with giving a conception of justice for domestic society, a difficult and an important problem in itself and one requiring his full attention.¹¹

This approach to the subject of justice reflects Rawls's overall method in doing a theory of justice. Rawls does not argue for a grand and unified conception of justice that applies to everyone, everywhere, and at all times. There is no such conception for Rawls. Instead, he thinks that there should be multiple conceptions, each designed to apply to a different subject-matter. Rawls's starting point is his special conception for domestic society. But then one has to move outward, beyond domestic society, and provide principles for the international order.¹²

In light of this sequentialist approach to justice, the assumption that domestic society is closed and self-sufficient in *ATJ* is thus pragmatic. Its purpose is to imagine what society would be like if it were isolated from the rest of the world. A fundamental role of a conception of justice for domestic society is to specify how the burdens and benefits of social cooperation should be distributed, and it is essential in developing such a conception to demarcate the effects of domestic institutions – not international ones – on the prospects of individual citizens. The assumption that a

¹⁰ See John Rawls, *The Law of Peoples*, Cambridge: Harvard University Press, 1999, pp. 32-42. Rawls touches on this in *ATJ*. See *A Theory of Justice*, pp. 377-78.

¹¹ Rawls does discuss in *ATJ* what principles nations may adopt in the original position, but the discussion is quite brief and has to do with principles for regulating conflict between states. See *A Theory of Justice*, pp. 377-382.

¹² One also has to go beyond the current generation and beyond our species. These present two additional problems for justice, each requiring a separate set of principles: one for the just treatment of future generations, and the other for the just treatment of the rest of the animal world and the environment as a whole.

domestic society is closed and self-sufficient allows Rawls to look at only those effects that are caused by domestic institutions, and adduce principles of justice that apply to and regulate these institutions and their effects. The institutions that survive the act of abstraction thus fall within the purview of a domestic conception of justice. But once there is an acceptable conception of justice for a domestic society, Rawls seems to think, one can then proceed to develop a conception of justice for a different subject-matter. The assumption that domestic society is closed and self-sufficient would be very problematic for Rawls and his constructivist project if he were to carry it across to the other stages, where a different subject-matter is at issue. Rawls does not do this, and this is evinced by his later work on international relations, in particular, in his *The Law of Peoples*.¹³ There he clearly states that his earlier characterization of domestic society was meant only as a rough approximation, motivated by the desire to make certain simplifying assumptions and make things more manageable. Once Rawls gets to the international sphere as the relevant subject-matter, as he does in his *The Law of Peoples*, he characterizes domestic society as entangled with the rest of the world, since, at this point, it is such entanglement that is in need of being regulated by a set of international norms.¹⁴

So what is wrong with Rawls's overall position if he eventually drops the problematic conception of domestic society as closed and self-sufficient? I think that although Rawls ultimately acknowledges that there is interaction among domestic societies, once this becomes morally relevant for him, he still manages to under-

¹³ Rawls, *The Law of Peoples*, Part I and II.

¹⁴ *Ibid.*

describe the extent of such inter-societal ties. In a Rawlsian world, trade is conducted, foreign investments are made, treaties are forged, and so on, but all these activities pale in comparison to what goes on inside domestic society. Domestic society continues to have a certain kind of pre-eminence for Rawls, for it is a place where the most pressing and profound problems of justice are found.

What we notice when Rawls's actual view of domestic society is brought to the foreground -- the view that says there is interaction among societies -- is that his approximation of society as closed and self-sufficient seems *prima facie* reasonable: much goes on inside domestic society, which has nothing to do with the rest of the world, and thus it makes sense to focus on domestic society and ignore what happens outside it, at least for now. The challenge, coming from Beitz and Pogge, is that, they would argue, this seeming reasonableness is in fact quite illusory because Rawls's characterization of interaction among societies is still not sufficiently empirically accurate. For Beitz and Pogge, what goes on internationally subsumes what happens domestically, and so to privilege domestic society as the locus of cooperation is a mistake. But, moreover, they would claim, so is Rawls's methodological move, even if it is made for pragmatic reasons, because to focus on domestic society and ignore the rest of the world implicitly invokes this impoverished view of global interaction. For Beitz and Pogge, domestic society on its own isn't a system of cooperation; rather, it is part of a larger system that is global. And so, to pry away domestic society from the rest of the world is thus just another way of denying the presence of an all-encompassing global system. According to them, when adducing principles of justice, one has to begin with the world.

It is important to note here that this line of attack on Rawls does not presuppose the attribution of the wrong interpretation of Rawls, the one that says that he actually thinks domestic society to be closed and self-sufficient. Even when Rawls's conception of domestic society in *ATJ* is placed in a proper context, Beitz and Pogge can be seen as making legitimate complaints against him. What is more, I maintain that up to a point their criticisms are actually right. Although I disagree with their conclusion that domestic society is not an appropriate subject-matter for distributive justice, they do point to something that Rawls gets wrong. I, too, think that Rawls's view of global interactivity is incomplete and his use of domestic society as closed and self-sufficient, even when this is dictated by pragmatic considerations, troubling. In what follows, I explain why I think Rawls's conception of society is still flawed, and why Beitz and Pogge are right in their criticisms -- though up to a point. But I also argue that the conception of society put forward by Beitz and Pogge is also quite problematic. My aim in the next section is to spell out what I think each camp get wrong about domestic society and its relation to the rest of the world, what they, nevertheless, get right about it, and what implications flow once a more accurate picture of domestic society emerges.

III.

The difficulty with Rawls's conception is that he assumes that domestic society is a single system of cooperation. I think this is a mistake. Instead, we should think of society as consisting of and constituted by multiple systems of cooperation, not a single system. Rawls's cosmopolitan critics, on the other hand, mindful of the fact of

globalization, view society as essentially a subsystem of a single global system. To this global system they apply principles of international justice, but reject any need to adduce principles of justice specifically and exclusively for domestic society. Rawls, even as he rejects his earlier view of domestic society as closed and self-sufficient, does not go this far. He does not give up the idea that there should be two separate conceptions: one for domestic society, and one for international. And he does this because he regards the domestic and the international as constituting two distinct systems.

The difference between Rawls, on the one hand, and Beitz and Pogge, on the other, is in their understanding of domestic society. The fact of globalization explains their disagreement over how to individuate the subject-matter of justice, but also opens them up to the charge that certain assumptions they make about the world are not quite right. Rawls underestimates the extent of economic cooperation that exists worldwide, while his cosmopolitan critics focus too exclusively on economic activity and neglect other forms of cooperation. By paying exclusive attention to economic cooperation, Beitz and Pogge insist – and I think rightly – that there is a global system of cooperation. But they also seem to be committed to domestic society being part of the global system, a mere subsystem and nothing more. Rawls, on the other hand, seems to think that when it comes to economic activity, most of it is conducted among members of domestic society, and consequently doesn't regard it as a subsystem of a larger, worldwide system. However, Rawls is wrong in thinking that domestic society is not a subsystem of a larger, worldwide system; it is in fact a subsystem of a certain

kind. But Beitz and Pogge are also wrong in thinking that domestic society is merely a subsystem and nothing more; it is in fact much more than this.

I think that we can avoid these mistakes by invoking a more accurate conception of society that I suggested above. Instead of conceiving of it as a system, we should imagine society as consisting of multiple systems or as a manifold of systems of cooperation – a system of systems perhaps, but not a system *simpliciter*. The systems that constitute it might be *inter alia* a political system, an economic system, a social system, a cultural system. Each of these systems has a distinct cooperative product, and we individuate them in virtue of the product they generate. I think it is right to say that domestic society consists of a political system, a social system, a cultural system, but not of an economic system. The fact of globalization has produced an economic system that is international and rapidly moving toward becoming global in scope. So Beitz and Pogge are right to think that there is an international system of cooperation. But the system they isolate for us is essentially economic in nature. Moreover, they are right that domestic society is a subsystem if we take it to be a subsystem of an international economic system. But we must not forget that there may be other systems that are constitutive of domestic society. I think in fact that there are: specifically, domestic society consists of a political system of cooperation. This suggests that domestic society is more than simply a subsystem; even if we subtract the economic, domestic society continues to be a manifold or a system of systems. Indeed, as Rawls himself puts it in *Political Liberalism*, domestic society is a system of cooperation where fellow members are to offer to one another

fair terms of cooperation that they can accept as free and equal citizens.¹⁵ If that is right, then it certainly deserves a conception of justice that applies exclusively to it, and Rawls is right in his sequentialist approach to justice by requiring a division of labor among the various conceptions of justice, each applying to a particular subject-matter.

There are perhaps four or more fundamental systems of cooperation, but I shall focus on only two of these systems: the political and the economic. Members of an individual domestic society engage with one another in all sort of ways that we think of as being political.¹⁶ They vote, pay taxes, join political parties, offer donations in support of their favorite candidate, form unions, debate political policies, protest wars, and so on. And from these activities we can, I think, discern the terrain of a distinct political system. It is political, in part, because the cooperation that goes on in this system has a product that is political in nature. Rights, liberties, laws, norms, reasons, institutions all seem to be a part of the cooperative product of a political system. Underlying this system are terms of cooperation that distribute the product among the participants in a particular way. Now it seems right to say that these terms should conform to a certain conception of justice. The burdens and benefits of cooperation should be distributed in some appropriate way. Interestingly enough, Elizabeth Anderson, like me, distinguishes the political from the economic sphere and offers a principle to regulate the terms of political participation, which she calls democratic

¹⁵ John Rawls, *Political Liberalism*, pp. 18-20.

¹⁶ For the sake of simplicity let us assume that there is only one such sphere, even though political cooperation and participation are quite variegated and come in various forms.

equality.¹⁷ I think there is something very appealing about democratic equality, though I won't defend this principle here. Instead, I shall simply use it in order to illustrate a certain problem that seems to arise for a theory of global justice.

Anderson thinks that a fundamental aim of an egalitarian conception of justice is to remove structures of oppression and domination, and she regards the provision of capabilities as the right approach to dissolve these structures.¹⁸ According to democratic equality, persons should be given equal access to capabilities that are necessary for them to participate on the basis of equality. This is true for political participation. Persons should have equal access to capabilities that would enable them to participate in a political system on an equal footing. Persons are considered equal in a political system if and only if they are equal in the functionings to which they have access.¹⁹ Anderson also holds this with respect to economic participation. But since I reject the idea that there is an economic system that is coextensive with domestic society, I will put aside the issue of equality within an economic system.

Capabilities are not directly a product of cooperation, but society generates social goods that can be converted into capabilities. Primary goods are one such example of social goods generated by society through various systems of cooperation,

¹⁷ Elizabeth Anderson, "What is the Point of Equality," *Ethics*, January 1999, Volume 109, 287-337.

¹⁸ Anderson, "What is the Point of Equality," p. 308.

¹⁹ To participate politically on an equal basis, for instance, you need to be able to make informed choices that reflect your political values, and this of course requires a certain level of education. A person who is manipulated by others to vote for someone who does not represent her political values because she lacks the sophistication to discern this is clearly someone who is not capable of participating in a political system on an equal basis.

and I shall confine my discussion to such goods, even though ultimately it is the distribution of capabilities, not primary goods, that is going to be equalized by a conception of justice.

Each system generates its own cooperative product. The economic system generates, among other things, wealth and income. There is of course more to its cooperative product than just wealth and income, but we think of these as being particularly important for generating capabilities, which is what we are after. The political system engenders, among other things, rights and liberties, which are also quite essential for generating certain capabilities. There is a division of labor in other words between the two systems in turning out capabilities. This means that certain capability sets may require the operation of both systems and would rely on their cooperative products.

Anderson argues that democratic equality requires the provision of primary and secondary education for all participants in a political system.²⁰ It seems perfectly reasonable to ask that citizens of a liberal democratic society – or any other polity that is similarly demanding and complex – should have as a matter of right those capabilities that can only be gained through extensive education. Without it citizens cannot be said to enjoy equal standing. But notice that primary and secondary education cannot be provided by political cooperation alone. That is, we cannot rely merely on the product of political cooperation. To provide education for all, schools have to be built, teachers have to be trained, texts have to be written, and much, much more, and of course all of these things have to be paid for. Societies thus have to be

²⁰ Anderson, “What is the Point of Equality,” pp. 316-320.

relatively prosperous to be able to provide primary and secondary education. But this means that in addition to a political system of cooperation, we also need an economic one because part of the cooperative product of the economic system is necessary for the political system to function and generate its cooperative product.²¹

The dependency relation also flows in the other direction. Economic cooperation depends on political cooperation. The kind of economic activity that goes on in a modern post-industrial society simply could not exist without the rule of law, or without the public support of institutions that regulate such activity. Without political cooperation of a certain kind, economic cooperation would simply not get off the ground, and so these two systems in particular mutually support and reinforce each other. For the purposes of this paper, however, I want to explore the implications that result from the dependency relation that flows in one of these directions, viz. the dependency of the political system on the economic. The move in the other direction is not less significant, but for my discussion here, it is sufficient to examine the flow just from the economic to the political.

As suggested earlier there is a dependency relation between an economic system and a political one. In order to provide rights and liberties, members of a political system in addition to political cooperation must also rely on some part of the

²¹ For Rawls income, wealth, as well as economic opportunity are already part of the product of a domestic political system, and construed as economic primary goods, are distributed by his second principle of justice. My qualm with Rawls is that he cannot simply assume that all economic goods that get distributed for political reasons within domestic society are products of that society understood as a political system of cooperation. That is because many of these economic goods originate in a different system of cooperation, one that is not coextensive with domestic society. And so the question arises, what is a just way to divide these goods and how much can domestic society appropriate for its own purposes? The way in which Rawls characterizes domestic society obscures this, in my mind, important question.

cooperative product that is generated by an economic system. If there is to be a right to education or health care, not only do you need consensus among the general public that indeed these are basic rights to which all citizens are entitled, pass the necessary legislation that gives these rights appropriate legal recognition and status, and establish institutions that guarantee that all persons have equal opportunity to access these rights, but you also need to set aside a certain portion of the state's budget to build hospitals and schools, pay health care professionals, teachers and administrators, purchase equipment for hospitals and schools, support research in medicine and education, educate and train the next generation of doctors, nurses, and teachers, and so on. And all of this of course depends on the productive labor of persons engaged in economic cooperation. Without economic cooperation and the goods that are generated by such cooperation, most of our rights and liberties would simply not exist in an institutionalized form.

How much of the economic cooperative product is going to be needed to achieve the political aims of a just society will depend on the content or substance of those aims. The more substantial the aims the more costly it will be to achieve these aims; correspondingly, the more costly the aims, the greater the share of the cooperative product will be required. In the U.S. where making an informed political choice can be demanding sometimes, a good secondary education at the very least is required in order for citizens to participate – in an election process, for example – on the basis of equality. But of course providing a good secondary education is quite expensive, and so in an advanced liberal democratic society to participate politically on the basis of equality requires a quite extensive set of capabilities, capabilities that

are quite costly to provide and that require a much greater share of the product of economic cooperation.

What distinguishes my relation to a fellow American from my relationship to a foreigner is the political system in which we participate, not the economic one. Citizens of France or Brazil don't participate in the same political system as I do; the demands of political participation are placed on me and my fellow Americans. This is why one may argue that I have a duty to my fellow compatriots to support a conception of justice that provides for those capabilities that are necessary for all Americans regardless of class, race, gender, etc., to participate on equal footing with respect to everyone else in America. Correspondingly, I don't have a duty to support a political arrangement that provides capabilities to Brazilians because Brazilians have their own political system of cooperation, and so they have duties to one another, but this system is different from the political system of which I am a member. The political system of which I am a part is thus coextensive with the domestic society of which I am a member. The same goes for Brazilians. The political system of which a Brazilian is a part is coextensive with the domestic society of which she is a member, and this of course happens to be Brazilian society. Without a fair distribution of capabilities within Brazilian society it is other Brazilians who take political advantage of those Brazilians who are disadvantaged from the standpoint of their capabilities, not me or other fellow Americans. If the wealthy and powerful Brazilian minority has its way and elects an official who will represent their interests, and not the interests of the poor and disadvantaged, it is the poor and disadvantaged of Brazil who lose and the wealthy minority who wins, not the poor and disadvantaged in the U.S. who lose and

the wealthy who win – politically speaking. We are part of two separate political systems, systems that generate duties which apply only to the members of each system.²²

The problem that arises for a theory of global justice is the following. To generate the required capability set for political participation in an advanced liberal democratic society requires that a substantial portion of the product of the international economic system of cooperation be used. Call this system E_w . The more extensive the demands for political participation, the more extensive the capability set for equal participation is going to be. As I argued above, one cannot generate the capability set through political participation alone. To generate the set, one also has to rely on the product of economic participation. How much of the economic product is going to be needed will of course depend on the specifics of political participation. But there is a further question that has to be asked, and that is: What is the proper share of the product of E_w that we as Americans are entitled to? This question applies to members of any individual society who expect to use some portion of the product of E_w that is meant to fund the provision of capabilities that deal with cooperation that is other than economic. A political system of cooperation is coextensive with membership of individual domestic society, or at least approximately so. An economic system of cooperation, on the other hand, is not; economic cooperation is

²² I emphasize capabilities that are essential for political participation because what I have in mind here is political cooperation, or basically the kinds of activities that a citizen of a country is typically expected to engage in. But I do not limit these activities to things that are clearly political in nature such as voting. Paying taxes and, more generally, obeying laws are political activities on my account. So political participation is broadly construed. Moreover, the capabilities that an individual has to have to participate politically in her society do not have to be political. For instance, one has to be reasonably healthy and more or less educated. So the needs that have to be addressed for political cooperation are both vast and variegated.

integrationist of domestic societies, and involves the participation of citizens of other states. And the general tendency that economic globalization is exhibiting is to integrate economic cooperation into a single worldwide system of cooperation. Therefore, its membership is certainly not coextensive with the membership of domestic society. What we end up with is a split between the product of political participation and the product of economic participation; the former is, for the most part, generated by members of domestic society,²³ but the latter is gradually moving to a point where it is generated by citizens of multiple domestic societies.²⁴

Each participant in this vast system of economic cooperation is clearly entitled to some share of the cooperative product. Furthermore, participants in E_w are also participants in a system of political cooperation, which happens to be coextensive with their domestic society, and would require, in a liberal society, a large capability set if they are to participate on the basis of equality. As I suggested earlier some part of the product of E_w has to be used to fund the provision of these capabilities. Without the product of E_w , there would no way to get political cooperation off the ground. The type of political cooperation will of course vary from society to society. In some societies political participation may be quite extensive. Liberal democratic societies

²³ I don't mean to suggest here that there is no political cooperation that occurs internationally, or involves only fellow citizens. That is clearly not the case. What I am suggesting here is that domestic society for the most part is a political system of cooperation, and that the kind of political cooperation that happens internationally is not something that is tending to absorb various domestic systems into one comprehensive international political system of cooperation. However, when it comes to economic cooperation, this integrationist tendency is a real phenomenon, and that I think is a morally important difference between the political and economic spheres.

²⁴ Now I don't think that this economic system includes everyone everywhere. That I think would be a false characterization of economic globalization. But it is safe to say that the system is vast and is ever expanding through ongoing integration.

are a case in point. And if political participation is extensive, it is quite plausible to suggest that this will call for a richer set of capabilities. Ordinary people need to be able to make reasonable political judgments and choices, and this requires the right sorts of capabilities, which have to be made available if the ideal of democratic equality is to be satisfied.

But notice that the capability set for an advanced democratic society will absorb significantly more of the product of E_w – because the capabilities are more numerous and expensive to engender – than the capability set for a society that demands politically much less of its people where cooperation on the basis of equality can be more easily achieved. If we as Americans have to use much more of the product of E_w in order to generate the capability set relative to political participation in our democratic society, are we entitled to appropriate as much as we need to meet the demands of democratic equality? Isn't it possible that we may be taking away more than our fair share of the product of E_w – which is a product after all that is generated by lots of people many of whom are from very poor and underdeveloped societies – in order to supply our compatriots with those capabilities that are essential for their equality? I think that the answer to the last question is a “yes,” and should give pause to constructing a conception of justice for domestic society as the first task of justice. Before we go on and argue for an extensive capability set that is in line with the demands of democratic equality, we have first to show that whatever portion of the product of E_w we use is something that we can justify to the participants of E_w . If we take more than our fair share, then our eagerness to make sure that our compatriots have no grounds to complain against us might deprive others of their

chance to participate with their compatriots on basis of equality or on the basis of some other requirement or standard that is commensurate with their views of a just society.²⁵ In funding capabilities that enable our compatriots to enjoy democratic equality, we may in fact be depriving fellow participants in an economic system from being able to realize fair terms of political cooperation with their compatriots.

So far I have argued that we as Americans, or as members of any other affluent society, in our zeal to make sure that political cooperation is fair and just might be inadvertently depriving members of other societies, in particular those that are poor and underdeveloped, from realizing fair terms of cooperation in their own society. There is at least the possibility of this and this should make us worry enough to establish how much of the product of E_w we are in fact entitled to before we go on and use some portion of it to supply capabilities to our compatriots.

I think that this worry pushes us in the direction of having to come up with principles of international justice that apply to economic cooperation and specify a fair division of its product for all participants. Before we as Americans appropriate a certain portion of the product of E_w , we have to know what our fair share is of this product and whether the amount we think we need in order to realize our domestic

²⁵ Principles of justice are essential here because we have a vast economic product involving billions of participants across the world, which has to be divided in a way that expresses equal respect for these participants. The fact that the economic system is not coercive does not eliminate the need for justice, since even under conditions of non-coercion the cooperative product of the economic system can be divided in a way that violates equal respect. What equal respect might mean under conditions where coercion is absent may be different from what it might mean when coercion is present – in a non-coercive context, expressing equal respect might be less demanding. But this difference in the demands for equal respect does not eliminate the need for principles of justice, since in both contexts there has to be equal respect and it is up to a conception of justice to ensure that the appropriate standard of respect is in place.

conception of justice is something that we are entitled to. And if not, then we have to reduce the demands that we have placed on that product, which of course might affect the kind of provisions that we are ultimately in a position to make to our compatriots, and in general the type of society that we can construct.

IV.

There are at least two important objections that one can make against my position that requires the specification of what constitutes a fair division of the product of E_w before domestic societies can appropriate their share of it. Let me take up each of these objections one by one and offer a reply.

A critic at this juncture might say that we already possess a mechanism for dividing fairly the product of E_w , and that is the market.²⁶ What a society (or a state) gets from the product of E_w is basically what the market allows it to take, and since the market is fair or is a fair procedure of exchange, what a society (or a state) appropriates is not unfair to the other participants. This may raise some eyebrows at this point, for it might seem that my critic shouldn't be saying what is or is not fair because that is precisely what is at issue, what is and is not fair, and what is needed here is a conception of international justice to do this, which as yet we have not provided. But I don't think we need to go this far, for presumably we do have certain pre-theoretic considered convictions about fairness, and perhaps my critic can make a

²⁶ Another way to make this point is as follows. What a society (or a state) extracts from the product of E_w is precisely what the market allows it to extract, and what the market allows that state to extract is more or less what that state is entitled to because that is what a market does – it allocates entitlements. So when a state appropriates its share of the product of E_w it basically takes that portion of the product to which it is entitled, and this one might argue is perfectly fair to everyone else.

case that indeed the market can generate a fair division of the cooperative product of E_w . So how might this go?

One way is to suggest that how much a society (or a state) should take away from the product of E_w should be in direct proportion to its contribution to the total product. So the more it contributes to the genesis of the product of E_w the more it should get. Let's designate this the contribution principle. There is something quite appealing about this principle because it seems to capture a basic insight contained in our pre-theoretical understanding of fairness. We seem to think that people should be rewarded for their greater contributions: if you gather twice as many bushels of corn as me, then it seems *prima facie* right that the wages you garner should be twice as much as mine. Now what my critic has to say is that the market more or less satisfies the contribution principle: what a society (or a state) appropriates as a participant in the global market tracks more or less that portion of the product of E_w that reflects its collective contribution.

As David Gauthier and Elizabeth Anderson have shown, however, we have strong reasons to think that it is very unlikely that the market – imperfect as it is in the actual world – can ever satisfy the contribution principle; and the global market is no exception to this.²⁷ What an agent can in fact take away from the market is often the result of all sorts of positive externalities and rent-extraction behavior, either from asymmetric bargaining power or from exploiting the scarcity of a particular factor

²⁷ David Gauthier, *Morals By Agreement*, New York: Oxford University Press, 1986; Elizabeth Anderson, *Value in Ethics and Economics*, Cambridge: Harvard University Press, 1996.

input. These components of a market transaction of course have nothing to do with the agent's productive capacity, and this is especially true in the global context.²⁸

There is little evidence to suggest that the global market in general satisfies the contribution principle. Of course, even if it did, that alone would not solve the fairness problem. In a capitalist system, those characteristics that permit agents to respond to demand once information about demand is made available are clearly differentially distributed. Whether a certain agent at this time has the productive capacity to respond effectively and efficiently to present demand is to a great extent a matter of luck because demand as such is independent of considerations of who has the right productive capacity and how she acquired it, i.e. did she acquire it through a

²⁸ Worldwide we see huge disparities in bargaining power. A firm that offers very low paying jobs where no jobs are available can extract hugely favorable terms of cooperation from workers in poor and developing countries that are desperate for employment. But the bargaining power a firm enjoys won't matter to the contribution it makes because bargaining power and the productive contribution that a firm makes are causally independent of each other. Companies can also locate their plants in countries that lack even rudimentary environmental standards so that they can pollute without incurring the cost of pollution. Domestic companies that are less mobile or simply don't have the capital to relocate may have to abide by more stringent standards of their native country and bear the burden of paying for some of the pollution they produce. The fact that there are no uniform and pervasive environmental standards permits some firms to produce goods without the added expense of covering the cost of pollution that results from such production. They can then offer their goods at a much better price than their less mobile competitors and remain more competitive even though their contribution in terms of the quality of goods produced is about as good as those made by their competitors. There is no shortage of examples that illustrate that market allocation can radically deviate from the contribution principle.

Now if these externalities were to be corrected, the contribution principle might seem more attractive as a standard for economic reward. The problem with such a proposal for the global market is that it is extremely difficult to eliminate all externalities. Externalities that have to do with asymmetries in knowledge and information can generate a superior bargaining position for the knowledge holder. And although certain kinds of information asymmetries – like insider trading – can be outlawed, asymmetry in knowledge as a whole cannot be eliminated. So there will always be ways to generate unfair competitive advantages and stray from the contribution principle. For a discussion of information asymmetries, see George Akerloff, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *Quarterly Journal of Economics*, 1970, 84, (3), pp.488-500.

fair process. And of course those who have the productive capacity now given current demand may not have it later as demand changes. There is no reason to think that demand and one's ability to effectively respond to it in any way track qualities of persons that they morally deserve.²⁹

There is, however, another objection that can be raised against my position. Surely, Americans cooperate for the most part with other Americans and not with foreigners, and this suggests that we can in principle isolate that part of the cooperative product of E_w that is essentially a product of American economic cooperation as opposed to French or Mexican. But if that is right, then we can also designate that portion of the cooperative product of E_w as something that should be distributed among Americans only. Americans and only Americans are entitled to it because after all that portion of the total product is something that is generated by their cooperation and not anyone else's. Thus they can choose to distribute that portion of the product of E_w in accordance to principles of justice for domestic society including the principle of democratic equality, which requires the provision of capabilities that are necessary for political participation on the basis of political equality for all Americans.

²⁹ What this argument suggests is that the contribution principle does not account for the notion of moral luck, and in particular for brute bad luck. Even if the contribution principle were to be applied to the global market, there would still the economically disadvantaged who ended up in such a position not because they made bad decisions, but because of certain historical or natural contingencies – they happened to have been born in a country where it is hard for most people to get a decent education; they were malnourished or sickly in their childhood, which affected their physical and intellectual development later in life; they are members of minority group that faces severe discrimination. The contribution principle is much more appealing when people start off from a position of equality. But since there is no way to do this, we need some form of redistribution to justify to the economically disadvantaged the substantial burdens they are forced to assume.

Superficially it may seem that Americans for the most part cooperate economically with other Americans, and that foreign participation is at best marginal. But appearances in this case are quite deceptive, for the contribution that foreigners make to American cooperation is not insubstantial by any means. The imprint of foreign contribution can be found in almost any commonplace or everyday cooperative interaction that seems in any way to be economic. We use roads and highways to get to our jobs, where we engage in what is quite obviously an example of economic cooperation among Americans. The roads may be built by your fellow Americans – construction workers that hail from your town for instance – but the tools they use or the resources that go into making these roads may come from abroad where they are built or excavated by foreign workers. Economic cooperation that takes place on American soil, as it were, is imbued with foreign involvement to such a degree that it is quite difficult to provide a case where economic cooperation among Americans does not in some way depend on the economic contribution made by foreign workers. And if such foreign presence is this ubiquitous it is hard to imagine how we might be able to isolate and demarcate that portion of the total product of E_w that is generated by Americans only. If there is such a thing it cannot be anything that is complete and thus quite unlikely to be of any use to anyone, including Americans.³⁰

³⁰ This gives us another way to respond to the critic who says that the market constitutes a fair process for dividing the product of E_w . If we cannot disentangle what is a product of American cooperation from what clearly isn't - for it depends on foreign input – then there is no way that the market can satisfy the contribution principle if the kind of contribution we mean here is collective in nature. In order for us to determine whether the market satisfies the contribution principle, we have to be able to demarcate what is and isn't a result of American contribution to total product of E_w and then suggest the share of E_w should be proportional to such contribution. But since this is something that we cannot demarcate, there is no way for us to conclude that the market can ever satisfy the contribution principle.

The above objection, however, can be made more precise, which would make it more difficult to respond to. The worry my opponent brings up has to do with measuring economic cooperation worldwide. Several questions have to be raised at this point. How extensive is the economic system that I have in mind? Is there a single system of economic cooperation, or are there many? If so, what are they, and what becomes of global economic participation? My answer is that if there are other systems of economic cooperation they are dwarfed by the international one, which I think implies that we had better take this system very seriously if we are to say something useful about distributive justice. But I also want to go further than this and say that whatever economic activity we think is distinct from international cooperation – because it takes place domestically and is regulated by domestic institutions – is basically an illusion. Domestic economic activity is in fact part of the international system, and domestic society serves as a site for economic activity, but it does not constitute a system.

But my opponent at this point might say that I have offered little or no evidence to suggest that the fact of economic globalization is as pervasive as I say it is, and that there is a single economic system of cooperation. Unlike me, she believes

Now it might be suggested that if receiving in proportion to one's contribution means receiving in proportion to how much one's product is valued by others, then a perfectly competitive market would be able to satisfy the contribution principle. I think that this suggestion has some plausibility to it. One way we can do is by measuring the value added to a commodity or an industry by American workers and then taking that as our measure of the amount of contribution made solely by Americans. The difficulty with this is that the value added measure does not eliminate all the ways in which American workers and industries depend on foreign inputs for their productivity. For instance, it does not take into consideration products that were not purchased by an industry as an intermediate input, but were used by it nevertheless. These include public goods, which are used by everyone, but also technical or scientific knowledge that is generated by government sponsored research.

that there are many systems of cooperation that are roughly coextensive with individual domestic society. A domestic economic system is constitutive of individual domestic society, not unlike a political system or a cultural system of cooperation. Domestic society is thus a system of systems or a second-order system that regulates first-order systems of cooperation. An economic system is one of the first-order systems that falls within the purview of domestic society; others that fall within the same purview are a domestic political system, a domestic cultural system, and so on. Moreover, these domestic economic systems are the dominant economic systems in the world, each with a cooperative product that can be traced largely to the cooperative labor of members of that society to which of course those members are naturally entitled. The American economic system is a system of American society, and its cooperative product is something to which Americans are entitled. And this cooperative product is so large that it can pay for the provision of those capabilities for all Americans that are called for by the principle of democratic equality. The international economic system that I make such a big fuss over is merely one system along with the domestic ones. And in fact it is probably a product of various domestic systems interacting with one another. This system has a cooperative product, but that share of the product that can be traced to the contribution of a particular domestic system is considerably smaller than the cooperative product of that system. Thus the cooperative economic product of an American economic system is significantly larger than its share of the international economic product that stems from international cooperation; it is so much larger that American society does not have to dip into that share in order to provide capabilities to its citizens so that they may engage in political

participation on the basis of political equality. In other words, my worry – that first and foremost we have to delineate the proper share for each domestic society of the cooperative product of the international economic system before we can fund domestic political participation – isn't really a serious concern because the cooperative product of a domestic economic system is sufficient to pay for the type of political participation that is called for by domestic principles of justice, even when these principles are very demanding like the principle of democratic equality. So in order to defend my position, I have to say what is wrong with my opponent's claims about globalization.

There are I think at least two ways to respond to this objection. The basic idea behind my response is that most of the goods and services that we as Americans produce exhibit counterfactual dependence on foreign factors of production. There are three counterfactual claims that can be made. First, most final goods and services that we as Americans produce are counterfactually dependent on foreign factors of production. Second, the value or price of final goods and services counterfactually depends on foreign factors of production. Finally, the size of the US GDP counterfactually depends on the global market.³¹ I contend that significant counterfactual dependence of any of the above type is evidence – though perhaps not conclusive evidence – that the international economic system is deep and extensive and with a product that is essential for domestic political participation.

³¹ Recall that the GNP of a particular state is the value of all final goods and services produced by that state's factors of production that are then sold in a given period.

Let's look at an individual final good produced in the U.S. Let g_i be that good, and v_i be its value. If g_i counterfactually depends (or *c-depends* from hereon) on a foreign input, it is an outcome of cooperative activity between foreign and domestic cooperators. It should thus count as part of the cooperative product of the international system. This seems right because foreign workers have played a cooperative role in the production of this good. But how do we show there is such counterfactual dependence (or *c-dependence*)? One way is to show that without a foreign factor of production a particular good would not have been made by American workers. In other words, to establish that g_i *c-depends* on a foreign input, we have to show that the following statement is true: If it weren't for foreign contribution, g_i would not have been produced. I suggest we do this by looking for any foreign input at any point along the production chain of g_i . If there is such input and once this input is taken out, then presumably g_i would no longer be made. There is a break in the production chain and something essential for g_i is not supplied.³² Moreover, this entails that v_i also exhibits counterfactual dependence; if g_i is no longer made, v_i is equal to zero, and this obviously implies a change in v_i . But notice that g_i is a generic example of any final good that includes a foreign input in its production chain. Any

³² In possible-worlds talk, a possible world where foreign participation is absent and g_i is not made is closer to the actual world than one where foreign participation is absent but g_i is made. Let's suppose that g_i is assembled from various component parts in a U.S. factory, and that one of its component parts was made in a factory in Malaysia. Now g_i could still have been made in the U.S. provided the component part made in Malaysia is made in a factory somewhere in the U.S. But of course in the actual world there is no such factory; it is something that first has to be built. This suggests that a world where there is no factory in Malaysia and in the U.S. is closer to the actual world than one where there is no factory in Malaysia but there is one in the U.S. The latter requires something further, viz. a factory in the U.S., which *ex hypothesi* in the actual world does not exist.

final good, therefore, that contains such an input in its production chain would *c-depend* on foreign contribution.³³

So if there is actual contribution of a foreign input at any point in g_i 's production chain, a good case can be made that g_i exhibits *c-dependence* on foreign participation. This suggests that our task is the following. If we can locate some amount of foreign contribution somewhere in the production chain of an individual good, we can say that the good exhibits *c-dependence*. And if there is such dependence, that good is part of the cooperative product of the international system. This may not be so hard to do if we examine the whole production process of a particular good and all that this process involves – the raw materials that go into making the good, the plants and factories where production and assembly take place, the labor that goes into making the good, the labor that goes into the production of all the subparts and their subparts, and so on – at some point we are bound to find an element of foreign contribution. And it seems that we can do this with respect to most of the goods that we produce. There are simply too many goods that somewhere in their histories involve some element of foreign contribution. Moreover, we can do this by going from country to country; the goods that citizens of other states consume and produce are similar to what we produce and consume, and their mode of production is also for the most part not unlike our own. But if that is right, then the international system is deep and extensive and its cooperative product is quite large, which means

³³ Something similar can be said about final services. But in many cases it would be the value of a service that exhibits *c-dependence*.

that our share of this product is something that we must rely on when making provisions for political participation.

I think that we can say something similar about the value of final goods and services. The value of a particular good that *c-depend*s on foreign factors of production also *c-depend*s on these foreign factors because they have values which in turn affect it. In another words, the value of a particular good is going to be affected by the value of all its production inputs that are part of its production history. Now there may be goods and services that don't *c-depend* on foreign factors of production. But the value of these goods and services may still exhibit *c-dependence*. A particular service within the low to semi-skilled spectrum of labor has the value that it does in part because of the distribution of workers that possess that skill, and this of course goes on not just domestically, but also internationally. If more foreign workers could freely migrate from a country or area where their skills are in low demand to a country or area where their skills are in high demand, then the value of that skill domestically would change. Something very similar can be said about goods as well. The counterfactual dependence of the value of final goods and services is far more expansive and includes many more goods and services. I suggest that goods and services whose values exhibit *c-dependence* should count as part of the international economic system of cooperation – for they do depend once again on foreign factors of production. If that is right, then this international system is quite large and so has to be taken seriously by us.

The moral significance of *c-dependence* is that it shows that the things that we as Americans consume are in part generated by non-Americans and that, moreover,

were it not for such foreign participation, we as Americans would not have these things -- hence the need to think of economic cooperation as extending beyond the state.³⁴ Of course, just how much foreign contribution for a particular type of good amounts to is something that *c-dependence* of goods does not reveal: all goods are treated similarly as long as they exhibit *c-dependence*.³⁵ But, it might be argued, this insensitivity to the amount of contribution actually made by non-Americans is problematic, for it might be the case that the foreign input involved in generating particular goods is still quite minimal -- or fungible, for that matter -- which would support much less redistribution from the US to the rest of the world. Singapore, being a small country, depends very heavily on imports to drive its economy, which is centered on exporting technological products. But can the same be said of the US, which has the capacity to produce much, if not all, of what it needs?

I think that *c-dependence* does not rule out that per good foreign contribution might be small in relation to that which is domestic. That is certainly a weakness in my analysis and in its use of this concept. But the actual empirical evidence suggests that foreign contribution is not minimal. There are difference from country to country, but even with states such as the US and Japan there is significant economic dependence on foreign inputs. In the next section, I try to use such data to make a

³⁴ Of course, it is possible that without foreign contribution, Americans would pick up the slack, as it were, and do all of the manufacturing of these goods. But if this were to occur, assuming of course that across the board substitution of all foreign inputs with domestic ones could be achieved, the price of these goods would change - the American consumer would have to pay more for the same good. So at least the economic value of goods consumed by Americans would be different if we abstract away foreign contribution.

³⁵ This, however, is not the case if we take the economic value of a good as exhibiting *c-dependence*, because presumably the greater the amount of actual foreign contribution, the greater the change to the economic value when foreign contribution is abstracted away.

stronger case -- and one which I hope will also give additional support to my argument above -- that there is indeed a global economic system of cooperation.

My arguments on globalization thus far have been conceptual in nature. However, my claims would perhaps be more compelling if economic interdependence could be given a quantitative description and measured in a more precise way. If it can be shown that the cooperative product of economic cooperation of, say, Americans or Chinese relies on cooperative contributions made by foreigners and if this reliance can be effectively measured, then I think we can say with more confidence whether there indeed exists at this point a global system of economic cooperation that is substantial enough to warrant being regulated by principles of justice. In the next section, I offer such a quantitative description of global economic interdependence and argue that for those states that are integrated into the global economy cooperation with the rest of the world is not peripheral but is quite deep.

V.

Measuring a state's dependence on the global economy for its cooperative product is not an easy thing to do given the sheer complexity of the interactions involved and the number of variables to consider. There is, however, one specific type of econometric analysis that may be applied here, which I think can provide a reasonably accurate estimate of global interdependence. The type of analysis I have in mind is called input-output analysis.³⁶

³⁶ There is considerable literature on explaining input-output analysis. For an early exposition of this method, see Wassily Leontief, *Input-Output Economics*, New York: Oxford University Press, 1986; Hollis Chenery and Tsunehiko Watanabe, *International Comparisons of the*

The modern version of input-output analysis was largely developed by Wassily Leontief in the 1930's, 40's and 50's.³⁷ The sine qua non of input-out analysis is that it models inter-sectoral linkages. Sectors are the individual industries or sectors of a particular economic unit – it could be a state or a certain region within a state. Linkages are basically the flows of products between these various sectors, as one sector purchases products from another and then uses them as inputs to generate its own products, which again are either sold to other sectors as inputs or to final consumers for consumption. What input-output analysis does is to model inter-sectoral linkages in a way that allows certain predictions to be made. Modeling sectoral linkages is important because ceteris paribus a rise or drop in final demand for the products of a certain sector will also affect demand for the products of those sectors that directly or indirectly supply the affected sector with their own products as inputs. In other words, a rise or fall in demand in one sector is something that reverberates throughout an economy, and input-output analysis allows us to measure how widespread and significant the impact from the change in final demand is going to be on individual sectors as well as on the economy as a whole.³⁸

Structure of Production,” *Econometrica*, 26, 1958, pp. 487-521; Ambica Ghosh, “Input-Output Approach in an Allocation System,” *Econometrica*, 25, 1958, pp. 58-64. A more contemporary discussion of input-output analysis and some of the most recent developments in the field is found in Ronald Miller and Peter Blair, *Input-Output Analysis: Foundations and Extensions*, Cambridge: Cambridge University Press, 2009.

³⁷See Wassily Leontief, “Input-Output Analysis and its Use in War Economies: Recent Developments in the Study of Inter-industrial Relationships,” *American Economic Review*, May 1949, Vol. 39 Issue 3, pp. 211-225; Wassily Leontief, *Studies in the Structure of the American Economy: Theoretical and Empirical Exploration in Input-Output Analysis*, New York: Oxford University Press, 1953.

³⁸ See Miller and Blair, *Input-Output Analysis*, Chap. 2, for a detailed discussion of how input-output analysis is supposed to work and the purpose behind this method.

For instance, a rise in demand for American-made automobiles in the U.S. means that U.S. auto manufactures have to increase their production of cars to keep up with demand. But in order to increase their production of cars, these manufacturers also have to buy additional inputs from other industries: they have to purchase more steel, more electricity, component parts, and so on. This means, in turn, that these other industries have to increase production of their products, and since they too use inputs in their production process from other sectors, demand for additional goods will continue to spread and encompass more and more sectors. Input-output analysis gives us a way to measure how much more each of these interdependent sectors would have to produce in order to satisfy the change in final demand – in this case, consumer demand for American-made cars.³⁹

Input-output analysis was used largely to predict how change in demand would affect the economy of a particular country or of a region within a country. My intention here is to use input-output analysis to measure the extent to which the cooperative product – i.e. the total economic output – of a certain state depends on its participation within the global economy. The way I aim to do this is to model sectoral interdependence of a particular state with the rest of the world, vis-à-vis international trade, and then apply input-output analysis to predict what would happen to a state when these global linkages are abstracted away. The difference between how a national economy performs when it is plugged into the international system of

³⁹ Change in demand is always change in final demand, which is essentially demand by individual domestic consumers, the government, or demand for exports. Change in intermediate inputs is calculated in light of change in final demand. For additional explanation of the variables involved, see *ibid.*

economic cooperation and how it does in a hypothetical situation where the contributions made by the rest of the world are erased should give us an estimate of the extent to which a state that is part of the global economy depends on the rest of the world in generating its economic output.

Fortunately, data are now available that with certain modifications⁴⁰ to the traditional input-output method will permit me to carry out these calculations.⁴¹ But before I can do this, I need to explain in some detail how input-output analysis works and some of the mathematics behind it.

Assume that a national economy can be divided into n sectors. Let x_i be the total productive output of sector i and f_i be the total final demand for sector i 's products. The equation below expresses the way in which sector i distributes its product through sales to other sectors and to final demand:

(1)

$$x_i = z_{i1} + \dots + z_{ij} + \dots + z_{in} + f_i = \sum_{j=1}^n z_{ij} + f_i$$

The term z_{ij} represents the inter-industry, or intermediate, sale by sector i to other sectors j – including itself when $j=i$. The intermediate sales of every sector i together with final demand amount to the total sectoral output of an economy. An equation

⁴⁰ These modifications are explained below.

⁴¹ Good data are available on individual states, usually through government agencies. For instance, input-output data on the U.S. is collected by the Bureau of Economic Analysis (BEA), and made available at <http://www.bea.gov/index.htm>. But one of the best sources for input-output data – data that covers many countries – is the OECD's Directorate for Science, Technology, and Industry.

similar to (1) can be written out for every sector, from 1 to n , as a way to express that sector's inter-industry sales:

(2)

$$x_1 = z_{11} + \dots + z_{1j} + \dots z_{1n} + f_1$$

$$x_2 = z_{21} + \dots + z_{2j} + \dots z_{2n} + f_2$$

$$x_i = z_{i1} + \dots + z_{ij} + \dots z_{in} + f_i$$

$$x_n = z_{n1} + \dots + z_{nj} + \dots z_{nn} + f_n$$

The equations in (2) can be represented in matrix form as follows:

(3)

$$\mathbf{x} = \begin{bmatrix} x_1 \\ \vdots \\ x_n \end{bmatrix}, \mathbf{Z} = \begin{bmatrix} z_{11} & \dots & z_{1n} \\ \vdots & \ddots & \vdots \\ z_{n1} & \dots & z_{nn} \end{bmatrix}, \mathbf{f} = \begin{bmatrix} f_1 \\ \vdots \\ f_n \end{bmatrix}.$$

More compactly, (3) can be written as $\mathbf{x} = \mathbf{Z}\mathbf{i} + \mathbf{f}$, where \mathbf{i} is a summation vector. In producing its goods, a particular industrial sector will purchase more than just intermediate goods or inputs from other sectors: the sector also has to pay for labor and capital, and may use inventoried items that have been stored for future need. These are primary inputs, as distinct from intermediate ones, and are collectively referred to as value added in a sector.⁴²

⁴² See Miller and Blair, *Input-Output Analysis*, especially Chapters 2, 5, and 12, for an extensive discussion of the usefulness of primary inputs for inter-industry analysis. Given my aim of examining global interdependence, primary inputs are not that relevant and so I will not rely on them in any way.

The term z_{ij} denotes the absolute value of an intermediate input from sector i to sector j in a given period, generally a year. However, the absolute value may not be good indicator of the importance of an input purchased by sector j from sector i . A basic assumption made in input-output analysis is that inter-industry flows from sector i to j depend on the purchasing sector's total output. This of course makes sense since if the automobile manufacturing sector produces more cars in a given year, it would have also had to buy more steel from steel producers. To signify the relative importance – and also dependence – of an intermediate input for a particular sector, the intermediate input is divided by total output of sector j , the purchasing sector.⁴³ The term z_{ij} is thus divided by x_j , where x_j is the total output of sector j . If we assume that $a_{ij} = z_{ij}/x_j$, then a_{ij} represents the ratio of input from sector i to the total output of sector j . The term a_{ij} is called the technical coefficient and forms the crux of input-output analysis.⁴⁴ So for example, if i is the steel sector, j the automobile sector, and a_{ij} , the technical coefficient, is .1, a_{ij} represents the value worth of inputs, measured in dollars, from steel manufacturers for every dollar's worth of output by automobile makers. This means that if in the US in 2010, GM, Ford, and Chrysler produced \$20 billion worth of automobiles, they had to spend \$2 billion on buying steel.

The equations in (2) can be rewritten by introducing a_{ij} , the technical coefficient, where $z_{ij} = a_{ij}x_j$:

(4)

$$x_1 = a_{11}x_1 + \dots + a_{1j}x_j + \dots + a_{1n}x_n + f_1$$

⁴³ Ibid.

