TRADE AND JUSTICE: LINKING THE TRADE LINKAGE DEBATES

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"I think we get very tangled up when we say, 'What is our hu­
man rights policy and how does it interact with our trade policy? . . . I
do not believe that human rights should be a key element of trade pol-
icy..." 1

1. INTRODUCTION

In recent years, the linkage between international trade and
various other aspects of social life and concern, or as it is com­
monly referred to, the “trade and ___” phenomenon, has been the
subject of increasing attention within academic and policy circles. 2

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2 Trade linkage is not a new phenomenon, particularly with regard to the link between trade and labor standards. See Virginia Leary, Workers Rights and International Trade, in 2 FAIR TRADE AND HARMONIZATION 175, 182-85 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (examining the link between domestic labor standards and international competitiveness asserted in nineteenth century labor reform debates); Frieder Roessler, Domestic Policy Objectives and the Multilateral Trade Order, in THE WTO AS AN INTERNATIONAL
The response from the trade community to such linkages has not been one of unalloyed welcome. However, rather than respond to the multitude of issues and problems being linked to trade in Organizational 213 (Anne O. Krueger ed., 1998), reprinted in 19 U. Pa. J. Int'l Econ. L. 201 (1998) (noting links between employment, balance of payments issues, and fair labor standards recognized in 1947-48 conference leading to the Havana Charter and in the Charter itself). However, in the last five years the literature devoted to these and other linkages has mushroomed, with the trade and environment link arguably leading the way. See, e.g., Daniel C. Esty, "Greening the GATT" (1994); Steve Charnovitz, "Free Trade, Fair Trade, Green Trade: Defogging the Debate," 27 Cornell Int'l L.J. 459 (1994). Other recognized or asserted linkage fields include: human rights, see, e.g., James F. Smith, NAFTA and Human Rights: A Necessary Linkage, 27 U.C. Davis L. Rev. 793 (1994); Patricia Stirling, The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization, 11 Am. U. J. Int'l L. & Pol'y 1 (1996), development, see, e.g., Bartram S. Brown, Developing Countries in the International Trade Order, 14 N. Ill. U. L. Rev. 347 (1994), competition law, see, e.g., Eleanor M. Fox, Toward World Antitrust and Market Access, 91 Am. J. Int'l L. 1 (1997), intellectual property, see, e.g., Frank J. Garcia, Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation, 8 Am. J. Int'l L. & Pol'y 817 (1993), and culture, see, e.g., John David Donaldson, "Television Without Frontiers": The Continuing Tension Between Liberal Free Trade and European Cultural Integrity, 20 Fordham Int'l L.J. 17, 24 (1994) ("The issues of environment and labor are often reviewed rather negatively by the trade camp."); Fox, supra note 2, at 10-12 (noting that the United States resists the linkage between trade and antitrust law); Smith, supra note 2, at 806-17 (charting U.S. reluctance to embrace disciplined unilateral human rights linkages); Spencer W. Waller, The Internationalization of Antitrust Enforcement, 77 B.U. L. Rev. 343, 344-45 (1987) (noting that international attempts at integrated transnational competition law are generally ineffective, with the United States playing an ambivalent role), and cautionary notes are sounded about linkage in general. See, e.g., Roessler, supra note 2, at 14-15 (arguing that such linkages undermine both the trade order and attainment of the desired domestic policy objectives).
the manner that a ship captain might rail against a sudden increase in barnacles, the trade law and policy community should welcome this abundance as a sign of the increasing prevalence and impact of trade law throughout all aspects of the societies of countries engaged in trade, economic integration, and international economic relations generally. This dramatic increase in the quantity, scope and reach of international economic law is often referred to as the “international economic law revolution,” and the trade linkage phenomenon is one aspect of it.

As international economic law increases in scope and effect, it will become increasingly important to define which issues, problems, and questions are legitimately within its jurisdiction, and how such issues are to be decided. As international economic relations grow more sophisticated, cooperative, and legalized, the rules and decisions of international economic law encroach more and more on other areas of social concern, such as environmental protection, labor law, development assistance, and non-economic human rights. Are these other areas of concern alien to international economic law, and are the linkages and conflicts among these issues and traditional trade law and policy mere “border conflicts,” conflicts at the margin? Or are they central, even constitutive, of modern international economic law? And how shall these issues and conflicts be decided?

It is in this context that recognition of the role of justice in international economic law can make a contribution to the analysis of the “trade and ___” debates. A re-examination of the classical roots of the Western concept of justice, i.e., Justice as Right Order, and the relationship between justice, or morality generally,

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4 Roessler exhibits a note of weary frustration by stating:
Many of the proposals to pursue environmental objectives through the multilateral trade order have features that resemble those of past failed linkages between trade policy instruments and domestic policy objectives. Again proposals are made that would permit the use of trade measures in the pursuit of policy objectives that cannot be attained efficiently with trade policy instruments. And, again, the hoped-for cross-fertilization is likely to turn into crosscontamination.
Roessler, supra note 2, at 15 (emphasis added).


6 This Article confines itself to the moral and political tradition that traces its ancestry to classical Greece. Outside of the West, other traditions explore fundamental questions of social order under different rubrics, such as dharma. See generally SURYA P. SINHA, LEGAL POLYCENTRICITY AND
Section Two of this Article introduces the concept of justice as a sort of “linkage” itself, joining order with value in legal and social thought, and outlines how justice as “Right Order” is related to the analysis of international economic law. Section Three applies this view to the “trade and ___” debate, suggesting how such an analysis could contribute to our understanding of trade linkage problems. As the title of this Article suggests, such an examination reveals that the question of justice is actually implicit in the many “trade and ___” linkages currently under discussion. Understanding how this is so may contribute to improving the questions being asked, and perhaps suggest what the answers might look like.

2. JUSTICE AND INTERNATIONAL ECONOMIC LAW

2.1. Justice as Right Order

In the Western tradition, thinking about justice and its relation to law is as old as organized political life, indeed as old as the tradition itself. In Protagoras, Plato writes that a sense of justice and law, suggests that, in fact, we must consider the claims of justice when we try to talk about international economic law. Moreover, as this Article will seek to illustrate, certain problems in international economic relations, including trade linkage problems, can usefully be examined as problems involving the often conflicting claims of justice in the context of international economic law.7

It may be that in these traditions such concepts play an analogous role to the concept of justice, linking order to value in social life, but that is a question left for another day.

Philip Nichols suggests that many trade disputes, and in particular disputes involving linkage issues, conceal underlying conflicts in societal values. See Philip M. Nichols, Trade Without Values, 90 NW. U. L. REV. 658, 659-61 (1996).

This Article does not develop or adopt a substantive conception of justice, for example, a Rawlsian conception of justice as fairness. The Article aims, rather, to suggest how the concept of justice might function in our analysis of international economic law.

See, e.g., CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 191 (2d ed. 1963) (noting that the problem of the relation of law to justice is central to the evolution of the philosophy of law).
is a prerequisite to living a civic life, to living in community. Why? Because the non-violent resolution of disputes, a cornerstone, if not the *sine qua non*, of civic life, requires that losing parties understand outcomes as “right,” as consistent with fundamental values. In other words, as “just.”

Over 2,000 years later, we find social psychologists stating, in modern parlance, essentially the same point. Klaus Scherer, in his introduction to an interdisciplinary study of justice research, writes that justice, understood as social outcomes justified by recourse to principles accepted by the community, is a basic and indispensable principle for any kind of human social association. This assertion relies on the grounds that human beings exhibit a powerful emotional response to the perception of injustice that no social system can afford to ignore.

The notion of social outcomes, then, is essential to any meaningful concept of justice. When we speak of justice, however, we speak of social outcomes not in a descriptive sense, but in an evaluative or justificatory sense. In other words, we speak of the acceptability of outcomes. If we consider an outcome just, we consider it acceptable, and its acceptability involves reference to particular criteria. Thus our notion of justice is quite closely linked conceptually and etymologically to justification.

The particular criteria by which the acceptability of an outcome is evaluated will depend on the theoretical framework used for the analysis, and on the discipline posing the general ques-
While a social scientist may study the effects of certain variables on our evaluations of acceptability, such as the subjective influence of social representations on individual perceptions of injustice; the effects of status, achievement, power, and social stratification on the distribution of social goods; or the effects of different principles of distribution on the economic system, it falls to philosophy, in particular moral and political philosophy, to articulate the substantive moral principles by which we judge the acceptability of individual and social behavior.

Moral and political philosophy are concerned with the order we bring to our social relations, both on the level of individual decisions and relationships, and in terms of the basic structure of our social institutions. Phrased in terms of the acceptability of outcomes, moral and political philosophy provide certain modes of justification, namely, in terms of moral and political norms, for individual decision-making and social organization.

The classical roots of our tradition of political philosophy yield two fundamental, related, but significantly different starting points on the nature of the concept of justice: the Platonic and the Aristotelian. While neither explicitly replaces the other, and

16 Disciplines which have studied the question of justice include: philosophy, law, psychology, sociology, and economics. In each discipline, the justification of outcomes is studied in a slightly different aspect. See generally Scherer, supra note 12, at 11-14.


18 See Wil Arts & Romke Van der Veen, Sociological Approaches to Distributive and Procedural Justice, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, supra note 12, at 143-76.


20 See WILL KYMMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 6 (1990). The distinction, never very clear, between moral and political philosophy can be expressed as follows: moral philosophy concerns the questions of what we are to do, and political philosophy concerns that subset of questions involving what we are to do when state power and authority are involved.

21 I am following Rawls in relying on a distinction between the “concept” of justice and the many varying “conceptions” of justice, the former consisting of “the role which these different sets of principles, these different conceptions, have in common.” JOHN RAWLS, A THEORY OF JUSTICE 5 (1971).
both in fact are complementary, each emphasizes a different aspect of justice, and both have had a fundamental influence in shaping our culture's investigation of justice.22

Plato's sense of justice is comprehensive and magisterial. Justice is Right Order, both within the individual soul and within the polis.23 Put another way, it is the concept of Justice that links the terms according to which social life is organized with a theory of value, or what is "Good."24 The "Rightness" of a given order depends on the particular relationship of the parts to the whole, which depends on other matters including a theory of human nature and a theory of value.25 But the function of the concept of justice, independent of the substantive conception, is to link the

Tom Campbell objects to the concept/conception distinction regarding justice, questioning whether any putative "concept" of justice can truly be neutral regarding substantive principles of justice. See TOM CAMPBELL, JUSTICE 5-6 (1988). However, in proposing his concept of justice as "treatment in accordance with desert," Campbell reveals that he has blurred the concept/conception distinction and is, in fact, advancing a substantive conception of justice as a concept of justice. Id. In this Article, I have sought to preserve this distinction in advancing the concept of justice as Right Order, which I believe more closely approximates Campbell's own criteria for a neutral functional concept.

22 See FRIEDRICH, supra note 9, at 26 (crediting Plato and Aristotle with together laying the foundation for all subsequent inquiries into law and justice in the West).

