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INTERNATIONAL JUSTICE AND THE TRADING REGIME

*James Thuo Gathii**

INTRODUCTION

In the last several years, a global trade and justice movement has blossomed. The movement is especially broad. A common theme uniting this movement is its focus on issues of justice, fairness, and equity that are raised by the adverse impact of trade, particularly among vulnerable countries and communities. The acknowledgement that trade has both positive and negative consequences has given the movement credibility, although it has also attracted its share of criticism. The movement has focused on a variety of themes, such as improving the World Trade Organization's (WTO) transparency and accountability.

The new attention that issues of justice, fairness, and equity have received has in turn raised several questions. For example, to what extent are these concepts useful in measuring the performance of the trading regime? Should they be incorporated into the negotiation of new trade agreements or the implementation and interpretation of existing agreements? Should the legitimacy of the WTO be measured against these conceptions adopted by the trade and justice movement? These questions have increasingly come to inform and animate assessments of the international trading regime.

Objectors to the trade and justice movement have argued that the absence of a well-developed framework for engaging in justice across national boundaries limits efforts to bring issues of fairness, equity, and justice to the center of the international trading regime. According to this criticism, the international trading regime cannot be analogized to political communities within nation-states, which have well-developed frameworks, as represented by ideals such as the social contract that, in turn, inform the nature of obligations between citizens within a national-political community. Lack of empathy for peoples across national boundaries in my view is further

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reinforced by differences in cultural, racial, and other affinities. Thus, accounts of the absence of a well-developed framework for engaging in justice across national boundaries or within the international trading regime are not simply the result of the limited possibility of justice within national boundaries. Justice across national boundaries, just as within national boundaries, must be won through the struggles and efforts being mounted by the trade and justice movement.

In this Article, I argue that legal claims aimed at achieving justice within the WTO may be pursued by recognizing the broad scope of moral reasoning in international economic institutions such as the WTO as well as among politicians and their constituents, even when it may seem inconsistent with their immediate interests or geopolitical ambitions. Thus, where rules, policies, and players embed trust and confidence into a shared value of concern, especially for the weakest, the integrity of the global trading system is strengthened. Where the opposite is true, this integrity is called into question and potentially threatens to undermine its very essence.

Part I discusses some of the leading refutations and justifications of international justice. Part II examines the extent to which the international trading regime incorporates notions of international justice. I also assess the difficulties that contemporary efforts of engaging in international trade justice continue to encounter.

I. JUSTIFICATIONS AND REFUTATIONS OF INTERNATIONAL JUSTICE

A. *A Realist View: Justice Across National Boundaries Is Implausible*

Philosophers and thinkers from Thomas Hobbes¹ to Hans Morgenthau² to Thomas Nagel³ have denied the existence of a general duty to pursue justice across national boundaries. Pursuing justice by ensuring the equality of individuals or pursuing redistributive or restorative justice, according to these philosophers, is only possible within a nation-state.⁴ In their view, it is only within groups such as the state, the family, or the neighborhood that special obligations arise. Similar obligations towards strangers, separate from the

¹ See THOMAS HOBBS, *LEVIATHAN* (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

² See HANS MORGENTHAU & KENNETH THOMPSON, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (6th ed. 1985).

³ See Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 114 (2005).

⁴ See *id.* at 115.

nation or the immediacy of family, friendship, or neighborhood, are arguably much lower, if they exist at all.⁵

Thomas Nagel argues that justice across national boundaries is not possible in the same way it is within a nation-state.⁶ Under this Realist model, engaging in justice within a nation-state is possible because of the existence of a centralized authority with the power to formulate binding rules that can in turn overcome the selfish nature of individuals.⁷ According to this view, the absence of a collective institution that has some centralized authority within the international arena makes it difficult to pursue justice in a manner similar to that of a nation-state.

Those who adhere to this view hold that justice is only realizable within each sovereign state rather than across national boundaries.⁸ The preeminence of the selfish interests of each nation-state and the absence of a sovereign above other sovereigns make it inevitable that the pursuit of justice is limited to the nation-state.⁹ Nagel, for example, argues against John Rawls' conception of political justice by asserting that individuals within particular countries are often preoccupied with domestic misery and internal injustices and are, therefore, unable to pay attention to similar issues in other countries.¹⁰ Under Nagel's conception, justice and moral reasoning are only possible within nations because associative obligations, such as those regarding socio-economic rights, can only be made when people are joined in a political community such as a nation-state.¹¹

Such associative obligations are binding either because members of the political community have participated in defining them or because, even when they are coercively imposed, they are intended to guard against arbitrary inequalities among the membership.¹² By contrast, there is only a minimal humanitarian morality to rescue non-members in other societies from immediate or extreme danger, violence, enslavement, or coercion.¹³ The justification for this minimal humanitarian morality with regard to non-

⁵ See Raymond D. Gastill, *Beyond a Theory of Justice*, 85 *ETHICS* 183, 184-85 (1975).

⁶ Nagel, *supra* note 3, at 114-15.

⁷ *Id.* at 115.

⁸ *Id.*

⁹ MORGENTHAU & THOMPSON, *supra* note 2, at 14-15.