⁴⁴ Ibid.

$$x_2 = a_{21}x_1 + \dots + a_{2j}x_j + \dots + a_{2n}x_n + f_2$$

$$x_i = a_{i1}x_1 + \dots + a_{ij}x_j + \dots + a_{in}x_n + f_i$$

$$x_n = a_{n1}x_1 + \dots + a_{nj}x_j + \dots + a_{nn}x_n + f_n$$

The equations in (4) express the dependence of inter-industry flows on the total output of a sector. Moving all the x terms to the same side, we get:

(5)

$$x_1 - a_{11}x_1 - \dots - a_{1j}x_j - \dots - a_{1n}x_n = f_1$$

$$x_2 - a_{21}x_1 - \dots - a_{2j}x_j - \dots - a_{2n}x_n = f_2$$

$$x_i - a_{i1}x_1 - \dots - a_{ij}x_j - \dots - a_{in}x_n = f_i$$

$$x_n - a_{n1}x_1 - \dots - a_{nj}x_j - \dots - a_{nn}x_n = f_n$$

Combining the common x terms in each equation in (5), we now have:

(6)

$$(1 - a_{11})x_1 - a_{12}x_2 - \dots - a_{1j}x_j - \dots - a_{1n}x_n = f_1$$

$$-a_{21}x_1 + (1 - a_{22})x_2 - \dots - a_{2j}x_j - \dots - a_{2n}x_n = f_2$$

$$-a_{i1}x_1 - a_{i2}x_2 - \dots + (1 - a_{ii})x_i - \dots - a_{in}x_n = f_i$$

$$-a_{n1}x_1 - a_{n2}x_2 - \dots - a_{ni}x_i - \dots + (1 - a_{nn})x_n = f_n$$

In matrix form, (6) may be formulated as,

(7)

$$(\mathbf{I} - \mathbf{A})\mathbf{x} = \mathbf{f}$$

where \mathbf{I} is a n-by-n identity matrix, \mathbf{A} is a n-by-n matrix of technical coefficients, \mathbf{x} is a n-by-1 matrix of total output, and \mathbf{f} is a n-by-1 matrix of final demand. The above equation can also be written as,

(8)

$$\mathbf{x} = (\mathbf{I} - \mathbf{A})^{-1} \mathbf{f}$$

This equation will have a unique solution if $(\mathbf{I} - \mathbf{A})^{-1}$ is non-singular, that is, if the determinant of $\mathbf{I} - \mathbf{A}$ is non-zero. In (8), $(\mathbf{I} - \mathbf{A})^{-1}$, or \mathbf{L} , is known as the Leontief inverse, after Wassily Leontief, who was the first to derive the equation in (8).⁴⁵ This equation is the most fundamental one in all of input-output analysis and is the starting point for other alternative formulations of inter-industry linkages, which try to model more complex situations.

The equation in (8) is predominantly used for examining how changes in final demand, or \mathbf{f} , will affect the distribution of intermediate inputs and total output of a national economy. My aim, of course, is to go beyond the national economy and introduce economic interdependence in the form of international trade between a particular state and the rest of the world. This will require me to employ a more complicated version of input-output analysis. Yet because equation in (8) is still so important for even an interregional approach, it would perhaps be useful to illustrate with an example just what the above equation is supposed to do.

⁴⁵ Leontief himself did not coin this term, but because of the importance of $(\mathbf{A} - \mathbf{I})^{-1}$ others began to refer to as the Leontief inverse. See *ibid.*, Chapter 2, for more discussion.

Suppose we have a simple closed economy that consists of three basic sectors, agriculture, manufacturing, and mining. Suppose also that final demand for the goods produced by each of the sectors is 250, 400, and 100 and total output by each sector is 1500, 2000, 1000 for agriculture, manufacturing, and mining in that order.⁴⁶ Table 1 illustrates final demand, total output and inter-sectoral flows.

Table 1

	Agriculture	Manufacturing	Mining	Final Demand	Total Output
Agriculture	350	500	250	400	1500
Manufacturing	350	750	500	400	2000
Mining	250	450	150	150	1000
Value Added	550	300	100		
Total Outlays	1500	2000	1000		

The first three columns of the table present sectors as purchasers of intermediate inputs from all three sectors and of value added, which inter alia can be labor and capital. The total outlay represents that the total amount of expenditure made by the sector. The rows present sectors as producers and sellers of their goods to each of the sectors – found in columns – and to final demand, which generally consists of individual consumers, as well as governments, who are interested in these goods as such. The total output is the overall value of the goods produced by the sector. The

⁴⁶ The numbers here represent the monetary value, in terms of dollars or euros for instance, of the goods made by a particular sector.

first three entries in the first three columns and the first three rows capture the inter-industry flows in this basic economy. The values of the intermediate inputs have to be changed to technical coefficients.⁴⁷ And technical coefficients are gotten by taking the value of an input bought by a sector and dividing it by the total output of that sector.⁴⁸ In Table 2, both the matrix of technical coefficients and the Leontief inverse are given.

Table 2.

A: Matrix of Technical Coefficients	(I - A)⁻¹: Leontief Inverse
$\begin{bmatrix} .233 & .25 & .25 \\ .233 & .375 & .5 \\ .167 & .225 & .15 \end{bmatrix}$	$\begin{bmatrix} 1.92 & 1.27 & 1.33 \\ 1.33 & 2.88 & 2.09 \\ .74 & 1.01 & 1.99 \end{bmatrix}$

The matrix $(\mathbf{I} - \mathbf{A})^{-1}$, or \mathbf{L} , allows us to predict what the total output of our hypothetical economy would have to be to meet an increase in final demand. So if we assume that there is an across the board 10% increase in final demand for agricultural, manufacturing, and mining goods, the total output is found by multiplying \mathbf{L} by $\Delta \mathbf{f}$, or the difference in final demand.

$$\begin{bmatrix} 1.92 & 1.27 & 1.33 \\ 1.33 & 2.88 & 2.09 \\ .74 & 1.01 & 1.99 \end{bmatrix} \begin{bmatrix} 40 \\ 40 \\ 15 \end{bmatrix} = \begin{bmatrix} 150 \\ 200 \\ 100 \end{bmatrix}$$

This means that to meet the increase in demand the agricultural sector's output has to go from 1500 to 1650, the manufacturing sector's from 2000 to 2200, and the mining sector's from 1000 to 1100. Because there are inter-sectoral linkages, an increase in

⁴⁷ Technical coefficients reflect the worth or value of inputs from sector i for every dollar's worth of output or production generated by sector j . This is done to relativize the worth of intermediate inputs so that inter-industry comparisons can be made.

⁴⁸ Miller and Blair, *Input-Output Analysis*, p. 16.

final demand for goods produced by one of the sectors entails an increase in intermediate demand for the goods of the other sectors. For instance, in order for the agricultural sector to generate more agricultural goods, it has to buy goods from both the manufacturing and mining sectors, because goods from these sectors are essential as inputs for the production of agricultural goods. The same goes for manufacturing and mining goods. In order to evince these sectoral linkages, examine what occurs when there is an increase in final demand of one unit for each of the sectors.

$$\begin{bmatrix} 1.92 & 1.27 & 1.33 \\ 1.33 & 2.88 & 2.09 \\ .74 & 1.01 & 1.99 \end{bmatrix} \begin{bmatrix} 1 \\ 0 \\ 0 \end{bmatrix} = \begin{bmatrix} 1.92 \\ 1.33 \\ .74 \end{bmatrix},$$

$$\begin{bmatrix} 1.92 & 1.27 & 1.33 \\ 1.33 & 2.88 & 2.09 \\ .74 & 1.01 & 1.99 \end{bmatrix} \begin{bmatrix} 0 \\ 1 \\ 0 \end{bmatrix} = \begin{bmatrix} 1.27 \\ 2.88 \\ 1.01 \end{bmatrix},$$

$$\begin{bmatrix} 1.92 & 1.27 & 1.33 \\ 1.33 & 2.88 & 2.09 \\ .74 & 1.01 & 1.99 \end{bmatrix} \begin{bmatrix} 0 \\ 0 \\ 1 \end{bmatrix} = \begin{bmatrix} 1.33 \\ 2.09 \\ 1.99 \end{bmatrix}$$

The first calculation above shows that a unit increase in final demand for agricultural goods increases output of the agricultural sector by 1.92. This makes sense since to meet the change in demand the agricultural sector has to first and foremost produce that one unit's worth; the other .92 increase in sectoral output is the result of the agricultural sector depending on itself to provide those inputs that are necessary to meet the initial increase in final demand. Moreover, that increase of one unit also stimulates the increase of total output of the manufacturing sector by 1.33 and of the mining sector by .74. Similar results can be gleaned from the other two calculations. In every case where there is an increase in direct demand for one of the sectors, there is also an increase in indirect demand – in the form of intermediate inputs – for all

sectors and consequently an enlargement of the total output.⁴⁹ What this says about even our basic example is that an increase of final demand for the goods of a sector stimulates an economy more widely by spreading to other sectors that exhibit inter-industry linkages. The economic impact the increase makes is thus not commensurate with but goes beyond the supply of simply those goods meant to satisfy the change in final demand.

Of course the real world is much more complicated than the example discussed above. One significant extension of input-output analysis is its application to regional inter-industry flows.⁵⁰ This can be done with regions of a particular country, say U.S. or Japan, or the regions can be countries themselves, for instance if countries are engaged in bi-lateral trade or are part of a regional trading bloc. I use regional analysis as a variant of traditional input-output analysis to measure economic

⁴⁹ It is worth pointing out that the change in total output given an increase of a unit's worth in final demand of a particular sector is given by the column in \mathbf{L} associated with that sector. The sum of the entries in a column indicate by how much the rise of one unit's worth of sectoral final demand affects the total output of the entire economy. So for instance for every one unit's worth of increase in demand for manufacturing, the economy as a whole has to expand its output by 5.16. These column sums are known as multipliers and are often used to predict which sector would have the greatest effect on stimulating an economy as a whole.

⁵⁰ For a good discussion of recent developments in as well as the various methods of regional analysis, see Miller and Blair, *Input-Output Analysis*, Chapters 3 and 12; for more detailed discussion, see John H. Dewhurst, Geoffrey Hewing, and Rodney Jensen (eds.), *Regional Input-Output Modeling: New Developments and Interpretations*, Aldershot, UK: Avebury, 1991; Okuyama, Nabuhiro, and Takeo Ihara (eds.), *Spatial Structure and Regional Development in China: An Interregional Input-Output Approach*, Basingstoke, UK: Pelgrave Macmillan, 2005; Takahiro Akita, "Interregional Interdependence and Regional Economic Growth in Japan: An Input-Output Analysis," *International Regional Science Review*, 16, 1994, pp. 231-248; Geoffrey Hewings, Yasuhide Okuyama, and Michael Sonis, "Economic Interdependence within the Chicago Metropolitan Area: A Miyazawa Analysis," *Journal of Regional Science*, 41, 2001, pp. 195-217; Ronald Miller, "Upper Bounds on the Sizes of Interregional Feedbacks in Multiregional Input-Output Models," *Journal of Regional Science*, 26, 1986, pp. 285-306; Alex Hoen, *An Input-Output Analysis of European Integration*, Amsterdam: Elsevier Science, 2002.

interdependence. In my case, two regions are compared: one region is a particular state, and the other consists of basically the rest of the world. What I want to show, using the regional method, is the extent to which the economy of a specific state, like the U.S. or China, depends for its productive capacity on the rest of the world.⁵¹

Regional input-output models as the name suggests compare the economies of regions. Such analysis allows the modeling of not just intraregional flows among sectors but also interregional ones as well. In a one-region case, the matrix of technical coefficients, \mathbf{A} , captures the inter-industry flows of a single region.⁵² In a multi-region case, data on inter-regional, inter-industry linkages additionally have to be incorporated.⁵³ This is accomplished by constructing a matrix of coefficients that captures inter-industry linkages from region R^i to R^j and one for R^j to R^i for all regions involved.⁵⁴ In a two-region scenario, $\mathbf{A}^{\mathbf{R1R2}}$ is the matrix of coefficients of flows from R1 to R2, and $\mathbf{A}^{\mathbf{R2R1}}$ consists of coefficients of flows from R2 to R1.⁵⁵ To complete the picture of inter-industry flows, we also need $\mathbf{A}^{\mathbf{R1R1}}$, coefficients of intra-industry flows in R1 and $\mathbf{A}^{\mathbf{R2R2}}$, coefficients of intra-industry flows in R2. The term $a^{\mathbf{R1R2}}_{ij} = z^{\mathbf{R1R2}}_{ij}/x^{\mathbf{R2}}_j$, that is the coefficient of $\mathbf{A}^{\mathbf{R1R2}}$ is found by taking the value of the

⁵¹ Here of course I have in mind only international trade. There are ways other than trade on which a state's economy relies for its productivity. For instance there is transference of technical knowledge, which can have a substantial effect on economic development. There is also foreign investment and capital flows. The effects of flows of knowledge and capital, however, have to be measured independently of inter-sectoral linkages.

⁵² Miller and Blair, *Input-Output Analysis*, Chapters 3 and 12.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

intermediate input sold by sector i in R1 to sector j in R2 and dividing it by the total output of sector j in R2. Similarly, $a^{R2R1}_{ij} = z^{R2R1}_{ij}/x^{R1}_j$, or the value of the intermediate input sold by sector i in R2 to sector j in R1 divided by the total output of sector j in R1. The coefficients found in \mathbf{A}^{R1R1} and \mathbf{A}^{R1R2} are calculated in the same way as the one-region case. In a two-region case, we thus have not one but four coefficient matrices:⁵⁶

(9)

$$\mathbf{A}^R = \begin{bmatrix} \mathbf{A}^{R1R1} & \mathbf{A}^{R1R2} \\ \mathbf{A}^{R2R1} & \mathbf{A}^{R2R2} \end{bmatrix}$$

The inverse of $(\mathbf{I} - \mathbf{A}^R)^{-1}$ is more complex since it is a matrix that is made up of sub-matrices, and is given in (10):

(10)

$$\begin{bmatrix} (\mathbf{I} - \mathbf{A}^{R1R1})^{-1} + (\mathbf{I} - \mathbf{A}^{R1R1})^{-1} \mathbf{A}^{R1R2} \mathbf{S}^{-1} \mathbf{A}^{R2R1} (\mathbf{I} - \mathbf{A}^{R1R1})^{-1} & (\mathbf{I} - \mathbf{A}^{R1R1})^{-1} \mathbf{A}^{R1R2} \mathbf{S}^{-1} \\ \mathbf{S}^{-1} \mathbf{A}^{R2R1} (\mathbf{I} - \mathbf{A}^{R1R1})^{-1} & \mathbf{S}^{-1} \end{bmatrix}$$

\mathbf{S} is the Schur⁵⁷ complement and is equal to: $(\mathbf{I} - \mathbf{A}^{R2R2})^{-1} - \mathbf{A}^{R2R1} (\mathbf{I} - \mathbf{A}^{R1R1})^{-1} \mathbf{A}^{R1R2}$.

Regional analysis is designed to predict how changes in demand – either for intermediate inputs or goods for final consumption – that originate in one region would affect the total output of the relevant sectors and the economy as a whole of another region – for example, how a drop in U.S. demand for American cars would

⁵⁶ Ibid.

⁵⁷ For a discussion of component matrices, see Fuzhen Zhang (ed.), *Schur Complement and its Applications*, New York: Springer, 2005.

affect car-part manufacturers and the national economies of Canada and Mexico, where many of the parts used in the production of American cars are made. My goal here, however, is a bit more ambitious, since I want to measure to what extent the U.S. or Chinese economies, for instance, depend on the rest of the world for their economic outputs – in other words, what would happen to the U.S. or Chinese economies if one were to abstract away the contributions made by the rest of the world? To model this kind of abstracting away, in addition to regional analysis, I also use what is called the Hypothetical Extraction Method (HEM).⁵⁸

HEM is a recent development in the field of input-output modeling, and it has been generally used to gauge the importance of a particular sector or industry to the rest of the economy by extracting that sector or industry and then measuring the impact this has on the total economic output. The sector or industry in question may be a regional one or it may be one that is located in another region. I use HEM to extract not a particular sector but an entire region, but the region I have in mind is the rest of the world. I then measure the effect such an extraction would have on a specific country that is engaged in international trade.

To implement HEM when using regional analysis, \mathbf{A}^R in (9) is reduced to,

(11)

⁵⁸ For a discussion of the Hypothetical Extraction Method, see Erik Dietzenbacher and Jan van der Linden, “Sectoral and Spatial Linkages in the EC Production Structure,” *Journal of Regional Science*, Vol. 37, No. 2, 1997, pp. 235-257; Guido Cella, “The Input-Output Measurement of Interindustry Linkages,” *Oxford Bulletin of Economics and Statistics*, 46, 1, 1984; . See Ronald Miller and Michael Lahr, “A Taxonomy of Extractions,” in Michael Lahr and Ronald Miller (eds.), *Regional Science Perspectives in Economic Analysis*, Amsterdam: Elsevier, pp. 407-441; Miller and Blair, *Input-Output Analysis*, Chapter 12.

$$\mathbf{A}^E = \begin{bmatrix} \mathbf{A}^{R1R1} & 0 \\ 0 & 0 \end{bmatrix}$$

Here, R1 is a particular state whose economic dependence on the rest of the world is being examined. R2 in \mathbf{A}^R is the rest of the world.⁵⁹ \mathbf{A}^E reflects the extraction of linkages between a particular state and the rest of the world – linkages that are captured in \mathbf{A}^{R1R2} and \mathbf{A}^{R2R1} – and the extraction of the rest of the world itself qua independent region, thus leaving the state in isolation with respect to international trade.⁶⁰ In this way, we can compare how a certain country fares post extraction. The Leontief inverse of \mathbf{A}^E is just,

(12)

$$\mathbf{L}^E = \begin{bmatrix} (\mathbf{I} - \mathbf{A}^{R1R1})^{-1} & 0 \\ 0 & \mathbf{I} \end{bmatrix}$$

The measure of dependence emerges when we compare the difference (in output) between $\mathbf{L}^R \mathbf{f}^R$ and $\mathbf{L}^E \mathbf{f}^E$, or in other words, the difference in output of state S when it is engaged in international trade and in output of that very same state when it stops.

⁵⁹ This is not entirely accurate since the data I use encompass 42 of the world's largest economies. Because their combined GDP constitutes 92% of the world's total GDP, it is I think safe to say that the difference in trade with these countries and with that of the rest of the world is not going to be that significant.

⁶⁰ In one version of HEM, only \mathbf{A}^{R1R2} and \mathbf{A}^{R2R1} are taken out but the intra-regional linkages of R1 and R2 are left in. For my purposes, this difference in the two approaches does not in the end alter my results. See Miller and Lahr, "A Taxonomy of Extractions," pp. 407-441, for a discussion of this alternative version of HEM.

The data I use are provided by the OECD's Directorate for Science, Technology, and Industry.⁶¹ The OECD has compiled input-output tables for all member states⁶² and for eleven other states that aren't members, but are some of the largest developing countries in the world.⁶³ Individual tables for each state provide data on intermediate input flows of 48 sectors, final consumer demand by individual households, final demand by the government, investment and capital formation, exports, imports, and, finally, total sector output.⁶⁴

I measure the global dependence of ten countries: U.S., China, Japan, India, Mexico, the Netherlands, South Korea, Germany, Canada, and Sweden. Both imports and exports for each country are made endogenous so as to reflect flows between particular sectors of a country and the rest of the world. Total output is measured when there is trade. The rest of the world is then extracted and total output of a country is measured under this condition.

When the rest of the world is extracted, both imports and exports clearly drop to zero. This does not mean, however, that individual sectors that import some of their intermediate inputs from foreign sources have to do without these inputs once the extraction occurs. Thus, for example, if the U.S. agricultural sector imports some of its equipment used in production of its goods from China, once extraction happens that

⁶¹ Organization for Economic Cooperation and Development, Directorate for Science, Technology, and Industry, available at <http://www.oecd.org/sti/inputoutput>.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ In addition, the tables also give data on labor cost, taxes, infrastructure expenditures. These data that constitute the value added are less important for my study.

sector can no longer rely on China and instead has to purchase the required equipment from a domestic source. Such import substitution is implicit in input-output analysis that employs regional HEM when final demand for the products of a sector is held to be the same before and after there is extraction. If final demand for agricultural products remains the same in the U.S., input-output analysis assumes that the agricultural sector will have met that demand. But if a certain intermediate input is an essential component of production of a unit's worth of an agricultural good, that input has to come from somewhere, and if not from abroad, then it must come from a domestic producer. The problem with this is that import substitution tends to underestimate the actual dependence of a sector – and of the overall domestic economy – on the rest of the world.

To correct for this, I use a variation of Hummels, Ishii, and Yi model (HIY model) for measuring vertical specialization.⁶⁵ The model developed by Hummels et al was designed to measure “the imported input content of exports.”⁶⁶ Instead of vertical specialization, I apply the HIY model to measure the imported input content of domestic final demand. In this way, when a particular state is imagined to be economically isolated, the imported content of final demand is subtracted or taken out in order to approximate more accurately such isolation. The imported share of final demand is defined as,

(13)

$$\text{IMPORTED SHARE} = \mathbf{sA}^1\mathbf{f}_d$$

⁶⁵ David Hummels, Jun Ishii, Kei-Mu Yi, “The Nature and Growth of Vertical Specialization in World Trade,” *Journal of International Economics*, 54, 2001, pp. 75-96.

⁶⁶ *Ibid.*, p. 78.

where \mathbf{s} is a one-by- n matrix of 1's – a summation matrix – $\mathbf{A}^{\mathbf{I}}$ is a n -by- n imported coefficient matrix, where a_{ij} is the value of an input imported from sector i by sector j , divided by total output of sector j , and \mathbf{f}_d is a one-by- n matrix of final demand of sector j goods.

Multiplying (13) by $(\mathbf{I}-\mathbf{A}^{\mathbf{R1R1}})^{-1}$ allows us to calculate the value of imported inputs used indirectly in the production of goods for domestic final demand. In other words, multiplying the imported share ratio by the Leontief inverse measures the imported inputs in one sector whose outputs are then used as inputs by a second sector, and then by a third, and so on, until these imported inputs are eventually embodied in goods meant for consumption as final demand. The final demand in post-extraction is thus adjusted by multiplying the original final demand by the above ratio, and the new final demand is thus,

(14)

$$\mathbf{f}_e = [\mathbf{I} - (\mathbf{sA}^{\mathbf{I}}\mathbf{f}_d)(\mathbf{I}-\mathbf{A}^{\mathbf{R1R1}})^{-1}]\mathbf{f}_d$$

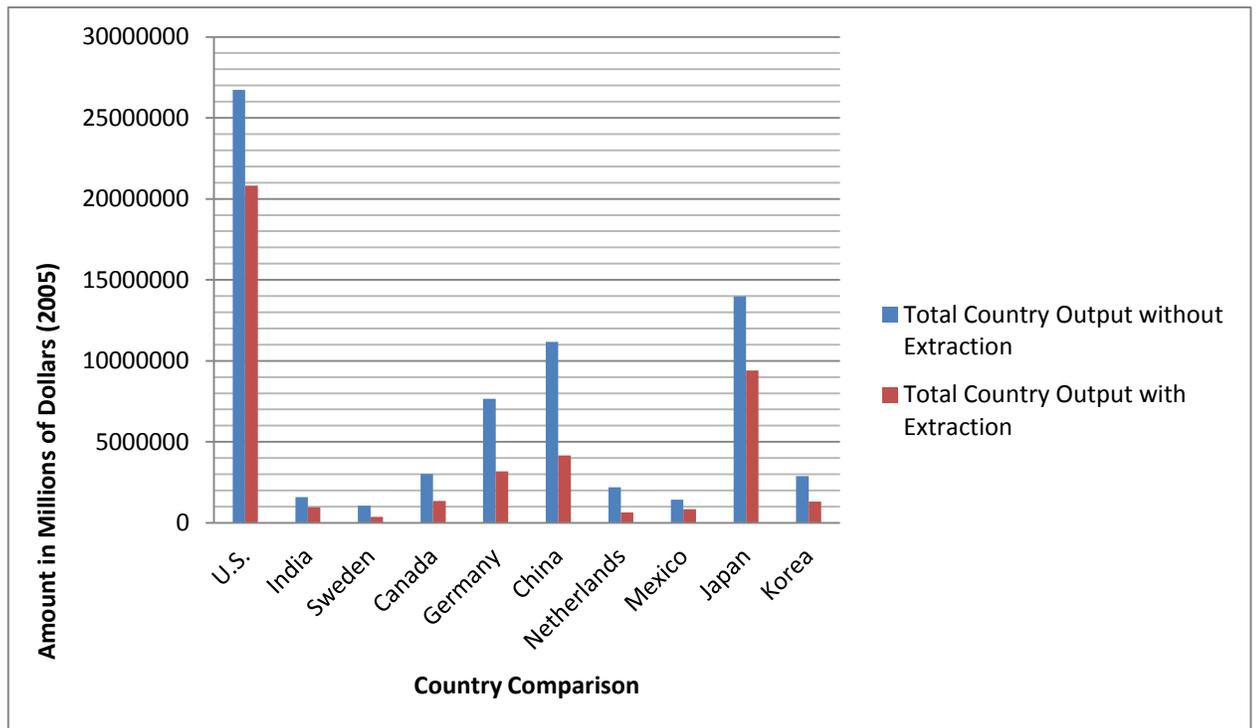
The adjusted final demand is then used to calculate the post-extraction total output. The total output of a state once the rest of the world is extracted is found by multiplying $\mathbf{L}^{\mathbf{E}}$, the inverse matrix where the world have been extracted, by \mathbf{f}_e , the adjusted final demand out of which all foreign inputs have been expunged.

The results of the calculations are summarized in Tables 3 and 4 below.

Table 3

Country	Loss in Total Output from Extraction (%)
U.S.	22%
India	40%
Sweden	65%
Canada	55%
Germany	58%
China	63%
Netherlands	71%
Mexico	42%
Japan	33%
South Korea	54%

Table 4.



What we see is a substantial drop in total output of every country used in the study. The most precipitous decrease in output comes from Netherlands, which loses 71% of its output when the rest of the world is extracted. Perhaps it is not that surprising that Netherlands exhibits such a dependence, since it is after all a relatively small country.⁶⁷ Other small to mid-sized economies that follow suit in this regard are South Korea, Sweden, and Canada.

One might suggest that states that have large economies do not rely on the rest of the world to the same extent. The U.S. and Japan seem to exemplify this point in so far as their drop in output is the smallest of the group of ten countries analyzed.

⁶⁷ Smaller countries in most cases have no choice but to import a good deal of products, because they do not have the capacity to produce them domestically, and to look to foreign consumers to expand market share for their goods.

Nevertheless, a diminution of output by a fourth to a third is still very large. What is more, other states that have large economies do not appear to instantiate this pattern of lower global dependence. Both Germany and China, the third and fourth largest economies in 2005 in that order, based on the above results appear to have huge stakes in the global economy.

The dependence exhibited by Mexico and India falls somewhere in between. This may be explained by the fact that both Mexico and India are newly developing countries. Their participation in the global economy is mostly focused on certain highly industrialized sectors.⁶⁸ However, India has ambitions to become a global economic power and Mexico a more important regional player. Their economic policies thus will only push them toward greater global integration.

Looking at the overall results, I think we can say that the ten countries used in the study show a deep and significant nexus to the economic activities of the rest of the world. Moreover, these countries are fairly representative of other developed and developing countries, and so we can say about this larger set that such countries are also likely to exhibit a similar pattern of integration and dependence.⁶⁹ What is more, this trend toward creating deeper economic interdependence seems to be growing:

⁶⁸ See Justino De La Cruz, Robert Koopman, Zhi Wang, and Shang-Jin Wei, "Estimating Foreign Value-added in Mexico's Manufacturing Exports," U.S. International Trade Commission, 2011, pp. 1-33; Dipti Prakas Pal, Erik Dietzenbacher, and Dipika Basu, "Economic Integration: Systemic Measures in an Input-Output Framework," *Economic Systems Research*, Vol. 19, No. 4, 2007, pp. 397-408.

⁶⁹ Unfortunately, data on many developing states is sparse or non-existent, and so the best that one can do at this point is to compare one country to another to which it is similar in relevant respects and for which adequate data is available.

trade barriers are being reduced throughout the world and the current mantra of developing states is the expansion of (high value-added) exports.

Global interdependence discussed in this section has to do with international trade. But this still under-describes the kinds of economic cooperation that are global in nature. Let me touch on two additional areas of cooperation. One important phenomenon that I have not discussed is the dispersion of technical knowledge throughout the world.⁷⁰ Ideas and innovations that originate in one area are used in another to develop products that are then used domestically or traded internationally. The development of these products of course owes a great deal to the original technical insight or foundation, and it is often difficult to capture and quantify the intellectual contribution in such a way that the economic value of products spurred by the contribution reflect this.⁷¹ Because knowledge flows have become so international, many products made and consumed domestically have a foreign input in the form of technical knowledge. It is therefore important to recognize that technical knowledge should be seen as yet another type of factor of production. The other type of global cooperation is the flow of capital: states invest in the economies of other states; states also prop up their domestic currency by buying or selling the currencies

⁷⁰Onder Nomaler and Bart Verspagen, "Knowledge Flows, Patent Citations, and the Impact of Science on Technology," *Economic Systems Research*, December 2008, Vol. 20, Issue 4, pp. 339-66; Yoo-Jin Han and Yongtae Park, "Patent Network Analysis of Inter-industrial Knowledge Flows: The Case of Korea between Traditional and Emerging Industries," *World Patent Information*, September 2006, Vol. 28, Issue 3, pp. 235-247.

⁷¹ This is especially the case when the intellectual contribution is not being protected by intellectual property laws, either because these laws are not being enforced by the relevant state or it falls outside the scope of protection. Moreover, input-output data does not register fees paid by domestic companies to foreign ones for using their patents. So what is in actuality a foreign input does not get recognized as such.

of other states thereby linking the macroeconomic health of their economies to that of others.⁷² The inclusion of knowledge and capital flows as types of global economic cooperation would offer, I think, a more accurate picture of global interdependence than one suggested by mere reliance on international trade.

Measuring dependence exhibited by a state by applying HEM supports the contention that many countries are deeply integrated in the global economy. But it also verifies my claim that the things that domestic society produces and consumes show *c-dependence*. Recall that there is *c-dependence* if foreign workers played a cooperative role in the genesis of products consumed domestically. This indeed seems to be the case if we interpret such cooperation as the use of foreign inputs by domestic sectors.⁷³ Every sector of the countries examined in the above study use foreign intermediate inputs. This suggests once again that there exists a global system of economic cooperation.

However, even if the global system of economic cooperation is such that it does not incorporate all domestic systems and that domestic economic cooperation can still be distinguished from its international counterpart when it comes to very large economies like the US and Japan, what I think is still undeniable is that the global

⁷² Dilip K. Das, "Financial Globalization: Past and Present," *Economic Affairs*, June 2011, Vol. 31, Issue 2, pp. 63-67; Dilip K. Das, "Globalization in the World of Finance: an Analytical History," *Global Economy Journal*, 2006, Vol. 6, Issue 1, pp. 1-22; Moritz Schularick, "A Tale of Two 'Globalizations': Capital Flows from Rich to Poor in Two Eras of Globalization," *International Journal of Finance and Economics*, October 2006, Vol. 11, Issue. 4, pp. 339-54.

⁷³ I suggest that such dependence is counter-factual. This is not to say that if the imported input were cut off production by the sector would never resume or come about. A domestic substitute would eventually be found, but this would require some restructuring by the affected sector, suggesting that there would be disruption to its production process until a substitute is found.

economic system is extensive and substantial, and capable of generating a huge cooperative product.⁷⁴ That system regardless of how it is in the end individuated has to be regulated by distributive principles of justice for the reasons I mentioned above.

It must be acknowledged, however, that the global economic system does not encompass every state in the world to the same extent. There are many countries that are on the margins of global integration with respect to the production of the global product of economic cooperation. This means that they are going to be only marginally affected by distributive principles of justice meant for regulating the division of the global cooperative product. But we must not infer from this that the countries that are left out, and which include some of the poorest and most desperate places in the world, are not part of something else where distributive justice prevails, and that something can be global as well. Indeed, this is what I argue for elsewhere.⁷⁵

The role of distributive justice is to specify fair terms of cooperation for specifically large-scale systems of cooperation – systems where the demands of cooperation are such that interactions for the most part happen among strangers and the natural moral sentiment toward a fellow human being is too weak to guarantee an outcome that those involved can freely and self-respectfully endorse. The state is one such example of large-scale systems of cooperation where a conception of justice must be applied to give rise to fair terms. Of course, the state is special because it is a

⁷⁴ It seems to me that a case can be made only with respect to these states. With respect to smaller well-integrated states, I think that their move toward complete immersion in the global economy is already complete.

⁷⁵ See my “International Intellectual Property, Coercion, and the Need for a Conception of Global Justice.”

coercive system of cooperation. Yet that special feature, important as it is, does not make a conception of justice, and in particular distributive justice, inapplicable to large-scale systems of cooperation that lack coercion. Such systems of cooperation still generate a cooperative product that gets distributed in a particular way, and that pattern has to be evaluated from the standpoint of justice. The global economic system has a cooperative product that gets distributed through the operation of the global market. But the global market isn't the right mechanism for generating a fair result. Even if we assume that the market is somehow in line with the contribution principle, that still would not guarantee a fair outcome – hence the need for a conception of justice.

Where a system is marked by a pattern of entitlements that is coercively enforced, the need for a conception of justice is especially acute and duties of justice that emerge in response to coercion have to be particularly robust and demanding. What makes global cooperation so complex is that there are aspects to it that are coercive. The WTO's rules and regulations, for instance, are coercively enforced. And the WTO is part of the global system of cooperation in so far as it regulates how certain aspects of international trade are conducted among member states. Yet, it would not be empirically correct to say that every aspect of global cooperation is coercively enforced. The significance of this is that a conception for the global system has to respond to and deal with the heterogeneity imbedded in the structure and operation of global cooperation. Indeed, we might conceive of global cooperation as consisting of distinct layers of cooperation, each requiring its own set of principles of justice: some of these layers will involve coercion, and others will not. Embracing the

complexity of our world head-on results in broadening the role that justice can play. And so although there are lots of very poor states that play a marginal role in the production of the global economic product, those that are members of the WTO and subject to its rules will still fall within the sphere of moral concern provided by a conception of justice.

It must be said, however, that the presence of coercion internationally complicates how justice is to be applied in a global context. Rawls himself eventually saw his special conception as a response to unjustified coercion imposed on members of domestic society.⁷⁶ Whether Rawls also thought that coercion is a necessary condition for distributive justice in any other form is an issue that is open to debate. His reluctance in putting forward a conception of justice for international society suggests that he may have shifted his views toward taking coercion as a requirement for distributive justice.⁷⁷ If Rawls did in fact veer in this direction, I would obviously disagree with him on this point, for it is my position here that distributive justice certainly has a place within non-coercive cooperative arrangements. I think this because, in so far as the global economic system is concerned, there is no other alternative to justice that is capable of regulating the distribution of the cooperative

⁷⁶ See Rawls, *A Theory of Justice*.

⁷⁷ I do think, however, that Rawls's reluctance in *The Law of Peoples* could be interpreted not so much as a shift toward taking coercion as a necessary condition than as his understanding of international relations as somehow not implicating the distribution of economic entitlements of individual citizens. If he did think that economic entitlements of individuals were being affected in the way decent societies dealt with one another, his conception of international relations might have included principles of economic redistribution, in which case coercion would simply be a sufficient, not a necessary, condition for distributive justice. See his *The Law of Peoples*, Part 1.

product in ways that recognize the equal dignity and respect of individual cooperators.⁷⁸ As I argued above, neither the global market nor the contribution principle are up to this task.⁷⁹ What the requirements of equal dignity or respect amount to will depend on the kinds of demands made and burdens placed by a cooperative system on the individual agent. A coercive cooperative system, because its demands of cooperation are much more onerous, will generate duties of justice that require that fellow members show a great deal of moral concern for one another, as a way to justify the kind of commitment to cooperation that a self-respecting individual can make.⁸⁰ But commitment to cooperation that is grounded in individual dignity and respect is something that is expected in non-coercive contexts as well. The only difference is in the level of moral concern to be shown. My claim is that only conceptions of justice have the flexibility to reflect this difference in moral concern without giving up the foundational requirement that terms of cooperation must extend equal dignity and respect to all cooperating members.

⁷⁸ The notion of equal dignity and respect has to be relativized here by limiting the scope of equality to members of a particular cooperative system. That is, we construe equal dignity and respect in relation to members of a cooperative system.

⁷⁹ Why I think these alternatives are problematic has to do with our considered judgments of how persons should be treated as cooperators: that differences in economic entitlements should not be based on unfair differences in bargaining power, that persons should not lose out economically on the basis of characteristics for which they are not morally responsible, and so on.

⁸⁰ There is also the caveat that the demands for greater redistribution within a state -- because the state is one place where there is clear coercion of the individual -- have to, nevertheless, comply with appropriating a justifiable share of the cooperative product of the global economic system. This might add another layer of complexity to the discussion of distributive justice both domestically as well as internationally. However, the addition of coercion doesn't affect my discussion of democratic equality because I take democratic equality to be sufficient to justify terms of political cooperation in a state, which I have assumed to be a coercive system.

Given the complexity of the world, theorizing about international justice is hard to do. Part of this complexity has to do with the fact that the world is in a state of organizational flux. There is continuous diffusion of sovereignty away from states toward regional and international institutions that perform few key functions that are only a subset of what states once did. What is more, it is not clear how the world will eventually organize itself – that is, what its state of organizational equilibrium will be. This means that principles of justice we invoke now are a way to deal with current injustices of a still inchoate international system. This response to existing injustices may be a temporary measure as the world moves toward a more stable position, where it becomes more clear how it is arranged and the role that states play within this arrangement. Once there, a conception of international justice could be given that is more comprehensive and systematized. But we are not there yet and have to live with a conceptually messy theory of international justice.

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CHAPTER 3

A Response to Nagel and Blake

I. Introduction

The subject of coercion has received a great deal of attention recently from a number of political philosophers writing on justice, especially those who focus on its international dimension. This concern with coercion, in its modern inception, goes back to John Rawls's political liberalism, which for many is the starting point for discussing legal coercion in relation to justice.¹

For Rawls, it is a basic fact about the nature of society that the state has the sole authority to enforce its laws. This power of the state, to a great extent, defines what a state is meant to do – it is, in another words, its *raison d'être*. But this power, according to Rawls, has to be justified to individual citizens of a state, for otherwise the state is engaged in pure coercion.² Rawls famously argues that this justification can be achieved only by applying his conception of justice to the basic structure of domestic society.³ Rawls conceives of domestic society as a system of cooperation having a basic structure, which is a configuration of the major social institutions of

¹ Rawls's concern with coercion becomes much more explicit in his later writings. See John Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, especially pp. 136-40. But it is also present in his earlier work. See John Rawls, *A Theory of Justice*, Cambridge: Harvard University Press, 1971, especially pp. 342-43.

² Rawls, *Political Liberalism*, p. 264.

³ Rawls, *A Theory of Justice*. For a further elaboration, see Rawls, *Political Liberalism*.

society that assign fundamental rights and duties and divide the benefits and burdens generated through social cooperation.⁴ Coercion is justified when principles of justice are applied to the basic structure and regulate its terms of cooperation.

Rawls's idea that only a conception of justice can justify the existence of state-based coercion has given rise to several important challenges to extending a liberal conception of justice globally. Such challenges borrow this important insight from Rawls and argue that in the international case no comparable form of coercion exists and hence no conception of justice is required. In this paper, I examine two such views: one put forward by Thomas Nagel and the other by Michael Blake.⁵

Both Nagel and Blake make the same key claim: that the international sphere is not coercive in the right or relevant way, and conclude, on the basis of this, that a liberal conception of *distributive justice* is not required internationally.⁶ Nagel argues that justifying coercion demands an egalitarian conception of distributive justice only when citizens are connected by a political associative relation.⁷ This associative relation is present, according to Nagel, when the agency of individual citizens is

⁴ Rawls, *Political Liberalism*, Chap. 1, especially pp. 15-22.

⁵ Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs*, 33, no. 2 (2005): pp. 113-147; Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs*, 30, no. 3 (2002), pp. 257-296. For another influential position on the limits of justice, see Richard W. Miller, "Cosmopolitan Respect and Patriotic Concern," *Philosophy and Public Affairs*, Summer 1998, 27(3), pp. 202-224.

⁶ It is important to emphasize here that both Nagel and Blake are rejectionists of conceptions of international *distributive justice*. It is the requirements of economic redistribution, they argue, that have no place within the international sphere. When I refer to their rejection of international justice, I mean specifically their rejection of international distributive justice.

⁷ Nagel, "The Problem of Global Justice," pp. 121,125. Note, also, that Nagel uses the terms "will" and "agency" interchangeably throughout the paper. I will follow suit in this regard.

somehow implicated in the coercion of their fellow citizens by the state.⁸ When such special involvement of the will is present, citizens have a right to demand from their fellow compatriots that the coercion to which they are subject be justified, and Nagel contends that this can only be done if the terms of cooperation are regulated by a conception of justice.⁹ Nagel insists that individual agency is not implicated in coercing fellow human beings in the relevant way in the international realm and argues that instituting a conception of justice to international terms of cooperation is not morally required.¹⁰

Blake's account takes as its starting point what he calls the liberal principle of autonomy.¹¹ According to this principle, persons have a right to exist as autonomous agents and are entitled to those circumstances and conditions that would enable them to be such agents.¹² Blake believes that persons can be denied their autonomy in a variety of ways. For instance, they can be denied by being impoverished, starved, illiterate, marginalized by norms that stigmatize, physically or mentally disabled, and so on.¹³ But, and this is of particular importance to Blake, persons may also be denied their autonomy through outright coercion. Acts of coercion, Blake writes, are "prima

⁸ Ibid., p. 128.

⁹ Ibid., p. 129.

¹⁰ Ibid., p. 140.

¹¹ Blake, "Distributive Justice, State Coercion, and Autonomy," p. 267.

¹² Ibid., p. 271.

¹³ Ibid., p. 272.

facie prohibited by the liberal principle of autonomy.”¹⁴ Yet, Blake notes, some coercive acts, in particular those of the state, are simply unavoidable and in fact justifiable. The issue for Blake, as it is for Rawls and Nagel, is how should such coercion be justified.¹⁵ Blake, like Nagel, insists that state-based coercion has to be justified, but his reasons are different from Nagel’s. For Blake, coercion has to be justified because otherwise it would violate the liberal principle of autonomy. For Nagel, autonomy is implicated more obliquely. Coercion has to be justified because citizens of a state stand in an associative relation with one another, and it is in virtue of this relation that citizens have the right to demand such a justification. Both, however, agree that to justify coercion, domestic society has to be regulated by a conception of justice; anything less than justice would mean that individual citizens are being morally wronged in a significant way. Both also conclude, moreover, that justice should stop at the borders of a state and not be projected globally.

My aims in this paper are several. First, contra Nagel, I argue that the international realm is indeed a suitable place for having principles of justice regulating terms of cooperation. I contend that Nagel’s own position on the conditions that make the application of justice germane can be used to argue that, even at the international level, implementing principles of justice, including distributive ones, would not be out of place. I suggest that even where the relevant associative bond is not yet present, the mere presence of coercion still gives people a right to demand that such coercion be justified. The substance of that justification may be less than a full blown liberal

¹⁴ Ibid.

¹⁵ Ibid.

conception of justice, but, I argue, when applied to a system of cooperation it gives rise to precisely those conditions that make it appropriate to apply a conception of justice. Next, I examine Blake's position in some detail. I argue that Blake substantially underestimates both the extent and the kind of coercion that persists internationally. Blake acknowledges there is coercion internationally, but also downgrades it as being of a different, and thus of a less morally problematic, sort from the coercion that takes place domestically. I suggest that Blake does not provide much of a basis for thinking that international coercion is so radically different from its domestic counterpart. International coercion may be different because it is more complex and less tidy: there are a variety of actors on the international stage that wield the power to coerce, and the effectiveness and the extent of the power to coerce varies from actor to actor. I argue, however, that these differences do not generate a moral reason to exclude the application of justice internationally. Justice still has a place internationally, including distributive justice. The form it takes internationally may be different from the domestic case, but this does not mean that it should be excluded outright as a regulative ideal.

II. Nagel on Coercion

Nagel asserts that we, as citizens of a particular state, live under a system of laws and institutions that are coercively imposed. We are joined together in a "political society under strong centralized control."¹⁶ The operation of a coercive social system "generates differences in people's expectations of better or worse lives"

¹⁶ Ibid., p. 127.

that flow from characteristics that “they have done nothing to deserve.”¹⁷ Nagel contends that the imposition of these arbitrary inequalities in life prospects presents a “problem for the justification of [this] system.”¹⁸ By being part of a political system with a unified, sovereign state that “exercises sovereign power” over us and in our name, we acquire “a duty of justice toward one another through the legal, social, and economic institutions that sovereign power makes possible.”¹⁹ From this system, we can claim a right to justice, and in particular to equal treatment: “to equal citizenship, nondiscrimination, equality of opportunity, and the amelioration through public policy of unfairness in the distribution of social and economic goods.”²⁰ But, Nagel insists, the duty of justice is not something that has universal application; instead, it is *sui generis* and is owed “only to those with whom we stand in a strong political relation” by being subject to a common set of institutions and laws that are coercively imposed.²¹ The obligations of justice “arise as a result of a special relation,” and are, what Nagel calls, associative.²² In other words, the duty of justice, for Nagel, is a

¹⁷ Ibid.

¹⁸ Ibid. Nagel points out that that the widespread inequalities in people’s life prospects is not something that they morally deserve, and so to that extent these inequalities are morally arbitrary. Nagel notes that these morally arbitrary differences in life prospects were particularly vexing for John Rawls . According to him, what presents a special problem of justification for Rawls is not the inequalities *per se*, but the context in which they are present. It is the fact that these inequalities are a product of a coercive system that makes justification so imperative.

¹⁹ Ibid., p. 121.

²⁰ Ibid., p. 127.

²¹ Ibid., p. 121.

²² Ibid.

product of an associative special relation that we *qua* citizens find ourselves in as a consequence of “our shared institutions” that the coercive power of our state makes possible.²³

Thus, for Nagel the fact that we are members of the same domestic society and subject to the authority of the same state is of fundamental importance in determining the extent of our moral responsibility toward our fellow citizens: it is as citizens that we have a right to demand from one another that social and economic inequalities be eliminated or, at least, minimized.²⁴ On this picture, the presumption against these inequalities is based not simply on the lower life prospects that many of our compatriots face from brute bad luck, but also on the claim that, as fellow citizens, we are bound to one another as a function of our common citizenship, engendered by the laws and institutions of our society.²⁵ According to Nagel, what is objectionable is that “we should be fellow participants in a collective enterprise of coercively imposed legal and political institutions that generates such arbitrary inequalities.”²⁶ In other words, what Nagel finds troubling about social and economic inequalities is that as citizens we are part of a common project or “enterprise” that is enabled by the coercive institutions of society and yet many of our fellow citizens, who contribute to this enterprise, suffer from lower life prospects with no reasonable means of escape.²⁷

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid. p. 128.

²⁷ Ibid.

Our common citizenship, as a form of a special relation, thus makes us responsible for what happens to our fellow citizens and, in particular, encumbers us with duties of justice that demand that we ameliorate our compatriots' social and economic deprivations.²⁸

However, it turns out that, for Nagel, the associative relation that engenders duties of justice does not come about simply because there is a coercive imposition (by the state) of a shared system of laws and institutions.²⁹ For there to be an associative relation that is capable of supporting duties of justice, there must also be that "special involvement of agency or the will that is inseparable from membership in a political society."³⁰ This special involvement of the will, for Nagel, is not about becoming or remaining a citizen, but about the demands made on individual citizens to actualize what is "essential to life inside a society."³¹ Such contribution on the part of individual citizens to enable society to function properly is the additional key feature of the citizenship relation that transforms it into something that is capable of generating substantial duties of justice.³²

²⁸ Ibid.