23 See id. at 13 (describing the root of Plato's comprehensive concept of justice in pre-Socratic notions of law as nomos, or sacred custom, which "is the order which embraces all").

24 Friedrich acknowledges that for Plato there is a close and essential link between law and ethics. See id. at 15, 18; see also HANS KELSEN, WHAT IS JUSTICE? 101 (1957) (noting that Platonic justice rests on the idea of the Good).

25 In other words, the substantive view of justice Plato adopts is a particular account of the proper order among the elements of society, based on his particular view of human nature and the Good. In Plato's case, the order advocated—his substantive theory of justice—is one of justice as "rational control," with the philosopher king at the head; the guardians in between; and the artisans at the bottom. See PLATO, REPUBLIC, 441e-442d, 444d (G.M.A. Gube trans., 1992). It is a hierarchy of rational ability and character traits, in which each takes the place most fitting for his or her particular constellation of abilities and traits. Those with the more prized of the Greek virtues—valor and rationality—are accorded pride of place. It is not an egalitarian vision, nor is it particularly attractive to a modern audience.

Later Platonists such as Augustine would modify the nature of the relationships according to more egalitarian principles, while maintaining the fundamental Platonic insight that justice is Right Order. See Ernest L. Fortin, S. Augustine, in HISTORY OF POLITICAL PHILOSOPHY 180-91 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).
social order to a theory of the desirable state or outcome of social relationships. In other words, the acceptability of the particular social order depends on its resemblance to the Good. Thus, for Plato, any question concerning the organization of social life can be framed as a question concerning justice.

In contrast, Aristotle’s analysis of justice, while arguably more influential, is somewhat narrower and more technical than Plato’s. Aristotle’s inquiry into justice begins with a distinction between justice in general as the supreme virtue, and specific forms of justice, with the latter being his principle interest. Specific forms of justice and injustice concern aspects of one’s social relations that involve gain, and whether what one has gained one has gained “graspingly” or in proportion to one’s proper share.

Out of this distinction arises the further distinction between types of specific justice for which Aristotle is best known: the distributive and the corrective. Distributive justice is “that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution,” which may be allotted among its members in equal or unequal shares. This aspect of specific justice thus involves the division of social goods, of goods which can be divided

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26 See discussion supra note 21.
27 See Alan Ryan, Introduction to JUSTICE 15 (Alan Ryan ed., 1993) (stating that, for Plato, Justice holds all the other virtues in place, and in this way is a mirror for reason itself).
28 See id. at 7 (stating that, for Socrates, justice is inherent in the organization of the whole, whether the whole in question is the individual soul or society in general).

This discussion may have particular relevance in connection with the trade and environment debate. See infra notes 109-18 and accompanying text.
29 Aristotle describes general justice, or justice in the broadest sense, as consisting of all aspects of one’s relationship to one’s fellows conducted according to virtue, and injustice, in this sense, as conducting such relationships in a manner contrary to virtue. See Aristotle, Nicomachean Ethics, in INTRODUCTION TO ARISTOTLE, 300, bk. V, ch. 1 (Richard McKeon ed., 1947) [hereinafter Ethics]. In this characterization of the concept of justice Aristotle is clearly reflecting Plato’s views.
30 See id. at 400-02, bk. V, ch. 2.
31 Subsequent commentators on justice generally take this distinction as their starting point. See Ryan, supra note 27, at 9 (noting that most modern writers on justice begin with these two distinctions). It is less frequently recalled that this distinction follows the earlier distinction between general, or Platonic, justice and specific justice.
32 See Ethics, supra note 29, at 402, bk. V, ch. 2.
or allocated, and which can be divided socially, by custom, opinion, informal decisions, and formal allocative mechanisms. In order to evaluate a particular division, one need only identify the particular conception of justice, the substantive principle, which would guide such allocative decisions towards a just result.

Corrective justice is a restorative form of justice; of putting into balance something that has come out of balance because of an injustice. It could be considered the elimination of gain from acts of injustice. If, as a result of voluntary or involuntary dealings with one's fellows, a party ends up with either more or less than what is properly its share of the subject of the transaction, Aristotle would say that this is an injustice, and the solution to

33 The notion of division among members of a group or community, or those who "have a share in the constitution," id., raises the question of whether this aspect of specific justice applies to any group in which allocation of social goods occurs, or if some particular type of social or political link, i.e., one that requires a shared constitution or membership in a polity, is a precondition to the claims of distributive justice. This issue arises again in the contention that distributive justice does not apply to trade agreements because, to the extent they affect such allocations, they do so across polities and do not affect members of the same polity. Of course, one can argue that trade agreements themselves form a sort of constitution, creating the relevant type of relationship among all individuals who are subject to their provisions. See discussion infra note 61.

34 Aristotle's substantive principle of distributive justice is akin to our notion of equality or fairness, but like Plato's version, it is not an egalitarian fairness. Aristotle did not conceive of a society of equals, but one of proper shares, in which ability, economic status, and character should result in what we would consider an unequal distribution of goods; it could be called proportionate equality or proportionate fairness. See Ethics, supra note 29, at 402-04, bk. V, ch. 3.

35 See id. at 404-07, bk. V, ch. 4. Corrective justice is often referred to as retributive, in that it is associated with criminal punishment, but it is not related to modern notions of retribution and is more properly concerned with correcting an injustice.

36 Aristotle conceives of corrective justice as applying to what can be translated as "transactions," both voluntary and involuntary ones. See FRIEDRICH, supra note 9, at 22 (noting that this distinction roughly mirrors the distinction between contract and tort).

37 The proper share here is not according to the merit-oriented proportions of distributive justice, but is more akin to the simple sum of the party's gain less loss at the start of the interaction, and the change envisioned by the terms of the interaction itself. See Ethics, supra note 29, at 404-07, bk. V, ch. 4.

Here again, it is useful to recall the distinction between the concept of corrective justice and Aristotle's substantive conception of what constituted corrective justice and injustice.
this injustice is to restore to each party the balance between loss and gain that was theirs before the transaction.\textsuperscript{38}

Aristotle’s two-fold characterization of justice has been enormously influential. Students of justice, since Aristotle, treat questions involving the allocation of social goods, such as wealth, advantage, and opportunity as issues of distributive justice,\textsuperscript{39} and questions involving the propriety of gain as issues of corrective justice.\textsuperscript{40} It can sometimes be forgotten that Aristotle himself acknowledged that he was working within a larger framework of justice as Right Order.\textsuperscript{41} When considered in that context, Aristotle’s categorizations can be seen as enabling us to more precisely apply the general concept of justice as Right Order to the evaluation of the justice of particular distributive or corrective situations.

The ensuing history of Western reflection on the problem of justice involves competing substantive answers to the basic question of what constitutes the Right Order, either generally or with respect to a particular area of social concern. A comprehensive survey of the dominant substantive theories of justice in the West, let alone the world, is beyond the scope of this Article, despite its undeniable relevance to any definitive account of the nature of justice in international economic law.\textsuperscript{42} However, in order to carry out at least the suggestive tasks of the present work, some

\textsuperscript{38} See id. This applies even in the case of physical injury, where Aristotle acknowledges that it strains the metaphor to speak of the aggressor as gaining from the injury to the victim. See id.

\textsuperscript{39} See, e.g., KOLM, supra note 15, at 4 (“[Justice is a central question of all life in society. . . . It is by nature ‘social’ and distributive.”) (emphasis added).

\textsuperscript{40} See, e.g., ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) (elaborating an Aristotelian model of the corrective nature of private law).

\textsuperscript{41} See supra text accompanying note 29. This aspect of Aristotle’s analysis is often misunderstood or criticized. See CAMPBELL, supra note 21, at 5 (“[I]t is best to follow Aristotle . . . where, having distinguished between justice as the ‘complete virtue’ and justice as ‘a part of virtue’, he goes on to concentrate on the latter.”); H.L.A. HART, THE CONCEPT OF LAW 157-58 (1961) (writing entirely of justice in the specific, Aristotelian sense and criticizing more general uses of the term).

\textsuperscript{42} Such a survey is part of a larger project on the general question of justice in international economic law, from which this Article is drawn. The interested reader is directed to consult any of the several excellent surveys available. See generally BRIAN BARRY, THE LIBERAL THEORY OF JUSTICE (1973); CAMPBELL, supra note 21; JAMES P. STERBA, HOW TO MAKE PEOPLE JUST (1988); WHAT IS JUSTICE? (Robert C. Soloman & Mark C. Murphy eds., 1990).
general observations concerning Western theories of justice are in order.

To begin with, particular theories of justice, be they liberal or Marxist, individualistic or communitarian, contractarian or utilitarian, share several traits in common. First, each theory must explicitly or implicitly account for the possibility of moral knowledge. Second, each theory presents a certain account of the organization of social relations in terms of whatever moral principles are identified as most relevant. Third, and perhaps most important for the purposes of this Article, each theory must present an account of the sort of rationale one must have for any version of the organization of social relations. Restated in terms of the acceptability of outcomes, different philosophical theories of justice provide particular standards of justification or acceptability, by which outcomes can be evaluated and accepted or criticized.

Since the Enlightenment, if not the Protestant Reformation, the dominant philosophical approach to matters of government and society in the West has been liberalism. Liberalism is a notoriously difficult term to define. For the purposes of this Article, I shall adopt the approach suggested by Jeremy Waldron and focus on liberalism as a theory of justice, a "view about the justification of social arrangements." In Waldron's reconstruction of liberalism, the liberal commitment to freedom and to respect for individual human will and capacities generates a requirement that "all

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43 Alasdair MacIntyre cautions that it is misleading to compare different philosophers' substantive views, or conceptions, of justice, on the grounds that these conceptions are heavily dependent on their context, namely an underlying theory of political rationality and a socio-historic tradition. See ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 1-11, 389-92 (1988). However, I believe the discussion which follows evades this objection, in that the common traits identified are the sort of formal qualities of theories of justice which MacIntyre himself investigates and reports.

44 Underlying the search for a persuasive conception of justice is a debate in moral epistemology. Moral philosophers have been preoccupied, throughout the last two centuries, with the possibility of moral knowledge. See Bernard Cullen, Philosophical Theories of Justice, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, supra note 12, at 17. In other words, a precondition for a persuasive theory of justice is the articulation of rationally convincing grounds for our knowledge of moral categories such as justice.

45 See JOHN RAWLS, POLITICAL LIBERALISM xxiv (1993).

46 Waldron, supra note 15, at 128; see also MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1 (1982) ("[L]iberalism' is above all a theory about justice . . . .").
aspects of the social should either be made acceptable or be capable of being made acceptable to every last individual."\(^{47}\) In other words, it is a fundamental requirement of liberal theories of justice that the acceptability of outcomes be demonstrable to any and all affected individuals.