²⁹ Nagel at times appears to suggest that the coercive imposition of a shared system of laws and institutions generates the associative relation among fellow citizens. But his position is actually more nuanced than this. The coercive imposition of a system of laws and institutions may be necessary, but it is by no means sufficient for the associative relation. Additional conditions have to hold for the associative relation to come into existence. Below I outline what these additional conditions are.

³⁰ Ibid., p. 128.

³¹ Ibid.

³² Ibid.

This special engagement of the will is central to Nagel's overall argument, for it is precisely such engagement that ultimately sets domestic society apart from the international realm. After all, the international sphere is already comprised of regimes of cooperation that behave in ways that affect both state policy and the well-being of individual citizens. Moreover, many of these regimes also encompass considerable coercive enforcement. Yet, according to Nagel, participants of these international regimes do not find themselves in a political relation that engenders duties of justice. What this implies is that the coercive imposition of a shared set of institutions and laws is not enough to give rise to the kind of relation that Nagel thinks exists among citizens of a particular state; without the special involvement of individual agency, whatever associative bond there may be among participants on the international plane cannot be of the sort that generates duties of justice.³³ It is, therefore, crucial to explore what this special involvement of the will really amounts to in order to see why Nagel is so skeptical about extending principles of justice globally.

To understand what Nagel means by the will being involved, it is, I think, important to grasp the significance he places on the role that individual citizens play in "the collective life" of domestic society. The difficulty in doing this is that Nagel's discussion of the subject is terse and short on concrete detail, instead relying heavily on metaphor, which makes it hard to discern the basic assumptions on which his

³³ This is a crucial step in Nagel's argument and I think makes his views on global justice quite powerful. The reason for this is that Nagel does not have to deny that the international sphere is marked by a considerable amount of coercion – coercion that is such that it affects how states conduct both their foreign and domestic policies. Rather, all he has to say – and in fact does say – to deflect this rather obvious criticism is that the coercion that is present internationally is of a different sort: it is of a sort that simply does not place persons in the kind of relation that obligates them with duties of justice.

argument rests.³⁴ What I try to do in my discussion of the special involvement of individual agency is offer my interpretation of Nagel's position that tries to make sense of the abstractions and metaphors he employs.

I think that, for Nagel, the special involvement of agency in the life of society refers to what individual citizens do, in their capacity as loyal citizens (committed to the integrity of their political system), that enables domestic society to run its normal course, which includes having its laws enforced. Nagel seems to think there are several ways in which our individual agency is implicated in the functioning of society. First, a demand is made on our agency to conform to the laws of our society. For the most part, this is our ineluctable fate: we are born into a society that has laws which we are required to obey; nor do we have the option to leave, if we happen not to agree with (some of) the laws that we are forced to obey – and even if we could, we would still end up having to obey the laws of the place to which we have moved and made our new home. Thus, we almost always find ourselves in a context where society is regulated by laws and institutions that are coercively imposed. We are, in other words, permanently cast as subjects made to obey the laws of some state.

Being made to be obey laws describes one way our agency is implicated in the functioning of society. But, according to Nagel, obedience alone does not explain why our responsibility toward our fellow citizens encompasses duties of justice. The

³⁴ It seems to me that having details in this context is quite important. After all, as I suggest, it is this special involvement of individual agency that distinguishes domestic society from the international sphere. Saying that citizens participate in the collective life of society doesn't seem to do the job of separating the domestic from the international case. We can certainly say that persons participate, for example, in the international trade regime by buying goods made abroad. Nagel presumably doesn't think that this implicates agency in the relevant sense. So what is it about the involvement of a citizen's will or agency in the life of her society that is so different from what occurs internationally?

reason for this is that mere obedience is not enough to engender the type of citizen relation that demands that concern for fellow citizens be in the form of justice: something else is required other than that we are forced to obey (the laws of our state). For Nagel, the additional element has to do with the coercion of fellow citizens being done “in our name.”³⁵ What this means precisely is hard to say, but Nagel seems to suggest that our agency is further involved in the following ways. First, we contribute to society through our political, social, and economic participation and cooperation. We are, Nagel writes, “assigned a role in the collective life of a particular society” and are “responsible for its acts.”³⁶ In other words, through our active cooperation as citizens of a state, we actively assist our state in coercing our fellow citizens. We do this, for instance, by supporting domestic laws and institutions “through which advantages and disadvantages are created and distributed.”³⁷ As citizens, we contribute to the coercion of our fellow citizens by enabling the state to enforce its laws: through our conformity, we make it possible for the state to strike against a small minority of unruly or disobedient individuals and keep in check many others with the mere threat of prosecution or an imposition of a penalty. Most of us, on the other hand, conform to the core legal norms of our domestic society because we think it is the right thing to do, not out of fear of reprisal by the state exercising its police

³⁵ Ibid.

³⁶ Ibid., p. 129.

³⁷ Ibid. p. 129. This specific phrase appears throughout the essay. Nagel relies quite heavily on this notion of a political system being in our name somehow. Yet, he does not quite pierce the veil of ambiguity of this phrase, and relies too much its metaphoric connotation. This makes hard to see what the argument really amounts to. But I make it my task to make sense in more concrete terms what precisely this phrase might mean and how it affects Nagel’s overall argument that justice should be confined to the domestic sphere.

and judicial powers. By cooperating and playing our respective roles in the “collective life” of society, we enable the state to carry on as a state, and, in particular, we enable the state to carry on by enforcing its laws.³⁸ Such active participation, thus, makes us complicit in the coercion of our fellow citizens.

However, when Nagel insists that coercion is done in our name, he has in mind more than just our participation in the coercion of our fellow citizens. Our agency is also involved in so far we are the source of the state’s authority to engage in its coercive activities.³⁹ We are the source of this authority, according to Nagel, because the “collectively imposed social framework [is] enacted in [our] name.”⁴⁰ Such authorization further complicates the role that citizens play in coercing one another. For coercion being done in our name indicates involvement that goes beyond mere participation: not only does the state coerce with our assistance, but, in addition, does so with our collective *affirmation* that it has the authority to do so.⁴¹ We are thus doubly implicated by participating in and by serving as the source of the coercion done by the state against our fellow citizens.⁴²

³⁸ Ibid., p. 140.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Moreover, the “social framework of laws and institutions” that is coercively imposed is also in our name in that it is enacted on behalf and for the sake of “all those governed by the [social framework].”

⁴² Some writers have interpreted Nagel differently from me. Andrea Sangiovanni is one such example. According to him, Nagel thinks that what the state does to its citizens, by imposing its laws on them, has to be justified not because it coerces its citizen into obeying its laws, but because it places them in a position that they did not choose and from which they cannot escape. That is, the situation that citizens find themselves in by being forced to obey the laws of their state is one that is involuntary. Sangiovanni thinks that for Nagel it is the fact that

Let me briefly summarize my discussion so far of Nagel's position on the limits of justice. First, justice is the appropriate response to inequality where persons stand to one another in a particular associative relation. This relation is present when (i) the laws and institutions of a political system are coercively imposed and (ii) the coercion is imposed in the collective name of all those who are members of this system. The latter condition obtains when citizens contribute to state coercion and affirm that the state has the authority to coerce. For Nagel, the citizen relation, within liberal democratic states, is a prime example of the associative relation that engenders duties of justice. As citizens of such states, we come closest to being the authors of one another's coercion.⁴³ Moreover, the associative relation that Nagel has in mind simply does not exist, at this point in time, internationally, and hence the international

persons don't volunteer to become citizens that is morally salient and makes justifying obedience to laws a moral requirement. Moreover, Sangiovanni also contends that for Nagel the real difference between the state and the international sphere is that the latter is voluntary, and thus there is no moral requirement to extend principles of justice globally. However, I do not think that this interpretation is right. Nagel is quite explicit that what sets the problem of justification for him is the existence of coercion, and coercion is, of course, not the same thing as involuntariness. And Nagel does appear to say that international regimes exhibit some amount of coercion. Sangiovanni seems to think that coercion is not a necessary condition for requiring the application of justice in order to justify the existence of coercion. Instead, he contends that involuntary membership in a regime is sufficient to trigger this requirement. Sangiovanni then goes on to criticize Nagel for insisting that international regimes are not suitable sites for justice when in fact such regimes are clearly involuntary, not unlike membership in a particular state. However, Sangiovanni is mistaken if he thinks this is an objection to Nagel's account. Not only does Nagel not think these regimes are voluntary, he does not even think they are free of coercion. Sangiovanni might be right that coercion is not a necessary condition for the application of justice, and this may be a legitimate criticism of Nagel. But he ends up attributing a position to Nagel that Nagel himself seems to reject. Nagel thinks that justice is not appropriate internationally because the right kind of associative relation is not present there, not because the international realm consists of voluntary associations. See Andrea Sangiovanni, "Global Justice, Reciprocity, and the State," *Philosophy and Public Affairs*, 35, no. 1, 2007, pp.3-39.

⁴³ See Nagel, "The Problem with Global Justice," p. 140.

sphere is not an appropriate site for the application of principles of justice.⁴⁴ What is significant about Nagel's assertion that the relevant associative relation is absent from the international space is that this does not commit him to the dubious proposition that the international sphere does not exhibit any type of coercion. For Nagel, there is coercion – at least, its possibility is not being foreclosed – but it is not the sort that is capable of generating the requisite associative relation that necessitates duties of justice.⁴⁵

Now Nagel's argument against global justice does not end here: Nagel also maintains that a state that exhibits a strong citizen relation is at the same time politically legitimate.⁴⁶ This is an important result for Nagel: because justice applies where there is an associative relation among fellow participants and such a relation is present within systems of cooperation that are politically legitimate, a conception of justice is applicable to systems of cooperation that are legitimate.⁴⁷ Nagel writes, "Justice applies only to a form of organization that claims political legitimacy and the right to impose decisions by force, and not to a voluntary association or contract

⁴⁴ Ibid., p.139.

⁴⁵ See *ibid.*, pp. 138-140.

⁴⁶ Nagel does not give us a definition of political legitimacy, which is unfortunate because, as I will explain later, this notion plays an important role in his account. However, Nagel does appear to connect the concept of legitimacy to the citizen relation: a state that locates its authority – and in particular its authority to coerce – in its citizens is deemed to be legitimate. It turns out that, for Nagel, when coercion is exercised by a legitimate state enforcing its laws and institutions, cooperation within the basic structure of that state – and also the domestic society that it encompasses – has to be regulated by principles of justice.

⁴⁷ Political legitimacy appears to be a necessary condition for justice according to Nagel. It is probably not sufficient also because it seems possible, at least in principle, to have a system that is legitimate yet not coercive. But, as Nagel insists, coercion is essential for justice.

among independent parties.”⁴⁸ In other words, political legitimacy and the special involvement of individual agency in the coercive activities of the state go hand in hand and are prerequisites for the application of a conception of justice to a system of cooperation. Interestingly, this also implies that if a state were not legitimate, no matter how much coercion it directed at its citizens, these citizens would not have the right to demand that their terms of cooperation be regulated by principles of justice.

As Nagel keeps emphasizing, as citizens, we are deeply implicated in the coercive mechanism of the state. The state, as an agent of coercion, depends on our participation to be in a position to coerce and to coerce effectively. And where the state’s authority to coerce is derived from the people, that state is endowed with political legitimacy.⁴⁹ All this, according to Nagel, transforms us into the authors of one another’s coercion.⁵⁰ Political legitimacy is thus the other side of the coin of our deep involvement in and affirmation of the mechanism of coercion carried out by the state: where political legitimacy is present, we are the authors of one another’s

⁴⁸ Nagel, “Problem of Global Justice,” p. 140.

⁴⁹What it means precisely for the authority to come from the people is something that Nagel does not make clear. I understand Nagel to mean that authorization essentially comes down to the recognition and acceptance on the part of individual citizens that the state has to engage in coercion - so that, for instance, the rule of law is maintained. Coercion, in another words, is a necessary political evil - one which we can’t do without; it is the only way to ensure that we have a stable and functioning society. In some sense, authorization is about the state carrying out the will of the people – deep down coercion is something that ordinary citizens would generally approve of. There may also be authorization from the people because to some extent ordinary citizens are willing participants in the coercive activities of their state . (Nagel mentions the general will at one point. By the will of the people I do not mean the general will. And so it would be wrong to say that according to Nagel a legitimate state carries out the general will of the people. Rather we participate in the general will, or the collective life of domestic society, and part of this means that we do this in a way that grants authority to the state to engage in coercive activities.) See Nagel, “Problem of Global Justice,” p. 128.

⁵⁰ Ibid.

coercion and are thereby ultimately responsible to what happens to our fellow citizens. This is a particularly insightful point: Nagel draws a conceptual link between the political legitimacy of a state and the deep citizen relation that necessitates duties of justice. This allows Nagel to characterize the international sphere in another way: not only can Nagel point out, as he does, that individuals who participate in cooperation within international regimes not stand in an associative relation to one another that compels the application of a conception of justice, but he can also say, as he does, that these international regimes are not politically legitimate.⁵¹ Justice, in another words, has no place within a system of cooperation until that system acquires the status of political legitimacy. In the next several pages, I explore, in some detail, this particular line of argument, one that maintains that the international sphere lacks legitimacy. I do this because Nagel's use of political legitimacy brings to light a rather novel rationale for keeping distributive justice within the confines of domestic society. Moreover, the rationale is worth our discussion, for it has certain rather far-reaching implications for global political organization and governance. In the end, however, Nagel's reliance on political legitimacy as a way to demarcate the domestic from the international sphere opens him up to several difficulties, which I do not think can be overcome.

Representative, liberal democracies are politically legitimate according to Nagel. While the international realm is not. But the lack of legitimacy internationally does not in any way suggest that the international sphere is a coercion-free zone. As I mentioned earlier, Nagel does not commit himself to this proposition, which has been

⁵¹ Ibid.

quite thoroughly repudiated.⁵² On the contrary, he appears to have a fairly accurate picture of how the international space is structured. Nagel is quite cognizant that what happens internationally often has far-reaching effects and understands that those who are affected naturally want to have a say or some manner of control in how international regimes are regulated. He takes the global economy as one of the most important of such regimes.⁵³ The global economy, for Nagel, is transactionally vibrant, becoming ever more widespread with deepening interdependence, and regulated by an expanding set of international norms.⁵⁴ A functioning global economy, according to him, relies on the application of several interconnected areas of law, including contract law, intellectual property, international business law – which regulates the global financial system – numerous bilateral and multilateral treaties that deal with specific areas of inter-state commerce, and so on.⁵⁵ In addition, there are various tribunals asserting jurisdiction and applying norms – often in ways that conflict – to resolve specific disputes.⁵⁶ What is quite clear from all this – and Nagel is aware of this – is that some sort of an enforcement of both international and domestic laws has to exist for the global economy to function at all. Yet, Nagel does not consider the mechanisms of such enforcement capable of generating claims of

⁵² See, for example, Darrel Moellendorf, “Equal Respect and Global Egalitarianism,” *Social Theory and Practice*, Oct. 2006, 32(4), pp. 601-616.

⁵³ Nagel, “The Problem of Global Justice,” p. 138.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

justice and equality among the various participants in the global economy.⁵⁷ What is missing is that the global economy is not “coercively imposed in the name of all the individuals whose lives [it] affect[s].”⁵⁸ Instead, on Nagel’s view, the global economy is a system of cooperation, set up by states for the sake of pursuing their interests. This makes the imposition of the global economic regime be in the name of individual states, which “represent and bear the primary responsibility” for the effects the global economy produces.⁵⁹ But without the imposition of a coercive framework in the name of individuals who participate, international economic regimes, according to Nagel, lack political legitimacy.⁶⁰

Now, Nagel takes the international sphere to consist in more than just economic activity. There are transactions, activities, and decisions done daily that have little to do with investment or trade. New institutions and organizations, designed to harmonize and regulate “policies and practices” of individual states, enter the international scene all the time.⁶¹ Yet, these new institutions and organizations, along with the more established ones, do not, on Nagel’s view, represent citizens from participating states. Nagel takes real actors on the international stage to be states, advancing their national interests. The lesson to be drawn from this, he insists, is that

⁵⁷ Correlatively, the existence of such enforcement is also not enough to generate the relevant associative relation among fellow participants in the global sphere. See Nagel, “The Problem with Global Justice,” p. 138.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid., p. 139.

international regimes are just not the sorts of things that are “collectively imposed” in the name of citizens; instead, these regimes bring together and facilitate cooperation among participating states as they “advance their separate aims.”⁶² Persons are thus given only an ancillary role in the “collective life” of international regimes of various ilk.⁶³ The authorization that international regimes seem to wield in enforcing norms and regulations thus appears to be derived from individual states. Yet, shifting the locus of authorization away from persons and toward states amounts to making international regimes politically illegitimate, for Nagel.⁶⁴ Moreover, such a lack of legitimacy, Nagel thinks, infects pretty much all international regimes, not just the global economy.

In his attempt to characterize the international sphere, Nagel casts a fairly wide net and concludes that the regimes and institutions that constitute the space of global cooperation lack political legitimacy. Let us accept for the sake of argument that Nagel is right about international regimes being illegitimate – that in particular individual citizens either do not or are not in a position to affirm or accept that the regime has a right to coerce. Even if we assume that Nagel might be right about this, what I find problematic about his position is that it says so little about what should be done about politically illegitimate regimes or systems of cooperation: do we, as

⁶² Ibid., p. 140.

⁶³ It is as if Nagel appears to think that when it comes to international trade, for instance, we have no choice but to participate in this regime. In other words, we are mere subjects in this context, which essentially describes the extent of our agency’s involvement internationally. No additional input is asked of us at the structural level; we are basically asked to engage in economic and commercial transactions.

⁶⁴ Nagel, “The Problem of Global Justice,” p. 140.

citizens, just sit back and assume a “wait and see” attitude until some form of legitimacy takes root, at which point, according to Nagel, it would make sense to talk about justice? There is something profoundly unsettling and unsatisfactory about making fundamental social change wait on the sidelines in this way.⁶⁵ For one thing, the international sphere is still characterized by rampant coercion. Such coercion is not structurally as tidy as what occurs within domestic society, with the state as the sole agent of coercive enforcement. But this does not make the coercion that exists internationally any less problematic and any less in need of a justification. Even where a system of cooperation is politically illegitimate, any coercion generated by it has to be justified to its subjects, for otherwise there is only pure coercion, and this seems difficult to accept. Even if we concede that international regimes are politically illegitimate, we do not also have to accept that no moral claims can be made against the illegitimacy of these regimes.

I suggest that international coercion, along with the illegitimacy of the system within which it occurs as well as the illegitimacy of the agents that exercise it, cannot go morally unchallenged or unchecked. The question is, what should be the appropriate response to illegitimate international systems of cooperation that propagate coercion? Nagel’s response to the illegitimacy of international regimes

⁶⁵ The world is certainly not short on politically illegitimate states. And it seems to me that even in states that are highly repressive, citizens bear some responsibility for one another. When a vulnerable minority is singled out by the state and subjected to unjust and oppressive treatment, other citizens, I suggest, have a duty to put a stop to such treatment. In certain cases, the moral requirement to stand up to injustice may be defeated by other moral considerations – for example, the state may throw one into prison for a very long time. But this is not to say that there is no duty to stand up to injustice. Thus it does not seem right to say that we should wait for legitimacy before we begin to strive towards justice. On the contrary, it seems that the push towards legitimacy often involves a struggle against injustice.

seems lax: he simply says that, at least, historically political legitimacy is generally established first, well before any attempt is made at creating a genuinely just society.⁶⁶ But this way of looking at political legitimacy does not sufficiently place it within a moral context. What we want to know is not simply the historic trajectory that political transformations take, but also the normative implications of living under an illegitimate political regime. And Nagel does not have much to say about this other worry.

There are two things that can be said at this point about the presence of political illegitimacy within the international sphere. First, it may still be the case that participants of coercively imposed illegitimate regimes have responsibility toward their fellow participants, even if such responsibility falls short of the rigorous demands of justice. Nagel, however, makes no mention of this possibility. Instead, he favors a moderate version of universal basic rights that imposes duties of humanitarian assistance that transcend state borders.⁶⁷ According to this view, as an American I may have a duty, for instance, to support a program that brings mosquito nets to villages in Burkina Faso. But that duty is independent of any political connection I have to the people of Burkina Faso, and, in fact, no political relation is needed to trigger demands of humanitarian assistance to those outside my country. Unfortunately, this ignores that participants of even illegitimate regimes may still stand in some type of a political relation to one another that is substantial enough to entail mutual responsibility that is more demanding than the moral humanitarianism

⁶⁶ Nagel, "The Problem of Global Justice," p. 140.

⁶⁷ See *ibid.*, pp. 130-33.

Nagel espouses. I will not, however, explore this possible alternative because I think there is a better way to deal with political illegitimacy.

Second, participants of an illegitimate political regime may have a right to demand that, where there is coercion, such coercion be exercised by a legitimate regime or system of cooperation. This may go some way, it may be argued, toward justifying the coercion. It is to this second response to the coercion posed by illegitimate systems that I would like to turn my attention.

On its face, the demand that there be legitimacy is plausible enough, but what precisely is signified by a progression toward legitimacy is not easy to say. Presumably it would be better to have a coercive system that is legitimate than one that is not: where there is legitimacy, the coercion done seems more palatable. But we have to explain why legitimacy would have this effect of making coercion seem more justified. To offer such an explanation, however, requires that we step back and examine what is meant by legitimacy in the first place. Even though I have touched on the subject in light of my discussion of Nagel, I do not think that the notion of legitimacy has been clearly spelled out.⁶⁸ Part of the reason for this is that Nagel

⁶⁸ As I have tried to make clear in my discussion of Nagel, there are two important notions for him that are conceptually linked: political legitimacy and the institution-mediated associative relation. They also seem to go together: whenever the associative relation is found, a regime that expresses the relation in its terms of cooperation is also characterized as being politically legitimate. However, I want to focus on legitimacy and not so much on the associative relation. The reason for this is that the invocation of political legitimacy is a novel idea in the context of discussing global justice. As far as I know no one else talks about the political legitimacy of the international sphere. But political legitimacy also exposes Nagel to a new set of objections. For one thing, it makes sense to demand that there be at least legitimacy in relation to coercive international regimes. The same cannot be said about the citizen relation. The citizen relation is either there, which means that citizens are encumbered with duties of justice, or it is not. If the citizen relation is not present, then persons who are not so related cannot make demand on one another that the relation be established. Legitimacy, however, appears to be different.

himself is terse and enigmatic about what he means by the term. This much, at least, can be discerned about Nagel's account of legitimacy: legitimacy appears to be conceptually linked to the associative relation that demands duties of justice. But this still does not adequately tell us what legitimacy really amounts to. For one thing, it is not clear from Nagel's discussion whether the existence of the associative relation is necessary or sufficient for political legitimacy – perhaps it is neither. It may not be sufficient if justice is necessary for political legitimacy, and so, despite the presence of the requisite associative relation, a state may not be legitimate if it continues to be unjust.⁶⁹ Furthermore, the associative relation may also not be necessary because for all we know there may be other ways of establishing legitimacy. For instance, it may be argued that the legitimacy of a political entity can be achieved through the actual

⁶⁹ This point is actually somewhat nuanced. Whether the associative relation is sufficient to establish political legitimacy depends on how closely legitimacy is tied to justice. As I will suggest below, one version of legitimacy essentially equates legitimacy to justice: a state is legitimate if it is also just. This is the view that is present in Nagel's earlier work on domestic conceptions of justice. Under this conception, the associative relation would clearly not be sufficient, since in addition to the relation the state has to apply a conception of justice to its basic structure. However, on a different conception of legitimacy, one that does not equate legitimacy to justice, where the relation is present, the state may be legitimate even if it is still unjust. Of course much will depend on the level of injustice present. If there is too much injustice, it would not make much sense to say that the state is nevertheless legitimate. But then it may be argued that a state that is that unjust surely cannot instantiate the requisite associative relation among fellow citizens because laws and institutions that are highly unjust cannot be said to be imposed in the name of individual citizens who are the victims of the state. I will argue below that on this version of legitimacy there is a way to construe the associative relation as a sufficient condition for legitimacy. What is important to note here is that Nagel does not make this clear, and it takes quite a bit of extrapolating from his original account in order to give a more concrete definition of legitimacy.

consent of its subjects.⁷⁰ In what follows, I will try to expand on my earlier discussion of legitimacy.

Legitimacy generally gets attributed to a state, and so it is a state that usually gets labeled legitimate or not. There are several accounts of legitimacy of a state. On one view, which some call the obligationist view, a state is legitimate if and only if its subjects are required – or more precisely, obligated – to obey it.⁷¹ On the obligationist view, the real challenge is to answer why citizens are obligated to obey the laws of their state. Asserting that a state is legitimate does not explain much because we want to know what makes it legitimate in the first place. One response is to say that persons have an obligation to obey the state – and its laws – because it provides them with public goods: national defense, clean water, electricity, a police force, etc.⁷² The obligation to obey is thus viewed as a way for private individuals to repay their state for the benefits conferred on them. However, this way of grounding obligation has been heavily criticized. Some have argued that it is wrong to demand obedience for benefits received without first giving a person a chance to opt out from having to

⁷⁰ A.J. Simmons holds this position. He is aware that this pretty much makes all states politically illegitimate. Nevertheless, at least in principle, it is possible to achieve political legitimacy through consent, and this I think can apply to systems of cooperation where an associative relation among persons is not even an issue – for instance, where the basic units of cooperation are not persons. See A.J. Simmons, “Justification and Legitimacy,” *Ethics* 109 (July 1999): pp.739-771.

⁷¹ The term was originated by Rex Martin, who attributes the obligationist view to Hobbes and Locke. See Rex Martin, “Two Models for Justifying Political Authority,” *Ethics*, 86, 1 (1975): pgs. 70-75. David Copp calls this position the traditional one. See David Copp, “The Idea of a Legitimate State,” *Philosophy and Public Affairs*, 28, no. 1, (Winter 1999): pp. 3-42.

⁷² For an extensive discussion of this view, see A.J. Simmons, *Moral Principles and Moral Obligations*, Princeton NJ: Princeton University Press, 1979, pp. 195-200, and David Schmidtz, *The Limits of Government: An Essay on the Public Goods Argument*, Boulder CO: Westview Press, 1991, pp. 55-60.

receive them.⁷³ We do not, for instance, think that it would be right for me to wash my neighbor's car and then demand that she pay me for my services. Instead, we think that such mundane transactions require that there be a mutual agreement for the benefits exchanged: the washing of the car followed by payment for said washing. But where public goods are involved, the argument goes, such an agreement becomes moot because both the benefit and the penalty are unilaterally imposed by the state. In addition, the value of the public good may not be worth the price of obedience, and so reciprocity "would require less than obeying the law."⁷⁴ A more straightforward approach is to ground obligation in actual consent – either express or tacit.⁷⁵ The obvious difficulty with this approach is that it would make most modern states politically illegitimate, since the vast majority of their citizens are never given an opportunity to consent to the authority of their state.⁷⁶

Nagel accepts that there is a moral requirement to obey the laws of a legitimate state, but unlike proponents of the obligationist view, he bases this requirement on hypothetical consent. In *Equality and Partiality*, Nagel links legitimacy to justification: a political system is legitimate if it can be justified to everyone forced to live under it.⁷⁷ Legitimacy, Nagel claims, is about achieving unanimity "about the

⁷³ See Simmons, *Moral Principles and Political Obligations*, p. 195.

⁷⁴ See Copp, "The Idea of Legitimate State," p. 12.

⁷⁵ For a discussion of this view, see A.J. Simmons, *Justification and Legitimacy*, New York: Cambridge University Press, 2001, pp. 122-157.

⁷⁶ For a criticism of consent-based theories, see Copp, "The Idea of a Legitimate State," p. 12.

⁷⁷ Ibid.

controlling framework within which more controversial decisions are made.”⁷⁸ This unanimity, for Nagel, is hypothetical, but he insists that this does not diminish the normativity of the justification that is achieved.⁷⁹

By a “controlling framework” I understand Nagel to mean some set of rules that functions as a regulative ideal, an ideal that offers the means to resolve political conflicts and disagreements. Given the kinds of systems we have in mind here, the rules are meant to regulate terms of cooperation, broadly construed.⁸⁰ So in a hypothetical choice situation, what is consented to are regulative rules or, in other words, laws that comprise the controlling framework of a system of cooperation.⁸¹ Unanimous convergence on these rules indicates that no legitimate reason can be adduced by any rational agent to reject them and they are *ipso facto* deemed justified.⁸²

⁷⁸ Ibid.

⁷⁹ The reason for this is that Nagel thinks that unanimity makes the choice the right one. This is a version of pure proceduralism; for Nagel, the very fact that there was unanimous convergence makes the choice correct. It is the unanimity that explains the rightness of a choice and not the other way round – the rightness expounding the unanimity.

⁸⁰ These terms have to be broadly construed, including social, political, and economic interactions and transactions among fellow participants.

⁸¹ It is important for me that Nagel’s discussion of justifying rules applies to all sorts of rules, including laws, which are a kind of rule that is enforced through legal coercion. Given that Nagel has domestic society in mind throughout *Equality and Partiality*, it is, I think, quite uncontroversial that his discussion of justifying rules is also meant to apply to justifying domestic laws. I assume, from now on, that justification is what is required, specifically, of our domestic laws, according to Nagel in *Equality and Partiality*. See Nagel, *Equality and Partiality*, p. 35.

⁸² Nagel borrows this idea from Thomas Scanlon. See T.M. Scanlon, “Contractualism and Utilitarianism,” in Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond*, New York: Cambridge University Press, 1982, pp. 215-43. I shall refer to Scanlon’s test as the “non-rejection test.”

Thus a legitimate political system, for Nagel, is one that applies a justified set of laws – laws that enjoy unanimous hypothetical consent.⁸³ But it seems that Nagel wants to say more than this. When we are dealing with a system that is legitimate or justified from the standpoint of hypothetical consent, Nagel insists, “no one is morally justified in withholding his cooperation from the functioning of the system, trying to subvert its results.”⁸⁴ In other words, when a system is legitimate, its subjects are morally bound to obey its laws. As I suggested above, this is a key feature of the traditional or obligationist conception of political legitimacy, except that on the obligationist view legitimacy is ascribed to states, not systems of cooperation. This distinction, however, does not amount to much, since political legitimacy, the way Nagel understands it, can be easily extended to states. So on his view, a state is legitimate if it enforces legitimate or justified laws.⁸⁵

⁸³ It would perhaps be more precise to suggest that it is not the total body of domestic laws that is under consideration. Instead, what Nagel has in mind, presumably, are foundational laws, which then shape the substance of the more mundane laws that get legislatively enacted through time to address specific needs of society. The set of foundational laws, I suggest, can be considered a constitution, and so in essence the real target of justification is a state’s constitution.

⁸⁴ Nagel, *Equality and Partiality*, p. 35.

⁸⁵ Now this additional claim, that subjects of a legitimate state are required to obey its laws, opens Nagel up to an objection raised by Ronald Dworkin against the normative force of hypothetical consent. See his, “The Original Position,” in *Reading Rawls*, Norm Daniels, ed., New York: Basic, 1975, pp. 16-52. Dworkin, who has been critical of hypothetical consent theories, has suggested that hypothetical consent may not be enough to ground the requirement to obey. He points out that the fact that we would agree to a recommended solution consisting of a set of rules does not entail that these rules may be enforced against us if we have not agreed to them. Nagel’s conception of political legitimacy links legitimacy of a system to the justification of its laws. But this way of looking at legitimacy seems to fall prey to precisely the kind of objection that Dworkin raises against hypothetical consent. It is one thing to say that a set of laws is justified because no (acceptable) reason can be given to reject it and quite another thing to say that there is now a moral requirement to obey these laws.

Let me just summarize what we have so far with respect to the first conception of political legitimacy. A legitimate political system embodies a set of laws that are justified from the standpoint of hypothetical consent – that is, laws that have passed the “non-rejection test.” Now, a state is politically legitimate in so far as it instantiates a political system that is itself politically legitimate because it embodies a justified set of laws. This makes states legitimate in a derivative way: their legitimacy depends on the legitimacy of the political system they actualize, which in turn depends on the laws the system applies as its adjudicative framework. This tells us what makes a state politically legitimate. But we have yet to say what the powers of a legitimate state are. For our purposes the relevant attribute of a legitimate state is that it has the right to coercively impose its laws against its citizens.⁸⁶

In *Equality and Partiality*, Nagel directs his discussion at domestic systems of cooperation.⁸⁷ In this context, Nagel holds that a justified set of laws has to be just because anything less than justice gives one a reason to reject it. In other words, the

To avoid Dworkin’s objection, Nagel has to explain how the duty to obey is derived without simply invoking the assertion that the set of laws was hypothetically consented to. I think that Nagel has a way to avoid Dworkin’s objection. The way he does this is by separating justification from the moral requirement to obey. See Nagel, *Equality and Partiality*, p. 35. This way he can reject the allegation that hypothetical consent to a set of laws is somehow meant to derive the requirement to obey. Instead, the requirement to obey is itself an outcome of hypothetical consent. That is, as rational agents, deliberating in a hypothetical choice situation, we cannot come up with any legitimate reasons for not obeying those laws to which we have already consented as specifying our terms of cooperation. This is why Nagel insists that once our domestic society applies a justified set of laws, no one is “morally justified in withholding his cooperation from the functioning of the system.” For a good discussion of this particular objection and how proponents of hypothetical consent can overcome it, see Cynthia A. Stark, “Hypothetical Consent and Justification,” *Journal Of Philosophy*, Vol. 97, No. 6, June 2000, pp.313-334.

⁸⁶ This is flipside of the duty to obey justified laws on the part of those who are governed.

⁸⁷ See Nagel, *Equality and Partiality*, especially pp. 33-40, pp. 230-40.

outcome of hypothetical consent has to be a just one. As mentioned earlier, a politically legitimate state enforces a justified set of laws. But this means that for a state to be legitimate it has to enforce laws that are just because anything less than justice would mean that the appropriate justification is not achieved. Political legitimacy, under this conception, requires that terms of cooperation be regulation by justice, and so for a state to be legitimate, it also has to be just.

To come back to our earlier discussion, we reached the conclusion that coercive international regimes lack legitimacy. For this reason, I suggested that those who are subject to these coercive regimes have a right or are entitled to demand that the regimes achieve legitimacy. But under the conception of legitimacy offered by Nagel above, this is a substantial demand: this is because a coercive regime, in order to count as legitimate, has to apply just laws – or, to be more precise, a just constitution. From the standpoint of hypothetical consent, it is presumed that only a just constitution would pass the non-rejection test. Thus the demand for political legitimacy really amounts to a demand for justice. However, this suggests that even at the international level those persons who participate in and are subject to the coercive practices of international regimes have a right to demand that these regimes be just.

This presents an obvious problem for Nagel. Nagel insists that the international sphere is not an appropriate site for justice. Yet, under his more fully developed conception of legitimacy, a demand for legitimacy is equivalent to a demand for justice. This assumes, of course, that where political legitimacy is absent in a coercive system, there is a right to demand that legitimacy be established, for otherwise there is only pure coercion. Under this conception of legitimacy, there is no

way to have a legitimate system that is not yet just. But this turns the international sphere into a suitable place for justice whenever political legitimacy is being established, which is something that Nagel clearly wants to reject.

For Nagel's argument to work, he has to rely on a different conception of legitimacy from the one offered in *Partiality and Equality*. But, as I suggested earlier, what precisely Nagel means by legitimacy in his work on international relations isn't at all clear.⁸⁸ He insists that when it comes to domestic society, our agency is involved in coercing our fellow citizens – the coercion is imposed in our name, as he puts it. Such coercion, of course, has to be justified, but, from the standpoint of hypothetical consent, a just system of laws will seem justified because citizens, *qua* rational agents, would endorse it. But this way of implicating ourselves in the coercion of our fellow citizens leads to the strong version of legitimacy that equates legitimacy with justice, which Nagel cannot, in the end, endorse if he is to insist that the international sphere is an inappropriate place for the application of a conception of justice. The involvement of individual agency thus has to be explained in another way.

A different approach, I think, is to define legitimacy as involving some form of political representation.⁸⁹ On this view, a democratic state is legitimate because its

⁸⁸ See Nagel, "The Problem with Global Justice," pp.138-140 for the remarks he makes about political legitimacy.

⁸⁹ Nagel himself hints that perhaps legitimacy should be construed along the lines of democratic representation. At one point he refers to the kind of legitimacy that he has in mind as democratic legitimacy. Thus, Nagel's "The Problem with Global Justice" may be read as somehow implicitly invoking a weaker conception of political legitimacy. The difficulty here is that Nagel does not even attempt to expound this conception, except to refer to it in certain select passages as "democratic legitimacy" and so we left with filling in most of the gaps in

citizens have a say in what the state does. Ordinary citizens, at a very basic level, can express their political views by voting for or against their current government; where there is a critical mass of dissatisfied voters, existing governments may be toppled or their makeup significantly restructured.⁹⁰ In a democracy, people, in principle, have the power to elect a government that they think will represent and advance some of their interests. In this way, representational democracies are said to be “by the people” and “for the people”.

This is no doubt a rudimentary and a simplistic sketch of how democracies operate. Modern democracies function in very complicated ways. Who really is in control of government is, I think, an apt question. We are well aware that powerful special interest groups exert enormous influence on the American political system that is quite disproportionate to the actual number of members these groups seem to possess. Monies that flow to the coffers of the two major political parties as well as to individual members of Congress and those running for office give special groups and coalitions access to important decision makers. This often translates into the crafting and passage of policies that are particularly favorable to these political benefactors. Such practices corrupt the representational character of our democracy. A democratically elected government, in principle, ought to advance the will of the

order to have a workable model. The danger of course is that the gap filling is my extrapolation of Nagel’s few cryptic remarks. Still, I think there is something interesting about construing legitimacy along the lines of democratic representation, and what I try to do is offer a very rough sketch of what such a view of legitimacy might amount to. For these hints of democratic legitimacy, see Nagel “The Problem of Global Justice,” pp. 145-47.

⁹⁰ Here I am thinking of coalition governments in a parliamentary system. In a parliamentary system, national elections can alter the composition of a government by, for instance, necessitating power sharing and the formation of coalitions without throwing a political party entirely out of power.

people – which is generally equated with what the majority would favor – while at the same time guaranteeing that the civil and political rights of vulnerable minority groups are not sacrificed in the process. In actuality, we do not have anything like this, and it is I think important for someone like Nagel to map out where we are, more or less, along this continuum of representation. With too little representation and the ensuing alienation from the polity, it may be difficult for us to say that we “own” this political system and are, therefore, responsible for its results. But for now let us put this difficulty aside; I will simply assume that in a representational democracy like our own there is enough political representation in what the government – and correlatively, the state – does to maintain populist political ownership and ensure that the social and political framework is in our name. For my purpose of outlining legitimacy along the lines of collective representation, this rather superficial sketch of democratic representation should be sufficient.

If we take political legitimacy as something that is defined by a democratic form of governance, we can make some sense of Nagel’s point about citizens being authors of one another’s coercion. We can see this happening along two dimensions. First, as citizens of a democratic state, we have some control or say over what becomes law. One basic way we express our political aspirations is through the ballot box: we cast our vote for a candidate for political office we think will represent our interests in the legislative arena. At other times, we participate in a more collective manner, through action groups, political organizations, social movements, and so on, which then advocate, through their own proxies, for laws and policies that we believe are particularly important. But whatever we do and no matter how active and

influential we may be, either acting on our own or through groups, what we in the end manage to shape pales in comparison to the total body of laws to which we are subject throughout our lifetime. So viewed as quasi-lawmakers in this direct way and with regard to individual laws and policies, our influence is quite negligible; it would be a stretch to call ourselves authors of coercion when at best we can affect a small fraction of the *corpus juris*.

However, as citizens of a democratic state, we affect the laws of our state in another way, which I think is much more far-reaching than our contribution to the passage of individual laws: we also endorse the basic procedure that transforms norms into laws. Built into the very conception of democratic citizenship is the idea that it is the people who decide what becomes law; it is the imprimatur that is handed by the body politic that ultimately endows a rule with the status of being law. As citizens this is something that we implicitly operate with: as individuals, we do not approve all the laws that come out of the democratic procedure, but nevertheless at some level we accept that this process of lawmaking is a fundamental aspect of our society. Our role as authors of coercion I think is best expressed in our endorsement of the democratic procedure, which is the mechanism that generates the *corpus juris*.

In a recent paper on Nagel's position on global justice, A.J. Julius suggests that for Nagel a state can be politically legitimate in one of two ways. First, the state can be legitimate if "people regard its terms as having a moral force" and "believe that they should conform to [these terms] because of their role in regulating" the interactions that take place among fellow citizens.⁹¹ But as Julius rightly points out,

⁹¹ A. Julius, "Nagel's Atlas," *Philosophy & Public Affairs*, Vol. 34, No. 2, 2006, pp. 176-192.

the problem with this way of understanding legitimacy is that it commits Nagel to an empirically false sociology of political membership. There are plenty of people who happen to obey laws because they simply do not want to get caught, not because they believe that the law has any moral force behind it. This makes it difficult to say that any state is politically legitimate. Second, a state can be legitimate if it imposes terms of cooperation that are “independent of anyone’s belief that [they] are to be accepted” but are justified nonetheless.⁹² The problem for Nagel with the second version of legitimacy is that there is no reason to think, given the presence of coercion internationally, that international regimes can’t be made legitimate once the requisite justification is made.⁹³ This puts Nagel in a difficult position: either he is committed to a sociologically false view or he can make sense of a political relation among persons that entails duties of justice but this relation transcends the boundaries of individual states.

I think that democratic proceduralism can help Nagel vis-à-vis Julius’s objection that Nagel cannot plausibly restrict and particularize distributive justice to individual states. Democratic proceduralism does not require that people believe laws have a moral force to them - in the words of Julius, it does not presuppose “a false sociology.” Democratic proceduralism stands for the proposition that what becomes law ultimately depends on the people, and the way this dependence is expressed is by giving individual citizens the right to participate in the legislative process. (There are,

⁹² Ibid. p. 184.

⁹³ Ibid.

of course, intermediaries, and proxies but their legislative actions are kept in check by the power of the public's vote.)

What implicates us as coercers is not that we believe that everyone should obey the laws of the state because this is the morally right thing to do. Instead, we are implicated because we accept *the procedure* for making laws. We accept this procedure by playing our part as good citizens of a democratic state. Implicit in the very conception of democratic citizenship is the idea that citizens participate in the legislative process in a certain way, and that given this conception the procedure for participation has to be structured in a particular manner – it has to be structured to reflect the political equality of individual citizens. This is of course an ideal of sorts, but in so far as an individual performs her role as citizen of a democratic society and approximates the ideal conception in her political life and activities, she is committed to democratic proceduralism. Moreover, there is no attribution of belief here: commitment is implicit in the very notion of citizenship.

Of course, as citizens we can also accept democratic proceduralism more directly, by actually thinking that this is a good way to make laws. As a norm, this is something that is widely accepted by people living in democratic states. There may be outlier citizens of course who do not buy into the democratic ideal and reject democratic proceduralism, but these outliers are likely to be so few that the generalization that citizens of democratic states embrace democratic proceduralism is still accurate enough not to be sociologically false.⁹⁴

⁹⁴ What is more is that the attraction and exuberance to the democratic ideal is felt in other parts of the world where democracies have still not gotten a foothold. So the norm of democratic proceduralism is something that is widely accepted throughout the world.

Now in so far as we endorse the manner in which laws are made, laws which subject our fellow citizens to coercion, we in some sense can also be said to participate in their coercion. Our engagement as good citizens of a democratic state and in particular our involvement in the political process is enough to establish our commitment to democratic proceduralism, which in turn is sufficient to implicated us as authors of coercion.

By connecting legitimacy to democratic proceduralism, we can make sense of the assertion that, as citizens, we are authors of one another's coercion. In a democratic society, we stand in precisely that kind of relation – we might argue on behalf of Nagel – that generates the requirement to justify coercive enforcement, which can only be done by invoking principles of justice. That's because in a democracy, at least in theory, we accept the procedure for how laws are made, laws that the state then goes on to enforce. On this view of legitimacy, a state is legitimate if it instantiates a political system that is a representative democracy of some form. But notice that on this view a legitimate state is not automatically or necessarily a just one; for instance, for all we know the *corpus juris* may consist of unjust laws. This has the nice result, for Nagel, in that a call for legitimacy is not equivalent to a call for justice. More importantly, on this conception of legitimacy, Nagel can still insist that the international sphere is not the appropriate site for justice – because the regimes that comprise it lack legitimacy. And any demand to bring legitimacy to the

international sphere is just that, a demand for legitimacy, and nothing more, such as, for instance, a demand for justice.⁹⁵

The reliance on democratic governance, and specifically on democratic proceduralism, as a way of demarcating between legitimate and illegitimate states offers Nagel a way to reestablish the legitimate state as the appropriate site for distribution justice: only democratic states – they are the ones that are legitimate – instantiate the special relation because their citizens are authors of one another’s coercion. The international trade system is not legitimate because it does not embrace democratic proceduralism.

This maneuver may save Nagel from making a sociologically false claim. But it does not make his account immune from a different sort of problem put forward by Julius. Julius contends that Nagel’s account implies that there is no way for him to say that an illegitimate state is unjust. Julius asks us to imagine a tyranny: in a state run by a tyrant, the people do what the tyrant tells them to do because they want to avoid being killed.⁹⁶ The state therefore is not in any way legitimate. But it is hard to argue, according to Julius, that there would be nothing unjust about the tyrant building his pleasure palaces as his people suffer from hunger.⁹⁷ The problem with Nagel’s

⁹⁵ On the stronger view of legitimacy, this wouldn’t be the case, since a demand for legitimacy turns out to be a demand for justice as well. But legitimacy predicated on democratic representation does not generate this result, and justice does not enter at the stage where the aim of political transformation is to achieve political legitimacy.

⁹⁶ “Nagel’s Atlas,” p. 183.

⁹⁷ Ibid.

theory, says Julius, is not that it rules out the possibility of justice “but that the theory cannot find injustice in their situation.”⁹⁸

Julius I think is right about this but only if injustice is understood more narrowly as injustice with regard to the distribution of (economic) entitlements. Nagel does say after all that there is a general humanitarian duty of justice, and this certainly would apply to tyrants: so if the hypothetical tyrant in Julius’s example does nothing to prevent his people from dying of hunger or kills or imprisons political dissenters, that would be unjust under the humanitarian conception of justice. But the threshold here is quite minimal, and so if we imagine a less awful regime, one where citizens are not starving but where there is, for instance, great economic disparity and economic exploitation, Nagel’s theory again cannot find the injustice in this situation. But this is surely implausible because even if we grant, for the sake of argument, that genuine economic egalitarianism may be controversial in this context, it seems that at the very least we should be able to say that the economic exploitation of a large underclass by a coterie of powerful individuals is unjust. We should be able to say that much, which we cannot do on the basis of Nagel’s theory, for the requirement to justify the prevailing pattern of economic entitlements just does not come up in an illegitimate state where citizens are not properly linked to one another via the special relation and the basic demands of humanitarian justice have been met. But surely we want to say that those who economically privilege themselves – because they have the power to do so – clearly owe a justification to their fellow compatriots for the kind economic standing they possess. This requirement seems to be just as important, if not more, in

⁹⁸ Ibid.

the context of an illegitimate state, where the social framework is not in the name of the people, as it is for a legitimate state. And it seems to me that we think this because the distributive injustice of an oligarchy is worse than the injustice that exists in a liberal democracy like the US or Canada, and where there is injustice we think there must be accountability, which the demand for justification makes evident.

Whatever the demands of justice may be in an illegitimate state, they are not non-existent or negligible: the people who are being economically exploited have a legitimate complaint against their exploiters and are right to demand that such exploitation end. Moreover, I do not see the logic in Nagel's proposal of first establishing a legitimate society and only later making it just.⁹⁹ The quest to end current injustice is as pressing as the need to establish legitimacy, and can be pursued simultaneously: in fact ending injustice and establishing legitimacy may be seen as part of a much broader project of enhancing justice, the last stage of which is the application of an egalitarian conception of justice.

So Nagel's theory can account for the injustices committed by a state that disregards basic rights and the injustices of a liberal democratic state, because it is not, say, sufficiently egalitarian, but the theory cannot do the same for that vast political space that is between these two points. At the very least, Nagel has to explain why the possibility of injustice skips this political space, which unfortunately he fails to do.

Julius I think is quite right to insist *contra* Nagel that we want a theory of justice that is capable of denouncing all kinds of states, be they legitimate or not, as unjust and of explaining wherein lies their injustice. Even within illegitimate states,

⁹⁹ See Nagel, "The Problem of Global Justice," p. 140.

the distribution of entitlements follows a certain pattern which is coercively imposed, and that pattern, it may be argued, has to be justified to those subjects of the state who are burdened by it, for otherwise we end up with pure coercion.¹⁰⁰ Of course, the division of entitlements that incorporates significant economic exploitation by the few is clearly not going to garner hypothetical consent: those subjects who are being exploited have reason to reject it. By using the device of hypothetical consent, we can illustrate the injustice of this particular pattern.

Of course, it may be argued that the use of hypothetical consent is inappropriate at this stage because it will result in an egalitarian conception of justice, which Nagel would contend is premature for an illegitimate state. The objection, however, seems to presuppose that hypothetical consent as a device can only be used for working out a conception of justice. However, I do not think that is the case: hypothetical consent can also be used to show why something is unjust.¹⁰¹ Moreover, there are other ways of explaining why extreme forms of economic exploitation are unjust. The point is, a theory of justice worth taking seriously has to explain why seemingly unjust states are unjust, and this cannot be simply reserved for politically legitimate democratic states. There are presumably far worse regimes out there that a

¹⁰⁰ When we consider states that are not politically legitimate because they lack democratic governance, people who live in them and suffer from injustice have legitimate grounds for complaint. Here complaints against injustice may not be lodged against fellow citizens: the majority of the citizenry of such states find themselves at the receiving end of an unfair distribution of entitlements – they in other words find themselves being forced to accept such a pattern without being its authors. They should instead be directed at those who sustain the political regime and have the power to change the way entitlements are distributed.

¹⁰¹ More generally, hypothetical consent can be used to explain why a certain rule is morally wrong. But in a context where what is being evaluated are rules that are meant to regulate terms of cooperation, the moral wrongness of such rules just is the fact that they are unjust.

theory of justice has to be in a position to condemn. They may be condemned from the standpoint of an egalitarian conception of justice that is appropriate for a legitimate democratic state. But the fact that we regard the circumstances as unjust suggests that citizens of these states deserve something better. What they are entitled to is at the very least the removal of certain forms of injustice that we find especially troubling – viz. extreme economic exploitation – and this is the sort of judgment that hypothetical consent is capable of delivering without the need of a fully developed conception of justice. In the alternative, what citizens of an illegitimate state are entitled to may also be delineated by a conception of justice, perhaps one that is weaker than a full blown egalitarian conception. What is important to note here is that hypothetical consent may be used as an instrument to shed light on existing injustice and point to a better social and political arrangement, which at the very least is an arrangement that lacks these particular injustices.¹⁰²

Thus, it seems quite reasonable to say that people who suffer under an illegitimate regime that mistreats them in significant ways – which yet does not amount to outrages that trigger humanitarian principles – deserve a more just regime, and that, moreover, deserve to be rid of exploitation. But they are also entitled to a more equitable distribution of political power – if indeed they are so inclined to have some say in the governance of their state. This last claim amounts to the assertion that the citizens of an illegitimate state have a right to challenge precisely those things

¹⁰² Certain terms of cooperation may be reasonably rejected because there is a special relation among citizens. But this does not imply that what is reasonable to reject always somehow implicates this relation. That I should not grossly exploit my fellow compatriots has nothing to do with there being a special relation between me and them because the prohibition against exploitation applies in other political contexts as well. I should not for instance exploit Mexicans even though there is no special relation between us.

about their state that make it illegitimate. That is to say, they have a right to demand the kind of distribution of entitlements that would make their state legitimate. This may or may not be enough, but it does suggest that citizens that live in illegitimate states, where the special relation is missing, are not in a place of political limbo and do indeed have a right to demand greater justice from those who hold the reins of political power and are responsible for the existing allocation of entitlements.

What is interesting about legitimacy based on representation is that establishing such legitimacy goes some way toward creating a just regime as well. The reason for this is that representational legitimacy requires some form of democratic governance, and democratic governance presupposes that individual citizens possess certain political and civil rights, such as the right to vote, to run for political office, to free association, to free speech – rights to political participation, in other words. But genuine democratic governance requires many more guarantees than simply the rights to political participation. Where political rivalries exist, there is always the danger that those in power will try to prevent, through repressive means, their opposition from mounting a serious challenge. Thus basic protections have to be set up to shield the opposition from various forms of political repression.¹⁰³ When too many people are kept out of the political process, it becomes hard to point the finger at

¹⁰³ Political repression can manifest itself in numerous ways. Political ideologies may be outlawed and those espousing them kept out of the political process. People can be disenfranchised on the basis of their religion, race, ethnicity, and so on. There is still the right to vote, in the abstract, but for it to be meaningful and accessible across the board, the right has to be fortified with other protections. In this way, we can see just how important the right to religion, the right against discrimination on the basis of race, gender, ethnicity, age, sexual orientation are to the maintenance of a healthy democracy.

them and say that they are responsible for the coercive practices of their state.¹⁰⁴ It seems right to say that those kept out should simply deflect such responsibility, since they have no way to exert any meaningful control over what their state does. Thus these additional protections are essential for the kind of legitimacy we have in mind here, one that is predicated on the collective ownership of a political system.

However, I think that political rights are still not enough to ensure that people are plugged into the political process. It may be argued that substantial resources have to be allocated to enable ordinary citizens to participate on the basis of fairness.¹⁰⁵ This means that in addition to political rights, distribution of economic entitlements has to come in at this point: to be an informed voter, for example, one has to have access to certain basic capabilities, such as a secondary education, decent wage, an adequate healthcare, enough leisure to make a reflective political choice, and so on. And these capabilities are generally funded by some type of a progressive taxation scheme. What is more, without the provisions that are necessary for meaningful political participation, there will be the temptation to gainsay any responsibility for what happens to one's fellow citizens. This will vitiate the notion that we are the coauthors of one another's coercion. Thus legitimacy once again requires the

¹⁰⁴ This again suggests why the representational format for political participation is so important for a political system to be in the name of the citizenry and for political responsibility to be diffused throughout the whole of society. A conception of legitimacy that embraces representation that is less than democratic is going to run into the difficulty of not being able to make a plausible case for making citizens responsible to one another for what their state does.

¹⁰⁵ Without some form of fairness, I think it becomes once again easy for someone who is unfairly kept out of the political process to cry foul and distance herself from the what the state does and how this affects her fellow citizens. So fairness becomes an important social value for society where collective ownership by the citizenry is a goal.

application of justice, and may even require the administration and implementation of distributive justice so that fair access to meaningful political participation is provided.

Let me summarize what I have tried to establish so far. On the strong version of legitimacy advocated by Nagel in his earlier work – where a legitimate state amounts to a just one – a demand for legitimacy entails a demand for justice. On this conception, it is appropriate to transform international regimes so that their terms of cooperation conform to principles of justice from the very the start, provided there is a genuine entitlement that these regimes be legitimate. On the weaker conception, a demand for legitimacy requires that a regime institute democratic governance. But I suggest such governance has to be of a certain type: it has to be substantial enough to generate ownership of the political system and authorship for the coercive activities of the state. Otherwise, the conditions for the associative relation among fellow citizens simply do not exist. I also suggest that democratic governance of this form has to provide not only basic political rights of political participation, but also a fair access to or opportunity for meaningful political participation. A regime that instantiates this form of democratic governance goes a considerable way toward realizing justice, including distributive justice. So even on this view of legitimacy, Nagel is simply not right to contend that the international sphere is not an appropriate site for justice – especially distributive justice – because a transition toward legitimacy, even under the weaker conception, involves the application of some amount of justice.

There is a further conceptual difficulty with Nagel's position that makes his apparent separation of legitimacy from justice quite beside the point. Recall that legitimacy is important for Nagel because it triggers the relevant associative relation –

which then necessitates that terms of cooperation be regulated by justice. This means that before a regime has attained legitimacy, those subject to the coercive enforcement of its laws do not yet have a right to demand that the regime be just: the associative bond is not yet in place. But the demand becomes ripe the moment there is legitimacy. So there are two distinct steps involved: first a transition toward legitimacy; then a transition toward justice.

It seems to me, however, that such a discrete progression hardly makes a difference in the end. At any point where there is coercion, one is in a position to demand that, at least, there be legitimacy – and once there is legitimacy, one can then demand that one’s state apply an egalitarian conception of justice. The result seems to be the same: a coercive system of cooperation in the end has to be regulated by principles of justice. A *status quo* where there is illegitimacy is never justified – at least, so I claim – and so it becomes morally incumbent to support a move toward legitimacy. But this has enough momentum to ultimately generate the duty to establish a just regime.

Now if this is the case, why not aim at justice from the very start? We can suppose that Nagel is right that at the pre-legitimacy stage there is not yet right to demand justice. Yet from a practical standpoint, this hardly matters. At this earlier stage, Nagel’s relevant associative relation may not exist, but this does not present a problem for asking that there be justice; that is because asking for justice does not require that there be an associative relation. Thus, a shift toward justice, from the start, is something that is consistent even with Nagel’s account as long as the trajectory first goes through legitimacy. Since, as I suggest, legitimacy can be

achieved by, at the very least, establishing some form of democratic governance, it seems all too natural that a transition toward justice should first engender a regime that is democratic.

What does this say about international regimes? My contention here is that with international regimes we can at least begin to move toward greater democratic accountability and governance. What this will look like internationally may be considerably different from what happens at the level of states. The ongoing international politicization of several important issues has generated the mobilization of many diverse actors, each claiming to have an authority to influence decision-making and policy design over these “transnational” concerns. This has made the international sphere politically - and also organizationally - much more messy. The really hard problem, from the standpoint of governance, is how to make these actors more accountable and responsive to ordinary persons who are affected by policies, formed in faraway places by nameless, faceless bureaucrats. There have been many attempts at answering precisely this question. Some have expressed a good deal of optimism that indeed some form of democratic governance can be injected into the global arena.¹⁰⁶ My point here is simply that it is possible to move in the direction of greater democratic governance and this transition can begin now.

¹⁰⁶ For a good discussion of global governance, see David Held and Mathias Koenig Archibugi, eds., *Global Governance and Public Accountability*, New York: Blackwell, 2005; David Held, “Principles of the Cosmopolitan Order,” in Gillian Brock and Harry Brighouse, eds., *The Political Philosophy of Cosmopolitanism*, Cambridge: Cambridge University Press, 2005, pp. 10-27; David Held, *Models of Democracy*, Cambridge: Polity Press, 2006. For a criticism of global governance, see Robert Dahl, “Can International Organizations Be Democratic? A Skeptic’s View,” in Ian Shapiro and Casiano Hacker-Cordon, eds., *Democracy’s Edges*, Cambridge: Cambridge University Press, 1999, pp. 19-36.

My criticism of Nagel thus far has granted that his introduction of the special relation into the discussion on justice has been an important contribution to our understanding of how distributive justice and coercion are conceptually connected. Moreover, I have presented Nagel in a way that suggests that his position is a Rawlsian one in spirit but also an advance over Rawls's original work in that it presents a more nuanced connection between distributive justice and coercion – and I do not think that Nagel himself would disagree with this assessment. However, I think that in the end Nagel gets Rawls wrong in an important way, one which makes his account less plausible than the one offered by Rawls. Below I turn to this final objection of Nagel.

Nagel claims that there has to be a special relation before we can attribute duties of justice. But this seems to add an additional component that Rawls himself does not do. In the Rawlsian version, we assume at the very start that persons are coerced and ask ourselves what would it take to justify the exercise of coercion. And it turns out that only a liberal conception, like the special conception, provides the requisite justification.¹⁰⁷ So far we have not mentioned how citizens are related to one another; all that matters is that they find themselves in a coercive scheme. A coercive

¹⁰⁷ In his *The Law of Peoples*, Rawls argues that this is true only with respect to liberal democracies. Societies defined as decent hierarchical can apply a comprehensive conception of the good to the basic structure in place of a liberal conception of justice. Such societies and the states that contain them are neither liberal nor democratic, and they are not just in the way that liberal democratic societies are. But nonetheless they are societies that are in good standing and deserve equal respect. See Rawls, *The Law of Peoples*, pp. 59-78. My own view of Rawls's work on international justice is that he gives too much deference to non-liberal, non-democratic societies. I think that basic rights are fundamental to all societies, including the right to democratic participation, and should be made available to all regardless of their cultural or religious heritage and tradition.

scheme makes an absolute demand for justification that can only be delivered in a very precise form. If we are to live under a coercive regime and if that regime is to be a just one, there is only one basic way to have this. Indeed it does not matter where we are coming from, whether we currently live in a coercive system that is autocratic or democratic. If we want to justify coercion, we have to have a liberal conception apply to our basic structure. Of course we are farther away from realizing this ideal if we live in an autocratic state.

For Rawls duties of justice do not seem to be conceptually prior to the establishment of a just society. Indeed, the question for him is not whether we have a duty of justice; rather, the question is, what would a just society look like – what is it for society to be ideally just, in other words? It turns out that when we assume the role of rational and reasonable deliberators in the original position, we would regard society regulated by the special conception as ideally just. And, as members of an ideally just society we have a duty to support and uphold its laws and institutions, and the state, as the enforcement arm of society, can justifiably punish us if we fail to live up to our end of the bargain. This means that, for Rawls, when we choose a conception of justice, we also commit ourselves to do our part to uphold a just regime.¹⁰⁸ The basis of our duties of justice is thus implicit in the hypothetical contract itself: our very conception in the original position is such that we would want to live under terms of cooperation that are defined by the operative conception of

¹⁰⁸ The way this comes out is through the political conception of the person that is put forward by Rawls. We are conceived as political beings who, when situated in a society that is just, would naturally uphold, and not undermine, its institutions and laws. See Rawls, *A Theory of Justice*.

justice. What is more is that for Rawls there is no pre-condition that has to be satisfied before we can legitimately entertain the idea of a just society. There is never the issue of whether we are morally entitled to live in a just society – because of how we are currently politically situated with respect to one another – standing in the way.¹⁰⁹ We deliberate about justice because we wish to live in a just society. Rawls takes this as a given and instead focuses his attention on how we should think about justice and what it would take for society to be ideally just.

On Nagel's view, there is an additional step. First, there has to be a special relation, which then entails that we owe duties of justice to our fellow citizens. This means that, for Nagel, the duties of justice have a basis that is separate from the hypothetical choice of an ideally just society. For Rawls, there simply is no question whether we deserve to live in a just society, and so he begins his enquiry at a point that is conceptually different from Nagel's. All that is required is that we think about justice in the way that Rawls claims that we should and at the end, he argues, we will arrive at his version of an ideally just society.¹¹⁰ Of course, what we get is an ahistoric projection of what it is for society to be just. It is ahistoric because, as hypothetical deliberators, where we are now in history – our historical situatedness – and how we

¹⁰⁹ Rawls does say that that his special conception may not be appropriate for a society that is desperately poor. But this limitation has to do with the conditions of society, not about how citizens are related to one another. See Rawls, *A Theory of Justice*.

¹¹⁰ *Ibid.*, pp. 150-161.

arrived there are not facts that are ultimately relevant to the ideal of justice that we end up subscribing to.¹¹¹

The same cannot be said for Nagel because certain historical facts do seem to matter to him, for they influence what gets recognized as ideally just. It matters to him whether individual citizens stand in a special political relation to one another, and this special relation is a product of a series of historical interactions by the polity, as citizens try to establish a political system that is legitimate in their eyes. The existence of this relation entails that distributive justice is the only way to justify the exercise of coercion. But it is also the case that the absence of the relation entails that justification can be achieved without including distributive justice. Thus Nagel's denial that the special relation is present within coercive systems that are international in nature means that distributive justice is not required to make these systems just. In other words, these systems can be ideally just without being just in the distributive sense. There is room for justice internationally, of course. Indeed, Nagel thinks that we owe duties of humanitarian assistance to citizens of other states when the need arises internationally. But once these principles of basic justice are applied internationally, the international sphere is justice – in fact, it is ideally just because there would be

¹¹¹ There is one important caveat here that must be mentioned. As Rawls makes clear in *Political Liberalism*, a liberal conception of justice, like the special conception, is really meant to apply to liberal, democratic societies. Thus which ideal we subscribe to depends whether as deliberators we are located in a liberal, democratic society. Deliberators who reside in a non-liberal society may embrace a different sort of ideal. Rawls talks about such non-liberal societies in his *The Law of Peoples*. See Rawls, *The Law of Peoples*, pp. 59-78. Still as long as we assume that the deliberators hail from a liberal society, how that society became what it is now and how they are currently related to one another does not make a difference to what would be an ideally just society to them.

nothing further to do.¹¹² Now the same can be said about a state where individual citizens are not linked to one another by the special relation. In such a state, there may be duties of justice of some sort, but no requirement to make the worst-off as well off as possible, for instance, in accordance with the difference principle. The clear implication here is that without the special relation a state can be ideally just despite the presence of vast economic inequalities that are present inside it.

As I argued earlier, this is an odd result in general, but I also think it is counter-intuitive to the way we deliberate about the subject of justice. If called to make a comparative judgment, I would not hesitate in asserting that a state where the special conception applies is more just than one where only principles of humanitarian justice operate because the special relation among citizens is missing. The reason for this is that we think that it is better to have a state that is democratic than one that is not; that it is better to have a state where citizens enjoy a wide range of fundamental rights than one where these rights are under threat; that it is better to have a state where wide economic disparities are a thing of the past and citizens can enjoy a standard of living that is compatible with their self-respect. These are of course commonplace convictions that most of us who live in liberal democracies hold and are not particularly deep. But they do seem to point to the following. Once we accept the fact that we have to live in a state – that the state is an ineliminable political unit that influences profoundly the choices we have and the life that we end up living – we want to know what would be the best state to have. Much of this will, no doubt, center

¹¹² Of course, this would not be the case if the world were to change in ways that ushered in greater interactivity among persons at the international level, backed by the coercive power of a single supranational entity. But as long as things remain the way they are currently, a minimal form of justice would be enough for the world.

on the political system that the state should exemplify. In other words, once we take for granted that our terms of cooperation are going to be regulated by the state – because that is the only way we can have a stable or enduring system of cooperation – we want to maximize the virtues of the state that has authority over us. It seems to me that it is natural for us to think about the ideal conception of the state – and of domestic society, for these are interlinked – because ultimately as citizens this is where we want to end up. To think that in certain cases the ideal state is one where we are called to end only the most dire forms of economic deprivation because, as occupants of a common political landscape, we are nevertheless still not related to one another in quite in the right way, seems to misconceive the very important project in political philosophy of figuring out what would be the best way to organize life in our own society. (And thinking about international justice should not be all that different. We work out what would be the ideal conception: what kind of a world do we want to live in? The ideal conception would then guide our thinking about what we need to do now so that an ideally just world can one day be a reality.) We do not work our way up to thinking about the ideal in stages; we think about the ideal from the very start. How we get there is a different and an important question, but in answering it, we take the ideal as the North Star of our advance toward greater justice. Rawls's theory of justice is the very expression of thinking about justice in this way. On the other hand, Nagel's insistence on the special relation as a factor of constraint on what we as citizens owe one another as well as to others frustrates such thinking because we are

prevented in some sense from imagining what would truly be ideal and instead are saddled with an inferior version that is masquerading itself as ideal justice.¹¹³

If Rawls is right and that his special conception would make society ideally just, there is still the problem of transition that remains: how do we transition from a society that in many respects is very unjust to one that is ideally just? This very important problem falls within the province of non-ideal theory, for Rawls.¹¹⁴ There is I think a normative aspect to the problem of transition, and so the question should be, what should we do in the here and now to achieve a just society? Our present condition is not one of moral stasis, where we recognize that our society is unjust but we are not in any way morally required to do anything about it, and those who do are engaged in supererogation. This does not seem right, for we are required to do something about the injustices that affect our fellow citizens. The reason for this is that we are to some extent complicit in the injustice. This is something that I hold and which serves as the basis of the moral requirement to fight against injustice. The extent of our complicity varies, of course, and under certain conditions vanishes

¹¹³ It is important to note here that Rawls and Nagel end up having similar views on international justice: in his *The Law of Peoples*, Rawls offers principles meant to regulate how decent societies conduct their foreign affairs. Conspicuously missing, from Rawls's regulative ideal for the international realm, are principles of distributive justice, and foreign aid is necessitated when there is a humanitarian crisis on hand. This similarity, however, is not explained by a convergence in their approach to working out conceptions of justice. In *The Law of Peoples*, Rawls continues to use the original position as a hypothetical contract device, though it appears in a different form as the agents of deliberation become decent peoples, not persons. Rawls insists that this purging of the liberal conception of the person from the original position is necessary to bring non-liberal, decent peoples on board and settle on a regulative ideal for international society that all decent societies can uphold, including those that reject the individual as the primary locus of moral concern and political rights. Still, the outcome that emerges is nevertheless an ideal, it is the best we can hope for in a world where not all societies are liberal democratic ones. Once again, there are no additional step as we work our way to the ideal as there is with Nagel.

¹¹⁴ See Rawls, *A Theory of Justice*.

entirely, but the default position is one of being morally required or bound by duty to support, through one's political choices and actions, a transition toward greater (social and economic) justice. The substance of the requirement will depend on the political circumstances. In a democracy we may be required to contribute toward transition through robust participation in the political process and only as last resort to civil disobedience. In an autocratic state, civil disobedience may be one of very few things that one can do. Yet, whether one would be morally bound to engage in such action would depend on several factors: the repercussions from being civilly disobedient, one's social and political standing within society – members of the political elite who control the state are more responsible for the harms done by the state and so correspondingly should bear more of the burden of correcting these injustices.

The notion of non-ideal theory brings to light both an important insight as well as an error made by Nagel. The sorts of political connections that citizens have with one another may have a place in a theory of justice, including international justice, but as an issue or topic within non-ideal theory. I think that political relations may matter in determining both the kind and the extent of responsibility that individual citizens may have for the injustices that exist within their state and society as well as the nature of their obligations in eliminating these injustices. So for example, if I am a citizen of a particular state and also a member of an ethnic minority that is persecuted by the majority population, my obligation to my fellow citizens who are economically least-advantaged may be tempered by the fact of my persecution. This seems especially to be the case when I am kept out of the political process at all levels of decision-making and am denied the kinds of equal protection and due process guarantees that are

routinely given to the majority, which implies both that many of my basic rights simply go unrecognized and that I am particularly vulnerable to being unjustly treated by the state if it decides to prosecute me for whatever reason. The obligation for removing vast economic inequalities should instead fall on those individual citizens who both contribute to a legal and political framework, that is responsible for these inequalities, in a way that is more substantial than my contribution – because, for example, they are not kept out of the political process in the way that I am – and can oppose these injustices in a manner that I cannot – because, for example, I may be punished for my opposition but they won't. What this means is that some citizens have a greater obligation than others in eliminating existing injustices and bringing both the state and society closer to being ideally just. And this difference in the extent of obligation largely depends on how the political and legal framework relates citizens to one another: I owe less because I play a much smaller role in the imposition of economic injustices on my least-advantaged fellow citizens. In this sense, Nagel I think is right to say that how we are connected to one another matters. But it matters not in a way that Nagel thinks it does. How we are politically related to one another as citizens does not change what we conceive to be as ideally just. An ideally just society is still one that is reasonably egalitarian. With this ideal in mind, there is still the problem of what should be done in the here and now to make the state and society realize ideal justice in the way that we imagine it to be. It is at this conceptual junction that our political relation to one another gains moral significance. Because of such political relatedness some will bear a greater obligation than others in effectuating the transition toward the ideally just.

Rawls's theory of justice is I think perfectly consistent with holding the ideally just fixed but varying our remedial obligations on the basis of our complicity in the genesis of injustice. Rawls himself does not mention complicity or responsibility as part of his non-ideal theory. In fact, his work on non-ideal theory with respect to domestic society is quite sparse. Instead, his major contribution is in the area of ideal theory. But the legacy he left for non-ideal theory is his conception of an ideally just society. In other words, Rawls gave us a blueprint of ideal justice and it is up to non-ideal theory to figure out how the ideal may be achieved. And it is precisely Rawls's commitment to the ideal as fixed that makes his view of justice more appealing and convincing than Nagel's. In the next section, I turn my attention to Blake's account of coercion and offer some criticisms.

III. Blake on Coercion

Blake defends what he calls the liberal principle of autonomy.¹¹⁵ The principle of autonomy stands for the following proposition: all persons are entitled to live an autonomous life and, therefore, have a right "to those circumstances and conditions under which this is possible."¹¹⁶ According to Blake, this principle is universal: it does not differentiate between citizens and foreigners, and "respects equally the

¹¹⁵ According to Blake, concern for individual autonomy has a long history within political philosophy, and has been applied in various approaches to political justification. Blake does not appear to give a defense of his principle of autonomy; rather he assumes that he is invoking a version of liberalism that is defensible and internally coherent. See Blake, "Distributive Justice," p. 266.

¹¹⁶ *Ibid.*, p.267.

autonomy of all individuals.”¹¹⁷ The principle of autonomy, Blake claims, embraces the commitment to individual autonomy as a fundamental political value and extends an impartial recognition of the moral importance of everyone’s agency.¹¹⁸

Blake’s conception of autonomy embraces “a pluralistic picture of human agency” and construes human beings as agents capable of developing “specific plans, attachments and interests.”¹¹⁹ On this picture of autonomy, individual choices should reflect the values and ideals that persons endorse. For this to happen, Blake insists, the mere exercise of practical reason is not sufficient; the principle of autonomy additionally requires that the options available to persons “provide adequate materials within which to construct a plan of life that can be understood” as one’s own and not imposed from without.¹²⁰ Moreover, concern for autonomy, on Blake’s view, does not demand that the set of options be maximized. In fact, Blake maintains, beyond a baseline of adequacy in choice, autonomy does not “depend on the sheer number of options available.”¹²¹ Once adequacy is achieved, even a limited set of options, Blake contends, does not stand in the way of living an autonomous life; beyond a certain point, what matters more, from the standpoint of autonomy, is how a person comes to make her choices. For Blake, to be an autonomous agent, it is essential to choose for oneself: to “live [one’s] own life from the inside, and to create value for [oneself] in

¹¹⁷ Ibid., p.266.

¹¹⁸ Ibid., p. 267.

¹¹⁹ Ibid., p. 268.

¹²⁰ Ibid.

¹²¹ Ibid., p. 269.

the world.”¹²² He maintains that when a person is forced to make a choice – even one that leads to a fulfilling life – her autonomy is, nevertheless, violated: her will is “vitiating by another’s deliberate agency,” and, more importantly, she is denied the ability to construct a life that reflects her values.¹²³

According to Blake, coercion is precisely the type of action that seeks to “replace the chosen option with the choice of another.”¹²⁴ Coercion, for Blake, “expresses a relationship of domination” and violates the autonomy of the person coerced by replacing her agency “with the agency of another.”¹²⁵ For this reason, he notes, coercive acts are “*prima facie* prohibited by the liberal principle of autonomy.”¹²⁶ Blake, however, does not think that coercion in all forms is always morally prohibited because it contravenes individual autonomy. Blake maintains that sometimes coercion is clearly morally justified: for instance, when a person is incarcerated for murder, we generally think that the murderer deserves to lose her freedom in this substantial way – and Blake does not disagree with this conviction.¹²⁷ But he notes that coercion gives rise to the problem of justification. Because coercion “is necessarily an affront to autonomy,” whenever it is exercised, coercion has to be appropriately justified, for “otherwise [an] impermissible invasion of autonomy might

¹²² Ibid., p. 270.

¹²³ Ibid.

¹²⁴ Ibid., p. 272.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

be legitimated.”¹²⁸ Blake thus accepts that some forms of coercion are morally acceptable. The basic issue for him is what would justify these seeming violations of autonomy?

Blake points to two areas of law where coercion has a ubiquitous presence: criminal law and private civil law. Criminal law is something that straightforwardly requires a justification because it is so clearly and directly an affront to individual autonomy. But, Blake notes, civil law is no less in need of such justification because it too involves coercion that is backed up by the full power and authority of the state. In the next section, I examine Blake’s discussion of the need to justify criminal and civil law, and pay special attention to the justification of civil law, since it is with respect to civil law that relative deprivations become relevant.

Criminal law, Blake notes, clearly involves coercion.¹²⁹ Individuals who committed a serious felony often end up going to prison for a very long time where their freedom is severely curtailed. For Blake, imprisonment, as a form of punishment inflicted by the state, is a *prima facie* violation of the liberal principle of autonomy: the person incarcerated cannot lead an autonomous life because she is locked up in a prison.¹³⁰ Blake argues that because state punishment is a violation of the principle of autonomy, it stands in need of a justification, and contends that the demand for such justification can be met through hypothetical consent.¹³¹ Hypothetical consent is a

¹²⁸ Ibid., p. 273.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid., p. 274.

method by which we can formulate possible ways of justifying state coercion, and so, according to Blake, when we ask whether imprisonment for murder is justified, we request “not what is consented to, at present, but what would be consented to, *ex ante*, under some appropriate method of modeling rational consent.”¹³² Blake, like Nagel, employs Scanlon’s rejection test as a way to characterize how deliberation about state coercion might proceed in a hypothetical choice situation.¹³³ In seeking to justify punishment, we look to forms of punishment for criminal acts from which we cannot reasonably withhold our consent.¹³⁴ Forms of punishment that are simply too abhorrent or disproportionate to the criminal act are rejected as unreasonable. Once the right amount of punishment is found, consent is guaranteed because there is no longer any reason not to consent, and the punishment is *ipso facto* deemed justified. In the case of criminal law, the justification for punishment is directed at the person who is being punished. Our collective response to the offender is that we are justified in punishing her because she herself, under the appropriate hypothetical circumstances, would have willed it this way.¹³⁵

¹³² Ibid.

¹³³ Ibid.

¹³⁴ For Blake the deliberation proceeds along the following lines. Most of us think that persons who commit rape, for instance, should be punished. But we also think that the death penalty for rape is morally unacceptable because it is too severe. We thus have a reason to withhold our consent to the death penalty for rape because the punishment is not proportional to the criminal act. By deliberating in this way, we arrive at a form of punishment that fits the crime and reach a point where we no longer can adduce reasons for withholding our consent to punishing persons for the crime of rape. See Blake, “Distributive Justice,” p. 275.

¹³⁵ Ibid.

Blake's approach to the justification of civil law also involves hypothetical consent. He asserts that civil law stands in need of justification because it too – no less than criminal law – generates coercion. Blake notes that property law, for instance, can trigger the use of force “against certain persons should they attempt to exercise control over certain goods” in a manner that is not legally sanctioned, and tax law involves the use of coercive threats if taxes are not paid when they are due.¹³⁶ According to Blake, what is common to these areas of the law is that a transfer of legal rights, from one party to another issued by the courts, is “ultimately enforced by coercive measures,” and if the defeated party refuses to conform to the judicial decision, she “risk[s] imprisonment for contempt.”¹³⁷ We are, in other words, given the choice between surrendering our goods or our freedom, and for this reason, Blake claims, private civil law “stands in as much need of justification as the practice of punishment.”¹³⁸

Now, the justification of civil law appears to be different from that of criminal law. As mentioned earlier, Blake thinks that justifying the punishment of person for violating a particular criminal law is about finding punishment that is commensurate with the seriousness of the criminal offense. Civil law, however, has a different focus in that it is “directed at the protection of private entitlements.”¹³⁹ Blake maintains that the system of laws that comprise civil law creates a pattern of entitlements: it says

¹³⁶ Ibid., p. 277.

¹³⁷ Ibid.

¹³⁸ Ibid., p. 278.

¹³⁹ Ibid., p. 281.

what counts as property, which economic activities generate legitimate holdings and which do not.¹⁴⁰ The significance of this is that in justifying the coercion involved in enforcing civil law, it is the pattern of holdings that has to be agreed to from the standpoint of hypothetical consent.

Blake insists that since our aim is to justify a legal system, such justification has to be directed at and require the consent of “those who live lives the dimensions of which are defined within that system.”¹⁴¹ In other words, it is the citizens of a particular state who have to consent to the legal system and the pattern of entitlements that it creates. But such consent will not be forthcoming, according to Blake, unless deliberation within the hypothetical choice situation reflects equal concern for the autonomy of all citizens.¹⁴² For there to be equal concern, considerations that seem to be arbitrary or not morally relevant have to be ruled out *ex ante*, since a choice that is based on them “could obviously be reasonably rejected by those [who are] disfavored.”¹⁴³ Thus, for example, reasons that favor one’s own economic standing have to be ruled out as illegitimate. Blake suggests that the way to model the hypothetical choice situation such that unanimous hypothetical consent is achieved is to use Rawls’s original position because the original position is precisely the kind of device that “abstracts away from morally arbitrary aspects of the individuals

¹⁴⁰ Ibid.

¹⁴¹ Ibid., p. 282.

¹⁴² Ibid.

¹⁴³ Ibid., p. 283.

considered.”¹⁴⁴ Now, Blake contends that in justifying our system of civil laws, our ultimate aim is to develop principles, grounding our legal system, that no rational citizen could reasonably reject. By employing Rawls’s device of the original position, we condition deliberation in such a way that the principles of justice that eventually emerge cannot be reasonably rejected and hence command unanimous consent.¹⁴⁵

Blake asserts that the fact that a system of civil laws has to be justified to citizens of a state brings up the issue of relative deprivations.¹⁴⁶ Because the legal system has to be justified to all those who are subject to it, those citizens who fare worse than others on account of their economic holdings may have a reason to reject this particular system for an alternative one under which they would be better off economically. To avoid this result, Blake insists, we have to offer reasons for accepting principles, underpinning the legal system, that the least advantaged could not reasonably reject. This would involve demonstrating to the least advantaged that there is no other alternative remaining that would make them better off – if there were this would give them a reason to reject the current arrangement. Blake argues that this process of deliberation will result in “material egalitarianism of the form expressed in the difference principle,” since under the difference principle there is no other more egalitarian arrangement that would make them better off.¹⁴⁷

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

The reason that relative deprivations are at issue is that differences in private holdings and entitlements have to be justified to the least advantaged who happen to be our compatriots. As mentioned above, it is the least advantaged who have a reason to reject the legal system – and the division of economic goods that result from it – if there an alternative arrangement under which they are better off. This means that the material egalitarianism that results from the deliberation process is in relation to the least advantaged of one’s own state, since they are the ones who have the power to veto the differences in economic holdings that cannot be reasonably justified to them. The poor who are not citizens of our state are not owed any justification because they not subject to our legal system; they have no right to veto the distribution of economic goods that is the product of our legal system, since our legal system plays no role in determining the bundle of economic goods that the global poor end up with. But the case with our own citizens who are the least advantaged is different: their economic standing is determined by our legal system. And so the egalitarianism that is called for by the principles that emerge from the original position is made necessary by the kinds of reasons that individual citizens can marshal against a regime that engages in *prima facie* violates of their autonomy.

Blake may be right that citizens of a foreign state are not owed a justification from us because they are not subject to our legal system, and vice versa. They are subject to the legal system of their own state, and are thus owed a justification for the material effects produced by that system. The moral lesson to be drawn, for Blake, is that justification for the economic effects of coercion should be directed at citizens of a particular state because that is where this type of coercion appears to prevail.

It may still be argued, however, that Blake has only covered coercion that is generated by the state. But what about coercion that exists internationally? Might not international coercion also create a need for justification that would require a more egalitarian distribution of economic goods? Blake acknowledges that some coercion does go on internationally.¹⁴⁸ But he claims that such coercion is quite different from what occurs within states. Coercion that occurs internationally, Blake insists, is not something that can be “justified through an appeal to distributive shares.”¹⁴⁹ He adduces several reasons for this. First, “international legal institutions do not engage in coercive practices against individual human agents” – in other words, persons are not directly coerced.¹⁵⁰ Furthermore, Blake adds, coercion that is generated by international institutions is not necessary for persons to lead autonomous lives. People can go about their lives and engage in projects that are meaningful to them without in any way depending on the presence of coercion that occurs globally. But Blake claims that state coercion functions differently. The state coerces persons directly: if a person violates a legal norm, she may well face the prospect of losing her freedom. Moreover, coercion that is generated by the state is absolutely essential for individual autonomy: without it “the very ability to autonomously pursue our projects and plans seems impossible.”¹⁵¹

¹⁴⁸ Ibid., p. 280.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

For Blake, the two features of international coercion that distinguish it from state coercion are meant to show that justifying international coercion cannot be done by appealing to distributive shares. However, it is not clear why this should be the case. Why does it matter that persons can be autonomous without the presence of coercion internationally? Blake is quite right that without state coercion, there would be too much social disorder and lawlessness for people to lead a life that is capable of supporting even a minimum level of autonomy. Yet, this merely points out the fact that we need some amount of coercion to engender stability that is sufficient for us to live a normal life, and this amount is supplied by the state. But what exactly does this say about international coercion other than the fact that, as autonomous agents, we can live without it? Blake does not appear to have an answer to this question. In fact, the claim that international coercion is not necessary for persons to be autonomous agents seems rather tangential to Blake's account of coercion. Recall that one of the basic claims he makes is that coercion is a *prima facie* violation of the liberal principle of autonomy and thus acts of coercion have to be justified to those agents who are being coerced. Now, if Blake does acknowledge that there is international coercion, he also has to maintain that such coercion is a *prima facie* violation of the principle of autonomy and hence has to be justified. But Blake says nothing positive about what such justification should look like; he simply suggests that whatever it is, it is not going to include any appeal to distributive shares. But why not? The fact that we do not, in principle, require international coercion to be autonomous agents does not appear to shed any light on why justifying international coercion, if it is to be justified

at all, should not include distributive principles. So what then is Blake's argument against principles of redistribution that apply to the international arena?

Blake does not appear to dispute that there is coercion internationally; he just thinks that it is unlike the coercion that is practiced by states. In other words, for Blake, international coercion is somehow different from domestic coercion. But so far this does not say anything interesting about international coercion: yes, it is different, but what are we to make of this difference? What makes Blake's view of international coercion more problematic is that he does not do a good job in identifying types of behavior on the international stage that could be described as being coercive; Blake simply says that sometimes states act in coercive ways toward one another and often such actions have to be condemned outright rather than be given a justification. But what exactly do states do to each other that can be regarded as being coercive? Well, they wage wars, threaten economic sanctions to force concessions, confiscate the other's property and other assets, etc. Yet, this is not the kind of coercion that we have in mind when we discuss international coercion: these examples illustrate coercive acts that, for the most part, we think should be condemned.¹⁵² But focusing on this aspect of international coercion would give us an incomplete and, for this reason, a very inaccurate picture of the world. There is plenty of coercion that occurs in the world, and we think that much of this should continue provided that such coercion is viewed as being acceptable or justified. And it seems to

¹⁵² Sometimes, of course, such acts are morally and legally justified. Wars waged in self-defense are clearly justified to that extent; sanctions are sometimes justified if there is a sufficient moral basis for them and the appropriate legal procedures are followed. Thus wars, sanctions also call for a justification, but in justifying them, we obviously do not appeal to distributive principles.

me that hypothetical consent can be a useful tool here as well as a way to examine whether in fact certain forms of international coercion can in principle be justified. The important thing to note here is that we have to look at the right forms of international coercion.

Blake I think fails at this task of identifying examples of international coercion that seem genuinely worthy of our scrutiny because – especially for relevant from the standpoint of justice. He offers an example of two fictional states in order to illustrate why he thinks distributive principles have no place internationally. The example goes as follows. Borduria and Syldavia are states that are situated next to each other, but there is no contact of any sort between them.¹⁵³ Borduria has terrific soil and develops “advanced techniques of farming.” In Syldavia, on the other hand, the conditions for growing crops are not as good and its expertise in the agricultural sciences is not as advanced as that of Borduria. Through the years Borduria becomes much more wealthy than Syldavia, which although poor can feed all of its people. Then one day a citizen of Syldavia goes across the border into Borduria and discovers just how well the people of Borduria are in relation to Syldavia. When the news of Borduria’s wealth travels to Syldavia, some Syldavians propose that the worst-off representative citizens, whether they are from Borduria or Syldavia, be made as well off as possible, expecting a transfer of wealth from Borduria to Syldavia. At this point, Blake has the following question in mind: may the Bordurians justifiably reject this proposal? His answer is that of course they may because Borduria and Syldavia do not share a

¹⁵³ Blake imagines Borduria and Syldavia to be nations, but for the sake of consistency, since I have been discussing states throughout, I treat them as states. This does not change the example in any significant way.

common legal system.¹⁵⁴ Blake complicates the example somewhat by assuming that Borduria and Syldavia trade with each other. The trade, however, does not bridge the economic gap between the two states, and so the same question arises, should the Bordurians worry about the worst-off in Syldavia. Blake's answer, once again, is that the Bordurians do not have to concern themselves with the relative deprivations in Syldavia. The reason for this is that trade does not engender a shared coercive system. Both Borduria and Syldavia may choose not to trade with the other at any time because neither is forced to participate in trade.¹⁵⁵

The problem with the thought-experiment is that it cannot be extrapolated to apply to the international sphere. It is conceivable that trade between two independent states can take place without coercion, as Blake describes it. However, it would be a serious mistake to think that this is how international trade in fact functions. In Blake's example, trade between Borduria and Syldavia is not unlike individuals exchanging goods on the open market. In such simple exchanges, person A makes an offer to sell her wine to B, and B can either accept, reject, or make a counter-offer to A. B is clearly not forced to respond in any particular way and is free to exercise any of the options that are open to her. Blake's example in its simplicity appears to mimic such basic interactions. The drawback to this approach is that international trade cannot be reduced to such simple transactions. Blake's example on its own thus does not prove that there is no coercion involved in international trade because the analogy to international trade fails. (Blake might have fared better by directly describing

¹⁵⁴ Blake, "Distributive Justice," p. 290.

¹⁵⁵ *Ibid.*, p. 292.

international trade and then arguing that it is not coercive or coercive in the way that states are, but he does not do this.)

Thus the example does not work to show that there is no coercion in international trade. Blake, nevertheless, appears to distinguish coercion that is exercised by international institutions from coercion that is exercised by states. If he is right that these differences imply that international coercion cannot be justified in terms of distributive principles, then it does not matter in the end whether he misconceives the coercive nature of international trade; even if we presume that international trade engenders coercion and therefore should be subject to a justification, such justification would still not involve redistribution because the coercion involved is practiced by international agents, not states.

The problem with Blake's position is that the distinction between international and domestic coercion does not amount to an argument against an appeal to distributive principles in justifying international coercion. The fact that international coercion is indirect and something that is not necessary for our individual autonomy does not yet tell us why we should eschew distributive principles. If there is an argument, a big piece still seems to be missing in Blake's analysis of international coercion.

Perhaps what Blake is trying to say is that international coercion does not affect the distribution of economic holdings that individuals have - in other words, it does not shape the pattern of individual entitlements. It does not do this because it directly affects states, not persons, and so whatever effect international coercion has, this is kept at the level of states. Moreover, as Blake insists, we seem capable of

carrying on as autonomous agents without the help of international coercion. That we can carry on in this way suggests that we already have the entitlements that make it possible for us to function as autonomous agents, and these entitlements are delivered to us by our state's legal system – primarily by its system of civil laws, as Blake maintains.

Thus one can argue that Blake's distinction between domestic and international coercion has two basic implications: (1) the effects of international coercion are directed only at states (and so individual citizens are not in any way affected), and (2) the state via its legal system is capable of providing entitlements to its citizens that are sufficient to render them autonomous. The question before us is: do these propositions, either alone or together, amount to an argument against an appeal to distributive principles in justifying international coercion?

Now if Blake is right that what happens internationally affects only states and so does not trickle down to the level of individual citizens, then this would offer us a powerful reason for thinking that an appeal to distributive principles is misplaced: if international coercion does not affect individuals in any way, then *a fortiori* it does not affect the division of their entitlements. The problem with this assertion, however, is that it is not empirically sound, as I will argue. To suppose that international coercion is something that takes place only among states is to misconceive the complexity of the international sphere: even if at times coercion is directed at states, they are by no means the only agents that are affected; when states are forced to do something, this often involves a corresponding change to their laws and institutions, and this, of

course, means that individual citizens will be affected as well. International coercion cannot be contained in the way that Blake thinks that it can.¹⁵⁶

The significance of the proposition about the sufficiency of state generated entitlements is even less clear. Blake is right that we can be autonomous without the presence of coercion internationally. But how is this morally relevant? Perhaps the idea is that it is the state that supplies us with the bulk of the economic goods that we possess. In other words, our socioeconomic standing is primarily the result of the pattern of entitlements that is generated through the legal enforcement of our domestic system of civil laws.¹⁵⁷ Whether we are rich or poor is thus the product of the coercive conduct of our state. What is implied here is that international coercion does not appear to contribute in a substantial way to our overall economic standing. If this is in fact the case, as is being suggested by this line of thinking, then it would not make sense to justify international coercive by appealing to distributive shares. Fiddling around about what would be an appropriate share would seem misguided because international coercion just does not generate entitlements that are allocated to individual citizens. (An analogy to justifying criminal law might be apt here. In the case of criminal law, what justifies putting a person into prison for a lengthy period is that she herself would have consented to such punishment when deliberating under the right sorts of conditions. It would be silly to bring in distributive shares because the objective is to find punishment that is commensurate to the crime; if the punishment is

¹⁵⁶ I make this point more forcefully below by using several case studies.

¹⁵⁷ Another way to state this is to say that the bundle of economic goods we end up with is made up either entirely or for the most part by that share of economic entitlements that is determined by the system of civil laws enforced by our state.

unjust because it is too harsh, for example, making the offender economically better off will not make the punishment just. Similarly, international coercion does not affect individual entitlements and thus appealing to distributive shares would commit one to a categorical mistake in the way that it does in the case of justifying criminal laws.)

The line of reasoning suggested above seems to assume that international coercion has little or no effect on or bears no significant relation to our economic standing. But this assumption conceals a certain ambiguity. There are two ways in which international coercion might not affect our individual economic standing. One explanation might be that such coercion is not involved in generating any kind of economic output. This is not to suggest that transnational activities are not economically productive – this would be false. Rather, the suggestion is simply that coercion does not figure into these transnational economic activities. A different explanation might be that international coercion does not create a system of entitlements that distributes economic goods to persons. Here there is no need to deny that international coercion plays a role in generating economic goods; what is being claimed instead is that such coercion does not determine how such economic goods are distributed – that may be the function of a domestic system of civil laws.

If the first explanation is right, then it follows trivially that it makes no sense to appeal to distributive shares in justifying international coercion: it is futile to appeal to distributive shares because international coercion is not in any way connected to the production of economic goods that are then subject to a pattern of division – in other words, there is nothing to divide and thus no particular way to divide in a manner that

seems more rather than less fair. On the other hand, if the second explanation is right, then the reason for eschewing distributive shares is not because there is nothing to distribute. Rather, the mechanism for division is something other than the coercive international system – for instance, it may be a state enforced system that determines the division. And so if we think the division of these economic goods should be justified, the target of the justification has to be the state system, not the international system, which has nothing to do with how economic goods are distributed in the first place.