On this view, the differences among liberal theories of justice are disagreements over particular principles which claim the ability to meet this stringent test. Thus, for example, utilitarian,\(^ {48}\) egalitarian\(^ {49}\) and libertarian\(^ {50}\) theories of justice, while they each may differ in the types of justification they suggest for outcomes,\(^ {51}\)

\(^{47}\) See Waldron, supra note 15, at 128.

\(^{48}\) The utilitarian account of justice is generally traced to the writings of Mill and Bentham, see JOHN STUART MILL, UTILITARIANISM (1863) and JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), reprinted in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL (Edwin A. Burtt ed., 1967), and until the publication of John Rawls' A THEORY OF JUSTICE, was considered dominant in the field. See RAWLS, supra note 20, at 22-27. See generally UTILITY AND RIGHTS (R.G. Frey ed., 1984). Initially, utilitarianism conceived of the moral rightness of an act in terms of its capacity to produce happiness for the members of society. See MILL, supra, at 900. "Happiness" has since been generalized into the concept of "welfare" or "utility," variously conceived of as hedonic satisfaction, desirable mental states, simple preference satisfaction, or rational preference satisfaction. See generally KYMLICKA, supra note 20, at 12-18.

\(^{49}\) Liberal egalitarianism, of which John Rawls' theory is the foremost example, considers justice to be a matter of the equitable distribution of basic social goods such as rights, resources, and opportunities according to some concept of "fair shares" that limits an otherwise unlimited utilitarian calculation. See, e.g., RAWLS, supra note 45, at 7-11; Ronald Dworkin, What is Equality?, 10 PHIL. & PUB. AFF. 185-246, 283-345 (1981). See generally KYMLICKA, supra note 20, at 50-55.

\(^{50}\) Libertarians assert the fundamental primacy of individual rights, in particular rights to property—broadly conceived, and therefore see justice in terms of respect for these rights. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). See generally KYMLICKA, supra note 20, at 95-98.

\(^{51}\) Utilitarianism would justify outcomes in terms of the degree to which they maximize utility, regardless of whose utility. In terms of the preferences-satisfaction model of utility, a just outcome is one which satisfies the greatest number of informed preferences, even if that means that the preferences of some will go unsatisfied, and even if, more disturbingly, the inclusion of "illegitimate" preferences, or preferences for outcomes such as racial discrimination, which we might question on other moral grounds, means a denial to unpopular groups of what we would want to consider basic rights. See MILL, supra note 48, at 947 ("[J]ustice is [merely] a name for certain moral requirements which, [although high on] the scale of social utility, [may be 'overruled'] in the utilitarian calculus."). See generally KYMLICKA, supra note 20, at 18-30.

Egalitarian theories would justify outcomes with reference to the particular principle of distribution espoused by the theory. Thus, in a Rawlsian model,
are all liberal theories in that they claim to be able to justify outcomes to any and all affected individuals.\textsuperscript{52} What is key in liberal theories of justice is the centrality of individual liberty and individual rights to the purpose and role of government and to the establishment of the social order generally. In other words, a precondition to justice is that the social order reflect and promote individual liberty and individual rights.\textsuperscript{53} The extent to which each theory differs suggests the conflicts and contradictions within liberalism; which may also surface as liberal theories of justice are applied to international economic law.

\textsuperscript{52} Despite the fact that some preferences will go unsatisfied and the problem of illegitimate preferences, utilitarianism is at least in principle a liberal theory in that, formally speaking, each person's preferences count, and count equally, in the utility-maximization calculus. See BENTHAM, supra note 48, at 804 (describing evaluation of merits of legislation in terms of aggregate of individual pain and pleasure); see also KYM LICKA, supra note 20, at 25-30.

Egalitarian theories are clearly liberal in that their basic premise is the moral equality of individuals; the justification for any distribution scheme involves individual rights and the individual economic effects of choices and circumstances and, in Rawls' case, the theory is based on the argument that any rational individual in the "Original Position" would choose his principle of justice. See RAWLS, supra note 45, at 19-21. See generally KYM LICKA, supra note 20, 58-66.

Libertarian theories are, of course, liberal, even if they oppose "liberal" redistributive policies, because they are based on the primacy of individual choice and individual rights. For Nozick, rights precede justice. See NOZICK, supra note 50, at ix ("Individuals have rights, and there are things no person or group may do to them.").

\textsuperscript{53} In contrast, Marxist theories of justice--that accept the concept of justice at all--propose a radically different, communal measure of justice, as do communitarian theories, which are essentially non-Marxist critiques of liberal accounts of justice. See generally KYM LICKA, supra note 20, at 160-237; STEVEN LUKES, MARXISM AND MORALITY (1985); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). In these approaches, outcomes are just if they can be made acceptable to certain groups, despite the fact that they may not be justifiable to certain affected individuals.
2.2. Right Order and Social Allocation in International Economic Law

The centrality of justice to the analysis and construction of international economic law is evident in the nature of the concept of justice itself. In the Platonic concept of justice as Right Order, whenever we consider the proper order of any aspect of social relations, we are considering a question of justice. In the Aristotelian elaboration of this concept, when law and public institutions affect the allocation of social benefits or the correction of improper gain, they are raising questions of distributive and corrective justice.

Therefore, it is necessarily true that every time the question of the proper order of a given aspect of international economic relations arises, one is considering a question of justice. Moreover, where law is a primary tool for establishing the social order, questions of justice in international economic relations will arise as questions of international economic law. International economic law does indeed affect fundamental decisions about the allocation of social benefits among states and among their citizens, including benefits such as economic advantages, preferences, and opportunities; wealth and property rights; information; and the protection of the law itself. International economic law also involves mechanisms for the identification and correction of improper gain through dispute resolution mechanisms, on the interstate and

54 This conclusion depends on the applicability of the concept of justice, first developed as Right Order within a political community, then as Right Order between political communities. See infra note 61.
55 Such benefits include, for example, tariff rates, tariff preferences, rights of establishment, and provision of services.
56 Among this category of rights are, for example, development assistance, trade finance, and intellectual property protection.
57 Access to information is affected by transnational issues such as transparency requirements and technical assistance.
58 Whether, for example, economic sanctions are available to increase the effectiveness of human rights protections, or whether countries can protect environmental resources through embargo statutes.
59 For example, dispute settlement mechanisms such as NAFTA’s chapter 20 and the WTO panel process can be understood as institutions for the application of corrective justice. See, e.g., Trade Injustice, N.Y. TIMES, Dec. 10, 1997, at A22 (criticizing WTO panel’s failure to censure allegedly protectionist practices in the Japanese film industry as an example of “trade injustice”).
private\textsuperscript{60} levels. Such influence on the part of international economic law must therefore be evaluated in terms of theories of distributive and corrective justice.\textsuperscript{61}

\textsuperscript{60} The case law of the European Court of Justice and NAFTA’s investor arbitration provisions are examples of the international application of corrective justice to private party conduct.

\textsuperscript{61} The fact that one is confronting justice issues in relations among states, and among disparate social systems and peoples, rather than within a single state or social system, raises important theoretical questions that can only be touched on in this Article. First, one might assert that obligations to do justice are, by their very nature, not suited to extension beyond the boundaries (presumed territorial) of a given political community. See, e.g., RAWLS, \textit{supra} note 45, at 12, 272 n.9; RAWLS, \textit{supra} note 21, at 7-8, 457 (noting that a theory of justice presupposes a closed society that seeks justice within a closed system, not including justice between nations). However, this view may be an artifact of social contractarian arguments for political morality, rather than a general limitation inherent to moral obligations by their very nature. See Anthony D’Amato & Kristen Engel, \textit{State Responsibility for the Exportation of Nuclear Power Technology}, 74 VA. L. REV. 1011, 1043-46 (1988) (discussing tensions between universal and socially contingent aspects of social contractarian approaches to political philosophy). It has, in fact, been vigorously asserted that territorial boundaries are irrelevant to moral obligations. See Fernando R. Tesón, \textit{The Kantian Theory of International Law}, 92 COLUM. L. REV. 53, 82-83 (1992) ("The contingent division of the world into discrete nation-states does not transform political freedom from an ethical imperative into a mere history."); D’Amato & Engel, \textit{supra}, at 1042 ([A] national boundary is an artificial, as well as a morally irrelevant, boundary with respect to moral obligations."). Moreover, Rawls has been criticized for failing to extend the original position to its logical transnational application. See CHRISTOPHER D. STONE, \textit{THE GNAT IS OLDER THAN MAN} 253-62 (1993). Finally, to the extent that obligations of justice depend upon some form of shared political community, it may be that international economic relations, particularly economic integration systems, establish the requisite form or level of transnational community. See D’Amato & Engel, \textit{supra} at 1046-47 ("The requirements of justice apply to institutions and practices . . . in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place.") (quoting CHARLES R. BEITZ, \textit{POLITICAL THEORY AND INTERNATIONAL RELATIONS} 131 (1979)); \textit{supra} notes 55-60 and accompanying text.

It can also be argued that, in the international community, as it exists today, obligations of justice are tempered or superseded by some form of realpolitik, see Terry Nardin, \textit{Realism, Cosmopolitanism, and the Rule of Law}, 81 AM. SOC’Y INT’L L. 415-16 (1987) (arguing that realism dictates that foreign policy be guided by prudent strategies for national survival, not morality), or that efforts at promoting justice will inevitably be perceived as “cultural imperialism, paternalism or worse.” Alfred P. Rubin, \textit{A Skeptical View}, 47 U. CHI. L. REV. 403, 405 (1980) (reviewing CHARLES R. BEITZ’S \textit{POLITICAL THEORY AND INTERNATIONAL RELATIONS} (1979)). However, this sort of pragmatic or utilitarian reasoning can itself be criticized on moral grounds as treating absolute moral obligations as discretionary.
The importance of recognizing this link between trade and justice increases with the globalization of the world economy and the development of international economic law. The greater the scope and importance of international economic law as a feature of international economic relationships, and the deeper its impact throughout the societies of trading states beyond traditional economic issues such as tariff rates and investment rules, the more we must be concerned with its normative impact and implications. In other words, the broader the law’s ordering power, and the more its “order” impinges on our attempts and our ability to “order” other aspects of our society, the more we must be concerned with the “Rightness” or the “justice” of the resulting international economic order.

In addition to the conceptual links discussed thus far between justice, international economic relations, and international economic law, there are very particular reasons why our jurisprudence requires us to consider, or at the very least does not excuse us from considering, what claims a concept of justice might make on the construction of international economic law. This assertion shall be explored in connection with the three principle accounts of the relationship between justice and law, which also apply to the question of the relationship between justice and international economic law: the traditional naturalist view, the modern naturalist view, and the positivist view.

There are many forms of naturalism, from the classical naturalism of Greece and Rome through the systematic, magisterial naturalism of Aquinas and up to the various modern naturalisms of Fuller, Finnis, and even Dworkin. In its strongest form,
of which Aquinas is the foremost medieval exponent \(^6^8\) and Finnis the leading modern representative,\(^6^9\) naturalism asserts two linked propositions: that knowledge of objective moral truth is possible,\(^7^0\) and that humanly promulgated law must conform to the dictates or norms of this moral truth in order to be considered fully valid law.\(^7^1\) While Aquinas and Finnis acknowledge the existence of morally questionable laws,\(^7^2\) both Aquinas and Finnis would regard such “law” as fatally defective although Aquinas, and to a greater extent Finnis, might nevertheless acknowledge their status as law in some sense.\(^7^3\)

In contrast, both Fuller and Dworkin conceive of the morality which they see as relevant to law as something less than the objective morality of traditional naturalism. Fuller’s morality is a limited one, confined to what he terms the morality of law itself,\(^7^4\) and thus his naturalism could be called a “limited” naturalism. Dworkin, while seeking to express a link to broader moral principles, sees that morality as the morality of the relevant

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1991). However, in important respects his stance is beyond the naturalist/positivist distinction. See id.

\(^6^8\) See AQUINAS, supra note 64.

\(^6^9\) On Finnis’ role as a leading modern exponent of traditional naturalism, see Neil MacCormick, Natural Law and the Separation of Law and Morals, in NATURAL LAW THEORY 105 (Robert P. George ed., 1992) (crediting Finnis with the powerful contemporary restatement of the classical tradition). Regarding Finnis’ own views, see FINNIS, supra note 66.

\(^7^0\) See AQUINAS, supra note 64, at question 91, art. 2 (noting that natural law is rational human nature’s participation, through reason, in eternal truths); see also FINNIS, supra note 66, at 59-99 (arguing that the seven basic values of existence can be identified as self-evident through rational introspection).

\(^7^1\) See AQUINAS, supra note 64, at question 91, art. 3 (noting that human laws proceed from practical reasoning upon the precepts of natural law); id. at question 95, art. 2 (“Every human law has just so much of the nature of law as it is derived from the law of nature.”); see also Hans Kelsen, Foundation of the Natural Law Doctrine, 1973 ANGLO-AM. L. REV. 2, 83-111 reprinted in 1 NATURAL LAW 125 (John Finnis ed., 1991).

\(^7^2\) See AQUINAS, supra note 64, at question 93, art. 3 (recognizing existence of unjust or wicked laws); see also FINNIS, supra note 66.

\(^7^3\) See AQUINAS, supra note 64, at question 93, art. 3 (noting that even an unjust law retains some appearance of law through its promulgation by one in authority, though its principal character is of violence, not law); FINNIS, supra note 66, at 363-66 (arguing that to say unjust laws are not laws distorts a complex relationship, as unjust law may still be law in a technical sense but not worthy of obedience as law).

\(^7^4\) See FULLER, supra note 65, at 38-44 (reviewing the basic elements of law’s morality).
community, not a particular moral order based in God’s will or an objective natural order.\textsuperscript{75} This results in a sort of “open” naturalism, where what is necessary is a link to moral principles, and not the possibility of an objectively identifiable universal moral view.\textsuperscript{76}

With respect to either form of naturalism, the demands of justice will be expressed as fundamental claims upon international economic law and its actors, insofar as international economic law claims to be law, and its actors attempt to operate within that law. The heart of the naturalist view of international economic law can be expressed syllogistically as follows:

(1) international economic law consists of the regulation of international economic activity through law;
(2) all law, insofar as it claims the status of law, must be just;
(3) therefore, international economic law, insofar as it claims to be law, must be just.

The differences among the various naturalisms lies in their different versions of the minor premise, according to their definition of justice as it is relevant to law, and their account of the relationship.\textsuperscript{77}

The distinctiveness of the modern positivist view lies in its substitution of an essentially formal description of the defining characteristic of law for what had heretofore been an essentially

\textsuperscript{75} See Dworkin, supra note 67.

\textsuperscript{76} “In principle, natural law theory may adopt any ethics.” Deryck Beyleveld & Roger Brownsword, The Practical Difference Between Natural-Law Theory and Legal Positivism, in 2 NATURAL LAW, supra note 67, at 138.

\textsuperscript{77} The traditional naturalist view would go beyond the bare assertion of the minor premise and assert a particular substantive standard of justice for international economic law, derived from a philosophical or theological account of objective morality. Modern naturalism would assert, in the limited naturalist version, that international economic law, as is required of all law, must conform to the basic morality of law in order to have such status. However, these claims are more limited than the moral claims which traditional naturalism might impose on international economic law. The open naturalist view would assert that international economic law, at least in the context of dispute resolution, must have recourse to some theory of justice, but would not specify or defend any particular theory, asserting rather the link itself. Thus, one could say that the McDougal/Lasswell approach to international law is a form of naturalism in that it does not attempt to argue for the key values of a universal order of human dignity as part of its theory of law, but does maintain that a link between law and these values, however established; accordingly it plays an essential role in the appraisal and critique of public order systems. See MYRES S. MCDougAL & ASSOC., STUDIES IN WORLD PUBLIC ORDER 16, 21-22 (1960).
normative one. In *The Concept of Law*, for example, H.L.A. Hart provides a sophisticated account of law as a system of primary and secondary rules. The conflict between this view of law and naturalism lies not in any positivist account of the formal qualities of legal systems, but in the separability thesis: the assertion that such a view is a sufficient account of the nature and function of law, separate from any reference to the law's morality.

Using Hart's theory as an example, the positivist view of international economic law can also be expressed syllogistically, illustrating the contrast to natural law as well:

1. international economic law consists of the regulation of international economic activity through law;
2. all law, insofar as it claims the status of law, must consist of a system of primary and secondary rules;
3. therefore, international economic law, insofar as it claims to be law, must consist of a system of primary and secondary rules.

Any mention of justice is absent from the minor premise, and therefore necessarily absent from the conclusion.

What is particularly noteworthy for our purposes is that, in spite of his insistence on the formal independence of law and morality as a definitional and constitutive matter, Hart took great pains to point out that law in fact could not and should not be evaluated independently from morality. To begin with, Hart acknowledges a fundamental similarity between a narrowly defined version of justice as fairness and certain essential properties of law.

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78 Law, in this view, is to be seen as "merely" or "essentially" certain types of statements, declarations, or rules that qualify as law because of their formal characteristics and not by reference to moral principles. Hart, for example, characterizes law's "essence" as the union of primary and secondary rules, and contrasts this to traditional naturalist accounts of this essence as consisting of the necessary link between law and morality. See HART, supra note 41, at 151-55.

79 The "primary" rules of law governing behavior recognizable in primitive and modern legal systems are themselves established, administered, and changed through the application of "secondary" rules which characterize mature legal systems, chief among these being the rule of recognition. See id.

80 See id. at 185-87; see, e.g., David Lyons, Moral Aspects of Legal Theory, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 49 (Marshall Cohen ed., 1984).
as a rule system. Moreover, of all the claims of morality, the claims of justice are privileged in their criticism of law, because justice, in the sense of treating like cases alike, is very much like the notion of proceeding by a rule. However, in neither case does Hart admit the claim that legal systems and laws, in order to be so considered, must comply with the broader claims of natural law, or with the claims of justice more broadly defined, which are very distinct from the nature of law. Law’s morality, broadly speaking, is not rooted in law itself, but in the moral obligations we are subject to in private and public life on the basis of independent philosophical or theological commitments. Nevertheless, Hart does contemplate and indeed advocate the moral critique of substantive law. In fact, he considers the positivist definition of law to facilitate an accurate moral critique of law.

From a positivist standpoint, therefore, the demands of justice on international economic law will take the form of policies to be pursued through such law, either as a matter of independent moral obligation or simple prudence. The positivist argument presupposes no necessary link between international economic law and justice, or any other value, at a definitional level, beyond a shared concern for the application of rules. To the extent international economic law is created or evaluated with reference to the substantive claims of justice, this may reflect simply the decision of the law-makers or analysts that it is prudent or useful for international economic law to be just. Alternatively, a positivist might conclude that international economic law must be just, but

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81 In Hart’s account of the relationship of justice to law, he admits a close link between the administration of law and Aristotelian notions of equality in distribution and correction. See HART, supra note 41, at 160-62.

82 See id. at 161.

83 Hart thus explicitly relies on a narrow Aristotelian concept of specific justice, distinguishing it from broader moral claims. This is vital for him because, as we have seen, he admits a special link between this sort of justice and law. See discussion supra Section 2.1. If he accepted the broader view of justice, it would both resemble less the administrative requirements of rule systems and in fact admit the entire naturalist argument.

84 Hart contends that the naturalist assertion, that unjust laws are not laws, is muddled and merely confuses the issues at stake. He suggests, instead, that the conflict is precisely over obedience to a valid law that may nevertheless be “too iniquitous to obey or apply.” See HART, supra note 41, at 205.

As Hart explains, a positivist analysis of law squarely presents us with the choice among greater and lesser evils and injustices involved when, for example, later courts are called upon to judge liability or guilt under Nazi statutes. See id. at 208-12.
for reasons of obligations rooted in political or moral philosophy, rather than its nature as law. However, in neither case is there any sense in which positivism is an obstacle to or substitute for the normative evaluation of international economic law, nor does it diminish the importance of theories of justice to such an evaluation on independent moral or prudential grounds.

2.3. International Economic Law and the Claims of Justice

One’s view of the nature and force of the actual claims of justice on international economic law will differ according to one’s position on the relation of law to morality generally, and according to one’s substantive theory of justice. It is beyond the scope of this Article to address all substantive theories of justice and the richness of their possible claims on international economic law, nor will this Article fully develop one substantive position on justice and apply to it to the richness of issues in international economic law. Rather, what this Article will attempt in what follows is to suggest, in an illustrative manner, how theories of justice could entail particular claims on international economic law. In the section which follows, this type of general relationship will be explored in connection with the trade linkage issue.

First, and most importantly from a Western standpoint, the claims of justice will affect the threshold question of the rule of law in international economic relations, and on this there is wide agreement. Fundamental to any conception of Western justice is a commitment to the rule of law. Such a commitment is also recognized by traditional trade theorists as a cornerstone of our attempts to regulate international economic relations through in-

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85 Of course, a positivist’s particular view of the requirements of justice in international economic law will depend on the substantive theory of justice to which that positivist is committed.

86 In fact, one can extrapolate from Hart’s writings that positivism facilitates the normative evaluation of international economic law, and might, in some limited way, even require it.

87 There is, however, no view of international economic law that does not presuppose or entail some answer to the question of what constitutes the Right Order, with the possible exception of a chaotic one. Even an anarchic view of international law embodies one view of the Right Order.