The assumptions that underlie the first explanation cannot be supported empirically. The international trade regime is clearly responsible for generating an economic output that is significant. But this system is also coercive, and so it would be a mistake to deny that coercion at the international level is entirely divorced from the economic activities that are conducted by international regimes.¹⁵⁸

The assumptions involved in the second explanation are also incorrect. The basic thrust of these assumptions is that coercion that exists internationally does not give rise to a pattern of entitlements that affects individual citizens. However, as I will argue below, this is just not the case. Coercive international regimes do indeed set up patterns of entitlement. In certain cases, depending on which international regime is at issue, individuals are directly affected by the way in which economic entitlements are divided. But in most cases, this effect is more indirect. To see how persons are affected by coercive international regimes, it is essential to understand how international coercion works in conjunction with domestic coercion. I suggest it is not

¹⁵⁸ Now it may be the case that the economic output that implicates international coercion is smaller than the output that involves coercion exercised by the state.

right to think that international coercion gives rise to one set of entitlements and state-based coercion creates another, entirely separate, set of entitlements. Instead, what I think happens in certain cases is that international and domestic coercion work in concert to set up a scheme of entitlements that affects both states and individual citizens. And if we think that this pattern has to be justified, then international and domestic coercion have to be examined together from the standpoint of hypothetical consent.

In the next section, I briefly illustrate how international coercion works in tandem with domestic coercion to create a pattern of entitlements, one that affects individual citizens in a rather profound way.

There are numerous international regimes and cooperative ventures, and they exhibit great differences in their organization, administration, and the objectives they pursue. Discussing all these regimes and systematizing them so that a single comprehensive picture emerges is an impossible task. Instead, I focus on a specific regime, which would allow me to make the argument that international coercion does give rise to considerations of distributive justice. The regime I have in mind is the system of international intellectual property and in particular the Trade-Related Aspects of Intellectual Property Rights (or TRIPS) Agreement that is part of the World Trade Organization (or WTO).

The purpose behind the TRIPS agreement, as stated by the WTO¹⁵⁹, is to provide a set of minimum standards that globalize a system of intellectual property

¹⁵⁹ See the World Trade Organization, “The TRIPS Agreement,” available at www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

rights so that owners of intellectual property are given protections in all WTO member states – which amounts to most of the world, since as of now the WTO consists of 153 members out of 193 internationally recognized countries.¹⁶⁰ TRIPS came into enforcement in 1995, at the end of WTO’s Uruguay Round of Ministerial negotiations. The history of the Uruguay Round and how the TRIPS agreement came into existence is quite complicated and I cannot go into its details here.¹⁶¹ What I want to do here is to briefly discuss just how coercive the TRIPS agreement is and mention one of the outcomes of its enforcement, which I suggest affects individual entitlements of ordinary citizens from the member states.

One important result of TRIPS is that all pharmaceutical products receive protection under its patent system. What is significant about this is that several major developing countries, including India, Brazil, South Africa, as well as others, historically did not extend patent protection to medicines.¹⁶² Once TRIPS came into force, to remain members in good standing, these countries had to change their national laws on pharmaceutical products in order to bring them in compliance with the minimum standards established by the agreement. TRIPS allowed developing countries a certain period of time – called a transitional period – for bringing their

¹⁶⁰ There are currently 153 members of the WTO. See the WTO, “Members and Observers,” at www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. The United Nations recognizes 192 states and excludes Vatican City. But it is standard by now that Vatican is a sovereign state. See United Nations, “Member States,” at www.un.org/en/members/about.shtml.

¹⁶¹ For an extensive discussion of how TRIPS came to be, see Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge: Cambridge University Press, 2003.

¹⁶² For a good discussion of pre-TRIPS national laws, see Holgen P. Hestermeyer, *Human Rights in the WTO: the Case for TRIPS and Access to Medication*, New York: Oxford University Press, 2007.

laws into compliance, and only at the end of this transitional period would they be legally bound to provide protection for all pharmaceutical products that have been granted a patent locally.¹⁶³

One effect of bringing medicines into the fold of patent protection is an increase in the price of certain essential drugs.¹⁶⁴ The reason for this is that the owner of the patent for the drug has an exclusive right, for up to twenty years, to manufacture and distribute its product, which allows it to charge a monopoly price.¹⁶⁵ As the price of essential drugs goes up in developing countries, they become less accessible to the general public, but, it is the poor in these countries who are the hardest hit as essential drugs become virtually out of reach for them. Prior to TRIPS affordability was less of an issue in many developing countries. India and Brazil, in particular, had fledgling pharmaceutical industries that had gotten very good in reverse engineering and were able to produce generic versions of patented drugs at affordable prices.¹⁶⁶ These generic versions of patented drugs were also exported to other poor and developing countries that did not have the manufacturing capacity to produce generic drugs locally.

¹⁶³ See Article 65 of the TRIPS Agreement.

¹⁶⁴ See Hestermeyer, *Human Rights in the WTO*.

¹⁶⁵ The most prevalent argument for giving the patent owner the ability to charge monopoly prices is that this both rewards innovation and also allows the innovator to recoup the expenditure spent on the innovation. Pharmaceutical companies will often say that monopoly prices are essential for them to recover the investments they have made in the research and development of their drugs. Without these exclusive rights they simply would not have the incentive to innovate and bring new products to the market.

¹⁶⁶ Janice Mueller, "The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the Rise of Indian Pharmaceutical Innovation," 68 *University Of Pittsburgh L. Rev.* 491 (2007), p. 30.

TRIPS put an end to the freewheeling days of the past when companies in India and Brazil could freely mass produce patented drugs and sell them both domestically and abroad without incurring legal repercussions. As of January 1, 2006, when India's patent laws with respect to medicines became effective, India became legally obligated to review patent applications for pharmaceutical products and grant a patent if the product met the requirements for patentability.¹⁶⁷ If India were to fail to bring its patent laws up to par with the standards contained in TRIPS, it would likely have faced legal action, within the WTO, from any member state that thought that India was not living up to its legal obligations under the Agreement.¹⁶⁸ The WTO has set up an elaborate dispute settlement mechanism to allow member states to overcome their differences of opinion with regard to matters that are trade related. This dispute settlement mechanism uses a procedure for resolving disputes that proceeds in stages. When a complaint is lodged by one member against another, the disputing parties are initially required to try to reach an agreement or come to some sort of a settlement on their own.¹⁶⁹ If after a certain period of time they fail to reach an agreement, the dispute then enters a quasi-judicial phase: a WTO Panel is formed, which hears arguments from both sides and delivers a written opinion whether there was a violation of any of the WTO rules.¹⁷⁰ Once the Panel has issued its report, the parties

¹⁶⁷ Ibid.

¹⁶⁸ Indeed, this is also likely to happen if India's laws make it hard for medicines to be patented domestically or are too liberal in permitting exceptions to the exclusive rights claimed by the owner of the patent. See my, "TRIPS and Justice," for more detail.

¹⁶⁹ See Article 4 of the Dispute Settlement Understanding.

¹⁷⁰ See Articles 6,7, 12,15,16 of the Dispute Settlement Understanding.

to the dispute may accept the Panel's findings, at which point the matter is considered settled. However, if one of the members disagrees with the Panel's decision, it may request that the Panel's rulings be reviewed by an Appellate Body to examine whether legal errors were made by the Panel.¹⁷¹ When a request is made for a judicial review, the Appellate Body issues its own report, which may either fully affirm or reverse, or partially affirm and reverse the Panel's decision. The Appellate Body's decision is final and binding on the disputing parties. If there is a finding that a violation was made, the non-complying party has to make all the necessary changes to its national laws to bring them into compliance. If the member state found to be in violation fails to remove it after a certain period, the WTO may permit the member state that has been wronged to take retaliatory action against the violator – and this can last as long as the state remains non-compliant.¹⁷²

To come back to our example of India, if India's patent regime were to fail to recognize the patentability of medicines, there would be a legal challenge to this coming probably from the U.S. or the European Community, since the majority of pharmaceutical products under a patent originate in these places. If India were to defy the final decision of the Appellate Body – assuming the decision finds India in violation of TRIPS – India would then face sanctions as a consequence of its non-compliance. In actuality, India has brought its patent regime pretty much in line with

¹⁷¹ See Articles 17, 19 of the Dispute Settlement Understanding.

¹⁷² See Article 22 of the Dispute Settlement Understanding.

the standards in TRIPS.¹⁷³ What this means is that ordinary Indians are subject to Indian patent laws, which if they were to violate them would make them liable to criminal prosecution. But more importantly, in my mind, these laws will raise the price of patented medicines, including those deemed to be essential, to point that will make it very difficult for the poor in India, which after all still make up the majority of the population, to afford these medicines. Even if we assume that the state will try to subsidize the poor through a national health care system, India still does not have the resources to absorb these price differences in their entirety, and so there will be certain medicines that will either not be subsidized or be subsidized insufficiently thereby inevitably increasing the economic burden on the poor. And I think the same can be said for the other developing member states in the WTO.

Notice that this decrease in accessibility to essential drugs is a product of domestic coercion: it is the national laws of a state that mandate the patentability of pharmaceutical products. Furthermore, this added burden on the poor illustrates the fact that the coercive enforcement of the patent regime of the sort that we have been considering will affect the bundle of economic goods that a citizen gets to have. A poor farmer in India or a miner in Brazil may have to spend a lot more of her already meager income to obtain a patented drug, or face an early death or a life that is riddled with chronic pain and discomfort.

Now it is indeed the case that this is a product of domestic law – of India’s patent regime, for example. And this might suggest that Blake’s claim that international coercion does not affect the individual has not been shown to be wrong.

¹⁷³ Janice Mueller, “Tiger Awakens,” p. 32-65.

But to suggest that my example of TRIPS does not challenge the view that international coercion is something that only affects states is to betray a certain kind of shortsightedness. India, and other developing members states, were essentially made to comply with TRIPS; they had no choice but to do this. Without making their national laws conform, these states would face retaliatory action in the form of trade sanctions or be booted out of the WTO completely. Leaving the WTO is in principle possible, but it is not a viable option for developing states that are interested in nurturing the export-led sectors of their economies, a policy goal that is essential for long-term economic growth. Outside the WTO, exports coming from the developing world can be effectively kept out from the markets of industrialized and developed countries by the imposition of very high tariffs at the border. What I think this shows is that to understand how it is that certain essential medicines are becoming less accessible to the poor in India and Brazil we cannot simply look at the national laws of India or Brazil because these laws themselves are a product of coercion, one that takes place at the level of the WTO. We have to recognize that less access is the result of national laws in conjunction with states being forced to comply with the standards announced in TRIPS. In other words, less access to essential medicines is a result of both international and domestic coercion. What this implies, which I think should be clear by now, is that both types of coercion have to be justified to those individuals who are subject to them, and such justification may have to involve principles of distributive justice, since the economic prospects of individual citizens seem to be affected in quite a profound way.

The TRIPS example I think illustrates that the assertions made by Blake about the nature of international coercion are not entirely right. *Contra* Blake, international coercion does seem to generate outcomes that reach down to the level of individual citizens and alter their economic wellbeing in a pretty significant way. And this fact about international coercion also compels the need to justify it for the sake of having a just trade regime. I have not said what such a justification would look like. My point here is simply that there has to be a justification and it has to involve distributive justice as a consequence of the way persons are affected by the global trade regime.¹⁷⁴

¹⁷⁴ In another paper, I offer a much more detailed discussion of the TRIPS Agreement, suggest a way to deal with the problem of access to essential medicines, and argue that we are obligated to make the international trade regime more just and one to do this is to ensure that the global poor have access to the medicines they need without being unreasonably burdened.

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CHAPTER 4

International Intellectual Property, Coercion, and the Need for a Conception of Global Justice

Introduction

The World Trade Organization (WTO), though still relatively young, has created an impressive international trade regime that is rule-based and which implements a multilateral mechanism for legally enforcing trade obligations. Member states that refuse to satisfy their membership obligations are usually sanctioned and incur heavy penalties if they persist in remaining noncompliant. It is generally acknowledged that to enforce its rules the WTO engages in coercion. Domestic legal coercion has received a great deal of attention in the philosophical literature in recent years. Influenced by John Rawls's work on conceptions of justice for domestic society, some writers have proposed a line of argument that maintains that the very purpose of a liberal conception of justice is to justify domestic legal coercion to those who are subject to it.¹ But when it comes to the international sphere, there is some reluctance on the part of these same writers to view coercion that exists internationally in the same light. Somehow international coercion is different and thus does not merit the kind of justification that is called for its domestic counterpart.

¹ The most prominent I take to be the following. See Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs*, 33, no. 2 (2005): pp. 113-147; Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs*, 30, no. 3 (2002), pp. 257-296; Richard W. Miller, "Cosmopolitan Respect and Patriotic Concern," *Philosophy and Public Affairs*, Summer 1998, 27(3), pp. 202-224; David Miller, "Against Global Egalitarianism," *Journal of Ethics*, (2005) 9: pp. 55-79.

I think that this view is mistaken and maintain that there is much coercion in the international realm that is in need of being justified. I argue for this position by examining how the WTO administers the international intellectual property regime through the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). I suggest that if we look carefully enough at the intellectual property regime, we will find that compliance on the part of individual member states with the standards of protection announced in the Agreement has important implications for the kind of access to essential medicines that individual citizens of these states appear to have. In light of these implications, I maintain that the appropriate response to the WTO administered intellectual property regime is to apply a conception of justice, albeit an attenuated one, that attempts to justify these effects on individual wellbeing. I suggest that such a justification may involve some form of economic redistribution. Furthermore, I propose that the content of the justification does not vary with respect to how individual participants within the WTO – i.e. actual citizens from member countries – are politically situated with respect to one another. Thus, I disagree with Thomas Nagel, who thinks that what we owe one another as participants of a coercive enterprise, depends on how we are politically connected.² *Contra* Nagel, I contend that the mere fact of coercion is sufficient to trigger the requirement for a justification that appeals to a conception of justice, irrespective of how we stand to one another, politically speaking. Furthermore, as participants in a system of cooperation that also happens to be structurally unjust, we have an obligation to transform and rid the system of these injustices. I defend the attribution of such an obligation by invoking

² See Nagel, “The Problem of Global Justice.” For a more extensive discussion of his view, see *infra*, pp. 42-52.

the notion of collective responsibility, though the magnitude or extent of such responsibility is sensitive to how individual members of a coercive enterprise are treated by their polity. In certain cases, individuals may be entirely exempt from collective responsibility.

The paper is divided into three major parts. In the first, I give some historical background to the international intellectual property system and explain some of the basic provisions of the TRIPS Agreement. Next, I discuss what individual member countries have to do to bring their national laws into compliance with TRIPS, and argue how this leads to increasingly higher prices of patented essential medicines. In the second part, I put forward a partial justification of the international intellectual system – it is partial because I only address the effect that the TRIPS Agreement has on access to essential medicines. Next, I discuss possible objections that may be adduced against my view and respond to them. I then offer a detailed discussion of collective responsibility and rely on David Miller’s substantial contributions to this topic as my starting point. I propose how collective responsibility can encumber us with the obligation to remedy injustice, and then relate my discussion of collective responsibility to the subject of access to essential medicines. I also examine several ways that persons may be exempt from collective responsibility. I apply these exemptions to the problem of access and draw certain conclusions about what may be owed by WTO participants – those who are not exempt – to ease some of the burden, falling on the most vulnerable citizens of member states, that stems from implementing the TRIPS Agreement. In the third part, I briefly discuss the WTO’s requirement that members states move to liberalize their domestic trade policies, and

contend that the requirement may rest on rather dubious empirical claims. I propose that the WTO should be much more cautious when it comes to pushing states toward greater liberalization, and embrace a more balanced approach to trade, one that is in line with new insights, from economic growth theory, that emphasize the importance of good institutions for sustainable economic development.

A. The Intellectual Property Regime

The Agreement on Trade Related Aspects of Intellectual Property Rights – or TRIPS, as it is more commonly known – is one of three major trade agreements that are administered by the World Trade Organization (WTO).³ The WTO has been the centerpiece of the current trade system when it came into existence in 1995, but the international trade regime dates back to an earlier period. Since 1948, the General Agreement on Trade and Tariffs (or GATT) provided many of the rules for the international trade regime, and quickly became the unofficial, or *de facto*, forum for members states to resolve their trade disputes.⁴

GATT established a multilateral trade system that gradually liberalized trade through the ministerial rounds of trade negotiations. Originally, GATT was meant to

³ The other two major trade agreements are the General Agreement on Trade and Tariffs, or GATT 1994, and the General Agreement on Trade and Services, or GATS. The Dispute Settlement Understanding is also part of the WTO, but the DSU does not deal with substantive trade issues; instead it offers a comprehensive procedure for settling trade disputes between member states. All members of the WTO are required to ratify the three basic trade-related agreements and the DSU. The WTO also contains plurilateral trade agreements, but their ratification is optional.

⁴ At the time, states could only bring up their disputes with respect to trade in goods, since the only agreement available until 1995 was GATT, which deals only with trade in goods.

be administered by the International Trade Organization (ITO), which was intended to be the third and final “Bretton Woods” institution, overseeing the regulation of international economic cooperation.⁵ Yet, the ITO’s mandate was very ambitious, extending well beyond issues related to international trade and commerce. The U.S. Congress, wary of the ITO’s mandate, for it threatened to assume responsibility over areas that were traditionally within the Congress’s purview, defeated any attempt to create the organization by refusing to pass the necessary domestic legislation.⁶ GATT, however, was signed in 1947 by twenty-three countries, and was to be provisionally applied until the ITO came into existence. But since the ITO never did, GATT assumed the ITO’s role of regulating international trade, which lasted until the emergence of the WTO. For the next forty-seven years, GATT, as the *de facto* organization, presided over international trade liberalization. Over the years, GATT underwent several transformations during the ministerial rounds of negotiations – of which the Uruguay Round was the most important. But it was becoming increasingly clear by the 1980’s that GATT, both procedurally and substantively, was ineffective in dealing with many of the challenges posed by international trade.⁷ It was by then a foregone conclusion that a significant transformation of the entire trade system had to take place.⁸ The Uruguay Round was launched as a way to achieve this radical

⁵ Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, London: Sweet & Maxwell, 2003.

⁶ Ibid, p. 38.

⁷ Ibid.

⁸ Ibid.

transformation in order to make the trade system more capable of solving the complexities of transnational economic cooperation.

The Uruguay Round was considered the most ambitious ministerial round to date. The Round began in 1986 and ended only in 1994, and managed to bring about some of the most important changes in the history of the modern trade system.⁹ At the end of the Uruguay Round, the WTO was unrolled as the official forum for members states to deal with their trade disputes – and the promise of a permanent international trade organization was finally fulfilled.¹⁰ In addition, the Dispute Settlement Understanding (DSU) was incorporated into the WTO, addressing the need to have binding and enforceable decisions resolving trade disagreements. Finally, three major agreements were made part of the WTO: GATT, with some important revisions to the original agreement; the General Agreement on Trade in Services (GATS), thus extending the scope of WTO jurisdiction over trade in services; and TRIPS.¹¹

For the purposes of this paper, TRIPS is the more relevant agreement because, as I will argue, its implementation affects access to essential medicines globally. But before I expand on this particular topic, let me briefly describe how the TRIPS Agreement came about and explain some of its basic provisions so as to place the Agreement in a proper light.

⁹ John H. Jackson, *The Jurisprudence of GATT and WTO*, Cambridge: Cambridge University Press, 2000.

¹⁰ Ibid.

¹¹ Ibid.

1. *Negotiating the TRIPS Agreement*

When the TRIPS Agreement finally emerged out of the Uruguay Round and came into force in 1995, it quickly became one of the most controversial aspects of the international trade system.¹² But the furor over TRIPS came much earlier, when the participants of the Uruguay Round began to contemplate for the first time the inclusion of an intellectual property regime within the WTO.¹³ The TRIPS Agreement, as it currently stands, universalizes the protection of intellectual property rights. It does this by setting forth minimum standards of protection for intellectual property that all members of the WTO have to eventually apply.¹⁴ Members are free to offer more stringent standards of protection domestically – by extending protection to areas of intellectual property not recognized by TRIPS – but they are required to adopt and enforce the minimum standards contained in the Agreement.¹⁵ But it was

¹² Carlos Maria Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, Oxford: Oxford University Press, 2002.

¹³ Carlos Maria Correa, *Intellectual Property Rights, WTO, and Developing Countries*, London: Zed Books, 1999.

¹⁴ The TRIPS Agreement does not require that states have to implement these standards at the same time. Developed states had a year from the time the Agreement came into force to make the necessary changes to bring their national laws in compliance with these minimum standards. Developing states could claim an additional ten years to ensure compliance. Least developed states have until 2016 to comply with TRIPS. I explain these transitional periods later in the paper.

¹⁵ The protection of intellectual property in TRIPS is not recognized, at least officially, as an end itself but as a means to further liberalize international trade. As the Preamble to the agreement states, the new rules and principles (contained in TRIPS) are meant to “reduce distortions and impediments to international trade” by promoting both “effective and adequate protection of intellectual property rights” and by ensuring that “measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.” The Preamble thus turns intellectual property into an issue of international trade. Several developing countries, at the onset of the Uruguay Round, argued that intellectual property should be kept out of the ambit of the WTO precisely because it had little or no connection to

not always clear, especially at the beginning of the Uruguay Round, whether there was even going to be an agreement on intellectual property, and if there were to be such an agreement, what form it would take.¹⁶

The Uruguay Round was initially scheduled to last only four years, beginning in 1986; instead, it took an additional three years to bring to a close.¹⁷ To some extent, this was to be expected, given the Round's ambitious plan to tackle multiple problems that were lingering for years and with respect to which there was great divergence of opinion. Intellectual property was one of these contentious issues over which people were divided from the very beginning of the Round. When the negotiations commenced, prospects for an intellectual property agreement seemed dismal.¹⁸ Between 1986 and 1989, there was little progress on even the basics of what it would mean for the WTO to involve itself in a global intellectual property regime.¹⁹ The "Group of Ten" developing countries, led by Brazil and India, resisted the inclusion of

trade. Indeed, for these developing countries any agreement on intellectual property was simply a way for developed North to extract income from the developing South – a form of regressive redistribution. To justify the inclusion of an agreement on intellectual property, developing countries, in particular the US and the EC, had to make a case that international trade does indeed involve intellectual property. And this point is made in explicit terms in the Preamble.

¹⁶ Correa, *Intellectual Property Rights, WTO, and Developing Countries*, pp 101-36; Gervais, *The TRIPS Agreement*, pp. 45-60.

¹⁷ Gail E. Evans, "Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights," *World Competition : Law and Economics Review* 18(2) Dec. 1994 : pp. 137-180.

¹⁸ *Ibid.*, pp. 166-167.

¹⁹ *Ibid.*

intellectual property in any trade agreement.²⁰ These developing countries were skeptical of the notion that the protection of intellectual property was essential for or would lead to greater liberalization and openness in international trade. They argued that, on the contrary, there was no direct connection between protection of intellectual property and international trade.²¹ India, for instance, claimed that the enforcement of intellectual property, by granting monopoly rights to the owners of the intellectual property, would create distortions and impediments to actual trade.²²

Developing countries also feared that intellectual property protection would hinder their economic development. For them, minimum standards had the potential to diminish their sovereign power to pursue policies of economic development by limiting access to technology that they needed to modernize.²³ They argued that to achieve their goals of economic development and technological modernization, they had to retain the ability to set their own standards, which where necessary would have to provide a much lower level of protection than that offered by the industrialized North.²⁴ India, for instance, was worried that patent owners might misuse their right by not working their patent in a host country, and so insisted that there had to be a right to compulsory licensing to ensure that important technological innovations were

²⁰ Ibid.

²¹ Correa, *Trade Related Aspects of Intellectual Property Rights*, pp. 120-145.

²² Byasdeb Dasgupta, *WTO & TRIPS: Indian Perspective*, Kolkata, West Bengal: University of Kalyani, 2003, pp. 60-88.

²³ Correa, *Intellectual Property Rights, WTO, and Developing Countries*, pp. 22-56.

²⁴ Ibid.

made available domestically.²⁵ India also took the position that certain key exceptions be made under patent and trade-mark law: it wanted the provisions relating to patents to have the flexibility to exclude pharmaceuticals and chemicals from protection, shorten the term of protection, and grant licenses to companies to exploit patents for the domestic market.²⁶

The industrialized states, on the other hand, countered that trade in counterfeit and patent infringing products and outright commercial piracy of protected materials were interfering with international commerce in legitimate goods and eroding company profits.²⁷ The developed countries presented this as an issue about fairness: those in developing countries who engaged in such conduct were free-riding on the enormous expenditures made by companies, as well as governments, in creating innovations that were enjoyed throughout the world.²⁸ Thus, from the standpoint of the industrialized states, it seemed only fair that developing countries, with access to products from the North, should pay the “right” price and reward the innovators. In addition, the developed world invoked the usual mantra that protection of intellectual property is good for developing countries as well: this way the needed technological products would continue to enter the South and eventually stimulate local innovation. But as some have argued, the leading industrialized countries were really interested in

²⁵ Dasgupta, *WTO & TRIPS: Indian Perspective*, pp. 70-88.

²⁶ Evans, “Intellectual Property as a Trade Issue,” p. 167.

²⁷ Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge, Cambridge University Press, 2003, pp. 78-120.

²⁸ *Ibid.*

protecting the commercial interests of some of their largest and wealthiest companies – talk of local innovation in the South was just a pretext.²⁹

Two years into the negotiations, when the Uruguay Round opened in Montreal in 1988, the debate between the developing and the industrialized countries continued unabated and threatened to derail any hope of achieving an agreement on intellectual property, until Norway, Sweden, Denmark, and Finland intervened to point out that most states participating in the Round remained committed to negotiating an agreement on intellectual property.³⁰ By April 1989, the negotiations turned a corner. Several developing states, including India, eased their resistance to negotiating an agreement within the framework of the Uruguay Round and accepted that GATT could have jurisdiction over intellectual property.³¹ This prompted the negotiations to enter a more intensive phase, and discussions began to be held on the standards of intellectual property. A framework agreement was later introduced

²⁹ US policy at the Round was heavily influenced by IPC, an organization with a lobbying arm that represented the interests of major US corporations. The US – and the EC as well – was really looking after the bottom line of some of its largest corporation in pushing for a much more expansive intellectual property regime. See Sell, *Private Power, Public Law*, pp. 101-120.

³⁰ Evans, “Intellectual Property as a Trade Issue,” pp. 169-172.

³¹ Recall that at this point, the WTO was still not in existence, and it was the GATT that functioned as the de facto organization for international trade. So the debate over jurisdiction was really about whether an organization that was dealing with international trade should also regulate intellectual property. Countries like Brazil and India felt that there already was an organization designed to handle intellectual property, and that was the World Intellectual Property Organization (WIPO). In the end under pressure from the US and the EC, India and Brazil gave up on their insistence that WIPO be in charge of intellectual property protection. See Sell, *Private Power, Public Law*, pp. 45-80.

spelling out the minimum standards for the availability, scope, and use of intellectual property rights and the methods for their enforcement.³²

Having turned the corner, the GATT negotiating team was able for the first time to debate the details of the proposed new rules.³³ Forty-nine proposals were submitted for review, including one by India, which was still worried about the abuse that might accompany the granting of monopoly rights.³⁴ The EC tabled a proposal that accelerated dramatically the work toward the TRIPS Agreement. Entitled “Draft Agreement on Trade-Related Aspect of Intellectual Property Rights,” the proposal covered all forms of intellectual property rights, their acquisition and enforcement, and the application of basic GATT principles, such as the most-favored nation status and national treatment, in treaty language.³⁵ The U.S. offered its own draft proposal under the same title and similar in language to its European counterpart.³⁶ The common structure put forward by both proposals served as the basis for the emerging agreement. A group of twelve developing states, later joined by Pakistan and Zimbabwe, offered their own draft agreement.³⁷

By early 1990, the TRIPS negotiating group had examined all of the submitted proposals, registered many of the major concerns of the various participants, and

³² Evans, , “Intellectual Property as a Trade Issue,” pp. 169-172.

³³ Ibid., p. 171.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Gervais, *The TRIPS Agreement*, 18-25.

³⁷ Ibid., p.18.

delineated some of the key differences that still remained, especially between the developed and developing countries. Later in the year, Lars Arnell, who was the Chair of the TRIPS negotiating group, circulated a document, called the “Composite Draft Text,” presented the main proposals on the table, along with their differences, and placed the negotiations on a single path.³⁸ The draft was later reduced to an official document that specified two basic approaches to the negotiations: the first, which was identified as approach A, consolidated the alternatives favored by the North, adopting the structure favored by the US and the EC and envisaging a single TRIPS agreement “encompassing all seven categories of intellectual property on which proposals have been made;” the second, called approach B and favored by the developing states, provided for two separate parts, one on trade in counterfeit and pirated goods and the “other on standards and principles concerning the availability, scope, and use of intellectual property rights.”³⁹

By the end of 1990, the negotiations intensified and progress was made on reaching consensus on the minimum standards of protection.⁴⁰ In early December of 1990, a draft of the TRIPS Agreement was already at a very advanced stage.⁴¹ The draft was submitted to the Ministers’ meeting in Brussels in the hope of bringing the Uruguay Round to an end.⁴² At that point, compromise on most of the outstanding

³⁸ Ibid.

³⁹ Document MTN.GNG/NG11/W/76 (July 23, 1990).

⁴⁰ Evans, “Intellectual Property as a Trade Issue,” p. 171.

⁴¹ Ibid.

⁴² Ibid., 173.

issues was well within reach: flexibility was being shown on many of the key issues and a new draft was being prepared.⁴³ But by December 7, 1990 the Uruguay Round negotiations collapsed in Brussels over a dispute on agricultural subsidies between the EC and other negotiating partners, and the new TRIPS text was never finalized.⁴⁴ After the Ministerial meeting in Brussels, the focus of the negotiations shifted to other sectors, and in particular to agriculture, where tensions over European subsidies were still running high.⁴⁵

The negotiations received a shot in the arm when the Director-General of the GATT, Arthur Dunkel, streamlined the negotiations by setting up seven different groups, including a TRIPS Group, with the goal of generating a text that could then be presented to individual governments for their signature early in 1992.⁴⁶ Within the TRIPS Group, an informal working group was made up of ten developed and ten developing states. The approach allowed a thorough examination of the Brussels Draft text with the aim of addressing each state's remaining concerns and then reporting back to the formal TRIPS Group.⁴⁷ Several specific proposals were discussed and a number of issues dividing the developed countries received significant

⁴³ Gervais, *The TRIPS Agreement*, 35-42.

⁴⁴ Ibid.

⁴⁵ Michael Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement*, London: Swift & Maxwell, 1996, pp. 80-105.

⁴⁶ Ibid.

⁴⁷ Ibid.

attention at this time, but as the second deadline for Uruguay Round drew to a close, there was still no final agreement on intellectual property.⁴⁸

Determined to prevent the Round from failing to reach any results, Dunkel again came to the rescue. He compiled all of the results that were achieved thus far into a comprehensive document that was then presented to all the participants.⁴⁹ Stripped of all options, this new version of the TRIPS Agreement garnered a positive reaction from most delegates.⁵⁰ But it was decided that the text would be left aside to deal with the seemingly intractable difficulties concerning the trade in agriculture. The protracted negotiations on agriculture were once again leading to a deadlock.⁵¹ Yet the overall mood on the part of the delegates was that the objectives that the Uruguay Round was meant to achieve were becoming increasingly vital for dealing with the world economy. Rising fears of yet another cycle of protectionism and the continued increase of national debt spurred the delegates to bring the Round to a conclusion and bring into existence many of the much needed reforms to the international trade system.⁵² The US continued to remain unhappy with the Dunkel Draft: it pushed for amendments until the very end of the Round and threatened to take away favorable bilateral terms of trade from states that favored more permissive

⁴⁸ Ibid.

⁴⁹ Evans, "Intellectual Property as a Trade Issue," p. 174.

⁵⁰ Gervais, *The TRIPS Agreement*, pp. 58-78.

⁵¹ Ibid.

⁵² Evans, "Intellectual Property as a Trade Issue," p. 174.

standards of intellectual property protection.⁵³ And yet, the text of the Dunkel Draft was not significantly modified in the end and became the basis for the TRIPS Agreement that was finally adopted in Marrakesh on April 15, 1994.⁵⁴

The TRIPS Agreement that emerged at the end of the Uruguay Round is quite complicated, and much can be said by way of interpreting each of the articles and their provisions. I will not try to do this, since my aim here is to examine a particular result that the enforcement of TRIPS appears to have. What I will try to do instead is highlight some of its basic provisions, and then focus on the standards of patent protection, since it is the international patent regime expressed in TRIPS that has the most direct connection to access to medicines.

2. *Minimum Standards*

Beyond the obligation to provide equal treatment, states are to accord to the nationals of other member states the minimum standards of protection that are enumerated in TRIPS.⁵⁵ There are seven different areas that given protection under

⁵³ Ibid.

⁵⁴ Blakeney, *Trade Related Aspects of Intellectual Property Rights*, p. 220.

⁵⁵ The starting point in the TRIPS Agreement are the basic principles of non-discrimination (in the treatment of foreign rights holders). The first is that of national treatment, which says/requires that domestic protections offered to one's nationals must also be extended to those of a member state. This principle of equality or equal treatment forbids states from discriminating on the basis of intellectual property protection between their nationals and those of another member state. The second principle is that of the most-favored nation, which demands that any intellectual property protections given to another member state that are more extensive than the minimum standards required by TRIPS must also be extended to all the other member states. This principle ensures that states do not reserve special treatment for each other by enacting hybrid legal regimes that run parallel to TRIPS but are beneficial to only a subset of all members states. Together these principles of non-discrimination guarantee

these minimum standards: copyright and related rights, patents, trademarks, geographical indicators, industrial designs, layout designs of integrated circuits, and undisclosed information (trade secrets). In delineating these minimum standards, the TRIPS agreement makes use of existing international law, established by several important conventions covering intellectual property. The Agreement incorporates by reference the Paris Convention for the protection of industrial property, the Berne Convention for the protection of copyright, the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations, and the IPIC treaty for the protection of integrated circuits.⁵⁶

The patent regime in TRIPS is perhaps the most controversial aspect of the entire Agreement. So let me turn my attention to the main provisions of this system. Article 27 stipulates that “patent shall be available for any inventions, whether products or processes, in all fields of technology” and without “discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”⁵⁷ To be patentable, an invention must be “new, involve an inventive step, and [be] capable of industrial application.”⁵⁸ Once granted, patents

that domestic law does not single out any rights holder for any special or preferential treatment and there is no cause for any states to engage in retaliatory protectionist conduct.

⁵⁶The TRIPS Agreement, however, does not just incorporate these Conventions, but in many cases modifies their provisions. Article 9 incorporates Articles 1 through 21 of the Berne Convention, which provides copyright protection to literary and artistic works. The TRIPS Agreement also supplements some of the Convention’s provisions. Computer programs are also protected by copyright as literary works and the term of protection is changed to fifty years from the end of the year of an authorized publication or end of the year of the making of the work. See also Articles 2, 10, 14, 22 on how TRIPS incorporates other conventions.

⁵⁷ The TRIPS Agreement, Article 27.1.

⁵⁸ Ibid.

confer exclusive rights. The holder of a product patent has the exclusive right to make, use, sell, and import the product to another country where it may be used or sold.⁵⁹ The holder of a process patent has the exclusive right over the use of the process as well as the products that are generated directly by that process.⁶⁰ Moreover, patent owners have a right to assign or transfer their patents and to enter into agreements to license their products or processes to other parties.⁶¹ The period of protection given to patent owner is twenty years from the date of filing.⁶²

The scope of patentability under TRIPS is quite broad, but several exceptions exist that give member states the power to exclude certain products and processes from patentability. Members have a right to exclude inventions that are contrary to common standards of morality.⁶³ Members may also exclude from patentability “diagnostic, therapeutic and surgical methods for the treatment of humans or animals.”⁶⁴ Furthermore, plant and animal varieties, with the exception of microorganisms, may be kept from being patented, provided that states that invoke this exception offer some other system of protection.⁶⁵

⁵⁹ Article 28.1(a).

⁶⁰ Article 28.1(b).

⁶¹ Article 28.2.

⁶² Article 33.

⁶³ Article 27.2. To use this exception the commercial exploitation of the invention must also be an affront to public morality. Also such exploitation cannot be allowed to happen even when the invention fails to receive a patent.

⁶⁴ Article 27.3.

⁶⁵ Article 27.3. Processes that generate plant or animal varieties that are biological in nature may also be excluded. But not so with processes that produce microorganisms.

Despite these exceptions, the patent system under TRIPS extends patent protection to inventions in all fields of technology. This was a major coup for the developed countries because they wanted pharmaceutical products and processes to qualify for patent protection.⁶⁶ Several developing states, such as Brazil and India, stood in the way of this during the early phase of the Uruguay Round, but under pressure from the US and EC to impose bilateral trade agreements with much harsher terms of trade, they eventually relented.⁶⁷ The developing countries, nevertheless, did get some things that they wanted. One of these was the right to have a transitional period to bring the member state's national laws into compliance.

The changes introduced to the international intellectual property regime by the TRIPS Agreement were significant for many WTO member states. They had to extend patent protection to areas that were not covered by their domestic laws and establish an effective enforcement mechanism against infringements. It was generally agreed at the negotiations stage that TRIPS should allow a transition period beyond its entry into force so that states can bring their domestic laws into compliance with their obligations under TRIPS.⁶⁸ Thus the Agreement contains a one-year transitional period for all member states and an additional four-year period for developing member states and member states in the process changing from a centrally planned economy to

⁶⁶ Sell, *Private Power, Public Law*, pp. 50-67.

⁶⁷ Ibid.

⁶⁸ Blakeney, *Trade Related Aspects of Intellectual Property Rights*, pp. 85-100.

one that is based on the free market.⁶⁹ The Agreement contains two additional transitional periods. Under Article 65, any developing member state that had not historically granted protection in an area of technology may ask for an additional five years to bring its domestic laws into compliance. Least-developed countries are given an even longer period, and have until 2016 to achieve full compliance.⁷⁰

As mentioned earlier, the provisions contained in the TRIPS Agreement constitute minimum standards of protection to be embodied by the domestic laws of a member state. Let me offer an example of how one country has dealt with transitioning its domestic patent laws toward full compliance with TRIPS.

3. India's Transition

As one of the more active participants in the Uruguay Round, India was an early opponent to a comprehensive intellectual property agreement (under the aegis of GATT).⁷¹ India eventually softened its position, signed the Uruguay Round Agreements, including TRIPS, and became a member of the WTO as of January 1, 1995.⁷² Because of its membership in the WTO, India became obligated to bring its domestic laws into compliance. At the time of its accession to the WTO, India was one of the countries that had not granted patent protection to pharmaceutical products. This had to change, since TRIPS mandates patent protection for pharmaceutical

⁶⁹ Article 65, sections 1-3.

⁷⁰ Article 65.4 and Article 66.

⁷¹ Dasgupta, *WTO & TRIPS: Indian Perspective*, pp. 30-35.

⁷² *Ibid.*

product and processes. As a developing country, India qualified for a lengthy transitional period and was given until January 1, 2005 to make its domestic intellectual property regime TRIPS compliant.

India undertook to transform its patent laws in three distinct stages.⁷³ First, India created a procedure for receiving pharmaceutical product patent applications that were filed during its transitional period – from January 1, 1995 through January 1, 2005. This so-called “mailbox facility” was enacted into law by the passage of the Patents Act, 1999.⁷⁴ Second, the Patents Act, 1970 was amended by the Patents Act, 2002, to extend the term of protection for patents to twenty-years, as required by TRIPS.⁷⁵ Finally, India brought patent protection for pharmaceutical products into full effect with its Patent Act, 2005.⁷⁶

India’s Patents Act, 2005 (The Patent Act), repealed the statutory prohibition against the patenting of inventions of substances “intended for use, or capable of being used, as food or as medicine or drug” or “prepared or produced by chemical

⁷³ Janice Mueller, “The Tiger Awakens: The Tumultuous Transformation of India’s Patent System and the Rise of Indian Pharmaceutical Innovation, 68 *University Of Pittsburgh L. Rev.* 491 (2007), pp. 491-641.

⁷⁴ Even though TRIPS recognizes transitional arrangements, it also requires that a procedure be set up during these transitional periods so that “applications for patents for such inventions can be filed.” See Article 70.8.

⁷⁵ Prior to this amendment, Indian patent law recognized a much shorter period of protection. Where the invention is a process for the manufacture of a substance that may be used as food, medicine, or drug the term is “five years from the date of sealing of the patent, or seven years from the date of the patent whichever period is shorter.” The term of all other types of patents was fourteen years. See Patent Act, No. 39. of 1970 (amended 2005).

⁷⁶ Mueller, “Tiger Awakens,” p. 519.

processes.”⁷⁷ This meant that as of January 1, 2005, the Indian Patent Office had to start examining patent applications for pharmaceutical products for domestic patent protection. Under India’s new patent laws, the first pharmaceutical product patent was granted to Hoffman-La Roche for its therapy to treat Hepatitis C.⁷⁸

The Patents Act, however, includes several important restrictions on the patentability of pharmaceutical products. The Act contains a provision that makes the ever-greening of pharmaceutical patents more difficult to achieve than in other parts of the world.⁷⁹ The Patent Act does not recognize the discovery of a new form of a known substance, i.e. the derivative of the known substance, as an invention if the new form “does not result in the enhancement of the known efficacy of the [original] substance.”⁸⁰ Moreover, it stipulates that a new use of a known substance is not an invention; a new method, however, for preparing an already known substance, may qualify for patentability.⁸¹

⁷⁷ Patent Act, No. 39 of 1970 (amended 2005).

⁷⁸ Holger Hestermeyer, *Human Rights in the WTO : The Case of TRIPS and Access to Medication*, Oxford: Oxford University Press, 2007, p. 28.

⁷⁹ Ever-greening is a way for pharmaceutical companies to extend the life of a patent of an already known substance by attempting to obtain a new patent for a new use or a new form of that substance. Ever-greening is quite common in the US, especially with respect to new therapeutic uses of a known substance that was previously used to treat a different ailment or condition. See Mueller, “Tiger Awakens,” pp 546-566.

⁸⁰ The Patents Act, No. 39 of 1970 (amended 2005), section 3(d).

⁸¹ The Patents Act, No. 39 of 1970(amended 2005). Large multinational pharmaceutical companies are generally quite unhappy about limitation on ever-greening. Companies will often spend additional capital on researching new and novel uses for an existing drug. This is a strategically rational move on their part because it allows them to extend the monopoly rights over the same product for another twenty years without having to make the kinds of expenditures that are required when developing an entirely new drug. However, there is

The Patent Act also excludes from patentability “plants and animals in whole or any part thereof other than micro-organisms.”⁸² TRIPS permits the exclusion from patentability of “plants and animals other than micro-organisms...and biological processes for the production of plants or animals other than non-biological and micro-biological processes.”⁸³ India has chosen to codify this option of excluding plants and animals from patentability, as well as varieties of seed. The Act, however, recognizes the patentability of microorganism, as is required by TRIPS, though there is some indication that India may interpret what it is to be a microorganism more narrowly.⁸⁴

As mentioned earlier, TRIPS places three basic requirements that any invention, whether a product or a process, must satisfy before it can qualify for a patent. According to Article 27, “patents shall be given for any inventions...provided they are new, involve an inventive step, and are capable of industrial application.”⁸⁵

India has embraced the language in TRIPS by defining an invention as a “new product

nothing in TRIPS to suggest that India’s new patent laws are not in compliance. Article 27, for instance, stipulates that inventions that are either products or processes may qualify for protection, but it says nothing about new uses of already known substances. In fact, under the same article, states have a right to exclude “diagnostic, therapeutic and surgical methods for the treatment of humans or animals” from patentability. A new use of an already patented drug, directed at a different medical condition, could be viewed as a therapeutic method, which as Article 27 makes clear, need not receive any patent protection. States are thus free to except new uses from protection. India has taken this route, and there is nothing in TRIPS that contravenes member states from passing laws that place certain limitations on the process of ever-greening.

⁸² Patent Act, No. 39, 1970.

⁸³ TRIPS Agreement, Article 27.3(b).

⁸⁴ A commission has been drawn up recently that is charged with examining whether certain organisms can be excluded from being patented because they may be microorganisms in the relevant sense. See Mueller, “Tiger Awakens,” p. 559.

⁸⁵ Article 27.1

or process involving an inventive step and capable of industrial application.”⁸⁶ In the Agreement, the requirements of novelty, inventive step, and industrial application are given a formal definition, thus giving member states the flexibility to offer their own interpretations of these terms. The Indian Patent Act has taken advantage of the flexibility, and defines the inventive step requirement in a rather novel way: an inventive step is a “feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.”⁸⁷ Thus under Indian law, for an invention to involve an inventive step two conditions have to be met. The inventive step requirement in TRIPS is generally taken to be synonymous with an invention being non-obvious when compared to prior art. U.S. patent law makes non-obviousness of an invention a condition of patentability, and other states have followed suit in equating inventive step with non-obviousness.⁸⁸ India includes non-obviousness as a condition on there being an inventive step, but then attaches an additional demand, that there also be a technical advance or an economic benefit to the invention. This implies that under Indian law, at least in principle, it is more difficult to confer a patent to an invention than under U.S. law, which merely requires that there be non-obviousness to a person of ordinary skill in the art. Whether this will result in a significant difference in the practice of granting patents between India and

⁸⁶ The Patents Act, No. 39 of 1970 (amended 2005).

⁸⁷ *Ibid.*

⁸⁸ 35 U.S.C. § 102.

the U.S. – specifically with respect to pharmaceutical products – remains to be seen. But TRIPS appears to be capable of tolerating such differences.

In addition to involving an inventive step, an invention must also be new or novel. The Patent Act defines an invention as new if it “has not been anticipated by publication in any document or used on the country or elsewhere in the world before the date of filing of the patent application.”⁸⁹ This definition of novelty incorporates any prior art that has been published or used anywhere in the world. This provision of the Act is entirely consistent with TRIPS, and reproduces the standard of novelty given in the European Patent Convention.⁹⁰

Perhaps the most controversial aspect of India’s patent regime has to do with compulsory licensing. Compulsory licensing allows a third party to manufacture and sell a patented product without the consent of the patentee, provided a reasonable fee, i.e. a licensing fee, is paid to the patent holder. TRIPS recognizes the importance of compulsory licensing and gives individual states some latitude in developing a patent regime that employs this flexibility, but also places certain restrictions on how such licensing may be used.⁹¹

⁸⁹ India Patents Act, No. 39 of 1970, (amended 2005).

⁹⁰ See European Patent Convention, Article 54. For further discussion, see Mueller, “Tiger Awakens,” pp. 563-566.

⁹¹ The unauthorized use of a patent, by the government or a third party, may be permitted if prior to such use, efforts were made “to obtain authorization from the right holder on reasonable commercial terms,” but such efforts were not “successful within a reasonable period of time.” The requirement to attempt in good faith to obtain an authorization may be disregarded, however, in cases of national emergency, extreme urgency, or when use is of a public, non-commercial nature. Moreover, the unauthorized use of a patent cannot exceed the purpose for which it was granted and must terminate when the circumstances that led to the use have ceased to exist. The patent holder is entitled to “adequate remuneration and to judicial review” both with respect to the “decision relating to the authorization of such use”

India has taken advantage of this flexibility in TRIPS, and has been quite generous in permitting compulsory licensing. The new Patent Act lists several grounds for compulsory licensing. One such ground concerns national health emergencies. Under the Patent Act, the central government may apply for a compulsory license, at any time after a patent has been granted, after publicly stating that “circumstance of national emergency” or “extreme urgency” make such a license necessary.⁹² Licenses are available for all medicines, and no prior negotiations with the patentee are required.⁹³ Moreover, when a national emergency or a case of extreme urgency has been declared, the Patent Act abrogates the right, on the part of the patent holder, to have the opportunity to be heard and oppose the grant of the license.⁹⁴

The Patent Act also creates an additional way to acquire a compulsory license. A compulsory license may be granted to meet the public health concerns of another country. Section 92A of the Act, permits an Indian drug company to acquire a compulsory license and then manufacture and export a patented pharmaceutical to

and to the “remuneration provided.” A significant restriction on the use of compulsory licensing is that it must be directed predominantly “for the supply of the domestic market.” The reason for this is partly historical, since compulsory licensing was generally used to punish a patent holder for not placing her invention in the domestic market of the country that granted her the patent. Compulsory licensing was thus a way ensure that someone else was able to put the product in the stream of commerce when the patent holder was unwilling or unable to do so herself. One consequence of the requirement that compulsory licensing be exploited for domestic markets is that a country issuing the license cannot then export the product, under the license, to another country. See Article 31 for additional details.