88 See Aristotle, Politics, in ARISTOTLE, supra note 29, at 598 (“[L]aws, when good, should be supreme.”); CAMPBELL, supra note 21, at 23-27 (noting that the rule of law ideal is linked both to substantive justice—consistent application of just rules—and formal justice—consistency of rule application as an independent principle of justice).
ternational economic law.\textsuperscript{89} This commitment to the rule of law as a principle of western justice necessarily implies that international economic law systems, in particular their institutional mechanisms, are subject to evaluation and critique according to how effectively they uphold, advance, or undercut the rule of law in international economic relations.\textsuperscript{90}

Western theories of justice can also serve to justify, from a normative standpoint, the fundamental economic concept of liberalization of trade. The core trade and integration commitment to liberalize trade naturally reflects the principles of trade economics, in which liberalized trade contributes to increased welfare due to gains in efficiency and the unfettered operation of comparative advantage. In doing so, however, liberalized trade also contributes directly to the achievement of the core aim of liberal justice, in that such welfare increases are a necessary precondition to a more just distribution of wealth and an improved standard of living for the least advantaged.\textsuperscript{91} Trade liberalization also directly reflects the fundamental commitment to individual liberty common to all Western theories of justice, in that it di-


In fact, the modern international economic law movement has been at the forefront of the expansion of the rule of law in international relations generally. See John H. Jackson, International Economic Law: Reflections on the "Boilervroom" of International Relations, 10 Am. U. Int'l L. & Pol'y 595, 596 ("It is plausible to suggest that ninety percent of international law work is in reality international economic law in some form or another."); Ernst-Ulrich Petersmann, Constitutionalism and International Organizations, 17 NW. J. Int'l L. & Bus. 398, 399 (1996-97) ("[International economic law] has become one of the most important foreign policy instruments for promoting not only economic welfare but also individual freedom and rule of law.").

\textsuperscript{90} See generally Petersmann, supra note 89, at 428-29, 431, 451 (evaluating rule of law aspects of select international economic law institutions).

\textsuperscript{91} See Petersmann, supra note 89, at 400 (noting that "market institutions" regulated by economic law "are an indispensable complement of human rights for [the promotion of] human well-being"). See generally Cass R. Sunstein, Free Markets and Social Justice 8, 203-22 (1997) (noting that markets play an important, albeit limited role in a basic rights system, for example in the development of constitutional democracies in Eastern Europe). This assumes, of course, that the distributive justice issues are also addressed. See infra notes 105, 109, 128, 146.
rectly expands the scope for unfettered individual decision-making in economic activity.92

Justice also plays a central role in the evaluation of international economic law institutions. Institutions created through international economic agreements, such as the World Trade Organization ("WTO") and the NAFTA Commission, can be analyzed from a variety of perspectives independent of moral and political philosophy. However, a justice perspective can clarify the implications of the design and operation of such institutions for the realization of our fundamental values, affecting for example how trade institutions reach decisions and resolve disputes.93

3. JUSTICE AND THE "TRADE AND" PHENOMENON

So far, the assertion that the claims of justice are essential to the analysis of international economic law is not likely to excite much controversy, even among those who maintain what one scholar has termed the "Efficiency Model" of trade law in which trade is strictly a matter of economic efficiency and welfare.94 That is, in part, because the issues discussed thus far, such as the rule of law, elimination of trade barriers, and the construction and operation of trade institutions, can be seen from the vantage point of traditional economic theory as simply part of what trade is "about."95

92 See Petersmann, supra note 89, at 400 (noting that properly functioning market institutions (i.e., markets regulated by economic law) are an indispensable complement of human rights for promoting individual autonomy). On this view government intervention in trade through tariffs and non-tariff barriers, for example, is inadvisable insofar as it reduces individual economic liberty.

93 For example, Ernst-Ulrich Petersmann's work applying constitutionalism theory to the WTO and other international economic law institutions points out several aspects of trade liberalization systems which advance or reflect fundamental liberal commitments to justice in social and economic relations, including: separation of powers, protection of fundamental rights, necessity and proportionality rules, and democratic participation. See id. at 429-32.


95 Of course, there may be some controversy about the precise outcomes that different normative theories may dictate. For example, to the extent constitutionalism theory suggests that binding dispute resolution is to be preferred on normative grounds over simple advisory opinions, this claim might be resisted by those who see the decision as a purely functional or political one. See supra notes 89-90.
However, the implications of justice for international economic law become more controversial when one moves beyond these sorts of issues to a consideration of other trade policy issues raised by the current “trade and” debate. This debate forces us to consider questions involving gross economic inequalities, conflicting concepts of human dignity and environmental protection, other heavily value-laden issues such as “culture” and “property,” and the role of such questions in trade law at all. In discussing linkages such as “trade and development,” “trade and labor,” “trade and the environment,” and “trade and human rights,” we are delving more deeply and perhaps more problematically into the nature of the relationship between trade and justice.

3.1. Recognizing the Linkage Between Justice and the “Trade and ___” Debate

Each “trade and ___” debate has, at its root, a question or series of questions which are about justice. Perhaps the most fundamental question is this: Who shall we trade with, and on what terms? More particularly, we may ask the following: What are the moral implications for us if our trading partners are, as a whole, much poorer than ourselves? What if our trading partner’s society is highly stratified, such that the gains from trade only go to a few? What if a trading partner has a different or no conception of environmental harm and environmental protection? What if our trading partners have a radically different (or lack any) concept of human dignity? Can we use the trading system to redistribute global wealth across states, encourage more equitable distributions of wealth within states, change or enforce human dignity laws, or protect the environment in such cases, even at some cost to liberal trading principles? Should we?

It is the main contention of this Article that these questions, and the similar questions underlying each of the major “trade and” debates, are inescapably moral questions, i.e., they are questions of justice. They are justice questions because they are questions of order, and they are inquiries into the Right Order for the

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96 See infra notes 100-08 and accompanying text.
97 See infra notes 109-14 and accompanying text.
98 See infra notes 115-24 and accompanying text.
99 See infra notes 125-31 and accompanying text.
given set of social relationships they presuppose or establish.\textsuperscript{100} They are questions of justice because their resolution depends upon our making decisions as to the allocation of social goods and social burdens, and may involve an investigation into the propriety of certain gains and the correction of improper gain.\textsuperscript{101}

The link between trade and the inequalities of various kinds that exist between trading states is a fitting place to begin exploring this contention, as the link is an ancient and perhaps constitutive one. On the one hand, the theory of comparative advantage suggests that certain inequalities are the \textit{sine qua non} of trade, in that it is the disparity in resource distribution which offers trading states the key opportunity to specialize.\textsuperscript{102} However, the more troublesome aspect of the link between trade and inequalities in levels of development among states has also been recognized since the early days of the study of trade itself, consisting of the manifold opportunities for outright predation and conquest,\textsuperscript{103} as well as for the pursuit of other inherently self-serving policies such as mercantilism,\textsuperscript{104} presented to developed states in their trade relations with the less-developed world.

\textsuperscript{100} That they involve relationships across societies and national boundaries, it is argued, need not alter the basis of moral obligation. \textit{See supra} note 61.

\textsuperscript{101} For example, Dunoff writes that trade and issues such as intellectual property highlight the fact that interstate, distributional questions are at the center of international trade policy, challenging one view common in the literature that cooperation or collaboration, rather than distribution, is the key issue. \textit{See Dunoff, supra} note 94.

\textsuperscript{102} \textit{See, e.g.,} \textit{PAUL A. SAMUELSON, ECONOMICS} 668 (1973) (noting that the starting point for comparative advantage is diversity in conditions of production between different countries).

\textsuperscript{103} In his seminal work, \textit{AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS}, Adam Smith writes:

Folly and injustice seem to have been the principles which presided over and directed the first project of establishing [the American] colonies; the folly of hunting after gold and silver mines, and the injustice of coveting the possession of a country whose harmless natives, far from having ever injured the people of Europe, had received the first adventurers with every mark of kindness and hospitality. . . . [I]t was not the wisdom and policy, but the disorder and injustice of the European governments which peopled and cultivated America.

\textbf{ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS} 350-51 (Kathryn Sutherland ed., 1993).

\textsuperscript{104} \textit{See id.} at 351-52.

When [the North and South American colonies] were effectuated, and had become so considerable as to attract the attention of the mother country, the first regulations which she made with regard to them had
The problem of trade and inequality is a paradigmatic case of the link between trade and justice. The distribution of social goods between the richer and the poorer is a central concern of theories of justice.\textsuperscript{105} Public debate concerning the relations between richer and poorer states as a matter of justice peaked within international economic law with the birth and demise of the movement for a New International Economic Order ("NIEO").\textsuperscript{106} While the NIEO may have failed as a political matter, this does not mean that the arguments asserted by NIEO advocates have been refuted.

One can discern in the debate over trade and development a range of positions traceable to the principal Western substantive theories of justice. Perhaps the most familiar reply to the question "What is our duty to developing states in structuring our trade relationships?" might consist of utilitarian justifications for various types of assistance to underdeveloped states, such as an appeal to increased stability in international relations or to the creation of larger and stronger markets of consumers for our products.\textsuperscript{107} An egalitarian liberal approach, however, might reject such utilitarian reasoning despite an apparent agreement in outcomes, and argue instead for the existence of a moral duty to aid poorer states based on deontological moral principles. Rawls' difference principle, for example, could be extended to cover eco-

\textsuperscript{always in view to secure to herself the monopoly of their commerce; to confine their market, and to enlarge her own at their expense, and, consequently, rather to damp and discourage, than to quicken and forward the course of their prosperity.}\textsuperscript{Id.}

\textsuperscript{105} This is certainly true as applied to domestic society, and, it is argued, would hold equally true where the richer and the poorer are states and not just individuals. See \textit{supra} note 61.


\textsuperscript{107} See \textit{SMITH, supra} note 103, at 308-09.
nomic relations with less advantaged states, leading to a duty to
effect wealth redistributions across national boundaries beyond
those that are justifiable on utilitarian lines. A libertarian view,
in contrast, would question such principles and resist any such
trans-boundary redistribution in favor of some minimal notion of
procedural fairness or fairness of opportunity on the part of less
advantaged states.

Whatever one’s view as to the appropriate answer to these
questions, simply understanding the trade-development link as a
justice issue involving the problem of inequality implies that we
are not free to govern our economic relationships with poorer na­
tions solely with regard to the politics of the moment. Moreover,
viewing the trade and development linkage as a justice matter
raises the question of how one can consistently be a redistributive
egalitarian at home and a libertarian or political realist abroad.

Given the nature of our concept of justice, it becomes incumbent
on those seeking to establish an economic order that does not
consider the claims of less developed states to articulate a norma­
tive basis for this position. In other words, they must explain
why such an order would be Right.

A related, and far more controversial, inequality problem in­
volves the inequalities within the societies of trading states and
whether, as a matter of distributive justice, trading states are obli­
gated to take into account such inequalities in their trade and eco-

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108 See D’Amato & Engel, supra note 61, at 1047; STONE, supra note 61, at
255-60.

109 The classic libertarian-egalitarian conflict involves a fundamental disa­
greement over the moral legitimacy of state-effected wealth redistribution. In
this context, the debate would be over the legitimacy of such redistributions
effecting through trade agreements between states. However, even if one con­
cedes to the libertarian the assertion that the free market may be the best
mechanism for basic distribution questions, the criticism can be made that the
moral basis for this position is substantially undermined by the reality of ine­
quality, particularly gross inequality, in natural “endowments.” What is there
to guarantee that the open market exchanges do not further erode or deny the
basic rights of the weaker party? The liberal objection, that there can be no
freedom where two sides are grossly unequal, emerged in the early nineteenth
century in the work of T.H. Green and others. See KELLY, supra note 63, at
306. Therefore, the state has a role in setting the basic conditions for a mean­
ingful exchange, a moral exchange. Id.

110 I am not so much questioning the validity of a libertarian view, but the
consistency of simultaneously holding both commitments.
nomic integration systems.111 At a normative level, the assertion that distributive inequalities within a society are justice matters can scarcely be gainsaid. But do states have a duty to consider inequality problems within their trading partners? Moreover, at an empirical level, one can distinguish between the distributive inequalities which might exist in a state relatively independent of trade and its effects, and the well-recognized fact that the effects of trade itself can vary widely with regard to groups within trading states; some groups may suffer great harm while the state as a whole prospers.115 Even if one were unwilling to recognize a duty to consider domestic inequalities generally, might not this empirical distinction between “types” or “sources” of inequality suggest a duty to consider trade-related inequalities?

From a utilitarian viewpoint, one might consider such concern useful or desirable but decide that the significant practical difficulties in responding to these trans-boundary concerns, and the potential friction from claims of meddling in internal affairs, would render the cost of such policies too high in relation to the benefit potentially to be achieved. A liberal Kantian analysis of international law, however, would suggest that recognition of such concerns and the ensuing responsibility are unavoidable as a matter of respect for individual rights.113 A communitarian analysis would agree with the need to consider the effects of trade on the disadvantaged in a trading partner’s society, but would suggest that the relevant unit of analysis is the group rather than

111 Traditionally, the economic disadvantages of individuals within their own states were not considered a legitimate subject for international law, which favored the black box or billiard ball approach to state relations. Recently, however, this view of international law has undergone significant criticism and modification from the human rights movement and particularly from feminist theorists of international law, who have attacked the public/private distinction as inimical to the rights of women within state societies. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 625-30 (1991).


113 See Teófilo, supra note 61, at 81-84 (arguing that human rights protections are fundamental to international law and the legitimacy of states).
the individual, and that trading states have an affirmative duty to act to improve the plight of vulnerable groups. In contrast, a libertarian might limit a state’s duty, both at home and abroad, to attempts to encourage policies in our trading partners that favor individual rights and the protection of private property. In any event, the simple assertion that, whatever one’s duty is to one’s less fortunate fellows, that duty does not apply across national boundaries, is not likely to go unchallenged in contemporary debates over the justice of failing to consider the stratification of one’s trading partners.

The trade and environment linkage, by contrast, has been at the forefront of the linkage movement. Environmentalists are

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114 See Carrasco, supra note 112, at 305 (arguing that economic regulation must give priority to conditions affecting vulnerable groups).

115 Alternatively, a libertarian might maintain that states have no role at all with respect to the domestic policies of other states, stemming from a view of states as “libertarian individuals” facing regulatory intervention both horizontally from one another and vertically from international regimes.

116 From the perspective of one’s moral obligation, why should our concern for those with an inequitable share of resources be affected by the intervening modality of a state? Sovereignty is the traditional answer, but it may not be an adequate one. Perhaps it is legitimate to assert that sovereignty prevents us from forcing our notion of equitable distributions on another trading partner. But might it not be the case that sovereignty is more likely to be raised by us, ourselves, to avoid the assertion that we have a duty, rather than by the intended beneficiaries of our concern? With respect to the collapse of the Mexican economy and the devaluation of the peso in 1994, Jorge Castaneda asserts the complicity of the United States in its decision to ignore the undemocratic politics and unequal wealth distribution accompanying Mexico’s trade liberalization reforms. “[N]o one, it seems, was willing to analyze the overwhelming evidence of abuses and financial mismanagement in Mexico since 1988. . . . Those surprised by the economic collapse and the stench of it all had simply neglected to open their eyes.” JORGE G. CASTANEDA, THE MEXICAN SHOCK: ITS MEANING FOR THE UNITED STATES 4-5 (1995).

attracted to the possibility of putting the tremendous leverage afforded by the threat of trade sanctions in the service of ensuring compliance with environmental protection obligations,\(^\text{118}\) and have concerns about the trade regulatory system adversely affecting their regulatory goals and systems.\(^\text{119}\) In much the same way, the trade community fears the environmentalists' interference will undermine the trading system.\(^\text{120}\)

It is not necessarily clear, at first blush, how the trade and environment linkage reflects a debate over justice. Even if one were to concede an ethical obligation to protect the natural world,\(^\text{121}\) how does this come within that category of obligations we recognize as justice, for example, in the traditional Aristotelian sense of an allocation of social goods, since it involves obligations to non-human entities?\(^\text{122}\)


\(^{119}\) Environmentalists' concerns include the fear that trade liberalization principles such as national treatment will be used to override conflicting provisions in statutory and treaty-based environmental protection measures, as in the Tuna/Dolphin example, and that the principle of comparative advantage will be used to legitimate a "race to the bottom" in terms of lax environmental protection laws. See Daniel C. Esty, Unpacking the "Trade and Environment" Conflict, 25 LAW & POL'Y INT'L BUS. 1259, 1260-61 (1994).

\(^{120}\) This includes the threat that legitimate protective devices which constitute exceptions to trade disciplines can easily be deployed for illegitimate protectionist purposes. See JACKSON, supra note 89, at 201; Roessler, supra note 2, at 227. Additionally, there is a concern that permitting domestic measures designed to compensate for different levels of environmental regulations will undermine differences in comparative advantage resulting from sovereign policy choices and constitute a form of meddling in states' environmental policies. See generally Esty, supra note 119, at 1261-62 (providing a general summary of trade-oriented concerns about environmental regulation).

There is also a concern that trade related environmental protection is not the optimal tool for environmental protection, threatening to introduce new and unproductive sources of conflict into an already contentious trade community with little to show for it in either environmental protection or trade enhancement. See Roessler, supra note 2, at 228.

\(^{121}\) Advocates of a human ethical obligation to protect the environment have done so on a variety of grounds. See generally RODERICK F. NASH, THE RIGHTS OF NATURE 121-60 (1989) (reviewing the historical development of ethical theories affording rights to non-humans and the natural world).

\(^{122}\) The classical concept of justice employed here—justice as Right Order—typically envisions Right Order as right relationships among human beings.
The trade and environment debate does, in fact, raise issues which can be considered to be justice issues, or issues involving Right Order decisions. First, the broad Platonic vision of justice as Right Order could be construed to include efforts to order the relationships between human beings and the natural world according to what is Right.\textsuperscript{123} Debates over the acceptable limits of accommodation of one’s ethical obligation to the environment in the face of competing economic interests presuppose such an extension. These debates also reflect a divergence between consequentialist approaches to this issue, such as utilitarianism, which can justify no link at all or a weak or flexible one,\textsuperscript{124} and non-consequentialist forms of moral reasoning, such as Kantian morality and other forms of egalitarian liberalism, which reject this sort of reasoning where ethical obligations to the environment are concerned. For example, Richard Stewart argues that in evaluating the competing interests at stake in the trade and environment linkage, a utilitarian analysis based on Mill is more effective rather than non-consequentialist forms of analysis, a position challenged by Robert Housman explicitly on Kantian grounds.\textsuperscript{125}

Second, public decisions concerning environmental protection can be seen as Aristotelian allocations of social benefits and burdens, in that such decisions inevitably involve the allocation of rights and duties involving the scope of permitted environmental activity. The “Environmental Justice” movement adopts this approach, examining the extent to which the burdens of environmental regulation, and the costs of environmental degradation,

\textsuperscript{123} The effort to structure the human-nature relationship according to a recognition or grant of legal rights in the natural world would be one example of this view. See generally CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? (1996).

\textsuperscript{124} Consequentialist moral theories judge the morality of actions solely according to the nature of their consequences. See ALAN DONAGAN, THE THEORY OF MORALITY 190 (1977). Utilitarianism is its “most persuasive and most thoroughly investigated variety.” \textit{Id.} at 192.

are disproportionately borne by the disadvantaged, and treating this as a problem of distributive justice.\textsuperscript{126}

The trade and human rights debate also raises difficult justice problems. They are justice problems because they involve the allocation of basic social goods such as rights, which in our tradition are perhaps the most highly valued of all social goods. They are difficult because they arise in a context of conflict over fundamental values, as revealed by different states' conceptions of individual and group rights,\textsuperscript{127} and different accounts of the place of such rights,\textsuperscript{128} and the appropriate response to such conflicts,\textsuperscript{129} within international economic law.

More specifically, the trade and human rights linkage involves a debate over the effects of trade and trade law on the allocation of human rights and on their effectiveness.\textsuperscript{130} The most contro-


\footnotesize\textsuperscript{127} A key aspect of Western conceptions of justice is respect for fundamental human rights. This commitment is the basis for the tremendous post-war development of human rights protection within public international law. But not all trading states share the same conception of human rights, whether within the Western tradition or outside of it, and not all trading states share the same view of how differences in human rights and the values they reflect should be ignored, accommodated or challenged in international economic relations.

\footnotesize\textsuperscript{128} There is some consensus concerning a core of individual economic rights such as labor and employment rights, but no consensus as to how such rights should be taken into account in trade relationships. See WTO Singapore Ministerial Declaration, WT/MIN(96)/DEC/W (Dec. 13, 1996); 36 I.L.M. 218 (1997) (providing that the WTO affirms commitment to international labor standards but eschews jurisdiction over trade and labor issues, suggesting ILO as forum). There is even less consensus with respect to non-economic human rights and how such rights should figure into trade and integration systems. See Stirling, \textit{supra} note 2, at 1, 8-13, 39-40.

\footnotesize\textsuperscript{129} Stirling notes that trade sanctions, paradoxically, are in principle the most effective, and, in practice, often the least effective means of enforcing human rights, as their use is often resented by the target state and is at the same time the subject of political manipulation by interest groups in sanctioning states. See \textit{id.} at 2-3.

\footnotesize\textsuperscript{130} Trade agreements can require as a precondition a strengthened rule of law within the trading partners' society, which can have an indirect systemic effect on improving rights protection. Second, specific economically-related rights such as the property rights of innovators can be linked to trade concessions. Third, trade concessions can be used as incentives to reward progressive democratic governments, which can secure human rights reforms and even create more of a ground-swell for further reform. Fourth, trade sanctions can be used as a weapon for ensuring compliance with human rights obligations stemming from other non-economic agreements. Finally, the juridical aspect of
versial form of trade-human rights linkage is the use of trade sanctions as a weapon for ensuring compliance with human rights obligations stemming from other non-economic agreements. Are we morally obligated to use trade agreements or trade concessions to punish human rights violators through economic sanctions for noncompliance with human rights conventions? At a minimum, are we obligated to refrain from granting them trade concessions? Is this a right use of trade?