⁹² The Patent Act, No. 39 of 1970, section 92 (amended 2005).

⁹³ Ibid.

⁹⁴ Ibid.

other countries that have neither the wealth to import the drug directly from the pharmaceutical company holding the patent nor the capacity to manufacture it themselves.⁹⁵

The kinds of changes that India has made to bring its patent regime in compliance with TRIPS have been typical for a developing country. By far the most important of these changes has been to extend patent protection to pharmaceutical products. But countries like Brazil, Thailand, South Africa, Argentina, etc., have had to do the same, since traditionally their laws excluded pharmaceutical products from

⁹⁵ Ibid. This appears to conflict with Article 31(f) of TRIPS, which as mentioned above, stipulates that when granted, a compulsory license has to be authorized for the supply of the domestic market. Now although Section 92A permits the exportation to a foreign market, it does not conflict with the TRIPS Agreement as it currently stands. Shortly after the passage of TRIPS, several least-developed countries complained that the right to produce essential medicines in response to a health emergency under a compulsory license would not benefit them, since they have no way to manufacture these drugs themselves and Article 31(f) forbids other states from granting a compulsory license solely for the purpose of exporting medicines to countries without a manufacturing capacity. Concerned that TRIPS was insufficiently sensitive to the plight of least-developed countries, the WTO in 2001 issued a Ministerial Declaration on TRIPS and Public Health at the Fourth WTO Ministerial Conference held in Doha, Qatar. In paragraph six of the Declaration, the WTO acknowledged that member states with little or no manufacturing capacities in the pharmaceutical sector “could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement” and requested that a solution be found. In 2003, the WTO’s General Council proposed a solution to waive the restriction in 31(f), provided that certain conditions are met. Section 92(A) of the Patent Act may be viewed as codifying the waiver to Article 31(f). The waiver, however, was designed to be applied in limited circumstances and could be invoked if several conditions were satisfied: the importing country has to notify the WTO that it lacks a manufacturing capacity and that it intends to grant a compulsory license the patented drug being imported; the exporting country has to notify the WTO that it is granting a compulsory license to the drug being exported and limit its manufacture of the drug to as much as is needed in the importing country. Section 92(A), on the other hand, has much broader scope because there is no requirement that the importing country must also grant the compulsory license, nor is the licensee obligated to specify the amount it will produce. Whether the compulsory scheme is consistent with the TRIPS will depend on how India will use compulsory licensing for exporting patented drugs to other countries. India may be challenged if it goes beyond what is strictly permitted by the waiver.

patent protection.⁹⁶ It is still an open question whether India has made its patent regime fully compliant. So far, India has faced few challenges over its patent laws. One reason for this is that it has not yet begun to use widely its powerful compulsory licenses scheme. Once it does, as some have suggested, disputes are likely to arise between India, on the one hand, and U.S. and the EC, on the other.⁹⁷ What I want to do next is examine what it means for a state to violate the TRIPS Agreement. Specifically, I want to discuss the coercion that a state faces when it is not in compliance. To do this I have to explore another aspect of the WTO, and that is its dispute settlement system.

4. *WTO's Dispute Settlement System*

Within the WTO, dispute settlement is regulated by the Dispute Settlement Understanding.⁹⁸ There are four basic stages of dispute settlement under this system: consultations, panel process, review by the appellate body, and implementation. The preferred way to resolve disputes within the WTO is to have the parties themselves settle their disagreement, without having to rely on litigation. At the first formal stage of dispute settlement, the parties to the dispute are thus required to enter into bilateral

⁹⁶ For further discussion see Correa, *Intellectual Property Rights, WTO, and Developing Countries*.

⁹⁷ Amy Kapczynski, "Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector," *California Law Review*, Vol. 97, 2009, pp.1607-1610.

⁹⁸ For a good discussion, see David Palmeter and Petros Mavroidis, *Dispute Settlement in the WTO: Practice and Procedure*, Cambridge: Cambridge University Press, 2004.

consultations and encouraged to work out a mutually acceptable solution.⁹⁹ If, however, the parties to the dispute fail to resolve their disagreement at the consultations stage, the complaining party may request that a panel be established to adjudicate the dispute.¹⁰⁰ A panel is a judicial tribunal that functions much like a trial court and has the authority to render a legal decision. After the parties have been given a chance to present their arguments, the panel, in a written report, delivers its opinion as to whether the respondent has failed to live up to its obligations under the WTO, as claimed by the complaining party.¹⁰¹ If the panel finds that there has been a violation, it also offers a recommendation that the respondent bring its domestic laws into compliance with WTO requirements.¹⁰²

The WTO dispute settlement system also includes judicial review by an appellate body. After the panel submits its final report, the losing side may appeal the panel's decision.¹⁰³ When the notice of appeal is filed, the party seeking the appeal, the appellant, has to submit a legal brief, adducing the legal errors that were committed by the panel and the determinations that should have been made.¹⁰⁴ The other party to the dispute, the appellee, may submit a written response to the

⁹⁹ Dispute Settlement Understanding (DSU), Article 4.

¹⁰⁰ DSU, Article 4.3. The complainant may also proceed to the adjudicative stage if the respondent fails to reply to the request for consultations.

¹⁰¹ DSU, Article 12.

¹⁰² Ibid.

¹⁰³ DSU, Article 17. If neither side request an appeal, the panel's decision may then be adopted by the Dispute Settlement Body, becomes binding on both parties, and proceeds to the implementation stage.

¹⁰⁴ Ibid.

allegations of legal error made by the appellant.¹⁰⁵ The Appellate Body that is assigned to review the panel report holds a hearing during which time the parties are given the chance to present their arguments.¹⁰⁶ The Appellate Body then deliberates and drafts its own report; in it, the Appellate Body may either affirm, reverse, or uphold only in part the findings of the panel with respect to those issues that are under appeal.¹⁰⁷ The parties to the dispute must unconditionally accept the conclusions of the Appellate Body, and once the report is adopted by the Dispute Settlement Body, the Appellate Body's determinations become binding.¹⁰⁸ If the Appellate Body finds that a party is in violation of a WTO obligation, the losing party has to bring itself into compliance with WTO law, within a reasonable period of time.¹⁰⁹

If the losing party fails to achieve full compliance, it may be sanctioned by the Dispute Settlement Body in a number of ways. If appropriate, the party may be required to compensate the other side.¹¹⁰ Such compensation does not have to be monetary; a benefit conferred on the other party in the form of tariff reduction on certain goods may be sufficient.¹¹¹ In most cases, compensation does not take place

¹⁰⁵ Ibid.

¹⁰⁶ Ibid. Generally, this happens about 30 to 45 days after the notice of appeal is submitted.

¹⁰⁷ Ibid.

¹⁰⁸ DSU, Article 19.

¹⁰⁹ Once the Appellate Body's report becomes adopted, the Dispute Settlement Body will make recommendations to the losing party on how to achieve such compliance. See DSU, Article 20.

¹¹⁰ DSU, Article 22.

¹¹¹ DSU, Article 22. The most-favored-nation provision, however, will mandate that such preferential treatment shown to one member – in this case, this would be the complaining

because the parties to the dispute do not agree on what counts as fair compensation.¹¹² And without such agreement, the prevailing party may then resort to retaliatory trade sanctions against the offending party. The prevailing party, in these circumstances, may suspend its WTO obligations with respect to the noncompliant party.¹¹³ In other words, the prevailing party may erect its own trade barriers against the offending party. In general, the complainant will retaliate by employing countermeasures within the same sector. So for examples, if Sri Lanka imposes a huge tariff on American high tech goods, the US may retaliate by increasing tariffs on certain Sri Lankan goods. If, however, the US does not import many goods from Sri Lanka such that its countermeasure is not likely to force Sri Lanka into compliance, the WTO allows the US to retaliate against a different sector – services, for instance – or suspend its obligations under a different agreement – e.g. under GATS or TRIPS.¹¹⁴ This flexibility in choosing which countermeasures are likely to do most damage gives developed countries a powerful weapon against developing countries, who are already quite vulnerable to trade barriers erected against goods and services they produce for

party – would have to be extended to the other members as well. This substantially magnifies the “compensation” that a member has to pay. Compensation is particularly problematic to developing states since they are given the option to gradually reduce their tariffs.

¹¹² Marco C. E. J. Bronckers and Naboth Van den Broek, “Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement,” *Journal of International Economic Law*, Vol. 8, Issue 1, 2005, pp. 101-126; Busch and Reinhardt, “Developing Countries and GATT/WTO Dispute Settlement,” *Journal of World Trade*, 37(4), 2003, pp. 719-35.

¹¹³ DSU, Article 22.

¹¹⁴ Bronckers and Van den Broek, “Financial Compensation in the WTO,” pp. 105-10.

outside consumption.¹¹⁵ This is particularly relevant to our discussion of intellectual property and the TRIPS Agreement. If a developing country is deemed to be noncompliant with respect to TRIPS, the complaining party, which is likely to be either the US, the EC, or Japan, may sidestep TRIPS altogether and instead suspend its obligations under either GATT or GATS. This can have a devastating effect on developing countries, since they depend so much on their export-led industries to generate domestic economic growth. In addition to instituting retaliatory measures, developed countries may also exert other, more subtle, forms of pressure on developing states deemed noncompliant. The US and the EC, in several cases for instance, have threatened to cut off foreign aid to induce compliance.¹¹⁶ This is a particularly effective way to force least developed countries to comply, since they rely to a great extent on foreign assistance to meet their domestic needs. It is no surprise, therefore, that the dispute settlement system has been very successful in resolving disputes. By 2008, there have been only fifteen authorized suspension of concessions and three cases of compensation, only one of which was monetary.¹¹⁷ Moreover, there have been very few cases of noncompliance, mostly on the part of the US and the

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ For a goods discussion of the data, see Kara Leitner and Simon Lester, "WTO Dispute Settlement 1995-2008: A Statistical Analysis," *Journal of International Economic Law*, 12(1), 2009, pp 195-208; Joseph Pelzman and Amir Shoham, "WTO Enforcement Issues," *Global Economy Journal*, Vol. 7, Issue 1, 2007, pp. 1-25.

EC.¹¹⁸ With respect to the TRIPS Agreement, there is only one case of noncompliance, and the noncompliant party was the US.¹¹⁹

5. The Implications of Being TRIPS Compliant

As I mentioned above, many developing countries that are now WTO members did not recognize pharmaceutical products as patentable subject matter. TRIPS has changed this, and as a result member countries, depending on the transitional period given to them, have already brought or will soon have to bring patent protection to pharmaceutical products. If they fail to do so, they will face severe repercussions either by having to compensate the complaining party or by incurring WTO sanctioned trade retaliations.

The presence of the TRIPS Agreement in the WTO has made these countries modify their domestic laws in a significant way. But what are the ramifications of these changes in the domestic laws of a state? One important result of the patent regime in TRIPS is that the price of medicines has gone up.¹²⁰ Once a patent is granted, the patent holder has the exclusive right to sell its patented drug for a period of twenty years. To recoup its research and development expenditures made in the

¹¹⁸ Bronckers and Van den Broek, "Financial Compensation in the WTO," pp. 110-115.

¹¹⁹ *US-Copyright*, WT/DS160/R. The EC argued that Section 110(5) of the US Copyright Act was inconsistent with the Berne Convention and therefore in violation of Article 9(1) of TRIPS. The US has still not make its copyright laws consistent with the Berne Convention, but it has agreed to pay the EC in monetary compensation for the nullification or impairment of EC benefits.

¹²⁰ A. Cameron *et al*, "Medicine Prices, Availability and Affordability in 36 Developing and Middle Income Countries: A Secondary Analysis," *Lancet* Vol. 373, Issue 9659, 2009, pp. 240-49.

course of developing a drug, a pharmaceutical company charges a monopoly price, which is well above the marginal cost of production. It is the high cost of patented drugs, set at monopoly prices, that makes these drugs out of reach for much of the poor in developing and least-developed countries. This was an important concern during the negotiations at the Uruguay Round: India and Brazil, in particular, wanted pharmaceutical products to be excluded from patentability as their own domestic laws had done. These arguments, of course, did not carry the day, and medicines were included within scope of patent protection. Yet, the worry about the accessibility of medicines still remained on the minds of many of the participants, and a compromise was eventually worked out that carved out certain exceptions and placed limitations on the rights given to patent holders. The most important of these exceptions is the right to issue a compulsory license, which has been viewed as a lifeline for developing countries in their effort to bring affordable medicines to their citizens. The TRIPS Agreement, in its all important Article 31, permits the use of compulsory licenses, albeit with certain restrictions. The question is, can a compulsory license scheme counteract the increase in prices of patented drugs?

Compulsory licenses have been used throughout the world for many decades, in many cases by highly industrialized countries.¹²¹ The U.S. for instance has done so with respect to clean air technology and atomic energy.¹²² But the tradition of permitting licensing, especially with respect to patented medicines, has fallen into

¹²¹ Both Britain and Canada used to grant compulsory licenses on pharmaceuticals quite regularly. See F.K. Beier, "Exclusive Rights, Statutory Licenses and Compulsory Licenses in Patent and Utility Model Law," 30 *IIC*, p. 251.

¹²² *Ibid.*

disfavor in many developed countries as they became net exporters of technology to the rest of the world, and licensing began to look like free-riding on costly innovations developed by domestic industries, innovations that in many cases were the product of government funded basic research. For the developing world, on the other, hand, the perception is that compulsory licenses are still an indispensable instrument for putting pressure on the big pharmaceutical companies to reduce their prices.¹²³ Article 31 of TRIPS tries to strike a balance between these competing views by allowing compulsory licenses.¹²⁴ So how do compulsory licenses work under this Article?

Under Article 31, the application of compulsory licensing is sweeping: there is nothing in the Article that limits the scope of inventions that may be subject to licensing. This means that any inventions is fair game for compulsory licensing, not just pharmaceutical products.¹²⁵ Yet, it should come as no surprise that most compulsory licenses that have been issued overwhelmingly target patented medicines. Although there are no restrictions on the subject matter, Article 31 puts in place certain procedural requirements before a license can be granted. First, the proposed user has to make an attempt to secure an authorization from the patent holder on

¹²³ Frederick Abbott and Jerome Reichman, “The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions,” *Journal of International Economic Law*, Vol. 10, 2007, pp. 921-87.

¹²⁴ *Ibid.*

¹²⁵ An earlier draft of the Article adduced a list of allowed subject matter, but this was later removed in subsequent drafts. This suggests that indeed any subject matter could be subject to compulsory licenses and it was up to individual states to decide how far their domestic laws would go.

“reasonable commercial terms,” which turned out to have been unsuccessful.¹²⁶ This requirement, however, is waived in “situations of national emergency or other circumstances of extreme urgency,” and in cases of public non-commercial use.¹²⁷ Second, the rights holder is entitled to “adequate remuneration,” and the decision as to the authorization of a compulsory license as well as the decision as to the adequacy of the remuneration are subject to judicial review.¹²⁸ Furthermore, the authorization of a license has to be decided on the “individual merits” of such a license.¹²⁹ When a license is granted, it must be used for the purpose for which it was authorized.¹³⁰ The requirement that the scope, and also duration, of the license be limited to its authorized purpose is designed to prevent the license from being abused and misused. In addition, if circumstances have changed such that the original purpose that necessitated the license no longer prevails, the party granted the license has to cease using it.

The procedural safeguards that require that there be adequate remuneration and judicial oversight, that the scope be limited to the authorized purpose, and that the

¹²⁶ TRIPS, Article 31(b). This provision forces the user of the license to seek a license directly from the patent holder, who clearly has a right to issue a license to her invention to any third party for any reason.

¹²⁷ Ibid.

¹²⁸ Article 31(g)-(j).

¹²⁹ Article 31(a). This forces the license to be directed at a particular drug, not at a class of drugs, so that the reasons for authorizing a license for a particular drug can be evaluated separately. This ensures that a license is granted per patented invention and the decision is based strictly on the reasons for granting a license for that particular drug.

¹³⁰ Thus, for example, if a license is issued for Efavirenz, an antiretroviral patented by Merck, for 500,000 tablets, the production of a million tablets would go beyond the authorized scope of the license and violate Article 31.

authorization of a license be considered on its “individual merits” have not generated much controversy. But there are two important weaknesses in the Agreement’s compulsory licensing scheme, which have sparked a great deal of debate that continues to this day. One of these weaknesses has been more or less solved, but the other has not.

Under the compulsory license system of Article 31, the use of such licenses is “predominantly for the supply of the domestic market of the member authorizing such use.”¹³¹ This specific requirement for issuing a compulsory license was not an obstacle for India and Brazil, which already possessed a significant generic pharmaceutical sector. The problem with Article 31 is that not all developing states, and in particular those that are least developing, have the capacity to produce low-cost generic drugs. Moreover, as it is stated Article 31 does not permit the importation of generic drugs by member countries without a manufacturing capacity from member countries that do.¹³² Thus, Article 31 essentially places compulsory licensing out of reach of many countries that are in desperate need of low-cost generic medicines.

Mindful of the fact that some of the poorest countries in the world simply cannot take advantage of the most powerful flexibility built into TRIPS, the WTO Ministerial Conference in Doha adopted the Doha Declaration on the TRIPS Agreement and Public Health in November 2001.¹³³ The Declaration issued a

¹³¹ Article 31(f).

¹³² *Ibid.*

¹³³ Declaration on the TRIPS Agreement and Public Health (14 November 2001), Doc. WT/MIN(01)/DEC/2 (20 November 2001) (Doha Declaration).

mandate to broaden existing flexibilities in TRIPS so that member countries that do not have the ability to produce generic drugs domestically are allowed to import them from countries like India, Brazil, or China that have a generic pharmaceutical industry.¹³⁴ The legal language that permits such importation is contained in a waiver known as the August 2003 Decision.¹³⁵ This permission would be rendered permanent in a proposed Amendment to Article 31, known as Article 31*bis*, the ratification of which is currently being considered by a number of countries.¹³⁶ The Amendment does not limit importation of medicines under a compulsory license to specific diseases and uses a definition of pharmaceutical product that is broad enough to include vaccines, active ingredients, and diagnostic kits.¹³⁷ Under the regime announced in the Amendment, the importing country (excluding LDCs) must notify the TRIPS Council of its intention to use the system as an importing country; the importing country (excluding LDCs) must also issue a compulsory license domestically for the medicine that it seeks to import.¹³⁸ The exporting country must

¹³⁴ The Doha Declaration.

¹³⁵ Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (30 August 2003), Doc. WT/L/540 (1 September 2003) (Waiver Decision).

¹³⁶ WTO General Council Decision of 6 December 2005, Amendment of the TRIPS Agreement WT/L/641, 8 December 2005, with attachment “Protocol Amending the TRIPS Agreement” (with Annex setting out Article 31*bis*) (Protocol Amendment).

¹³⁷ Protocol Amendment. The US was quite unhappy about this at the time and wanted the importation be restricted to only those medicines that targeted AIDS/HIV, malaria, tuberculosis, and a few other highly infectious diseases. The EC was concerned that there would be extensive importation of all sorts of medicines and thus wanted the regime under the Waiver and the Amendment to permit importation only when the public is threatened with grave public health problems. See Abbott and Reichman, “The Doha Round’s Public Health Legacy,” p. 934.

¹³⁸ Protocol Amendment.

also notify the Council of its intention to use the system and issue a compulsory license for the patented product that it intends to produce for export.¹³⁹

The problem with the Amendment, as well as with the original Article 31, is not that they are administratively onerous, as some have suggested, but that they restrict the application of compulsory licenses to three types of cases: national emergency, extreme urgency and public non-commercial use.¹⁴⁰ The US and the EC are inclined to interpret national emergency and extreme urgency as exceptional circumstances.¹⁴¹ Thus it is generally accepted by now that the spread of HIV/AIDS in sub-Saharan Africa constitutes a national emergency for the countries that are affected by this epidemic. There is also widespread consensus that malaria, tuberculosis, and other infectious diseases that affect the global poor may also be considered an emergency, provided the number of people affected in a given country is not trivial.¹⁴² The appearance of avian flu, on the other hand, is more likely to be seen as an extreme urgency in light of its potential lethality, though it may also be perceived as a national emergency. What is much more controversial is whether other health problems may constitute either a national emergency or an extreme urgency. May heart disease or common types of cancer be considered national emergencies?

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Abbott and Reichman, "The Doha Round's Public Health Legacy," p. 954.

¹⁴² Ibid.

In 2007, Thailand issued a compulsory license for Plavix, which is used to treat coronary disease and is patented by Sanofi-Aventis.¹⁴³ After negotiations between the representatives of Sanofi-Aventis and the Thai government broke down, the pharmaceutical giant threatened to sue the Indian company that was awarded the contract by the Thai Ministry of Public Health to produce the generic version of the drug.¹⁴⁴ That year the US government, from the pressure exerted by the pharmaceutical industry, placed Thailand on its Special 301 “Priority Watch” list, stating its growing concern over the erosion of respect for patent rights in the country.¹⁴⁵ The EC was even more aggressive in condemning the Thai government for its use of the compulsory license regime. In a letter to the Thai Minister of Commerce, the European Trade Commissioner, Peter Mandelson, insisted that “neither the TRIPS Agreement nor the Doha Declaration appear to justify a systematic policy of applying compulsory licenses whenever medicines exceed certain prices.”¹⁴⁶ The European Commission took a strong position against Thailand because “something like heart disease does not meet the criteria” of an urgent public health issue.¹⁴⁷ Fearing economic retaliation from the US and the EC, Thailand has been quite sparing in expanding the list of medicines – other than those that target

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid., p.955.

¹⁴⁶ David Cronin, “EU Split Arises over Thai Effort to Obtain Cheaper Patented Drugs,” *IP-Watch*, September 2007.

¹⁴⁷ Ibid.

HIV/AIDS, tuberculosis, etc. – that may be issued a compulsory license.¹⁴⁸ Other developing countries have also been very cautious in pushing for a broader interpretation of what constitutes a national health emergency. But even if certain cancer drugs or drugs for heart disease are made available through compulsory licensing there is no reason to think that all patented medicines that may be used by the poor in the developing world to ameliorate their suffering or stave off a premature death will fall within the scope of a domestic compulsory license regime. There is already substantial pushback from the developed world as it is, and so a more comprehensive approach of providing generic versions of essential drugs that are presently under a patent is simply not likely to happen.

The existence of various flexibilities within the TRIPS Agreement has been an important source for mitigating some of the effects of raising the standards of intellectual property protection worldwide. However, these flexibilities, the most important of which been compulsory licensing, are not enough to bring affordable medicines to the poor in developing and least developed countries. There have been many promising proposals made to make essential medicines affordable without relying on TRIPS in any way.¹⁴⁹ But so far these proposals have not been translated into an actual system that turns out affordable medicines, and so the TRIPS flexibilities are the only available method we currently have to bring down the price of

¹⁴⁸ Recently, the Thai government has issued compulsory licenses for three anti-cancer drugs. But the government has also engaged in negotiations with the pharmaceutical companies that hold the patents to decrease the price of their drugs. See Cronin, “EU Split Arises over Thai Effort to Obtain Cheaper Patented Drugs.”

¹⁴⁹ For a good discussion of alternative ways to provide essential medicines, see Michael Abramowitz, “Perfecting Prizes,” *Vanderbilt Law Review*, Vol. 56, 2003, pp. 114-236.

essential medicines. Unfortunately, however, their impact on the price of essential medicines is not substantial enough to solve the problem of access. Thus, the question remains, what is to be done about this problem? In the rest of the paper, I examine whether there is a moral obligation, which is transnational in nature, that directs us to address this special problem.

B. Justice and the Access to Essential Medicines

What I have been suggesting is that the presence of TRIPS has made it more difficult for states to provide affordable medicines to their citizens. All members of the WTO have to bring their intellectual property laws in compliance. For most states, their transition periods have already run out – only LCDs have until 2016. Compliance requires at least the following: states have to recognize the patentability of pharmaceuticals. But this is not a trivial move for states to make; the change in patent laws has had an impact on public health by making the provision of cheap generic drugs in the developing world the exception rather than the rule. As members of the WTO, states are legally obligated to conform, and if they refuse to bring their laws into compliance, they will face stiff penalties and sanctions for their noncompliance. I contend that this impact on public health is a product of international legal coercion. First, because states are coerced into changing their laws, in particular their patent laws. The changed laws are, of course, domestic laws, which thus may be legally enforced against individual citizens. If persons in the US or Mexico violate the patent laws of their country, they will be prosecuted – and in many cases criminally prosecuted – for their actions.

On a broadly Rawlsian view, which I endorse here, coercion has to be justified to those who are subject to it. The content of such a justification is a liberal conception of justice in which principles of redistribution form a prominent part.¹⁵⁰ I claim that international coercion that affects the kind of healthcare that people are able to receive is precisely the sort of coercion that has to be justified if it is to have any moral legitimacy at all. Furthermore, the justification may require the employment of distributive principles, which target the basic structure of the international trade system. This conclusion is quite controversial, and several important objections may be adduced against my view. In this section, I put forward some of these objections, examine their individual merits and suggest ways to overcome the difficulties the objections seem to point to.

1. *Objections*

Someone like Michael Blake might argue that the coercion that affects a person's access to essential medicines is domestic in nature, and so the justification that is due should surely come by way of a domestic conception of justice.¹⁵¹ The coercion that is done to states at the level of the WTO may require a justification, but

¹⁵⁰ This is a view that is endorsed by a number of people. See, e.g., Thomas Nagel, "The Problem of Global Justice," pp. 113-147; Michael Blake, "Distributive Justice, State Coercion, and Autonomy," pp. 257-296; Richard W. Miller, "Cosmopolitan Respect and Patriotic Concern," pp. 202-224. Nagel, Blake, and Miller understand Rawls himself to be concerned with domestic coercion, and take their own accounts as elaborations of Rawls's view of justice in a global context.

¹⁵¹ Blake, "Distributive Justice, State Coercion, and Autonomy." Blake seems to think that there is international coercion, but it is of the following sort. First, international coercion does not directly affect persons – instead, it affects states. Second, international coercion ultimately does not alter the distribution of individual economic entitlements. My example of TRIPS and its effect on access to essential medicine is meant to cast doubt on Blake's conception of international coercion.

because it involves states and not persons, a conception of justice with distributive principles would not seem to be the appropriate response: the coercion of states does not affect the division of economic goods of individual citizens – because these bundles of goods are affected by the enforcement of only domestic laws. Of course, domestic laws are also affected by international coercion, since they have to be at least consistent with the international standards under TRIPS. These laws in turn affect the livelihood of individual citizens, which means that once again we have to ask ourselves whether these laws are justified. This requirement of justification cannot be eschewed, but the focus still remains on domestic laws. So whatever justification is offered for national intellectual property laws, such a justification would have to be reflected in a domestic conception of justice. In other words, a just society, one where distributive principles apply, would take care of accessibility of essential drugs to those who can no longer afford them: much more redistribution might be called for to offset the increase in the price of patented drugs. The basic point of this objection as I see it is that the impact of the new patent regime can be dealt with by a conception of justice for domestic society, and thus there is no need to internationalize or globalize principles of distributive justice.

There are several responses that can be made to this objection. First, although the WTO itself does not stand behind the enforcement of domestic laws, it makes its member states do precisely this, albeit with respect to only some of their laws. The WTO plays a fundamental role in the genesis of certain domestic laws, and although it does not directly enforce them against individual citizens, this in no way suggests that the WTO is not responsible for their coercion. Indeed, the WTO and individual states

work in tandem to implement a global intellectual property regime: even though individual states engage in the actual coercion, they do so on behalf of a legal regime that has been authored by the WTO. In other words, member states are basically the enforcement arm of the WTO's system of intellectual property. The distinction between direct and indirect coercion does not appear to have much moral force to it: both the WTO and individual states are responsible for coercing individual citizens, but they are responsible by doing different tasks that lead to this result.

It might be argued, at this point, that individual states willingly enter the WTO. If that is indeed the case, one might then contend that member states, for this very reason, are not subject to any coercion. They consent to becoming members of the WTO, and by consenting to membership, they also consent to all of the obligations that accompany it. The fact of consent thus would remove any and all danger of member states being coerced by the WTO.

This objection clearly presents a difficulty for my view. But its proper discussion would require a lengthy exposition of the concepts of coercive threats and coercive offers, the differences between them, and an argument defending coercive offers as capable of generating coercion, which I think would take us too far afield from the main line of argument of this paper. However, a more succinct response to this objection is, I believe, possible and may be enough for my purposes here.

I think that if any coercion is involved in making certain member states join the WTO, it cannot be by way of applying coercive threats. That is because states are not threatened with a circumstance that would make them worse off than they would

be, relative to the baseline of non-membership, if they were to refuse to join.¹⁵² On the contrary, membership would make states better off than they would be if they were to do it alone. Still, in my opinion, despite a net gain over the baseline of non-membership, many states – specifically, certain developing and least developed states – are coerced into joining the WTO. They are coerced because they are given a coercive offer – and not a threat – which I suggest is nevertheless a type of coercion. Why coercive offers are in fact coercive is quite complicated and has generated a great deal of discussion.¹⁵³ However, a basic explanation of why they are coercive can be given, and it has to do with how such offers are used by a putative coercer. Coercive offers are generally made to an offeree who finds herself in dire circumstances – e.g. she is threatened with imminent death or serious physical injury, is forced to live a life that is degrading to her, etc.¹⁵⁴ All offers including the coercive ones promise to rescue the offeree from her current circumstances. But what makes coercive offers coercive is that they come with certain conditions, which if accepted exact a heavy moral, and often psychological, toll on the offeree, usually, by subjecting the offeree to degradation or humiliation – to conditions, in other words, that cannot be accepted from a position of moral self-respect. The coercive offer forces the offeree to accept a new circumstance, even though it comes with conditions that are degrading and

¹⁵² For an extensive discussion of coercive threats and coercive offers, see Alan Wertheimer, *Coercion* (Princeton, NJ: Princeton University Press, 1987); Robert Nozick, “Coercion,” in *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel*, ed. Sidney Morgenbesser, Patrick Suppes and Morton White, New York: St. Martin’s Press, 1969.

¹⁵³ For a good discussion of the various strands of thought for and against coercive offers being coercive, see Wertheimer, *Coercion*.

¹⁵⁴ These examples are more thoroughly developed in Wertheimer.

humiliating, because the offeree has no real choice but to accept them – the alternative is even worse than the degradation and humiliating implicit in the offer. The offeror exploits this vulnerability to her advantage by extracting a concession out of the offeree, a concession that the offeree would not have self-respectfully made were she not facing a desperate situation.

Let me suggest the following definition of coercive offers: S makes a coercive offer to T if and only if: (1) T finds herself in circumstances that are intolerable (generally, because her autonomy is severely restricted); (2) T is powerless to escape her current circumstances on her own; (3) S communicates to T that if T were to do A, S will make T better off than T currently is (generally, by bringing about circumstances C where T's autonomy is less restricted); (4) S intends T to understand that S is making an offer and that S will make T better off only if T complies; (5) T understands that S is making an offer; (6) T believes that S is capable of making her better off; (7) T does A; (8) T would not have done A if her current circumstances weren't so intolerable; (9) T's reasons for doing A are in part to escape her current circumstances.¹⁵⁵ I contend that many developing countries enter the WTO because they see membership as a step in the right direction toward escaping from economic deprivation. These poor developing countries agree to their obligations because they have no choice but to accept them, since they are not in a position to do it alone and need the WTO. But from a position of greater strength, their choices might have been different. Thus membership for these countries seems to resemble coercive offers in

¹⁵⁵ In defining coercive offers, I take as my starting point Joseph Raz's definition of this concept. See Joseph Raz, *The Morality of Freedom*, New York: Oxford University Press 1986, pp. 148-57. I offer a more elaborate definition that tries to overcome certain counterexamples to which Raz's definition is susceptible.

the way that I have defined them.¹⁵⁶ They face a dire situation at home, namely, severe deprivation and poverty of their citizens, out of which they cannot emerge on their own. But WTO membership comes with a price, and this is the lack access to affordable medicines for their most vulnerable citizens, an outcome that is coercively imposed, since those affected would not accept it from a position of self-respect.¹⁵⁷ The lack of affordable essential medicines for the poor in developing member states is precisely the type of condition that is analogous to degrading conditions that accompany coercive offers directed at individuals.

But even if I am wrong that certain states are coerced into joining the WTO, I think that in the end this might not matter. The reason for this is that once a state has made such a fateful step, it is very hard to make it out, in part because one's policies have already been shaped by one's obligations under the WTO. But for a state to remain a member means that it will now be subject to coercion that forces both the state and its citizens to be compliant. And when it comes to individual citizens of

¹⁵⁶ My definition of coercive offers involves persons, not states. Although I think that it can be extended to states, a more detailed discussion has to be given, one that offers an argument for why my account of coercive offers can be used to explain the coercion of states. This I hope to do in another paper, which would be exclusively on coercive offers.

¹⁵⁷ The above definition is meant for offerees who are individuals, not states. But I think that the definition with certain changes can be extended to states. Of course, we cannot talk about the autonomy of a state as conceptually relevant, but we can still talk about the autonomy, or lack thereof, of individual citizens and that when this is widespread, because of extreme poverty and deprivation, we can say that this is a dire circumstance for the state. In addition, it also does not make sense to say that WTO membership degrades the developing country, but I think we can still hold that lack of access is an affront to individual dignity and is something that a citizens cannot self-respectfully consent to. Of course, for coercion to take place it matters whether the leadership of the state actually cares about the plight of their economically disadvantaged citizens. There is evidence, given the involvement of many local NGOs that representatives from several developing countries such as India, Brazil, Thailand were concerned about the plight of their citizens when negotiating the TRIPS Agreement. See

member states, they certainly become subject to legal coercion, which then has to be justified.

Let me now leave aside the issue of whether certain states are coerced into joining the WTO, and focus on other objections that can be made against my view that the problem of access requires WTO-wide economic redistribution.

One line of argument against me might contend that individual states are in a better position to remedy the problem of access. It may be suggested, along these lines, that there is after all a net benefit accruing to a state from its membership within the WTO. Why not then have the state use some of its economic gains from integrating within the international trade system to deal with some of the costs of such integration? For instance, why not expect the state to provide something like a subsidy to its public so that essential medicines are once again affordable despite their increase in price? The point of the argument is to spur individual states to pick up the slack so that the downside to economic integration is quickly remedied.

This particular objection, which seems to favor a shift in responsibility toward member states, is problematic in several ways. First, it is quite unrealistic about what states, in particular developing and least developed states, are capable of doing. Most of the states we have in mind here are still quite poor, have a bad record of governance and inadequate institutions, and continue to generate budgets that are too meager to address the basic needs of their people. Again many of these states are reeling from other injustices and so cannot address them all at once. And indeed there may be a need to prioritize their domestic problems, which could mean that access to essential medicines may not be realized right away, or even at all, if left entirely to the state to

deal with. What can we expect from Sierra Leone when it is still desperately poor, socially fragile, and very far from realizing anything like a basic structure that conforms to a conception of justice?¹⁵⁸

There is I think another worry about the above objection. Even if countries like India and Brazil can overcome the problem of access through increased redistribution (of income and wealth), this does not mean that what we have is a morally adequate justification for a coercively imposed patent system. I think that one way in which the justification, involving only the state in addressing the problems of access, is woefully inadequate is that it lets the WTO off the hook. As I have tried to suggest, this is a mistake because the WTO and its member states play a crucial role in making individual states adopt a particular patent regime.¹⁵⁹ They thus have to be held accountable, and the justification of the patent regime should reflect this. One result of holding the WTO accountable is that those Brazilians and Indians, who are suffering as a result of the changes in the patent laws of their countries, may direct their complaints not just against their fellow compatriots but also against other member states of the WTO and their citizens. The WTO's involvement in the coercive imposition of a patent regime in India and Brazil expands the domain of actors who are complicit in the imposition of national patent regimes. The justification that is sought has to satisfy in some appropriate way those who are

¹⁵⁸ Note that by a conception of justice I do not have a particular conception in mind, like, for instance, Rawls's special conception. Any species within a family of liberal conceptions of justice would do.

¹⁵⁹ The WTO's Dispute Settlement Body can, for instance, sanction a member for a violation once the Appellate Body has determined that the member is not living up to its obligations under TRIPS. See *supra* for a more detailed discussion of the WTO's Dispute Settlement System, pp. 26-30.

subject to the patent system. To see whether domestic redistribution alone is sufficient to justify the effect on global access to essential drugs, we have to examine whether this is something that cannot be reasonably rejected by those who are affected by such an arrangement. Which arrangement cannot be reasonably rejected is something that concerns not only citizens of India or Brazil, but in fact should be directed at all participants within the international trade regime. So the question is, is a purely internal or domestic proposal to solve the problem of access to essential drugs something that cannot be reasonably rejected in light of the expanded domain of actors?

One example of such a domestic arrangement would be to have the well-off in Brazil contribute to a tax-financed subsidy that goes to their worst-off fellow citizens in order to assist them in purchasing essential drugs. Under this arrangement, the worst-off in Brazil appear not to have any legitimate reasons to reject it, which would make the arrangement at least in their eyes seem justified. The well-off do not have any legitimate reasons to complain against this arrangement when those complaints are directed at the worst-off, and the reason for this is that the burden of having to go without essential medicines is much more serious than what the well-off would have to give up in the form of tax contributions that fund these subsidies. However, this does not imply that the well-off in Brazil have no grounds for complaint. Brazil is significantly poorer than the US and the EC and the well-off there are on average poorer than their counterparts in the US and the EC. Any state-wide redistribution from the well-off in Brazil would leave them worse off than they would be under an arrangement that looks to the other member states for additional economic assistance.

This implies that the well-off in Brazil have legitimate reasons to reject the purely state-wide arrangement because there is an alternative, more global, arrangement under which their burden is less and yet there is still adequate access to essential medicines. Moreover, the well-off in developed countries cannot reasonably reject the more global arrangement, since their burden under this scheme is less than the burden on the well-off from developing countries under a purely domestic arrangement. From the standpoint of hypothetical consent, the arrangement that achieves equilibrium is likely to be more global, requiring that there be redistribution among WTO member states, and not within an individual state where the flow of economic assistance moves from the well-off to those who no longer can afford essential medicines under the new patent regime.

There is, however, a much more serious objection that may be raised against my view. I have been saying all along that member states contribute to the coercive imposition of a national intellectual property regime. But it may be argued that what does not follow from this is that all citizens from these members states contribute to the coercive imposition of this regime in a way that makes them somehow responsible as agents of coercion. For instance, there are citizens of member states who live under a political system that is not democratic and have no say in what the state does, be it domestically or internationally. Would it be right to hold such citizens responsible for the effects engendered by the WTO regulated trade system even if their state is a member?

An argument of this sort may be discerned in Nagel's writing on international justice.¹⁶⁰ Nagel makes a case that citizens of one state do not owe a duty of distributive justice to citizens of another. Nagel argues that the obligations of distributive justice are the result of a special political relation that exists among fellow citizens.¹⁶¹ Citizens are in a sense unique and deserve special attention because they are subject to a shared set of laws and institutions that are coercively imposed. But, Nagel adds, for the special relation to be capable of supporting duties of justice, there must also be that "special involvement of agency or the will that is inseparable from membership in a political society."¹⁶² This special involvement of agency is present when citizens participate in state-based coercion of their fellow citizens and endow their state with the authority to engage in such coercion. Citizens participate in the coercion of their fellow citizens when they assume their respective roles in the collective life of society, and, by doing their part, make it possible for the state to be an effective enforcer of its laws. Citizens grant the state the authority to coerce by affirming that the state has the right to enforce its laws. Thus the special relation, grounded in the special involvement of citizen agency, makes citizens, according to Nagel, complicit in one another's coercion.¹⁶³ It is in light of this special relation that citizens may demand from one another that there be justice, and, in particular, economic equality. The reason for this is that the only way that citizens can justify the

¹⁶⁰ Thomas Nagel, "The Problem of Global Justice."

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

laws and institutions of their state to one another – laws and institutions that have a profound effect on individual life prospects – is to have them exemplify a conception of justice that embraces some form of economic equality.¹⁶⁴

But what happens when the special relation is missing? Nagel contends that in such a context there simply are no duties of distributive justice; the most there can be are duties of humanitarian aid.¹⁶⁵ This presents an obvious problem for my view. It might be argued that the WTO regulated international trade regime simply does not exhibit anything like the special relation among the collective citizenry, i.e. those citizens who hail from the member states of the WTO. But if that is the case, there is no room for duties of distributive justice within the international trade regime.

¹⁶⁴Ibid.

¹⁶⁵ Ibid. It might be suggested that the provision of essential medicines to the global poor is humanitarian in nature and so would be entailed by duties of humanitarian aid. I think that this may be the case in very extreme situations. For instance, humanitarian aid may be extended to people who are facing death or the prospects of a life of pain or substantial disability because of their medical condition, but who simply cannot afford the necessary medication – and if they managed to gather enough money, would face starvation, severe malnutrition, or something else that is equally dire. But if getting the necessary medication means borrowing money at exorbitant interest rates and then having to live a life of toil to pay off the debt, then Nagel's humanitarian duties of aid won't be triggered – that is because these duties are triggered when there is a humanitarian crisis that is rather extreme: starvation, genocide, ethnic cleansing, natural disasters, etc. The key issue with access to essential medicines has do with the kind of burden that we think is acceptable to impose on the global poor. From the standpoint of Nagel's humanitarian aid, duties of aid appear to tolerate burdens on the poor that can be quite significant. This is why we need duties of distributive justice, for duties of justice entail a much less burdensome and, therefore, also a less harsh system of access. What is more, humanitarian duties do not take into consideration how the particular humanitarian crisis came to be: as long as it is there, we have a duty to its victims. But what I am suggesting here is that those of us who have a duty to makes essential medicines more accessible to the poor are encumbered in this way because we are complicit in creating this problem, and consequently may be required to do a lot more than the sort of assistance that is entailed by humanitarian aid.

I think that Nagel's argument is a challenge to me on the following front. It may well be that the international trade system is coercive in more or less the way that I suggest that it is. Moreover, it may also be the case that such coercion affects the economic wellbeing of some citizens – because essential medicines become much less affordable. Nevertheless this is not enough to establish that there are duties of distributive justice within the international trade system because the citizenry of the WTO are not related to one another in a way that would entail such duties.¹⁶⁶

I think there are two ways to respond to this challenge. One way is to say that the citizenry of the WTO do stand in the right sort of relation to one another so that there are duties of distributive justice that are specific to the international trade system. Another way is to suggest that the special relation is not really a requirement of distributive justice. The second of these responses is more promising, and later in this section I explain why this is so. But let me first try to develop an argument along the lines of the first response.

It might be argued that there is already something like the special relation within the international trade regime. After all, the special relation is premised on the special involvement of individual agency. And this is present when individuals participate in the making of the laws and institutions and in enabling their coercive imposition by an agent with the authority to do so. Of course, when it comes to the

¹⁶⁶ Note that this is a different challenge from that coming from Blake. The Blakian challenge, if we can call it that, was that international coercion was just not the sort of thing that could affect the economic wellbeing of individual citizens. For Blake international coercion is something that takes place just between states and its effects do not trickle down to the level of individual citizens. The TRIPS example is meant to challenge the accuracy of Blake's assertions about international coercion. But as yet the example does not address Nagel's requirement that there be a special relation.

WTO, the various multilateral agreements that specify the rules to which member states are bound have been designed and agreed to by individual states. Moreover, when there is a dispute about compliance, it is once again individual states that are authorized to raise this issue within the WTO. So far individual citizens do not seem to be involved in any way. But this is not entirely accurate. During the early phase of the Uruguay Round when it was still unclear what form the TRIPS Agreement would ultimately take – and indeed whether there was even going to be an agreement on intellectual property – numerous local NGOs in India, for instance, lobbied the national government quite vigorously in an effort to prevent any agreement from extending patent protection to pharmaceutical products.¹⁶⁷ These NGOs ultimately ended up on the losing side, as India eventually succumbed to the pressure coming from the US and the European Union. But this effort nonetheless did represent an attempt on the part of some Indians to try to influence the substantive provisions of the TRIPS Agreement. Something similar may be said about the role that the US played during the Uruguay Round. The US was pushing an agenda that was quite pro-business and one that favored the protection of all forms of intellectual property that are recognized by its national laws. Much of the substance of the policies that were advanced by the US was heavily influenced by the Intellectual Property Committee (IPC).¹⁶⁸ There was thus an effort in the US as well, on the part of certain well-placed

¹⁶⁷ See Evans, “Intellectual Property as a Trade Issue,” pp. 171-74; Dasgupta, *WTO & TRIPS: Indian Perspective*.

¹⁶⁸ The IPC consists of some of the largest corporations in the US; its stated purpose is to improve intellectual property protections throughout the world. See Susan Sell, *Private Power, Public Law*.

and powerful individuals and also their firms, to shape the rules that were to be incorporated into TRIPS.¹⁶⁹

The difficulty with this response is that it seems to work with states that are representative democracies to some extent. India and the US are examples of this. But of course not all states that are members of the WTO are democracies or even functioning states. Both the Democratic Republic of Congo and Niger, for example, are member states. But could we say that the agency of citizens from two of the poorest and politically dysfunctional countries in the world have been somehow involved in the making and enforcement of the TRIPS Agreement? I think that the reasonable answer is, of course not. It may be suggested that citizens of democratic member states stand in a special relation to citizens of other democratic member states, and thus owe duties of justice to one another. But this proposal has the result that the Americans may owe a duty of justice to the Indians but not to the Congolese, which seems quite implausible, since the Congolese are more vulnerable and more in need of economic assistance than the Indians.

I think that the better response to Nagel is to say that the special relation is not necessary for distributive justice in the way that he thinks that it is. What I will in fact argue is not only that the special relation is not necessary, but there is also something quite misguided about Nagel's approach to thinking about distributive justice and about justice in general.

¹⁶⁹ The people involved of course were only a small cross-section of the American public. But the American public at least in principle has a way to influence the policies, both foreign and domestic, that are carried out by its government: if unhappy, the American public can voice this unhappiness by voting against the government that is in power.

For Nagel, as mentioned above, there has to be a special relation before we can attribute duties of distributive justice to one another. Where the special relation is present, as it does in a liberal democratic state, the state has to be quite egalitarian. On the other hand, where the special relation is absent, the demands of distributive justice are non-existent, and so a state may have a basic structure that tolerates huge economic disparities without thereby becoming unjust. This suggests that what is ideally just for a state really depends on whether or not its citizens exemplify the special relation. In other words, the special relation is the all important variable whose presence affects what we consider to be ideally just. For Nagel, what is ideally just has to be worked out in stages. First, citizens have to fight for a political system that implicates their agency in a way that makes the system be in their name. Only once individual agency is implicated in this way and the special relation binds citizens together, may what is viewed as ideally just move up a notch and embrace some version of social and economic equality.

This I suggest is a very strange way to think about justice. When we think about what it would be like to have a just state or a just world, we are immediately drawn to what we perceive to be as ideally just. We may of course disagree with what it is for a state to be ideally just. (The debate between Rawls and Nozick may be viewed in this way.) But in every case what is on offer is a conception that embraces an ideal. The reality of course is that we have no choice but to be subjects of one state or another, and for most of us this will be a specific state, as we remain nationals of a single country from birth to death. Once we accept that it is our fate to live in a state, it seems natural to want to maximize its virtues. In other words, as long

as the state is going to wield enormous power and control over our lives by regulating our terms of cooperation with one another, we would want to perfect the state as much as possible, and justice clearly ought to constitute the sine qua non of the virtuous state. There will be differences of opinion about what is an ideally just state, but not in the way that Nagel's account appears to imply. Whether I happen to live in a totalitarian state that is in the iron grip of the military or party elite, or in a liberal democracy, what I imagine to be ideally just should not vary. For instance, I would not hesitate to say that it is better to live in a state that is democratic than one that is not; that respects a wide range of human rights than one that respects only a few or none at all; that limits the extent of economic disparities among its citizens than one that pays no heed to the presence of economic inequality.