First, consider the position against linkage, namely that trade relationships with human rights violators ought to continue unabated. It is not difficult to see why this course of conduct would be considered morally questionable on its face, in that continued trade has at least the appearance of contributing to the wealth and economic power of the violators and, in fact, may lead directly to their ability to carry out their repressive practices. This view, however, can be justified on several grounds. A utilitarian has no difficulty in supporting relatively unrestricted trade, if he or she is convinced that the best road towards fuller rights protection in the future is a moderately repressive open market regime in the short term, or a policy of constructive engagement, as the Clinton administration adopted in its China decision. A utilitarian can also justify completely unrestricted trade, on the grounds that trade flows best when it flows freest, and future general welfare increases are the best road to human rights.

In contrast, both egalitarian and libertarian approaches would be opposed to a utilitarian analysis, measuring as it does the utility of rights protection abroad, and our trade-related measures for enhancing it, against the utility of permitting or ignoring rights violations abroad, or of refraining from the potential domestic

trade agreements and integration systems, to the extent they themselves reflect fundamental concepts of justice such as democratic participation and the rule of law, can also strengthen the human rights climate in international law.

131 See id. at 42-45 (noting that a properly designed sanctions regime can be an effective human rights tool); Alston, supra note 112, at 168-69 (noting that the relative inefficacy of sanctions argues for more constructive system of ex ante incentives).

132 Witness the speed with which military equipment and military-oriented exports are suspended even where the general link to human rights is resisted.

133 See Randall Green, Human Rights and Most-Favored-Nation Tariff Rates for Product from the People’s Republic of China, 17 U. PUGET SOUND L. REV. 611 (1994) (arguing that supporting economic development in China through MFN and other policies is the best way to promote human rights in China).
trade-related costs of trade-oriented rights measures. As with the trade and environment linkage, the struggle underlying the trade-human rights linkage may be between utilitarian approaches to this issue, which can justify no link at all or a weak or flexible one, and non-consequentialist forms of moral reasoning, such as Kantian morality and other forms of egalitarian liberalism, which reject this sort of reasoning where human rights are concerned.

As with the trade and inequality link, the trade and human rights link forces us to consider the consistency of our commitments, specifically whether one can be an egalitarian liberal or libertarian as far as rights issues at home go, and a utilitarian on rights issues abroad.

3.2. Changing the Linkage Discourse

Despite the justice implications of the linkages discussed above, linkage issues may not always be approached or even recognized as justice questions. The dominant perspective of both sides to any linkage issues tends towards what can be characterized as the External View, in which each opposing camp on the linkage issue views the other camps’ claims and modes of analysis as external to its own concerns and commitments. Within the trade policy side, the External View is best represented by those adhering to the Efficiency Model, trade theorists who view trade law principally in economic terms as a matter of enhancing efficiency and the general welfare. From the viewpoint of Efficiency Model adherents, the non-trade camp is seen as trying to get in the way or “gum up the works” with what are at best extraneous concerns such as human rights or environmental protec-

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134 One might even see a curious alignment between egalitarian and libertarian views on this point, as both theories place a fundamental emphasis on individual rights and their protection as a cornerstone of a just society.

135 See Tesón, supra note 61, at 64-65.

136 Adam Smith is the classical exponent of the view that the unimpeded free market is the best guarantor of ultimate economic well-being. See KELLY, supra note 63, at 303; SMITH, supra note 103; see also JACKSON, supra note 89, at 8-9 (naming efficiency-based increases in general welfare as the pre-eminent goal of trade law); Robert E. Hudec, GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices, in 2 FAIR TRADE AND HARMONIZATION, supra note 2, at 95, 108 (“The GATT’s economic goal is to promote, through liberal international trade policies, the greater effectiveness of national economies.”).
tion, and what may be at worst simple protectionism. The non-trade side of the External View can be represented by the “Green” movement in international trade, for whom the international economic law regime is seen as adversely affecting its efforts to establish their vision of a just order with regard to the environment.

Recognizing trade linkage questions as justice questions inevitably changes our approach to the trade linkage debates. First of all, regarding the framework of the debate, the External view becomes ultimately untenable, because trade policy cannot be considered as independent of the concerns raised by the various trade linkage debates. The alternative, or “Integrated View,” suggested by a justice perspective requires recognition of the fact that conflicts between traditional trade policy and other areas of social policy involve branches of the same tree, and that this tree is the construction of a just society. Environmental and human rights advocates, for example, cannot be viewed as bounders or gate crashers at the trade policy party. Rather, they raise fundamental questions that are inescapable within trade policy, for they raise questions of justice, and trade policy exists and operates within the larger inquiry as to justice.

137 See Charnovitz, supra note 3, at 23 (citing objection by GATT and WTO members to efforts in 1991 and 1994 to begin work on labor and environment issues, on the basis that such issues were not “trade issue[s]”); Hudec, supra note 136 (arguing that GATT has a good reason to be skeptical of linkage claims).

138 See Charnovitz, supra note 3, at 32 (“Simplistic demands for drastic trade remedies against so-called eco-dumping or social dumping sometimes bear a striking similarity to more conventional forms of protectionist rhetoric . . . .”) (citing then-GATT Director General, Peter Sutherland).

139 The outcry over the GATT Tuna-Dolphin dispute is a classic example of this framework, in which the trade community’s rules and fora are viewed by the environmentalists as serious obstacles to the accomplishment of their objectives, in that case the protection of dolphins through the United States Marine Mammal Protection Act. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187; GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, supra note 117. See generally James Cameron, The GATT and the Environment, in PHILLIPE SANDS, GREENING INTERNATIONAL LAW 100, 100-21 (1994).

140 Recognizing the link between trade and justice means a recognition by linkage partisans that their common search for justice binds them far more than their different views divide them, and that each side is engaged in a search for justice, and seeks to enact their vision of it in a given area of social concern. The problem, of course, is that those areas of social concern, in fact, overlap, and each community may have conflicting visions of the Right Order and conflicting criteria of justification of justice.
Second, in answering linkage questions, we must consider the implications of our various substantive theories of justice on each of these issues. The fact that they are justice questions means that the debate and resolution of trade linkage issues must include comprehensive and systematic normative analysis, which is an essential part of how we answer any question involving social goals and social values. From a justice perspective, linkage debates are not merely disputes over the accommodation by trade policy of exogamous priorities, but rather involve disagreements at the level of normative theory, over the proper construction of a just society. Particular linkages such as “trade and inequality,” “trade and human rights,” and “trade and the environment” present a series of debates within and among substantive theories of justice, and concerning the relationship of international economic law to justice. The fact that there is disagreement reveals that, with regard to each particular area of social concern, we lack consensus as to what, precisely, the Right Order should be.

Rendering such normative conflicts more transparent is all the more critical in view of the fact that the Efficiency Model would, at first glance, seem to stand outside the Justice question, suggesting explicitly or implicitly that it takes no position on justice questions, and that considerations of justice (often read as distributional equity) have no place in trade law so understood. This Article has argued that trade linkage questions cannot be definitively resolved a-normatively, and that it is an error of the Effi-

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141 See Charnovitz, supra note 3, at 21 (noting that one similarity between environmental and labor issues in trade is that “[m]orality has always been a concern with labour[sic] and is becoming increasingly so with the environment”). There are, of course, other ways of analyzing these issues which are equally important, such as the descriptive and prescriptive modes of the social scientific tradition, which can complement, but not replace, a normative analysis or a normative answer.

142 Circumstances have changed; technology has advanced; international economic law has developed; fundamental values are in conflict; and the range of options for “rightly ordering” each of these corners of society is represented more fully by the views of the trade and non-trade partisans taken together, than by either side separately.

143 Trade law, on this view, is about comparative advantage, efficiency, and welfare. See, e.g., Ronald Brand, Sustaining the Development of International Trade Law, 21 VT. L. REV. 823, 842 (1997) (“The fundamental goal of the WTO system is the reduction of trade barriers through rules consistent with the underlying theory of comparative advantage.”).
ciency Model to consider itself a convenient, neutral manner in which to resolve these issues. There is no such stance. 144

In fact, when one considers the question of justice and its relation to international economic law, as outlined above, one is immediately struck by the fact that the Efficiency Model of international economic law is actually one response to the question of what constitutes the Right Order. 145 On this view of international economic relations, justice is best served through a system of international economic law that promotes free market exchanges among private parties and within the state “market” for trade agreements. Such market exchanges will promote efficiency, enable comparative advantage to operate, and enhance the general welfare of the market participants. 146 Neoliberal economic arguments against linkages thus presuppose a substantive theory of justice. They are not neutral arguments to preserve trade policy from unwarranted normative baggage, but rather normative arguments towards a different vision of the Right Order. 147

144 Trade linkage issues thus flush the neo-liberal economic trade viewpoint out of its assumed neutrality and into the mudpit of normative brawling, where it belongs.

145 Put another way, Efficiency Model advocates rely on the positive analysis of economists while ignoring the normative aspects of economic theory, which modern economists themselves take little cognizance of despite a historical tradition of theorizing as to the proper ends of economic activity. See EDW. E. ZAJAC, THE POLITICAL ECONOMY OF FAIRNESS 69-78 (1995); Daniel M. Hausman & Michael S. McPherson, Taking Ethics Seriously: Economics and Contemporary Moral Philosophy, 31 J. ECON. LIT. 671, 675-76, 677-78 (citing the moral presuppositions and implications of welfare economics, and the intermingling of positive and normative analysis in such economics).

146 This view may reflect the conclusion that the only professional contribution economists can make to the justice debate is analysis of what contributes to these modest but necessary ingredients in a just society. In that case, the position is consistent with modern economics’ eschewal of ethical theory beyond their own methodological limits. See ZAJAC, supra note 145, at 76-77; Hausman & McPherson, supra note 145, at 671-78 (citing modern economists’ relative ignorance of moral theory, and arguing for the importance of moral theory to effective economic analysis). However, it must be recognized that efficiency and welfare, while arguably necessary, are not sufficient, in themselves, to express all our intuitions about just outcomes.

Alternatively, to the extent that this view is an assertion that efficiency is a sufficient justification of outcomes, it runs counter to most liberal theory and ignores the significant distributional issues raised by economic activity. See ZAJAC, supra note 145, at 77.

147 The claims of justice, be it libertarian justice or utilitarian justice, are satisfied on this view solely through maximizing individual economic liberty.
Finally, the articulation of trade linkage positions, in terms of substantive theories of justice, makes it possible to recognize potentially useful areas of agreement on a normative level among differing linkage views. At its most basic level, international economic law and policy can be seen as committed to and advancing key tenets of Western theories of justice in the area of economic relations. For example, the core values of free trade and economic integration (increases in general welfare through trade liberalization, nondiscrimination, and the implementation of treaty-based regulatory schemes) reflect core principles of a liberal theory of justice such as liberty, equality of opportunity, and the rule of law. Thus, Efficiency Paradigm advocates and those with other linkage viewpoints can find common ground, for example, in trade linkage approaches that advocate measures which strengthen the rule of law and the effectiveness of institutions in international economic relations as part of a linkage scheme.