Of course, I say these things because my considered convictions, which shape these judgments, reflect my immersion in a political culture where convictions of this sort are quite prominent. Someone, on the other hand, who comes from a different cultural and political background might have a different ideal in mind. She might claim that it is better to have a state that is theocratic, with laws and institutions that reflect a comprehensive conception of the good, steeped in centuries-old religious traditions of her people. But what is important to notice here is that the person who embraces the religious ideal is not going to vary it on the basis of whether her agency is involved in a particular way. Instead, she simply identifies an ideal, and if the state falls short of this ideal, then presumably she would want the state to come to realize it one day. In this respect, the religious person and I are on the same page: we work out what we think would be an ideally just state and use it as a guide to inform us about

what is wrong with our state currently and what has to be done to correct this. Nagel's insistence on the special relation as a factor of constraint on what is ideally just frustrates this way of thinking because we are kept from imagining the truly ideal and, instead, are saddled with an inferior version.

Rawls's approach to developing a conception of justice, I think, avoids Nagel's counterintuitive results. On the Rawlsian picture, we have to justify the coercive laws and institutions of the state because they ultimately define the constellation of rights and the bundle of economic goods that citizens receive. When we make the subjects of coercion the focus of a theory of justice, the question then becomes, what would justify the presence of such coercion to these subjects?¹⁷⁰ But once we take the position of the coerced, there is one and only one way to justify the presence of coercion and that is by way of a conception of justice – for nothing less than ideal justice would be enough. But when we attend to this fact of coercion, any mention of the special relation between fellow citizens essentially drops out. That is because regardless of who is doing the coercing or how it gets generated, citizens are being coerced, and it is this fact about their political existence that has to be addressed. And because this can be achieved by nothing less than ideal justice, it does not ultimately matter whether the state exercising the coercion is democratic, where the special

¹⁷⁰ This is a key difference between Rawls and Nagel. For Rawls, the fact of coercion is of central concern, which, prioritizes the position of the coerced and demands that we examine the adequacy of justifying coercion from their standpoint. This makes the project of justifying coercion more straightforward because we only have to look at coercion from the standpoint of the coerced without having to include fellow citizens as middlemen mitigating the adequacy of justifying coercion.

relation is present, or nondemocratic, where it is not.¹⁷¹ In either case, coercion has the same result and that is to define the entitlements that citizens have access to.¹⁷² But if the result is more or less the same in either case, then it stands to reason that the justification for coercion done by a democratic state and one for coercion done by a state that is not would also have to be more or less the same.¹⁷³

How we are connected to one another as citizens does not change what we think is ideally just, as I tried to argue above. Our conception of ideal justice, in part, is meant to illuminate the various injustices that are present in our state. But the fact that there are these injustices out there does not yet tell us what we are supposed to do about them. Is it obvious that as citizens we have a duty to eliminate these injustices and bring our state closer to realizing our conception of ideal justice? I do not think so. Nor is it obvious that even if there is such a duty that the burdens of political transition should fall in equal parts on all citizens regardless of their status in society.

This suggests that Nagel's claim about the special relation may still be relevant, but in relation to the task of rectifying existing injustices. Duties that attend a conception of justice are one thing – and here the special relation does not have any

¹⁷¹ This is not explicitly Nagel's claim. But in another paper, I contend that a good case can be made that nondemocratic states do not implicate individual citizens in the coercion of their fellows compatriots in a way that would make the state's system of laws and institutions be in their names.

¹⁷² This is not to suggest that the two generate the same entitlements, which would be false. What I mean here is that formally coercive laws and institutions both in democratic and nondemocratic states affect the bundles of rights and economic goods that citizens have access to. Of course, the content of these bundles will be vastly different.

¹⁷³ What is more, there is nothing unfair about having rather robust duties of justice that demand redistribution because that is what justice demands in circumstances where there is coercion. If we have settled on the right conception of justice, then there is no room for complaint.

bearing on the substance of a conception of justice. But what we are required to do in the here and now to make the state conform to ideal justice is a different, though a related, problem in a theory of justice – and here it may be argued that something akin to the special relation still matters. Our task in the here and now is not the same as what we are called to do by a conception of justice.¹⁷⁴ In other words, there are two distinct problems at issue: one of the problems has to do with transitioning toward ideal justice, and which falls squarely within the realm of non-ideal theory; the other has to do with working out a conception of justice, which when implemented by a state would make it ideally just.¹⁷⁵

My contention here is that we have a further problem in a theory of justice to deal with, which is not about what is owed to others as required by a particular conception of justice. Indeed, as citizens of an ideally just state, we have duties of justice because the conception of justice that applies to the basic structure requires that we do. These duties of justice are constitutive of an ideally just state: they are the very expression of a conception of justice, which when instantiated makes the state ideally just. But this is only part of the story, for there may also be duties of justice that have

¹⁷⁴ Even if we think, for instance, that economic inequality in the US has to conform to the difference principle, there is no way that this can be done without politically preparing the American polity for such an endeavor. The institutional groundwork has to be laid before anything like the special conception becomes a political reality. Think of what it would take to implement the difference principle. Our state in its current form may not have the institutional framework to put the difference principle into practice. So laws would have to be changed and new institutions would have to be designed to support the massive redistribution that would begin to take place. But the more difficult problem has to do with convincing the vast majority of the American people and the American government that the difference principle is the right principle. At this point in time given the current political atmosphere this seems like an impossible task to pull off. This suggests that a great deal has to be accomplished before anything like the special conception can be applied to the basic structure.

¹⁷⁵ This is a problem of course for ideal theory.

to do with transitioning a state from having a basic structure that is unjust to one that exemplifies a conception of justice.¹⁷⁶ Nagel's objection may be taken as challenging an account of justice that stipulates that citizens *per se* have duties of the latter sort. It may well be the case that a just state is one where citizens have a duty to make their state reasonably egalitarian. But what happens when the state falls short of realizing such ideal justice in its basic structure? What obligations, if any, do citizens have to one another to make their state transition toward being ideally just? Nagel's original point about duties of justice requiring the special relation can be reformulated to apply to duties of transition instead: if citizens are to have duties of transition, then there has to be a something like the special relation.

Viewed in this way the objection does have merit, for there is something right about examining the role the individual plays in her polity in delineating the duties that may be owed to rectifying injustice.¹⁷⁷ An individual, for instance, may play only a *de minimus* role in the coercive imposition of unjust laws because of her social and political status within the state. For example, if Jamila is a member of an oppressed minority who is kept out of the political process entirely, and who may be severely punished for any type of behavior that appears to challenge the laws and institutions of the state, then her obligation to her fellow citizens who are least-advantaged may be mitigated by the forced political disenfranchisement from the political process.

¹⁷⁶ We can call them duties of transition because their purpose is to achieve ideal justice.

¹⁷⁷ However, I interpret this relation in a way that is somewhat different from what Nagel has in mind when he invokes the special involvement of individual agency. I argue that the relation has to be explained in terms of how the individual is being treated by the relevant political system of which she is a member and not in terms of the involvement of her agency.

Jamila's connection to the least advantaged is more attenuated because she has no way to influence the laws and institutions to which they are subject. Nor do the laws and institutions seem to favor people like her, since she is a member of a minority that has been targeted for ill-treatment. Because of the way Jamila is treated, it may not be right to say that she is implicated in the coercion of her fellow compatriots in quite the same way as that of the majority whose access to the political system is much less hindered. For this reason, it would be unfair to hold Jamila responsible for the plight of her fellow citizens to the same extent, or even at all, as members of the majority who play a more substantial role in generating injustice.¹⁷⁸ Thus, even if we accept that our ideal includes distributive justice, what is demanded of us to achieve this ideal may depend on our standing within the state. Furthermore, this applies not just to states, but to any coercive system of cooperation that falls short of ideal justice as specified by a conception of justice that is suited for it, including international systems like the international trade regime under the WTO.

The difference between my position and Nagel's may be explained by looking at where we locate the relevance of a person's nexus to her polity. Nagel thinks that it makes a difference to what we, as members of a coercive system of cooperation, owe one another under ideal justice. I, on the other hand, maintain that coercion alone is

¹⁷⁸ What Nagel says about the special relation may be viewed as a way to make sense of our intuition that citizens are not all responsible in the same way for the harms suffered by their compatriots. But the reason for this, as I will explain, goes deeper than the way in which individual agency is implicated in state coercion. As I suggest below responsibility hinges on how the individual is treated by her polity. Nonetheless, when a person is poorly treated by the polity in the way that I suggest, it is also the case that her agency is not going to be involved in the coercion of her fellow citizens in the way that Nagel thinks is morally significant.

sufficient to trigger the requirement of justifying the exercise of coercion, which can only be achieved by invoking a liberal conception of justice. But I also suggest that how a person is treated by her polity does make a difference to what she may be obligated to do to bring about a transition toward ideal justice.

In the next section, I offer an account of why we have an obligation to bring a coercive system of cooperation of which we are members closer to justice. But I also try to make sense of how some individual participants may have a lesser obligation or none at all to remedy injustice based on their role or involvement in such systems. I suggest how this can be done with respect to states and their citizens, but more importantly, I maintain this can be extended to apply to the international trade regime as well.

2. Collective Responsibility

As citizens of a state – and correspondingly as members of society – we are responsible, to some degree, for the injustices that are committed by our state. The injustices I have in mind here are ones that have been at issue throughout the paper, namely, those that flow from a basic structure that happens not to instantiate some suitable version of a liberal conception of justice. The issue of responsibility, of collective responsibility to be exact, ties in with our attempt to offer an account of what should be done when our state, and also society, fall short of ideal justice. The notion of collective responsibility gives us a straightforward way of both specifying the content of a moral duty – or a moral imperative – and of identifying the agents on whom the duty falls. If we are the ones responsible for these injustices in some way,

then it would only seem right to demand from us that we see to it that these injustices are rectified and things are set as they ought to be. Indeed, this is the line I will pursue here as an answer to the question, what are we morally required to do to bring our state in compliance with a conception of justice and why we are expected to do so. I call duties that apply to ordinary citizens at such a juncture duties of transition. My answer roughly is that we are required to correct these structural injustices because we are collectively responsible for them and the only way this can be done is to have a conception of justice be applied to the basic structure. The duties of transition, in other words, entail that in discharging our collective responsibility we are to ensure that the state implements a conception of justice.¹⁷⁹

Collective responsibility is, I think, a rich, albeit a controversial, basis for duties of justice, but, as I argue, it forms an important part of non-ideal theory. In my discussion of collective responsibility, I rely on David Miller's significant contributions to this subject.¹⁸⁰ I accept his general thesis that responsibility may be assigned to individuals based on their group membership. However, I disagree with some of the details of his position. In particular, I reject Miller's explanation for when and why individual members become exempt from collective responsibility. Instead, I offer my own grounds for annulling responsibility, which cover a much broader set

¹⁷⁹ One thing that I do not want to do is to suggest that collective responsibility exhausts the source of these duties of transition. It might well turn out, and I think that this is probably right, that the natural duty of justice may compel individual citizens to support an institutional shift toward greater justice as well, though it may not go far enough as what I think we are required to do as a result of our collective responsibility. See Rawls, *A Theory of Justice*, p.

¹⁸⁰ David Miller, "Holding Nations Responsible," *Ethics*, Vol. 114, Issue 2, January 2004, pp240-68. See also David Miller, "National Responsibility and Global Justice," *Critical Review of International Social & Political Philosophy*, Vol. 11, Issue 4, December 2008, pp. 383-99.

of cases. Below I offer a discussion of Miller's overall views on collective responsibility. After the summary, I put forward some of my criticisms of his account and then apply collective responsibility in this revised form to my discussion of the international trade regime.

3. Miller's Account of Collective Responsibility

Miller argues that individuals may indeed be held responsible for the actions of their groups or collectives. (These terms are used interchangeably by Miller.) So, for example, if a collective causes environmental damage, engages in ethnic cleansing, then its members are, at least putatively, collectively responsible for these harms. The responsibility is collective because it attaches to individual members in virtue of the role they play within the collective.¹⁸¹ Of course, the collective itself may be held responsible, but, as Miller explains, this really does not amount to much if we are serious about the normative implications of responsibility, which are meant to make agents accountable for the consequences of their actions and liable to make amends. In the end, Miller insists, it is persons who are equipped to deal with undoing or rectifying the harms of collectives, and so responsibility ultimately has to descend to the level of individuals.¹⁸²

Now Miller has a specific form of responsibility in mind. He thinks that those individuals who are collectively responsible are generally outcome responsible for the

¹⁸¹ Miller, "Holding Nations Responsible," p. 247.

¹⁸² *Ibid.*, p. 250.

harms caused by their collective.¹⁸³ For Miller, if a person is outcome responsible, then she may be required to bear the cost – some or all of it, depending on the situation – of remedying harms and compensating the injured party.¹⁸⁴ An individual may be outcome responsible for the harms she herself has caused or for those caused by her collective. Outcome responsibility in other words may apply either where there is collective or individual responsibility, but in either case the person becomes liable for the harms done. Miller distinguishes outcome responsibility from causal responsibility because he does not think that causal responsibility necessarily leads to outcomes responsibility.¹⁸⁵ Outcomes that arise in unforeseeable and unintended ways usually do not entail outcome responsibility. Furthermore, Miller insists that we should not equate outcome responsibility to moral responsibility: a person may be outcome responsible for a particular harm without necessarily being morally blamed for it.¹⁸⁶ If Smith is visually impaired and accidentally bumps into and breaks a Ming vase on display, then presumably she ought to pay for it. But we would not say that she deserves to be rebuked for having accidentally broken the vase.¹⁸⁷ These distinctions seem right to me, and I think the separation of outcome responsibility from moral responsibility is especially important for it allows the imposition of

¹⁸³ *Ibid.*, p.245. Miller attributes the term to Tony Honore', which appears in Honore''s, *Responsibility and Fault*, Oxford: Oxford University Press, 1999.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*, p. 246.

¹⁸⁶ *Ibid.*

¹⁸⁷ We are assuming here that Smith was not doing anything out of the ordinary like running around flailing her arms and bumping into things. Perhaps under these circumstances some moral blame might not be out of place.

liability without having to establish moral culpability or blame, which is much harder to do.¹⁸⁸ So from now on it will be with outcome responsibility that I will be concerned with in my discussion of collective responsibility.

It is one thing to specify the moral demands that are implied by outcome responsibility, but it is quite another thing to justify the attribution of outcome responsibility on the basis of membership. So how does Miller justify such an ascription? In his discussion of justification, Miller distinguishes between two types of collectives: the first type he calls the “like-minded group model,” and the other, “the cooperative practice model.”¹⁸⁹ The like-minded group consists of members who are brought together because they share a common cause – a group of rioters, criminal gangs, etc. fall within this category. The second type consists of persons who are part of a “common practice” and share in the benefits created through cooperation, and there is no “requirement that the group in question should share a common identity.”¹⁹⁰ With respect to each type of group, Miller offers a series of rationales for holding their members responsible. Participants in a mob, for example, are responsible because they participated in a “collective activity that was certain to inflict

¹⁸⁸ What really is the point then of moral responsibility if just like outcome responsibility the agent is liable for the harms done? It seems to me that one thing that can be said about someone who is also morally responsible is that she may deserve to be punished, and this may be reflected in the cost of remedial measures imposed on her, or in the way she is treated – for instance she may be deprived of her freedom as retribution for the things that she did. Persons who are outcome responsible are not being punished, nor do we think that they deserve to be.

¹⁸⁹ Miller, “Holding Nations Responsible,” p. 249.

¹⁹⁰ *Ibid.*, p.253.

damage on other people.”¹⁹¹ Miller maintains that it does not matter whether the actual outcome was intended by these participants as long as it was reasonably foreseeable – and insists that this is certainly the case with participants of an angry mob who happen to enter a vulnerable neighborhood. Nor does it matter, according to Miller, whether an individual rioter did any of the actual damage herself because she “shared in the general aim” of her group.¹⁹²

In another example, Miller extends collective responsibility to whites in the post-bellum South “for keeping blacks in a state of subjugation,” including those who rejected the worst forms of racial animus. He maintains that we are justified in casting a wide net of collective responsibility because even the less racist white Southerners who disapproved the way some of their fellow Southerners treated African-Americans nevertheless “shared in the set of cultural values” that encouraged such conduct.¹⁹³ This sharing of certain values amounted to a form of participation, for it generated an ethos of racial intolerance. Even passive members, in maintaining their allegiance to norms and values that underpinned the notion of white supremacy, contributed to a climate of racial hatred that led to lynchings and beatings.

In his exposition of the second model of a collective, Miller again asks us to consider an example. Suppose an employee-controlled company is engaged in a manufacturing process that causes environmental damage to a river. Miller argues that the employees of the company are outcome responsible for the environmental damage

¹⁹¹ Ibid., p. 250.

¹⁹² Ibid.

¹⁹³ Ibid., p. 252.

and thus should jointly bear the cost of cleaning it up. They (causally) contribute to the environmental damage to the river and also benefit from the activities of the company – they make a living, express their creativity at work, and so on. But, Miller contends, collective responsibility also extends to everyone, including those who objected to causing the environmental pollution. This is so because they too benefitted from a common practice: they enjoyed the benefits of their job, had a fair opportunity to influence company policies, and “so they must be prepared to carry their share of the costs...that stem from the external impact of the practice.”¹⁹⁴ Miller’s contention is that a member’s participation in and benefit from the common practice of her collective together are sufficient to make her outcome responsible for its actions.

The examples of collectives given by Miller point to the following common features. First, members contribute to the activities or practice of their collective. That contribution, however, does not have to be one that results in a harm: the individual rioter does not have to throw a single stone because her mere presence can be enough to encourage her fellow members to commit a violent act. Of course, when a member does participate in an action that causes a harm, it is much easier to find her outcome responsible. The passive white Southerner is held responsible because his support of values that underpin white supremacy normalizes and validates racial discrimination practiced by others. Second, members derive a benefit from the activities of their collective. This seems particularly true with cooperative ones, and both states and nations are prime examples of such collectives. Within states or

¹⁹⁴ Ibid., p. 253.

nations, individual members benefit by having access to public goods. Benefits that flow to individual members, however, do not have to be in the form of public goods – though public goods perhaps make a stronger case for collective responsibility. Members of ‘like-minded’ collectives also stand to gain from their membership: they may, for instance, derive a psychological benefit from having others join them in pursuing an end that is particularly important to them. The key point, for Miller, about collective responsibility is that to be outcome responsible a member has to both contribute to and benefit from the cooperative activities of her collective.

This basic claim about collective responsibility suggests that it can be extended to any collective as long as there is both contribution and benefit. As mentioned before, this is the case with states and nations. But this can be applied to other large systems or regimes of cooperation. (Indeed, cooperative collectives are examples of systems of cooperation.) In particular, we can extend this to *international* regimes of cooperation, including the international trade system. Miller himself directs his attention to nations in his discussion of collective responsibility and eschews the mention of states.¹⁹⁵ Yet there is nothing in his discussion that prevents states and the

¹⁹⁵ Miller insists that nations in particular may be held collectively responsible for what they do. Indeed, such collective responsibility implies that members of a nation may be held outcome responsible for the harms done by their nation, either to outsiders or to other members. For him, members of a nation are both participants in and beneficiaries of an ongoing cultural project carried out by the nation. And so as participants and beneficiaries, members have to own up, at times, to the deleterious consequences of the national project. My qualms with Miller have to do with making nations the loci of collective responsibility. Nations in pursuing their cultural agenda have to work through states. When a particular cultural aspect of a nation is under threat for whatever reason, laws are generally passed to protect it from going extinct. Canada for instance has language laws that try to maintain the importance of the French language throughout the commonwealth and especially in Quebec so that Quebecois culture remain vibrant and not overwhelmed by the more dominant culture of English speaking Canadians. Canada of course is multicultural, liberal democracy and so it may be argued that only more or less liberal states intervene on the side of marginalized cultures.

citizenry from collective responsibility. Nor is there anything to suggest that international systems and their participants are immune from responsibility.

States generate all sorts of harms, and in particular they produce injustice, which is a type of social harm. As we saw earlier, states engender injustice when their basic structure does not instantiate a conception of justice. This demand on the basic structure is made because the coercion exercised by the state has to be justified, which can only be done by applying a conception of justice. The presence of coercion is essential in defining the outcomes generated by the state as injustice and therefore as harms: without it, these special harms would not be there, nor would there be a need to alleviate them. The significance of coercion is thus two-fold: first, the presence of coercion can turn a certain outcome into injustice; second, coercion makes certain systems of cooperation possible, systems which would not endure without it and which immerse persons in a collective.

A nation that is the dominant one within the state, or the only one for that matter certainly does not need any assistance from the state. The claim that a nation can carry out its business independently of the state is not quite right. For one thing, a state can make it very difficult to pursue a national project and it can do so with a legal system that is hostile to this endeavor. This does not happen with respect to a dominant nation or one that is exclusive because in these cases the state is in sync with the nation; the laws are such that they allow the nation to express itself, through its cultural forms for example. My point here is that nations act through their own states and that brings in state coercion into the picture. National projects are outcome of state coercion. But when coercion is involved, those who contribute to the national project are not merely members of that nation. On the contrary, it is all citizens of the state that have to participate in the national project: English speaking Canadians participate in the preservation of Quebecois culture by abiding by the language laws of Canada. When only members of a nation are held collectively responsible, we may be undercounting the number of actual participants when non-national citizens are involved. Thus I would argue that when... the collective we in fact have is the citizenry, for those who participate in the coercion that is carried out by the state are precisely its citizens, not just members of a nation. So coercion is in some sense the political glue that engenders a collective that is just synonymous with the citizenry of a particular state.

When the basic structure of a state fails to live up to the standards of a conception of justice and there is thus structural injustice within the state, citizens of that state are *prima facie* outcome responsible for these injustices. That is at least what I want to defend. We have before us all of the ingredients of collective responsibility. The state certainly can be described as a collective. Its members are the citizens of that state and they work together to produce a cooperative product. They are bound to one another by the laws of their state and are kept from making themselves exempt from obeying them by the coercive power of the state. In a typical state, citizens also have access to certain public goods. How rich the set of public goods is and whether access to them embraces some form of egalitarianism will depend on how wealthy and just the state is. What is important to note here is that the benefits of being a citizen cannot be insignificant if we are to make citizens liable to the harms of their state. Indeed, it would seem unfair to burden a person in the way that outcome responsibility seeks to do if the benefits of citizenship are trivial or non-existent. This means that in the context of a failed or outlaw state, we cannot make sense of imposing collective responsibility on ordinary citizens of that state. But barring such cases, people generally benefit considerably from living in a state that is competent enough to provide even such basic provisions as personal security, basic education, protection of private property, and so on. Individual citizens through social and political cooperation also enable the state to carry on in the way that it does; in particular, they enable the state to enforce its laws within the territory that is under its sovereign control. As I argued elsewhere, the practice of good citizenship – i.e. obeying the law, recognizing that the state has the authority to enforce its laws, being

economically productive, making a good faith effort in participating in the political process where this is allowed – makes it possible for the state to be an effective enforcer of its laws.¹⁹⁶ One important consequence of such enforcement is that if the laws are unjust, the state in enforcing them is acting in an unjust way – it is committing injustice. Ordinary citizens in so far as they enable the state to behave in this way thus contribute toward engendering such injustice. That is to say, citizens become complicit in the harms generated by their collective, which is the state. In light of such contribution and the fact that citizens of a typical modern state derive certain important benefits, a case can be made for their collective responsibility.

Collective responsibility on the part of citizens of a state entails that they are, at least, outcome responsible for the structural injustices caused by their state. And outcome responsibility makes individual citizens liable for these injustices. A state that generates structural injustices – because the distribution of rights and entitlements is unfair – has a basic structure that falls short of ideal justice. Liability for these injustices requires that those responsible should remedy the harms done. In this case, this means that individual citizens ought to, through collective action, undo these structural injustices. Of course, these structural injustices would disappear if the basic structure were to instantiate a conception of justice. The responsibility that falls on individual citizens thus would require that they endeavor to make their state apply a conception of justice to its basic structure. In other words, they have a duty to see to it that their state transitions from being structurally unjust to being ideally just. It should

¹⁹⁶ In another paper, I suggests ways in which individual citizens contribute to one another's coercion. For the most part this consists in enabling the normal functioning of the state, which can they go on and enforce its laws. See my, "Response to Nagel and Blake."

not surprise us that the demands of outcome responsibility fall within the ambit of transitional justice.

Similarly, participants of the international trade regime are outcome responsible for the injustice caused by that regime. Certain essential drugs are much less accessible to the poor. The change in the patent laws has made a substantial impact on the wellbeing of persons who are subject to the global patent system. And as we saw earlier, this has to be justified. To do this, TRIPS may have to be amended so as to include a subsidized transfer of essential medicines to states that cannot afford to pay monopoly prices. My contention here is that doing nothing at this point would constitute an injustice. This specific result is an outcome of the international trade regime, which also happens to be coercive. It is not coercive in a straightforward way where there is a central and unified agent that directly coerces its subjects. States are coercive in this way, but not the trade regime. From the standpoint of justification, however, this hardly matters. The trade regime does indeed coerce individuals, but this happens when the WTO works jointly with individual member states. The process of coercion is started by the WTO, but it ultimately descends to the level of individual citizens. But this difference in how coercion is enforced does not diminishes the need for justifying the outcomes generated by the trade system, for the effect on individuals is the same: they are forced to obey international intellectual property laws that have also been nationalized. If the trade regime continues to operate by denying people access, then it is unjust in that respect. Because the trade regime also constitutes a collective, its participants may be held *prima facie* outcome responsible for this specific injustice and be required to rectify it.

4. Limitations on Collective Responsibility

So far I have argued that outcome responsibility based on citizenship and membership within the international trade system may compel a transition toward greater institutional justice. That said, not every member can be found outcome responsible. It would be a terrible mistake for instance if members who are victims of their own collective are saddled with collective responsibility for these harms. If an account of collective responsibility is to be plausible at all, it has to have the conceptual resources to exclude certain members from outcome responsibility. Miller is aware of this difficult problem and offers an interesting solution. Miller formulates two kinds of exceptions or exemptions to outcome responsibility. The first exemption applies to individuals who have gone out and done something substantial against the wrongs or injustices committed by their collective or group. As I interpret Miller, the idea behind this exemptions is that the morally decent and conscientious person has already done her part in trying to rectify the harms caused by her collective, and so it would be wrong or unfair to demand that she also take part in remedying these harms once her collective is ready and willing to discharge its obligation, as stipulated by outcome responsibility, to its victims. The second exemption applies to individuals who are members of a collective and who have been seriously victimized by their collective. An oppressed minority is a case in point. According to Miller, it would be wrong to hold members of a deeply vilified community outcome responsible for the harms done by the larger collective – i.e. nation or state – when they are themselves targets of these harms. Thus, German Jews should not be held outcome responsible

for the terrible fate that befell them during the Nazi period, even though they were members of the German nation as well as citizens of the German state.

In the section that follows, I examine Miller's exemptions to outcome responsibility and suggest how his account of exemptions might be revised to fall more squarely in line with our intuitions about collective responsibility. I claim that Miller's second exemption is spot on: we clearly do not want to hold victims outcome responsible for their victimization. But I also think that Miller's explanation for why we ought not hold victims responsible is not entirely convincing. Instead, I offer an explanation along Kantian lines that I think is more plausible and can be generalized to include other forms of victimhood that ought to exclude persons from outcome responsibility. On the other hand, I maintain that Miller's justification of the first exemption understates the extent to which even morally decent individuals may be unjustly rewarded by being part of a predatory collective. I provide an extensive discussion of this exemption and argue that the morally decent person should still be held outcome responsible, though to a lesser extent. In place of Miller's first exemption, I suggest another exemption, which Miller himself does not bring up. I claim that some members of a collective qualify to be exempt from outcome responsibility because the imposition of the cost of remedying a harm is unreasonably burdensome on them.¹⁹⁷ When it comes to large political entities, like the state or the

¹⁹⁷ An unreasonable burden is one that would severely diminish a person's overall life prospects. However, it has to be emphasized that what is at issue here is the cost of making the victim whole that goes beyond the cessation of active participation in committing a harm or injustice. Even poor white Southerners may not continue to benefit from racist and discriminatory policies even if this means that their livelihood would be harmed as a result. But they may be made exempt from contributing to a tax-financed project of undoing the legacy of white supremacy in the South if such contribution involves burdens that are severe

trade regime, and the remedy calls for some form of economic redistribution, the economically worst-off members may be entitled to be exempt, for the loss to them may be substantial enough to seriously diminish their life prospects.¹⁹⁸

5. Exemptions to Outcome Responsibility

In his work on outcome responsibility, David Miller contends that under certain circumstances persons should be excused from being held outcome responsible for the offences or crimes committed by their group or collective. He argues for two types of exemptions from outcome responsibility by way of discussing two examples from history.¹⁹⁹ In this section, I examine each of these examples in some detail, focusing specifically on what Miller thinks they purport to show. I then raise some objections to Miller's rationale for granting exemptions to outcome responsibility and instead offer my own explanations for them.

Let me first turn my attention to Miller's example of a white Southerner living in the post-bellum South.²⁰⁰ The imagined white Southerner – let us call him Jones – is not a victim of his collective; in fact, he is part of the perpetrator class that is responsible for the injustices done to African-Americans. Yet, according to Miller, Jones can eschew outcome responsibility for the sins of his collective if he stands up

enough to be considered unreasonable. The implication here is that those who are outcome responsible and for whom the burdens are not severe should assume a greater share of the remedying the harm.

¹⁹⁸ This of course in large part depends on nature of the economic redistribution.

¹⁹⁹ Miller, "Holding Nations Responsible," pp. 254-65.

²⁰⁰ *Ibid.*, pp. 254-57.

to the racial practices of his fellow white Southerners.²⁰¹ But, Miller insists, mere disapproval by the individual of what is being done in the name of white supremacy is not enough to avoid being outcome responsible. The reason for this is that Jones may still contribute to the practice of white supremacy in other ways.²⁰² According to Miller, Jones has to come out against his collective in a more radical way.²⁰³ Thus if Jones were to participate in Civil Rights marches, this may be radical enough to annul his share of collective responsibility. Still, the question is, why does such oppositional activism have this effect of erasing outcome responsibility? Miller's own answer to this question is not entirely clear.

At one point in the discussion, Miller says that those individuals who choose to remain members and struggle against the injustices committed by their collective from the inside remain on the hook for outcome responsibility.²⁰⁴ This suggests that perhaps the way to annul being outcome responsible through overt and radical opposition to the crimes of one's collective is to exit that collective once and for all. This would fit well within Miller's narrative of the morally decent white Southern. So when Jones repudiates the core values of his group by standing up to its racism, he has essentially made himself into a nonmember. The explanation for not finding Jones

²⁰¹ Ibid., p. 255.

²⁰² Ibid.

²⁰³ Miller notes that sometimes being too much of an activist – i.e. publically demonstrating one's allegiance to racial equality – may be asking a member to do too much if this means having one's life threatened. Miller concludes that although we have to be fairly active in our opposition to the immoral or unjust conduct of our collective we are also not expected to be heroic. Just how robust our activism ought to be depends in large part on the political context in which we find ourselves.

²⁰⁴ Miller, "Holding Nations Responsible," p. 256.

outcome responsible becomes pretty straightforward: Jones is not responsible because he is not part of the relevant perpetrator group anymore, he has made his exit.

One difficulty with this is that there are collectives where an exit is not an option or the morally decent person still prefers to remain a member of her collective, but wants the collective to change its ways. Where this is the case, the morally decent person will remain a member and therefore on the hook for outcome responsibility despite her oppositional activism. However, it seems morally arbitrary to treat a continuing member differently from a member who chooses to exit when the two are morally decent to the same extent.²⁰⁵

²⁰⁵ Miller I think anticipates this objection to some extent. He suggests that when there is procedural unfairness that denies a member access to or influence over the decision-making process of the group, that person is excused from outcome responsibility, or such responsibility is diminished, despite the lack of activism on her part. But why exactly does this provide the individual with an exemption? Perhaps the idea here is that it matters whether a member is disposed toward taking a radical stand against the injustices of her collective and that such a disposition therefore should be rewarded accordingly without asking the individual to do the impossible or expose her life to a serious risk. Access to the decision-making process is important because it offers a way for a member to voice her opposition to the policies or objectives being pursued by her group. In other words, access to the decision-making process permits a member to engage in the kind of oppositional activism that makes her an outsider and gets her out of outcome responsibility. If the conscientious member is prevented from such activism because it is too dangerous or she is kept out of the decision-making process, Miller claims that such a member should nevertheless be excused from collective responsibility. She is in some sense given the benefit of the doubt provided she has the right frame of mind – the frame of mind that makes her an activist counterfactually: if she could engage in an exit-inducing activism, she would.

What is interesting about this case is that the individual is excused or made exempt from collective responsibility even though she does not engage in any radical activism – which also implies that she is still a member of her collective. The reason for this, as I understand Miller, is that she has the right disposition toward radical activism and that appears to be enough. But the kind of radical activism that Miller has in mind is precisely the sort that if practiced would make the individual an outsider of her collective.

The difficulty with this is that it still presupposes at least a desire to make an exit: if the individual did not face all these difficulties, she would make herself an outsider and extricate herself from her collective. Another way of stating this is to say that the individual is disposed toward making herself an outsider. However, this way of expanding the scope of the exemption seems to run into the second prong of the original objection, which is that there are cases where the agent despite her radical activism still sees herself as a loyal member, and if

The deeper problem with Miller's view is that it still seems wrong to exempt Jones even in light of his opposition to the racist culture of the South. His solidarity with those on the side of civil rights indicates that his heart is in the right place, but it may not be enough to absolve him entirely of outcome responsibility. It may not be enough because as a white Southerner Jones benefits, despite his activism, from a social arrangement that is morally reprehensible. His opposition may dispose Jones to reject some of the morally tainted benefits that come his way, but he cannot refuse all such benefits, and this is an important point that has to be emphasized. The culture of the American South was so deeply imbued with white supremacy that it was simply not possible to live a life that was not marked by it in some way. Access to even such basic goods as education, healthcare, individual security, meaningful employment, due process, reflected the vast divide between African-Americans and Southern whites. But to refuse these goods entirely, even if this could be done, is not something that one could reasonably expect the morally decent person to do, for this would mean condemning her to a life of hardship, unrealized potential, even premature death.²⁰⁶ This suggests that not even Jones, who detested the racism of his day, could realistically keep himself from benefitting from a social arrangement that was extremely unjust. Because Jones has been unjustly rewarded simply in virtue of being

there is to be an exemption for good deeds performed, she deserves it as much as the former member.

²⁰⁶ Also, in many cases we really do not have a choice about the basic goods we are given: as children we are sent to school; when we are sick we have to take the care we are given; when we are in trouble with the law, we have to face a judicial system that favors those of us who are white, educated, well-off, etc.

white, he is still obligated to do his part in setting things right and undoing the legacy of slavery in the South.

It may be argued that Jones's activities should count for something. For instance, Jones's activism may be viewed as a way of assuming his share of responsibility for what has been done to African-Americans and doing his part to put an end to an ongoing injustice, without waiting for his fellow white Southerners to repudiate their racism en masse. Jones, in other words, is paying forward his contribution toward ending racial discrimination by engaging in an individual effort well before there is any coordinated action on the part of other white Southerners to remedy the grave injustice of white supremacy, and by discharging his moral debt to the victims of his collective now, Jones is relieved of making further sacrifices in the future. Or, it may be said that his activism is a way to neutralize or offset the contribution he may be making to the harmful activities of his collective.²⁰⁷ By refusing to live in neighborhoods with discriminatory ordinances or restrictive housing covenants, by declining to frequent businesses that mistreat black Americans, by fighting against segregation in schools, Jones may be able to neutralize the contribution he unintentionally makes to maintaining the Southern culture of white supremacy.²⁰⁸

²⁰⁷ Jones, for example, may be residing in a town where African-Americans are not permitted to own or rent a home, where local businesses refuses to serve non-whites, where schools are segregated. Simply in virtue of living in a typical town in the South, before the legislative reforms of the Civil Rights Act of 1964, Jones could not help but be entangled in a culture of racism.

²⁰⁸ The above explanation seems to cover a broader range of cases than the first, which appears to work for cases where there is already a harm and the morally decent member is trying to put an end to it. If we suppose, on the other hand, that a collective is about to or is in the process

The problem with these explanations is that no matter what Jones does he simply cannot help but benefit in a way that is morally problematic. Jones is perhaps not complicit in the harms of white supremacy in the way that his fellow white Southerners are, but he is nonetheless complicit. Jones is an unjust beneficiary of a social arrangement that is rigged in his favor, and he is thus obligated to put an end to an arrangement that gives him benefits that rightly belong to someone else. It is not up to Jones to singlehandedly change the system of basic entitlements in the South, but nonetheless he is expected to participate in a collective project that aims to do that.

In some cases forcing a benefit on a person when that benefit should have gone to someone else, the person who is in fact entitled to it, does not generate being liable to the rightful owner on the part of the actual beneficiary. But Jones's predicament is not one of these cases. When an intangible good is involved, a benefit may be conferred on a person who is not entitled to it without her having a chance to refuse.²⁰⁹

of causing a harm, the morally decent member's activism should be understood as trying to prevent this harm from coming about. But if this is right, it cannot be said that what the member is doing is assuming his share of rectifying an injustice because the injury has not yet taken place – in fact, the activist's intention is to prevent the injury from occurring in the first place.

²⁰⁹ When physical goods are involved things are a bit more straightforward. Consider the following case. If someone offers me a stolen Bugatti I have to be ready to hand it over to the rightful owner. If I refuse to accept, then the issue of liability does not even come up for me. I never did anything to the owner: I never asked for the car to be stolen, and when it was delivered to me, I promptly refused – if the real owner were to appear and demand his car, I would be happy to comply. Here the fault lies strictly with the thief. On the other hand, if I were to accept the gift and use it for some period of time, even though I never participated in the act of stealing the Bugatti, I nevertheless would have done something wrong. By using the car, I benefitted in a way that I should not have – I did not have a right to it. The owner has every right to take it away from me and if I damaged his precious Bugatti while it was in my possession, I am liable for the damages. With objects like cars, yachts, etc., we generally have to agree to take possession – and the act of taking possession signals such acceptance – before we can derive any benefit; and if we have no right to the benefit, we can rightly be chided for that, because we had the power to refuse, which we failed to do.

In such cases, it would seem inappropriate to morally censure the undeserving beneficiary because her agency was never involved; it just happened to her and in an unexpected way.²¹⁰ Even though I was the undeserving beneficiary, the benefit arrived in a way that did not involve any intentional action on my part to shift the benefit toward me. The difference between intangible goods and tangible ones is that there is no way for me to restore the benefit to the rightful owner: once the benefit is conferred it is entirely exhausted on me.²¹¹ But the fact that I end up as the beneficiary of an intangible does not make me any less innocent.

However, even with intangible things, one's agency may at a later stage come into play. This I think is so when the wrong beneficiary extracts additional value from the benefit at a point when she has a choice in the matter, which cannot be incidental to something to which she has a right. So if I were to use the good in a way that would get me additional value from it because I saw there was such value to be gotten out of it and I wanted it, I would be intentionally extracting further gains from a benefit that did not rightly belong to me. This act of extraction starts to implicate my agency in the following ways. First, I intentionally accept a benefit, albeit a derivative one, to which I am not properly entitled and I exercise active choice in the matter, because after all I did not have to do it. Second, the act of extraction is my way of indicating that the benefit has value for me, that I have internalized it as having

²¹⁰ So if Smith, my neighbor, pays a painter to paint his house, but the painter paints my house instead, Smith cannot demand payment from me.

²¹¹ So unlike a car, I cannot transfer the labor the painter put into my house to Smith, which means that in the end I remain a more permanent beneficiary, whether I like it or not. With a stolen Bugatti, I have to restore it to its owner.

meaning for me in a way that it does not for someone who thinks the benefit makes only a marginal difference to her life. When I start taking away additional value from something that should not have been mine or to which I was never entitled, it seems right to hold me accountable and liable for the benefit that I am receiving. In other words, I am no longer an innocent bystander and may be required to compensate the victim in some way.²¹²

With respect to an unjust distribution of basic goods like education, healthcare, security, opportunities for meaningful employment, the situation is not unlike the one where we continue to extract value from that which we do not rightly deserve. It is of course true that we generally do not have much say in how these goods are distributed, but we continue to benefit from them. For most of us we cannot help but extract value from these important goods in a way that makes a difference to our lives because they are so foundational to living a meaningful life – the extraction, in other words, becomes intentional and begins to generate real value for us. But this fact does not extinguish our liability to set things right. Jones is no exception to this because he continues to enjoy benefits that in a more just social arrangement he would not have.

Miller's second example points to another category of individual members who ought to be exempt, and these are members who constitute an oppressed minority.²¹³ During Nazi-era Germany, it would have been a travesty of justice to

²¹² Two additional factors strengthen the case for liability. If the extraction of additional value is persistent or continuous, it seems that there is more reason to think that I owe it to the victim to undo the harm that was done to her. It also matters whether the taking of additional value further injures the victim, and if it does, then I am even more complicit and my duty to rectify the harm more substantial.

²¹³ Miller, "Holding Nations Responsible," pp. 264-65.

hold German Jews responsible for their persecution by the Nazi regime. But why is this so, we may ask, if German Jews at the time made significant contributions to the German culture and were part of the German nation? (And if not nation, then of the German state, since German Jews were also citizens of the German state.) Miller offers two distinct rationales for their exemption from collective responsibility.²¹⁴ First, because it matters for outcome responsibility whether a person actually benefits from her membership, the distribution of the burdens and benefits of membership becomes morally significant, according to Miller.²¹⁵ When a certain minority is saddled with most of the burdens but few of the benefits “it will be hard to justify the claim that their membership alone makes them responsible for the consequences of national decisions.”²¹⁶ In other words, fairness in the distribution of burdens and benefits is a necessary condition for outcome responsibility. Miller’s argument seems to be that where the distribution is so skewed that there is a distinct subset of individual members who are disadvantaged as a result, that subset avoids being outcome responsible for the harms of the collective. German Jews at this time were excluded from most of the benefits of national membership, and thus clearly fell within this subset. Miller’s second argument for exempting German Jews refers to the reconfiguration of the German national identity that was occurring at the time.²¹⁷

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

According to Miller, notions of racial superiority that became incorporated into the German national identity by the Nazis were so repugnant to the Jews that they simply stopped identifying themselves as being German. But once this happened, “the very idea of the nation as a cooperative practice” began to dissipate.²¹⁸ According to Miller, German Jews ostensibly detached themselves from the German nation, and thus could not be held outcome responsible because, for all intents and purposes, they were no longer members of the German collective.

Miller is clearly right to exclude oppressed minorities from collective responsibility. But his reasons for the exemption are not entirely convincing. First of all, grounding an exception in unfair distribution makes it much too broad.²¹⁹ Standards of fairness are very demanding, and no large-scale system of cooperation in existence today, be it a state or an international regime, distributes its benefits and burdens in anything like a fair way. This would make too many individual members exempt. Moreover, what the German Jews suffered may be called unfair, but this hardly gets to the heart of what they experienced. Nor would it be accurate to say that the burdens faced by German Jews were of the sort that one normally associates with being a member of a collective. The crimes that were perpetrated against German Jews should not be characterized as the disproportionate imposition of the burdens of cooperation, for the hardships they faced had little to do with the demands of

²¹⁸ Ibid.

²¹⁹ Of course it might be that Miller has in mind distribution that is radically unfair. Thus some systems of cooperation might be unfair but no so unfair as to create exemptions. Unfortunately, Miller does not specify the standard of fairness he has in mind, and so it is hard to judge in the end just how plausible his argument is.

cooperation or with being part of a cooperative enterprise – in fact, the hardships were anathema to cooperation. Lack of fairness in the distribution of benefit and burdens of cooperation simply does not strike the right note in explaining away collective responsibility. Miller’s second argument is no less problematic, for it relies on conjectures that do not appear to be historically accurate. German Jews were certainly disgusted by many of the aspects injected into German culture and identity by the Nazis. Yet, many German Jews who found themselves in exile produced great works of art, and continued to see themselves as part of the same tradition as that of Goethe, Heine, Bach, and as the real vanguards of German culture. Indeed, there was a deep schism between Germans and Jews, but this was something that was done by the Nazis, and those Germans who sympathized with them, not by the Jews, who for centuries remained loyal subjects of the German state.²²⁰

It seems to me that a better explanation for exempting members of an oppressed minority should instead examine the status of the individual member and how she is treated by her collective. An explanation that has Kantian undertones has a better chance to zero in on how a collective may sever its moral connection to individual members. I suggest that when an individual member fails to be recognized as a moral agent and is, instead, viewed purely instrumentally by her collective, she is not being treated with minimal decency and respect. Such disrespect involves, in part, having a member’s basic needs and interests *qua* moral person not be given any moral

²²⁰ For a rich discussion of Germany under the Nazi regime, see Evans, *The Third Reich in Power*, New York: The Penguin Press, 2006. Before the unification of Germany in 1871, there were Jews living in Prussia, Bavaria, and other Germanic principalities and kingdom, and they were generally viewed as loyal subjects.

consideration by the collective.²²¹ Instead, the member is valued on purely instrumental grounds, as a contributor to the cooperative product: she is valued because she works on a plantation, is law abiding, is deferential to the right sorts of people, etc. When an individual is mistreated to such an extent that she no longer counts as a moral agent, i.e. someone who is entitled to basic rights and capable of leading an autonomous life, the reciprocity between the collective and the member, which is expected under normal conditions, is broken and the individual at that point owes nothing to her collective, including accountability or responsibility for the things done by her group. The collective has behaved so badly toward its member that it does not deserve to benefit from her in any way.²²²

What happened in Nazi Germany was an example, albeit an extreme one, of treating a member with such moral indecency. The German state in the hands of the

²²¹ So for instance when one's basic needs and interests, that is, those needs and interests that essentially define the individual, do not figure into the design or delineation of some of the aims of the collective, this amounts to a form of treatment that does not live up to even minimal decency or respect.

²²² Earlier, I mentioned that Nagel's notions of the special involvement of agency and the special relation may be conceptually linked to outcome responsibility. The type of mistreatment that I have in mind makes sense of this connection. When an individual is badly mistreated by her collective, there is no agency to speak of because there is no recognized moral agent. The reason for this lies in the fact of the denial of her humanity. The mistreated individual is denied most of the benefits that come from group membership. She may benefit in some limited way from being a member but not because she "deserves" it in virtue of being a person endowed with some measure of dignity but because she has instrumental value that has to be protected. Thus while it may be true that she contributes to the coercion of her fellow members, she does so not as someone who is recognized as a genuine moral person. Instead, her contribution is that of an instrument that is wielded and manipulated by others who do not have their dignity diminished in quite the same way. This suggests that a person who has her humanity denied cannot stand in a relation to her fellow members as someone who is complicit in their coercion because that requires that she be complicit qua autonomous agent, which is precisely what she is prevented from being. I can thus agree with Nagel that without the special involvement and the special relation there is no outcome responsibility falling on the individual.

Nazi regime denied their Jewish victims their very humanity, and to such an extent that everything became permissible, including their physical annihilation. But the kind mistreatment I have in mind here may be exhibited in other ways as well. A person, for instance, may be treated merely as a cog in the cooperative scheme, a beast of burden who is there because her participatory labor is needed to ensure that the collective achieves its aims. Her life outside what she does for the collective is more or less ignored, and her basic rights may be infringed at any time so that she is kept in line and maximizing her contribution. It may well be that the mistreated individual benefits from some of the cooperative goods that the group provides, but this is so only incidentally and not because the goals of the collective were designed to advance the interests and needs of members like her. The benefits accruing to her are an accidental by-product or a trickling-down of advantages meant for others, members whose interests are given consideration and reflected in the objectives pursued by the group.

There are numerous examples of such treatment: slavery, serfdom, indentured servitude, extreme forms of capitalist exploitation. The slaves in the American South were essential for the agrarian economy of the region.²²³ Yet they were kept out of the political process entirely because they were perceived by the white majority as not having the capacity for political agency or of being of such low rank as not to deserve the right to political participation. And even though some slaves in the South did benefit from being part of the American polity, despite their diminished political and

²²³ For a good discussion of the political economy of the South, see Roger Ransom, *Conflict and Compromise: The Political Economy of Slavery, Emancipation, and the American Civil War*, Cambridge: Cambridge University Press, 1989.

social standing, in so far they lived in a functioning state and not in a state of nature, they were certainly unintended beneficiaries, since the American political system was not designed to take their interests into account – in fact, in many ways it did the opposite. It may even be said the rule of law benefitted slaves to some extent. But this must not be exaggerated, since the rule of law was also an instrument of oppression by keeping people in line through the exercise of enforcing racist and unjust laws by the state. Similarly, the blacks of South Africa during apartheid were useful for the white minority in so far as they contributed to the cooperative product of South Africa, but they were deprived of equality by a political system that was intentionally designed to predominantly serve the interests of the white minority.

These two examples, in particular, suggest that it would be entirely wrong to attribute collective responsibility to slaves in the American South and to black South Africans during apartheid for the terrible things done by their respective states. It goes without saying that they should not be held responsible for what was being done to them by their state. But we also want to say that victims of slavery and of apartheid should not be held responsible for what was done by their state to others. Thus slaves ought not be held responsible for what the American government was doing to Native Americans; nor should black South Africans be held responsible for their government's support of the racist policies of Rhodesia.²²⁴

There is I think yet another set of members who ought to be given an exemption from outcome responsibility. Miller does not mention this particular category in his account. This omission, however, is a mistake, and one which I will

²²⁴ For a good discussion of South Africa's policy toward Rhodesia, see Jonathan Farley, *South Africa*, London: Routledge, 2008.

try to correct. Some members deserve an exemption not because they are poorly treated or tried to prevent or rectify the harms caused by their collective. Rather, they should be exempt from outcome responsibility because the cost of remedying a harm may be unreasonably burdensome for them – or, they may simply lack the capacity to participate in a collective project that aims to rectify a past harm. In a state, the example that immediately comes to mind is the economically disadvantaged. We think that our poorest compatriots should be exempt from most forms of government taxation. Part of the reason for this, of course, is that taxation schemes designed to achieve a more equitable distribution of income and wealth are meant to benefit the economically disadvantaged, and asking the poor to make themselves even poorer would seem counterproductive. However, taxation, even in a progressive society, is not always about redistributing wealth to help the poor. It is also about providing public goods that benefit everyone, regardless of economic standing. Nonetheless, even when taxation is directed at promoting public welfare, we think the worst-off should not be made to contribute if this results in a (significant) decrease in their life prospects. I think that something similar can be said about a tax-financed project that aims to compensate or make whole victims who suffered at the hands of their group or collective. A case in point, in a US context, would be an attempt by the US government to undo the legacy of racism in America. Even here the burdens of such an enormous endeavor ought to be shared fairly, even if this means that poor whites are excused from making an economic contribution to the state. What poor white Americans cannot do is to continue to benefit from racist policies and practices even if the removal of such policies and practices makes them worse off than they were

before. In other words, they cannot keep infringing on the rights of others. But they ought to be exempt from making a positive economic contribution if this exacts a heavy toll on their life prospects. This proposition I think also applies to other collectives where the economically disadvantaged can be identified.

In the next section, I apply outcome responsibility and the two exemptions – one offered by Miller and the other by me – to the international trade regime.

6. WTO and Collective Responsibility

If the international trade regime is a collective and the increasing non-affordability of patented drugs that are essential to health is a result that is generated by this system, who then is responsible for remedying this injustice? Recall that what is at issue here is the transition toward a more just international trade system and how such a transition ought to be carried out.²²⁵ The list of those individual members who potentially may be held outcome responsible consists of citizens of member countries. However, given the set of exemptions delineated above, that list may in fact shrink considerably. Thus the exemptions to outcome responsibility will influence who in the end will be responsible for the problem of access.

²²⁵ It has been my contention in this paper that the problem of transition falls within non-ideal theory and includes a different set of considerations from those involved in the task of constructing a conception of justice. With respect to the problem of transition, the place that persons occupy within their state, or any other coercive system, and the role they play in coercing their fellow citizens or fellow members matter to the kinds of obligations they have that require them to effectuate changes that are meant to generate a more just system of cooperation. On the other hand, once a conception of justice is in place and the system is ideally just, it no longer makes sense to tie what we owe one another, qua citizens or qua members of system of cooperation, to the political or social roles that we play. That is because when we find ourselves in a such a position, our task is to maintain an ideally just cooperative regime, which can only be done by carrying out the demands of justice, as specified by a conception of justice.

It may be argued that the real challenge in holding participants of the trade regime outcome responsible comes from the fact that so many of the WTO member states are nondemocratic. The ordinary citizen from one of these states must surely be exempt from outcome responsibility because by being denied her right to political participation she is being mistreated in precisely the sort of way that makes her exempt from outcome responsibility for the harms generated by her state. Moreover, curtailed as she is from domestic political participation, she simply cannot contribute to international coercion. If this is the case, this has the potential to exempt most citizens from non-democratic member states.

However, I do not think this conclusion quite follows. Many citizens in the end will be exempt from outcome responsibility, but not simply because they live in nondemocratic states. The reason for this is twofold. Indeed, there are some truly egregious states that are members of the WTO. But not all nondemocratic member states mistreat their citizens in ways that would warrant their exemption. Certain nondemocratic states exhibit concern for their ordinary citizens by tapping into the social values and norms that are generally accepted by the public at large in forging their policies. In such states, citizens do not have a direct way to influence the policies of their state, but their needs and interests are not entirely ignored, since the state does invoke basic values that have common currency.²²⁶ This suggests that nondemocratic

²²⁶ Rawls's decent hierarchical societies are examples of non-democratic societies where persons are showed respect by their state because the policies of the state are regulated by a comprehensive conception of the good which is more or less endorsed by the people. See Rawls, *The Law of Peoples*, Cambridge: Harvard University Press, 1999. It is important to point out that such decent societies do not actually exist in the real world. Nevertheless, what this does suggest is that a nondemocratic political system is not strictly opposed to individual human dignity.

states are capable of treating their citizens with some measure of dignity. Furthermore, even in some nondemocratic states, people contribute to coercion (both internationally and domestically) and benefit from state membership and WTO membership in ways that warrant holding them outcome responsible to some extent.²²⁷ Thus, what matters for outcome responsibility is not simply whether the state is nondemocratic, but how the individual citizen fares under its political system. The fact that a state is nondemocratic itself constitutes a form of mistreatment, a disregard for some of the moral powers that the citizen as a moral agent possesses. But such mistreatment does not amount to denying her basic humanity.

I think that a good way to illustrate how these exemptions work is to examine particular member countries where the exemptions may be relevant. Consider, for example, the Kingdom of Saudi Arabia, which has been a member of the WTO since 2005.²²⁸ Saudi Arabia is a hereditary monarchy.²²⁹ The current King is Abdallah bin

²²⁷ Recall that for Miller contribution to and benefit from a collective practice are a sufficient condition for a prima facie case of outcome responsibility. There is contribution because citizens by being generally law abiding enable the state to behave coercively. Domestically, the state is enabled to enforce its own laws, and, with respect to the trade regime, the state is enabled to enter the WTO and collaborate with the other member states into forcing individual members into complying with WTO rules. But contribution to or participation in enabling the state to engage in coercion does not require a democratic form of government. Moreover, it is also perfectly conceivable that citizens of nondemocratic state may benefit from residing in their state and from their state being a member of the WTO. Of course, if there is a benefit, such a benefit must accrue to a person in a way that recognizes her basic humanity, as an autonomous agent and possessing basic rights.

²²⁸ World Trade Organization, *Saudi Arabia and the WTO*, available at www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm.

²²⁹ David Sorenson, *An Introduction to the Modern Middle East: History, Religion, Political Economy, Politics*, Boulder CO: Westview Press, 2008, chap. 5. See also, Central Intelligence Agency, *World Factbook: Saudi Arabia*, available at www.cia.gov/library/publications/the-world-factbook/geos/sa.html.

Abd al-Aziz Al Saud. No elections take place in Saudi Arabia to elect the head of government because the current King is also the Prime Minister.²³⁰ Nor is the legislature, the Majlis al-Shura, subject to popular vote, since it is the King who decides who becomes a member of the legislative council.²³¹ In Saudi Arabia, sharia is the source of all domestic laws, thus making religious law the foundation of the country's constitution.²³² Despite the fact that Saudi Arabia is not a democracy, I would not hesitate to say that its citizens may be found *prima facie* outcome responsible. There is evidence to suggest that the Saudi public is generally supportive of what the government does in its role as a member of the WTO.²³³ Moreover, as the largest producer of oil, Saudi Arabia has benefitted tremendously from its membership in the WTO and participation in the international trade system.²³⁴ Although individual citizens are not shown the kind of respect that as moral agents they ought to be given, they are not entirely deprived of it either: as fellow Muslims, they are viewed as possessing dignity in virtue of being God's creation and as having interests, i.e. religious ones, that are intrinsically valuable. Their treatment by the state is thus of the sort that would not outright exempt them from outcome responsibility because as citizens of Saudi Arabia they are accorded some measure of respect.

²³⁰ Sorenson, *An Introduction to the History of the Modern Middle East*.

²³¹ *Ibid.*

²³² Central Intelligence Agency, *World Factbook: Saudi Arabia*.

²³³ William Clatanoff *et al.*, "Saudi Arabia's Accession to the WTO," *Middle East Policy*, Vol. 13 Issue 1, 2006, pp. 1-23.

²³⁴ Moin Siddiqi, "Saudi Arabia," *Middle East*, Issue 392, Aug/Sep2008, pp. 44-48.

On the other hand, the same cannot be said about the Democratic Republic of Congo (DRC), which has been a member of the WTO since 1997.²³⁵ The DRC has been involved in a regional war since 1998, and despite a peace accord signed in 2003, violence in the country is still widespread.²³⁶ The people of the DRC have suffered terribly at the hands of the national government, its army, and numerous rebel groups that are being propped up by foreign powers.²³⁷ The International Red Cross has estimated that close to 4.5 million people have perished from the conflict, most from hunger and preventable diseases.²³⁸ Human Rights Watch has found that over the past six years, over 40,000 women have been victims of rape or sexual assaults.²³⁹ In much of the country, food continues to be rationed and most of the population does not have access to clean water.²⁴⁰ Hundreds of thousands of people have been displaced from their homes, many of whom are physically and mentally disabled and

²³⁵ World Trade Organization, *The Democratic Republic of Congo and the WTO*, available at www.wto.org/english/thewto_e/countries_e/democratic_republique_congo_e.htm.

²³⁶ For a general discussion, see United Nations, Office of the High Commissioner for Human Rights, *Report on the Most Serious Violations of Human Rights and International Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010, available at www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.

²³⁷ Arnaud Gorgemans et al, "Between a Rock and a Hard Place: The Intensification of Violence Against the Population of South Kivu in the Democratic Republic of Congo by Rwandan Armed Groups and the Forces of the Democratic Republic of the Congo," EurAc, April 15, 2005.

²³⁸ The International Red Cross, *The Democratic Republic of Congo*, available at www.icrc.org/web/eng/siteeng0.nsf/htmlall/congo_kinshasa?opendocument

²³⁹ Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, 2005, available at www.hrw.org/en/reports/2005/03/06/seeking-justice-0.

²⁴⁰ Fiona Fleck, "The Democratic Republic of Congo: Quantifying the Crisis," *Bulletin of the World Health Organization*, Vol. 87 Issue 1, 2009.

unable to earn a living.²⁴¹ Infant mortality is one of the highest in the world.²⁴² If there ever was a country that needed our compassion, it is the DRC. The people of this country are so badly off that they are in no position to do anything about the harms caused by the international trade system.

The DRC exemplifies the basic rationales for exempting individual citizens. First, the circumstances that most Congolese find themselves in are simply not commensurate with even a minimal form of dignity. The national government is undemocratic, ineffectual, and highly corrupt. The revenues that flow to the government from the sale of highly prized minerals are not used to build domestic infrastructure or provide public goods to the Congolese.²⁴³ Instead, these revenues for the most part go toward the funding of the national army, which, far from providing protection to the people, has in fact been involved in widespread human rights abuses.²⁴⁴ The Congolese are thus victims of a predatory regime and see none of the advantages of living in a state. As I argued above, without conditions that make minimal dignity possible, the Congolese owe nothing to their state, including being liable to the harms caused by it.

²⁴¹ Human Rights Watch, *Always on the Run: The Vicious Cycle of Displacement in Eastern Congo*, 2010, available at www.hrw.org/en/reports/2010/09/14/always-run-0.

²⁴² Benjamin Coghlan et al, "Mortality in the Democratic Republic of Congo: a Nationwide Survey," *Lancet*, January, 2006, pp.1-8.

²⁴³ Edward Rackley, "The Democratic Republic of Congo: Undoing Government by Predation," *Disasters*, Vol. 30 Issue 4, 2006, pp. 418-32.

²⁴⁴ Gorgemans et al, "Between a Rock and a Hard Place."

Second, and more importantly, the DRC is a failed state. The national government is unable to carry out even the most basic functions of a state, functions and responsibilities which the modern state is designed to implement.²⁴⁵ Indeed, the DRC may not even constitute a state at all, thus leaving the Congolese effectively stateless. Whatever the case may be – whether the DRC is not actually a state or merely one that is severely debilitated – the following seems clear. First, the Congolese qua citizens do not coerce one another because the rule of law is absent and there is no cognizable legal system, only brute force seems to prevail. Second, and more importantly, the Congolese also have nothing to do with the coercion that goes on within the WTO because such contribution can only happen through a viable, functioning state, which they do not obviously have. The upshot of this is that they cannot be held outcome responsible for the harms caused by the trade system.

Ravaged by a regional war on its territory and ruled by a corrupt and weak government, the DRC is in economic shambles despite being resource rich. Both the World Bank and the IMF rank it as the world's poorest country, with a per capita GDP of about \$300.²⁴⁶ This brings us to the final ground for exempting the people of the DRC: they are simply too poor. Undoubtedly the fact that they reside in a failed state

²⁴⁵ Here it may argued that there is no outcome responsibility because the Congolese are not beneficiaries. Specifically they do not benefit from the DRC being a member of the WTO. The revenues that come from the mining industry are mostly captured by private companies, which pay a percentage to the national government. The Congolese who are employed by mining companies work under terrible conditions. I have seen no evidence to suggest that the WTO membership has made a difference to these workers who are the only Congolese to see any benefits from the mineral trade.

²⁴⁶ Based on data provided by Foreign Policy and the Fund for Peace, available at www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index_interactive_map_and_rankings.

contributes to their (economic and social) desperation, but even with a functioning state the Congolese would still be too poor and therefore exempt from outcome responsibility. The average Congolese would be exempt because she does not have the economic wherewithal to assist in undoing the harms stemming from the implementation of TRIPS; an imposition of such liability would be unfair because it would constitute an unreasonable burden.

As a least developed country, the DRC is not atypical when compared to the other member states. Of the hundred and fifty individual states that are members of the WTO, twenty-one percent are considered least developed. And of these least developed member countries, twenty-five percent are not free and thirty-eight percent are failed states.²⁴⁷ If the remedy of the problem of access to essential drugs requires some form of economic redistribution, such redistribution would have to leave out the thirty-two least developed countries that are members of the WTO.²⁴⁸ The redistributive remedy thus would have to fall on the remaining members that do not happen to be disqualified for other reasons.

On the hand, as a failed state, the DRC appears to be more atypical. In the world currently, there are twenty countries that are considered to be in a critical state

²⁴⁷ Mali is the only country that is ranked as free and is also a LDC. See Freedom House, *Freedom in the World*, 2010, available at www.freedomhouse.org/template.cfm?page=505.

²⁴⁸ It is important to note here that the transition toward a more just trade system will involve more than simply economic redistribution. The WTO for instance may not have the institutional capacity to implement such redistribution. There may be other structural problems as well. Now with respect to institutional reform, even citizens from least developed countries are in a position to support such changes because not much else, other than their support, is being asked of them. In other words, the burden with respect to certain remedies may not be all that great as to be unreasonably taxing.

of failure.²⁴⁹ Of these, only twelve are WTO members, or eight percent of the total WTO membership. Of the twelve that are WTO members, seven are also least developed countries, and thus could be made exempt on the basis that their citizens are too poor. Zimbabwe, Cote d'Ivoire, Pakistan, Kenya, and Nigeria are failed states that are not least developed. If, in addition to least developed countries, the deeply failed states should also be made exempt, then the citizens of these member countries should also be excused from contributing to a redistributive remedy.²⁵⁰

Global poverty of course is not concentrated in only the least developed countries. Developing countries have their share of the world's poor. Sixty percent of the world's poor reside in India and China.²⁵¹ Thus we also have to conclude that the poor in developing countries must be exempt as well. Moreover, it seems to me that even the very poor in developed countries should also qualify for being exempt from outcome responsibility because the burden of redistribution is likely to be substantial, and therefore unreasonable, for them as well.

What is more, the WTO's trade regime has not been all roses for developed member countries. There are costs associated with open trade even for countries like the U.S., costs which are not spread out evenly, but disproportionately affect the

²⁴⁹ These are, in descending order, Somalia, Chad, Sudan, Zimbabwe, DRC, Afghanistan, Iraq, Central African Republic, Guinea, Pakistan, Haiti, Cote d'Ivoire, Kenya, Nigeria, Yemen, Burma, Ethiopia, East Timor, North Korea, and Niger. See Foreign Policy's Failed States Index, available at www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index.

²⁵⁰ The reason for this is not that they are poor, even though the majority of the citizens from these countries are still desperately poor, but either that there isn't a way to make of sense of a citizen making a contribution to the coercive imposition of an intellectual property system or that a citizen is so badly mistreated by the state that she owes nothing in response.

²⁵¹ According to data provided by the World Bank.

working classes – specifically, those engaged in the rapidly contracting manufacturing sector – as American firms, in order to stay competitive, increasingly rely on outsourcing semi-skilled and low-skilled labor to countries where the cost of such labor is significantly less. This has generated unemployment and underemployment among millions of American workers who are facing a dim economic future.²⁵² Many of these displaced workers have fallen into the ranks of the economically least advantaged, with little or no prospects of ever re-entering the labor force with jobs that are comparable to what they had before.²⁵³

What we have here is yet another harm that is generated by the international trade system, but one that is directed at citizens residing in the US, namely, those American workers who were once employed by the manufacturing sector. The significance of this for the present discussion is that we have an additional set of individuals who are economically harmed by the WTO's trade regime, but who are also expected to make an economic contribution toward resolving the problem of access. This I think suggests the following question: How do we allocate responsibility in a wealthy state like the US when the US itself has citizens who have suffered economically from its trade policies? Would it not be unjust, as might be argued, to saddle a person, who has already lost so much economically, with a requirement to assist people in faraway places avoid a premature death? As I have tried to argue, individuals, regardless of where they live, qualify to be exempt from

²⁵² See Michael Spence, "The Impact of Globalization on Income and Employment: the Downside of Integrating Markets," *Foreign Affairs*, July/August 2011.

²⁵³ See Gary Greenberg, "Manufacturing Depression," *Harper's Magazine*, Volume 314, Issue 1884 (May 2007), pp. 35-46.

outcome responsibility, if they are sufficiently destitute such that any contribution on their part to alleviate the problem of access would constitute an unreasonable burden. And this certainly would include the American worker who has lost her job and has been swept into the economic underclass of the least advantaged.

This leaves out individuals who have managed to avoid becoming part of America's economic underclass – either because they found other employment or have a partner who is employed – but nonetheless are not as well off as they once were. In this case, an economic contribution would still be in order provided it is done in accordance with a progressive scheme that reflects the relative economic standing of each contributor. This of course does not include policies that may be instituted in the US that aim to help those Americans who have lost out because of the globalization of trade. In other words, Americans collectively may decide that some of their compatriots have not obtained a fair share of the economic gains from global trade and that as a result economic assistance has to be given. Such assistance may be shown in the form training or educational programs that teach new skills, placement programs that try to help unemployed workers find gainful employment, welfare programs that provide temporary financial support to unemployed workers and their families until they reenter the work force, and so on. But it may also include a provision that exempts them from making an economic contribution toward alleviating the problem of access. Such differences in the treatment of one's compatriots are acceptable in my view because I find domestic conceptions of justice, given the way in which the world is arranged, still indispensable. And because as compatriots our lives are more closely entangled than as participants of international trade, there are many more ways in

which we can harm one another, and so an assumption of greater outcome responsibility seems quite plausible in a domestic context.²⁵⁴

To go back to the two aforementioned exemptions to outcome responsibility, we are left, in the final analysis, with citizens from democratic member states – excluding the worst-off, and possibly others for whom the additional burden would be unreasonable, as determined by local standards of justice – and those from nondemocratic ones – excluding the poor – that treat their citizens with, at least, minimal decency to bear the cost of remedying the problem of access to essential medicines. With respect to nondemocratic states, minimal decency is the relevant threshold, I suggest, below which citizens stop being collectively responsible for the transgressions of their state.²⁵⁵ If individual citizens are so badly treated that it cannot

²⁵⁴ There is still the important issue of priority. In other words, what happens when the problem of access and the problem of displaced Americans workers who have lost out because of international trade cannot be simultaneously dealt with – because the US, given its current economic woes, does not have the economic resources? Should American workers be given priority over the global poor who lack access? I think that priority may be shown for the reasons powerfully elucidated by Richard Miller in his work on patriotism and justice. See his, “Cosmopolitan Respect and Patriotic Concern.” Yet, in my view, the acceptable range of applicability of priority is more limited: priority is acceptable only when comparable harms are involved, and I leave it to our pre-theoretic considered convictions to judge whether harms are comparable. But I also think that in many cases the urgency of priority is exaggerated. Now it may be the case that the US federal government does not have the budget to generously fund programs that aim to alleviate the suffering of needy Americans as well as global poor. But much of this is caused by the fact that the richest Americans and the largest American corporations have not been doing their fair share for the American people. If they were, the federal government would not be in the state that it now is in. Under these circumstances, talk of priority is out of place, since its implementation would not achieve a just outcome. The reason for this is that priority would keep in place the current *de jure* distribution of wealth and income in the US, which by any conception of domestic justice worth mentioning would be unjust.

²⁵⁵ I do not mean to suggest that the least advantaged in wealthy liberal democratic member states and the economically disadvantaged in poor developing member countries are exempt from contributing to any type of collective action that aims to remedy a past injustice. It would certainly be wrong not to repeal a racist or discriminatory law even if it benefits poor white Americans in the deep South. But once direct and active victimization of African-

be said that they are shown even minimal respect, then indeed such citizens would be exempt. But not all non-democracies mistreat their people to such an extent. Even thoroughgoing religious states like Saudi Arabia allow their people some freedom to express themselves in ways that they find meaningful. Their responsibility may be diminished, because they are not given the kind of respect that they deserve, but it is not entirely extinguished either.

The remedy to the problem of access is, as I have argued, part of non-ideal theory. Our obligations that fall within non-ideal theory are concerned with enabling a coercive system of cooperation to transition toward ideal justice, which is a point where a liberal conception of justice fully applies to the basic structure of the cooperative regime. This involves two basic tasks. First, preparing the system of cooperation for implementing a conception of justice. This requires, for instance, the construction of institutions that are necessary for distributing the burdens and benefits of cooperation in the manner specified by a conception of justice. The second basic task is to remove the injustices that are currently being committed by the cooperative regime.²⁵⁶ I have been suggesting that the use of economic redistribution of some form may be necessary to correct the lack of access to essential medicines. But this

Americans through racist policies and laws is no longer occurring and the issue becomes one of restitution and making victims whole again through tax-financed programs of education, job creation, economic revitalization of depressed communities, and so on, poor white Americans may be exempt from contributing to these programs if the economic burden on them would be substantial.

²⁵⁶ These tasks are generally complimentary. Thus to stop legally sanctioned racial discrimination it is of course necessary to repeal discriminatory laws. But this may not be enough. Other discriminatory laws may spring up in the near future and so perhaps a government entity to monitor such problematic laws and policies might be needed. Racial discrimination may also leave a terrible legacy behind it that would have to be undone. To do this, certain new institutions would have to be created that specifically deal with addressing the lingering effects of racial discrimination.

may not be enough: certain institutions within the WTO may have to be created so that such redistribution can be carried out. If we, as citizens of member states, are found to be outcome responsible, we have to do both: removing the social harms and building the institutions that are necessary to permanently cure our cooperative system of these social ills.

C. The WTO and the Liberalization of Trade

For the most part in this discussion, I have focused on the TRIPS Agreement and the problem of access that its implementation appears to give rise. Of course, overcoming this difficult problem would not by itself transform the WTO into a system of cooperation where (ideal) justice prevails. I have tackled one aspect of what I perceive to be a harmful side-effect of the international trade regime, but there are others, which perhaps are just as acute and deserving of attention from political philosophers. What I would like to do next is address a more general problem with the WTO, which I think implicates the core values of the organization. I must admit that my treatment of this problem is somewhat superficial. My intention is not so much as to offer a comprehensive solution, but rather to outline what I find to be a deficiency of the WTO and the economic policies it is committed to pushing across the world.

A fundamental aim of the WTO is of course to liberalize international trade in goods and services. Behind this is the view embraced by the WTO that open trade is economically beneficial to all who practice it because it spurs domestic economic

growth.²⁵⁷ However, the link between open trade and economic growth is not that straightforward, as current research on economic growth seems to suggest.²⁵⁸ But this is not being acknowledged by the WTO, as its exuberance for trade liberalization continues to outpace the empirical evidence for its position on trade. Much of the conviction that trade liberalization is good for growth has been based on several high profile cross-country studies.²⁵⁹ However, a spate of articles has recently emerged criticizing the more influential of these studies on open trade. One of the most

²⁵⁷ There is literature of a theoretical nature that suggests that liberal trade policies should at least in theory lead to economic growth. Some economists have pointed out that increase in international trade may facilitate the transfer of knowledge and technology from several sources, including *inter alia* from the importation of technical goods, from greater access to the sources of innovation, and from foreign direct investment. See R. Almeida and A. Fernandez, "Openness and Technological Innovations in Developing Countries," *Journal of Development Studies*, 2008, 44(5), pp. 701-27. Others have argued that liberalization allows the capture of benefits that arise from increasing returns from scale and product specialization. Paul Romer for instance has argued that trade liberalization is positively correlated with increase in productivity. According to him, liberalization increases the supply of intermediate goods which then stimulates competition among local firms, prompting them to adopt technologically and eliminate factor inefficiencies. See Romer, "Growth Based on Increasing Returns Due to Specialization," *American Economic Review*, 1989 77(2), pp. 56-62; see also A. Alesina, E. Spolaore, and R. Wacziarg, "Economic Integration and Political Disintegration," *American Economic Review*, 2000, 90(5), pp. 1276-96.

²⁵⁸ See L. Alan Winters, "Trade Liberalization and Economic Performance: An Overview," *The Economic Journal*, 114 (February) pp. 4-21; Axel Bortmann, Matthias Busse, and Silke Neuhaus, "Institutional Quality and Gains from Trade," *Kyklos*, Vol. 59, 2006, pp. 345-68; Robert Wade, "What Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of Development Space," *Review of International Political Economy*, 10:4 November 2003, pp. 621-644.

²⁵⁹ See D. Dollar, "Outward-oriented Developing Economies Really Do Grow More Rapidly: Evidence from 95 LDCs, 1976-1985," *Economic Development and Cultural Change*, 1992, vol.40 (3), pp. 523-44; JA Frankel and D. Romer, "Does Trade Cause Growth?" *American Economic Review*, 1999, vol. 89 (3) (June), pp. 379-99; JD Sachs and AM Warner, "Economic Convergence and Economic Policies," *Brookings Papers in Economic Activity*, 1995, (1), pp. 1-95; Jeffrey Sachs and Andrew Warner, "Economic Reform and Process of Global Integration," *Brookings Paper on Economic Activity*, 1, 1995, pp. 1-118.

prominent critical pieces is a paper by Francisco Rodriguez and Dani Rodrik.²⁶⁰ In it, Rodriguez and Rodrik dissect the methodology used to draw a causal link between open trade and economic growth. For instance, they argue that Sachs and Warner, in their very influential paper, “Economic Reform and Process of Global Integration,” define the openness indicator in a conceptually problematic way.²⁶¹ For Sachs and Warner, an economy is deemed closed if any of the following conditions are met: the economy had average tariff rates that are higher than 40; its nontariff barriers covered on average more than 40% of the imports; it had a socialist economic system; it had a state monopoly of major exports; its black market premium exceeded 20% during either the decade of the 1970s or the decade of the 1980s.²⁶² When the openness variable is plugged into growth regression, there appears to be a high correlation between open economies and economic growth.²⁶³ But as Rodriguez and Rodrik insist, the problem with the analysis is that when openness is construed as a combination of several indicators, it is hard to see what explanatory role barriers to trade are playing. Indeed, they argue that the real work is being done by the last two factors and not by direct measures of barriers to trade, suggesting that where the state does not control major exports and the black market has a trivial presence, a country

²⁶⁰ F. Rodriguez and D. Rodrik, “Trade Policy and Economic Growth: a Skeptic’s Guide to the Cross-national Evidence,” in *NBER Macroeconomics Annual*, B. Bernanke and K. Rogoff, eds, Cambridge, MIT Press, 2000.

²⁶¹ Rodriguez and Rodrik, “Trade Policy and Economic Growth,” pp. 15-24.

²⁶² Sachs and Warner, “Economic Reform and Process of Global Integration,” pp. 22-53.

²⁶³ Economies that are open according to their definition experience growth that is 2.5% higher than does that are not. See *ibid.*

may experience growth without fully liberalizing its trade. In a similar vein, Rodriguez and Rodrik contend that David Dollar's measurement of distortions to trade has serious conceptual flaws.²⁶⁴ The measurement variable does not so much track trade barriers as indicate serious instability in economic policies of a state, which itself is likely to be a cause for poor economic performance.²⁶⁵

Rodriguez and Rodrik, along with other development economists, have injected a considerable amount of skepticism about a direct link between openness and growth, and the pro-liberalization camp has been put on the defensive.²⁶⁶ As some have suggested, current theory of economic growth is still a work in progress and many gaps remain in our understanding. Further research may vindicate those who say there is a causal connection between liberalization and growth, but we have not reached this point.²⁶⁷ Yet, the WTO is behaving as if the debate about liberalization is over and as a policy it is unequivocally and uniformly a good thing. The current state of research on economic growth raises serious questions about whether it makes sense

²⁶⁴ Rodriguez and Rodrik, "Trade Policy and Economic Growth," p. 20.

²⁶⁵ Rodriguez and Rodrik suggest that it is the instability in the nominal exchange rate policies that explains the absence of growth, and not trade restrictions. See "Trade Policy and Economic Growth," p. 20.

²⁶⁶ This is not to say of course that papers that have been critical of empirical studies that link trade liberalization to growth are the last work on the subject. Research has recently come out supporting the original studies; but so has research that casts further doubt. See e.g. JA Frankel and AK Rose, "An Estimate of the Effect of Common Currencies on Trade and Growth," (2002), *Quarterly Journal of Economics*, vol. 117 (469), pp. 437-66.

²⁶⁷ There has been some pushback from the pro-growth camp. Research has recently come out supporting the original studies and so has research that casts further doubt. See e.g. JA Frankel and AK Rose, "An Estimate of the Effect of Common Currencies on Trade and Growth," (2002), *Quarterly Journal of Economics*, vol. 117 (469), pp. 437-66.

for the WTO to push its liberalization agenda on all its member states, when the debate on what the best path is to economic development still rages on.²⁶⁸

These uncertainties about trade liberalization would seem tolerable if it turned out that members states generally did well when implementing the WTO's trade policies. But this clearly has not been the case: there are many developing countries that either continue to languish or in some cases have done worse once they began to liberalize. What is worrying is that the WTO may be forcing developing member states to adopt trade policies that are in fact harmful to them – and there is indeed evidence that suggests that openness is simply not working for many of these countries.²⁶⁹

There is now an ever expanding body of literature that attempts to answer why trade liberalization is not working for many developing countries. A growing number of economists argue that good institutions are a key to making openness lead to growth.²⁷⁰ Moreover, as Rodrik et al maintain, the quality of institutions is the single

²⁶⁸ This does not mean that we should wait until we have certainty; important decisions are made under conditions of uncertainty all the time. What I think this does suggest is that the WTO should proceed with some caution. It ought to keep an eye out on the best available evidence and what such evidence seems to say about the methods used to expand trade. If at this point there is no best way for achieving economic growth, then some freedom should be given to member states that are not seeing any dividends from liberalization to experiment with other policy options.

²⁶⁹ See Dong-Hyeon Kim and Shu-Chin Lin, "Trade and Growth at Different Stages of Economic Development," *Journal of Development Studies*, Vol. 45, No. 8, 2009, pp. 1211-1224; Michael Beaney and David Greenaway, "The Impact of Terms of Trade and Real Exchange Rate Volatility on Investment and Growth in Sub-Saharan Africa," *Journal of Development Economics*, Vol. 65, 2001, pp. 491-500; Joseph Stiglitz and Andrew Charlton, *Fair Trade for All*, New York: Oxford University Press, 2007.

most important determinant of long-run economic development, outpacing the influence of trade and geography.²⁷¹ Several studies have recently been done that suggest that states with an institutional quality above a certain threshold see an increase in growth once they begin to transition toward greater openness in trade; on the other hand, states with low institutional quality, when instituting similar policies, tend to do worse than they would if they were to exercise less openness.²⁷² Institutional quality thus matters to a state's macroeconomic health when it decides to implement liberal trade policies. Developing member states, especially those that are least developed, run a very high risk of not having an adequate institutional framework. If the current research is to be believed, member states that lack good institutions are not going to benefit from liberalizing trade – in fact, liberalization might make things worse for them. But if institutions matter, this should influence

²⁷⁰ See D Acemoglu, S. Johnson, and JA Robinson, "The Colonial Origins of Comparative Development: an Empirical Investigation," *American Economic Review*, (2001), vol. 91(5), December, pp. 1269-401; D. Rodrik, A. Subramanian, and F. Trebbi, "Institutions Rule: the Primacy of Institutions over Geography and Integration in Economic Development," *Journal of Growth Economics*, (2004), 9(2), pp. 131-65.

²⁷¹ Dani Rodrik and Arvind Subramanian, "The Primacy of Institutions (and What This Does and Does Not Mean)" *The Development Economics Reader*, Giorgio Secondi (ed.), London and New York: Taylor and Francis, Routledge 2008, pp. 79-85.

²⁷² See Dong-Hyeon Kim and Shu-Chin Lin, "Trade and Growth at Different Stages of Economic Development," pp. 1219-1220; Dani Rodrik and Arvind Subramanian, "Why Did Financial Globalization Disappoint?" *IMF Staff Papers*, 2009, Vol. 56 Issue 1, p112-138; Margaret McMillan and Dani Rodrik, "Globalization, Structural Change and Productivity Growth," NBER Working Papers: 171432011, 2011; Alberto Alesina and Dani Rodrik, "Distributive Politics and Economic Growth," *Inequality and Economic Development: The Modern Perspective*, International Library of Critical Writings in Economics, Vol. 237, Cheltenham, U.K. and Northampton, Mass., 2009, pp. 79-104; Nancy Birdsall, Dani Rodrik, and Arvind Subramanian, "How to Help Poor Countries," *Foreign Affairs*, Jul/Aug2005, Vol. 84 Issue 4, p136-152; Dani Rodrik, "A Symposium on Fostering Growth in South Africa: Understanding South Africa's Economic Puzzles," *Economics of Transition*, Vol. 16, Issue. 4, 2008 pp. 769-97.

how the WTO pushes states to liberalize.²⁷³ Indeed, some economists have suggested precisely that.²⁷⁴ What is more, there is no evidence to suggest that good institutions might actually be bad for growth. That is to say, the risk from having good institutions is virtually nil for developing countries in the WTO.²⁷⁵ But the upside may be significant and may fill in the explanatory gap for why trade liberalization can be such a hit or miss in relation to developing states.

If institutions matter and there is only an upside to them, the WTO has to take this into consideration vis-à-vis its trade policies. If Haiti clearly lacks the institutions to make openness work for its economy, then, I suggest, Haiti has a

²⁷³ I am not saying that an organization like the WTO has no role to play in the world. Certainly trade should be encouraged and trade wars discouraged, but this basically requires preventing states from engaging in extreme forms of protectionism. (Protectionism where I get to place my goods in your market, but get to prevent your goods from entering my market, is of course prudentially foolish because it will quickly lead to a trade retaliation from the other side.) But there is quite a bit of space between extreme protectionism and no protectionism at all, and some states that might want to situate themselves along this continuum should run into trouble with the WTO for having done so.

²⁷⁴ See Robert Wade, “What Strategies are Viable for Developing Countries Today?”

²⁷⁵ The economic literature on the importance of good institutions does not suggest that developing countries cannot achieve high levels of economic growth without establishing good institutions that exemplify the rule of law, regulatory transparency, and government accountability. For, instance, Edward Miguel and Raymond Fisman give the example of Indonesia, which under the Suharto regime achieved relatively high growth rates – about six percent – but was also incredibly corrupt. The Suharto family made billions of dollars by having the central government award lucrative contracts to companies controlled by individual family members. See Edward Miguel and Raymond Fisman, *Economic Gangsters: Corruption, Violence, and the Poverty of Nations*, (Princeton, Princeton University Press) 2010. I think that what this suggests is that some countries can achieve economic growth *despite* being very corrupt. In other words, corruption in Indonesia continues to be an obstacle to economic development, but Indonesia is doing other things right so that there is economic growth. But if corruption were to decrease, the contention of people like Rodrik is that this would only help the Indonesian economy, especially in the long run. What has also be said is that Miguel and Fisman take Indonesia to be corrupt, especially at the top, but not *that* corrupt, and believe that if it were a lot more corrupt, and corrupt in a very diffuse and pervasive manner, Indonesia would not have been able to generate the same growth rates. See *ibid.*

legitimate complaint against the WTO. That is because the putative justification for compelling states to liberalize trade is the contention that this is good for all – and in particular for developing states. But if it turns out that it is precisely poor developing countries like Haiti that experience the fallout from liberalization without any of its benefits, and the gains instead are directed at the industrialized world, no one would hesitate to conclude that this outcome is profoundly unfair. This would implicate the major parts of the WTO as unjust. So how should the WTO be reformed to avoid such unjust outcomes?

I think there are two options available to the WTO.²⁷⁶ First, the WTO may relax its obligations under GATT and GATS and allow members that are struggling under its regime the option to experiment with a different set of trade policies. One such alternative might be to permit a struggling member to partially re-raise its trade barriers until it is in a better position to take advantage of open trade – when it has the right institutional framework, for instance.

The second approach for the WTO is to maintain the same basic obligations, but make the development of good institutions part of the package. This would mean

²⁷⁶ It has to be acknowledge that the WTO's trade policies are operating under a cloud of uncertainty at this point. Under these circumstances, the rational approach for the WTO is to exercise epistemic modesty and flexibility. It has to be epistemically modest because its policies may turn out to be wrong and have a harmful effect, especially on the poorest and most vulnerable of its member states. Epistemic modesty also requires that the WTO keep up with the latest research on economic growth in case its current views are proven to be wrong, and when this is indeed shown to be the case, it has to be flexible enough to amend its policies. Flexibility is also required during periods when there is serious disagreement over one or more of its policies – i.e. whether there is a direct link between open trade and economic growth. When there is such disagreement among economists, the WTO should allow members states that appear not to be thriving under its current rules, the flexibility to opt out and experiment with different policies as long as there is good science that supports these policies. These two options for the WTO capture this rational approach under conditions of uncertainty.

that trade policy is not simply about lowering or removing trade barriers, but also about having good domestic institutions. This approach has the advantage that it does not require the WTO to make a significant departure from its current policies. Moreover, it avoids the problem of having to decide which states, if any, qualify to opt out, at least temporarily, from liberalizing trade. These two features make the second approach the more realistic option for the WTO. Working out the various opt-out options in the end might prove to be an intractable problem: there are too many, often inconsistent, alternatives to open trade, and there may be too many member states trying to take advantage of these options. What is more, opting out goes against the very purpose of the WTO, and it is hard to see how the WTO can be convinced of making such a radical departure.

There are, however, two difficulties with making good institutions part of trade policy. First, there may be disagreements over which institutions are necessary to make openness work and thus have to be improved. The second difficulty has to do with whether the WTO has the proper authority to require states to develop these institutions. The first problem might not be that intractable, for there is a good deal of agreement that a core set of institutions are important for growth when combined with liberalization: these are institutions that (1) protect robust property rights, (2) correct for externalities, asymmetries in information, and market failure, and (3) achieve market stabilization.²⁷⁷ The WTO may begin by including provisions that deal with

²⁷⁷ See Dani Rodrik and Arvind Subramanian, “The Primacy of Institutions.” Again, the significance of these institutions – and of good institutions in general – is not that they are necessary to achieve economic growth, but that a national economy that is undergirded by good institutions is going to do better than if it did not have them. This, I think, can be said

the development or strengthening of these particular institutions. Once there is reliable evidence that other institutions may have similar benefits, the list of necessary institutions may be expanded to include them as well.

With respect to the second problem, I think that the right approach is to leave the decision up to individual states. If a particular state undertakes to implement more liberal trade policies without developing the right sorts of institutions – of its political economy – that are essential to make these policies work, then it runs the risk of failure. If the aforementioned institutions are beneficial for the success of open trade, then it is surely in the interest of individual states to bring their institutional framework up to speed; failure to do so carries its own penalty and so there is no

even about such economies as China and Russia, where there has been significant economic growth without a consistent protection of private property.

Russia would probably do better with better protection of private property. Russia has had a very hard time attracting foreign investors, in part because investing in the country is fraught with all kinds of dangers. Corporate raiding is still a widespread problem in Russia, making it difficult for legitimate companies - both foreign and domestic - to operate freely and invest in their businesses. This results in the lack of foreign direct invest - because foreign companies simply don't want to risk losing their companies and assets to corporate raiders - and capital flight - because domestic companies try to move as many of their assets as possible offshore.

China, on the other hand, is a more difficult case, since it has done extremely well despite not having a system of property rights that is as robust as that of the US. This is certainly a problem for Rodrik, since he does place a great deal of importance on a strong system of property rights and regards such a system as a good institution. However, Rodrik might respond to this problem in the following way. First, he might suggest that China would do even better with a more robust system of property rights. After all, there is no evidence to suggest that China has done well in part because it has a much weaker system of property rights. A different response would be to say that China's system of property rights, though not as robust as that of the US, is nevertheless good enough - it is certainly better than that of Russia. So perhaps this is more of a threshold issue: China has system that is good enough, given its current position along the economic trajectory that it has taken. At a different position along this trajectory, China, in order to maintain its economic progress, would have to embrace a system that offers better protection. In other words, whether an institution is good is relational question and depends on the current economic conditions of a particular state. This makes the determination of what is a good institution much harder to do, but it does not make the concept hollow: it may still be the case that for a country to grow economically it has to engender the right sorts of institutions.

reason to force them into making these changes.²⁷⁸ This approach of giving states the option to embrace institutional change has the feature that the types of institutions that the WTO can recommend may be quite robust. Rodrik, for instance, in addition to the core set mentioned above also thinks that institutions that provide a social safety net, that quell social instability, that promote democratic governance are also beneficial for growth when combined with openness.²⁷⁹ Requiring states to develop such institutions would involve a significant interference with state sovereignty. And although I am not in principle against putting pressure on states to make them embrace greater democratic governance, the WTO is not the right forum in which to do this. Thus it is much less objectionable, and in the long run just as effective, to leave the building of good institutions up to the states themselves. Still, the WTO has to be in a

²⁷⁸ The difficulty with this is that what may be good for the country as a whole may not be in the interest of the ruling elite who stand to gain from a status quo where there is less rule of law and corruption is part of the political landscape. In these cases, the WTO can try to persuade individual states to develop the right institutions. But I just do not see what more the WTO can do when facing a recalcitrant government that is acting in bad faith. Still, this does not mean that nothing can be done about corrupt governments and their proxies. There are legal instruments that currently exist that may be used to combat foreign corruption. I certainly favor the development of international law that specifically targets the worst forms of corruption. But I do not think the WTO is the right forum for this.

²⁷⁹ Dani Rodrik, "Institutions for High-Quality Growth: What They Are and How to Acquire Them," *Institutions, Globalisation and Empowerment*, Kartik Roy and Jorn Sideras (eds.) Cheltenham, U.K. and Northampton, Mass. 2006, pp. 19-55; Dani Rodrik, "Globalisation, Social Conflict and Economic Growth," *Globalization and Productivity*, David Greenaway, Holger Gorg, Richard Kneller, (eds.) Globalization of the World Economy series, Vol. 20, Cheltenham, U.K. and Northampton, Mass. 2008, pp. 338-53. It must be noted that there is quite a bit of controversy with respect to democratic governance as an independent causal factor for economic development. China seems to be a great counter-example to this: China has been outperforming every major national economy in the world for the past decade and yet it is undemocratic, ruled by a coterie of technocrats chosen within the ranks of the Communist Party of China. Economists like Rodrik, however, think that over the long run states that are governed democratically are going to do better – because undemocratic states are less politically stable. And so to properly judge the Chinese miracle, we have to observe how China fares in the future.

position to assist individual states in their effort to improve their institutions by giving them technical advice.

Of course, there is still the possibility that the WTO's recommendations about which institutions to improve and how, along with its mandate to liberalize, might turn out to be economically unsound. There is always the possibility that policies that are in line with the most up-to-date and accurate economic research might still prove to be harmful to the economy of a member state. It has to be recognized that poor developing and least developed members run a high risk of being harmed by the policies of the WTO. That is because there are so many ways in which liberalization may falter for them. Despite its efforts to reform its institutions, a state may still lack the institutional quality – one that is above the requisite threshold – to make liberalization work for it. Country-specific conditions such as social cohesion, geography, availability and quality of education, and so on, make locating this threshold an imprecise science, requiring several trials before the appropriate level of institutional goodness is reached.

This uneven distribution of risk is problematic from the standpoint of justice: it is hard to see why the most vulnerable members of the WTO should run a much higher risk of failure when indeed their participation in the trade regime contributes to the benefits that the more industrialized members enjoy, and although they themselves are in a position to benefit, those benefits are certainly not substantially greater than what is directed at the more advanced countries to warrant the increase in risk. A more just regime would require a more equal allocation of risk throughout the WTO. What such an allocation of risk should be has to be adduced by a conception of justice,

and the need for a conception of justice is especially acute since the imposition of risk is a product of coercion. In the meantime, some justice can still be done by employing more remedial measures to alleviate the most serious burdens falling on the poorest and most vulnerable members of the WTO.²⁸⁰ This much the WTO can do now.

²⁸⁰ One way to do this is to protect vulnerable members from significant economic downturns – e.g. precipitous fall in the GDP or a gradual decline that takes place over several years – which palpably affect the wellbeing of individual citizens. If, for instance, basic social services have to be cut because of a shortfall in state’s budget for social welfare programs like healthcare, this is something against which vulnerable states should be protected. To prevent these cuts economic assistance in the form of redistribution may be given at least until the crisis is over. This can be done by setting up a fund which can then be used to support a vulnerable member during an economic emergency.

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