3.3. Towards a Just Resolution of Trade Linkage Issues

Recognizing the link between trade linkage issues and justice can also contribute to a more just resolution of those linkage issues. It becomes possible to evaluate techniques and options for resolving linkage conflicts in an analytic framework that draws out their underlying normative commitments and implications. Various trade policy mechanisms have been developed by states and international economic institutions for managing conflicts among linkage areas. Efficiency alone is an inadequate basis on which to formulate policy in areas which involve so many interests, costs, risks, and opportunities. Furthermore, trade linkage

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148 Cf. Petersmann, supra note 89, at 406 ("[I]ndividual liberties and actionable property rights are preconditions for the proper functioning of economic ... markets, and for maximization of individual autonomy, human well-being, economic efficiency and social welfare in a free society.").

149 The current trade linkage debate is dominated by a bewildering variety of issues and techniques, including rule-making issues such as harmonization, domestic versus multilateral standards, and priority schemes for rule conflicts; enforcement issues such as admission criteria, conditionality, suspension of concessions and trade sanctions; and institutional issues including jurisdiction, competence, participation by NGOs, debates over decision-making criteria.

150 See Dunoff, supra note 94; Nichols, supra note 7, at 707 ("[T]he multitude of efficient states cannot be narrowed to one by excising all goals except maximization of monetary wealth.").
issues can not be resolved solely at the level of a choice of technical or doctrinal tools. Techniques to manage these issues involve prioritizing between certain trade liberalization values and other aspects of the liberal view of justice, such as human rights. As such, they contain deeply embedded normative assumptions, which must be addressed as such.\(^{151}\) A justice perspective may thus serve both to put the quest for efficiency within a larger normative context and to supplement this line of inquiry with a more adequate framework for policy formulation.

One principal practical implication of a normative analysis of trade linkage techniques would be that certain existing policies or practices now considered to be discretionary on the part of the implementing state could come to be seen as in fact obligatory, on the basis of that state's moral obligations to its trading partners. For example, in the trade and development area the principle of asymmetry or preferential treatment for developing countries is a principal instrument in managing inequality problems, and is as old as the GATT system.\(^{152}\) However, much of the trade between developed and developing countries is conducted under some form of unilateral trade preference program\(^ {153}\) which disfavors to some degree exports of manufactured goods which are directly competitive with the manufactured goods of developed states.\(^ {154}\)

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\(^{151}\) What is lacking today is a comprehensive analysis from the perspective of the developed states of the ethical relationship between developed and developing states, and the articulation of the implications of such an analysis for the current trading system. This lack of consensus reflects debates, within the West, on justice itself, as well as the debate within trade law between the Efficiency Model and other models of economic justice.

\(^{152}\) The Havana Charter contained extensive provisions detailing preferential treatment for industrializing developing countries. See Brown, supra note 2, at 358-59. Unfortunately, the Havana Charter never went into force; the resulting GATT had a much weaker regime for developing countries; and the amendments adding part IV, in 1966, did not fully remedy the situation. See id. at 359.

\(^{153}\) In 1971, the GATT Contracting Parties approved a waiver authorizing, but not requiring, developed states to extend preferential tariff rates to developing country exports on a non-reciprocal basis for ten years. In 1979, the waiver for the resulting Generalized System of Preferences ("GSP") was made permanent. See id. at 362-63. Most developed countries have some form of GSP program, including members of the European Community and the United States. See, e.g., 19 U.S.C. § 2461 (1994).

\(^{154}\) Despite its widespread implementation, the GSP effort is widely judged a failure, as most often the exports of greatest interest to developing countries are not covered, and the complexity and discretionary nature of the program undermine its utility. See generally Brown, supra note 2, at 362-63.
It may be that under some form of redistributive or feminist theory of justice one could articulate a moral obligation to permit the preferential export of competitive goods. Justice may also require that such discretionary unilateral preferences be supplanted by nondiscretionary bilateral treaty commitments for preferential treatment, together with non-discretionary trade-related development aid, and other ways of recognizing inequality in trade relationships.

A second, related effect would be that certain existing linkage tools now considered legitimate, even attractive, might come to be seen as unattractive or even unjust if normatively reevaluated. For example, one linkage tool often employed and advocated in the human rights and environment debates is the practice of trade conditionality, which in this context means linking trade preferences and other advantageous trade treatment with adherence to certain values as reflected in appropriate treaties involving the environment, human rights, etc. This approach is popular

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155 For example, under the Rawlsian difference principle inequalities are to be justified by their working to the advantage of the least favored, which would mean, in this instance, that preferential or unequal trade treatment must be structured to favor the interests of developing country exporters over developed country competitors.

The ethic of care articulated by feminist philosophers, as applied to international relations, might require a similar result. See Charlesworth et al., supra note 111, at 615-16.

156 Such a transition can play an important interim role in an evolving process of regional integration. See Frank J. Garcia, “America's Agreements” - An Interim Stage in Building the Free Trade Area of the Americas, 35 COLUM. J. TRANSNAT'L L. 63, at 98-106 (1997).

157 See Bernard Cullen, Philosophical Theories of Justice, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, supra note 12, at 28 (describing Barry’s notion that justice might require a non-discretionary system of interstate development aid).

158 One broad, systemic effect of a justice perspective on linkage issues might be the elimination of certain options on the basis of a widespread rejection of utilitarianism or consequentialism generally.

159 One example of this practice is the requirement that EC member and associated states be parties to the European Convention for the Protection of Human Rights and Fundamental Freedom. See Smith, supra note 2, at 808-09. Therefore, if a state is to participate in European integration, it must recognize certain human rights norms. The China MFN debate is a key example of this issue, and of the failure of the Clinton administration to follow through on its initial impetus to recognize and respect this link. See Robert S. Greenberger, Restraint of Trade: Cacophony of Voices Drowns Out Message From U.S. to China, WALL ST. J., Mar. 22, 1994, at A1. As a result, the liberal view of a just society becomes further fragmented.
with non-trade interest groups, as it suggests in the strongest possible terms the conditioning state’s commitment to the relevant aspect of justice linked to the trade benefits in question. This approach is equally unpopular with the neoliberally-oriented trade community, which sees such efforts as a serious threat to the fundamental economic principles of trade theory and a stalking horse for arbitrary discrimination.

The issue of trade conditionality is ideally suited for analysis from a justice perspective. On this issue, the neoliberal economic view of justice militates against conditionality on trade economic grounds, but has no answer when faced with the assertion that such a position undermines other commitments stemming equally from a liberal view of justice, in that it enriches states pursuing values contrary to our own. However, the facially liberal argument in favor of conditionality seems to ignore that, at least with respect to developing countries (often the most popular targets for conditionality due to their relative vulnerability), a wealthy state might be under a moral duty to give preferential trade treatment and even direct aid that might preclude conditionality altogether. In other words, if justice requires that wealthy states assist the development of poorer states through trade preferences and outright wealth transfers, then conditionality would be a violation of that moral duty, regardless of its possible advantages in the pursuit of other aims.

The trade and environment link in particular has highlighted a third area in which a justice perspective may have practical implications, namely the issue of determining the proper forum and decisional criteria for the institutional resolution of trade linkage conflicts. Institutional dispute settlement bodies confronted

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160 See, e.g., Charnovitz, supra note 3, at 22 (citing conditionality practices with approval).

161 Certain conditions tied to ensuring that the aid go where it is intended, i.e., to benefit the lot of the poorest, might, of course, be justifiable. However, links to rights not implicated in the subject of the aid (free speech or free emigration rights, for example) would not be justifiable, because they presume discretion over the grant of assistance where that grant might, in fact, be a moral obligation.

162 Environmentalists roundly criticized the GATT decision-making process in the first Tuna-Dolphin case, United States—Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991), in which the first explicit trade linkage issues was resolved in an international legal forum, for failing to take cognizance of environmental policy issues and for clumsily handling these matters in a piecemeal
with linkage issues must be capable of making decisions that address the wide range of social values at stake. To date, the GATT, as a principal trade-based forum for handling linkage issues, has not passed the test, at least in the view of non-trade linkage interest groups.

As a threshold matter, justice might require for example that the forum chosen be one which most closely embodies our procedural standards for just decision making and dispute resolution. In this respect, one key aspect already prominent in trade policy debates is participation by interest groups, an issue with clear overtones of democratic theory. Once such institutions are chosen, a justice perspective requires a careful analysis of the principles and criteria employed in making decisions involving linkage issues. Normative preferences which may well predetermine the outcome of linkage decisions are likely to be embedded

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163 As Joel Trachtman writes, "[N]o society can afford to make decisions in an unintegrated fashion." Trachtman, supra note 5, at 57. The risks for institutions such as the WTO in ignoring the fundamental values at stake in their decisions are highlighted by Philip Nichols in Trade Without Values. See Nichols, supra note 7, at 702-07.

164 See, e.g., Esty, supra note 2, at 1268.

165 See Petersmann, supra note 89.


in such criteria. For example, it has been argued that in the analysis of GATT dispute settlement involving trade-environment issues, certain criteria such as “proof of endangerment” mask utilitarian assumptions tending to favor pro-trade outcomes to such disputes.

4. CONCLUSION

In any successful revolution, there comes a moment of truth when the former revolutionaries must finally confront the challenge of governance, and the international economic law revolution is no different. The trade linkage phenomenon, in particular, is forcing international economic law to wrestle with its own normative assumptions and implications across a broad range of issues. One should expect no less of a system of governance that so promises to affect all aspects of global social policy.

Successfully managing trade linkage issues means, for the trade policy community, accepting that the linkages come from within and not from without. Even if one maintains the neoliberal economic view of justice in international economic law, it must at least be conceded that advocates of linkage issues are acting from other answers to the same question, the question of justice, and that it is a shared question.

Furthermore, the resolution of linkage issues cannot be sought exclusively on the doctrinal level. The resolution needs to be articulated normatively, as an attempt to resolve dilemmas and tensions within the liberal vision, and between liberalism and other candidates for Right Order. From the perspective of justice, the debate within international economic law over linkage issues reflects debates within various aspects of Western moral and political theory, and especially within liberalism itself. It reflects tensions between the liberalization of individual choice through free trade and investment, and the commitment to individual rights and other fundamental moral obligations expressed in other as-

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168 See Nichols, supra note 7, at 700-01 (reviewing factors in GATT dispute settlement panel doctrine giving primacy to trade in conflicts with other values).
169 “Endangerment” implies that there is no harm short of dire peril that could justify interference with economically lucrative activity, ignoring the possibility that any harm, for example, justifies such interference. See Housman, supra note 125, at 1376-77 (challenging Stewart).
pects of liberalism, such as human rights and environmental protection.

The ideal solution would be consensus on the question of what justice demands in the case of international economic law generally, and for each linkage area in question. Absent that, one must resort to legal techniques for managing linkages where consensus is not achieved, but always with the understanding that one is mediating local conflicts within an overall search for justice.