¹⁰ Nagel, *supra* note 3, at 121-22.

¹¹ *Id.* at 127. In contrast, Nagel argues that negative rights such as bodily integrity, freedom of expression and religion are universal rights and exist independent of any special form of association. *Id.*

¹² *Id.* at 128.

¹³ *Id.* at 131.

members is that it does not oblige those engaging in it to make their ends those of persons deserving of this humanitarian morality. Non-members are, therefore, free to continue pursuing their own ends while those engaging in humanitarian morality can relieve those suffering from extreme threats without sacrificing their own ends.¹⁴

Ideally, Nagel would much prefer to have a global sovereign institution undertake such humanitarian conduct.¹⁵ He argues that, in the absence of a global sovereign, non-governmental organizations and international institutions could fill the gap.¹⁶ He therefore subscribes to the notion of cooperation between sovereigns and non-governmental organizations to ensure the "protection of human rights; the provision of humanitarian aid; and the provision of global public goods that benefit everyone, such as free trade, collective security, and environmental protection."¹⁷ Nagel, however, disclaims the possibility of engaging in justice within the current incipient system of global cooperation that lacks the "authorization by individuals that carries with it a responsibility to treat all . . . individuals in some sense equally."¹⁸ In his view, international institutions, unlike sovereign states, lack the political legitimacy to impose decisions upon individuals by force.¹⁹ Voluntary cooperation among sovereign states or contractual arrangements to promote common interests are, in this view, far from the kind of powerful supranational institutions that would be required to legitimately pursue justice at the international level.²⁰

B. A Cosmopolitan View: The Possibility of Justice Across National Boundaries

Nagel limits the possibility of pursuing justice, particularly of the distributive kind, which allocates benefits and burdens within the borders of the nation-state.²¹ He does not contemplate any basis for seeking to address and eradicate morally arbitrary inequalities beyond the borders of any nation-state, primarily because of the lack of a centralized mechanism to enforce

¹⁴ *Id.*

¹⁵ *Id.* at 131-32.

¹⁶ *Id.* at 132.

¹⁷ *Id.* at 136.

¹⁸ *Id.* at 138.

¹⁹ *Id.* at 140.

²⁰ *Id.*

²¹ *Id.* at 119-20.

rights and bind individuals at the global level.²² Similarly, scholars who subscribe to Nagel's view also justify it based on the belief that the existence of a special relationship such as family, friendship, or neighborliness is a precondition for the existence of a moral duty to engage in justice for those outside those relationships.²³ Cosmopolitan conceptions of justice, by contrast, contemplate the possibility of justice across national boundaries and beyond the immediacy of special relationships.²⁴ They reject the idea that redistributive justice or other forms of justice are confined to nation-states when addressing morally arbitrary inequalities.

Unlike Realists, Cosmopolitans generally begin by acknowledging the possibility of engaging in justice across national boundaries as well as beyond special relationships.²⁵ Most Cosmopolitans, for example, affirm individual rights, liberal equality, and the existence of obligations binding on all. Simply put, Cosmopolitans subscribe to universality.²⁶ In addition to justifying international justice on moral principles, some Cosmopolitans also examine how the international system actually works as a basis for arguing in favor of international justice. For example, they might point to the fact that the nature of global trade and finance has repositioned political power away from its statist moorings.²⁷ Thus, while the state is still an important site of political legitimacy, it is now more enmeshed in a network of global processes and flows.²⁸ These enmeshments are in turn a reflection of the fact that there are fewer and fewer states that have a self-contained and self-reliant economy or claim that they constitute only a particular society or culture independent from the influence or interaction of other societies or cultures from other nation-states. Thus economic, cultural, and social flows across national boundaries challenge the Realist view that democratic politics, practices, and the possibility of justice ought to be limited to the nation-state. For Realists, the state is the only proper political space for individual rights and, in turn, for

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See generally Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, in *POLITICAL RESTRUCTURING IN EUROPE: ETHICAL PERSPECTIVES* 89 (Chris Brown ed., 1994).

²⁷ See generally DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999).

²⁸ See Anne Marie Slaughter, Centre for Int'l Governance Innovation, *Government Networks, World Order, and the G20* (Feb. 29, 2004) (unpublished paper, <http://www.cigionline.org/publications/docs/g20.ottawa.slaughter.pdf>); Charles K. Whitehead, *What's Your Sign?—International Norms, Signals, and Compliance*, *MICH. J. INT'L L.* (forthcoming 2006).

democracy, legitimacy, and the possibility of justice. By contrast, Cosmopolitans argue that while the state is still central in an increasingly interdependent world, international organizations represent some analogous, though incipient, democratic forms within which the pursuit of justice is a possibility. For example, the principle of the sovereign equality of states inheres within the United Nations;²⁹ the United Nations General Assembly makes resolutions through a one-state-one-vote system,³⁰ and members of the World Trade Organization make their decisions by consensus, failing which, they resort to a majority of the states.³¹ Cosmopolitans also emphasize the respect for individual human rights embodied in the Universal Declaration of Human Rights and other United Nations human rights treaties protecting the rights of minority groups and individuals, including women, children, and the disabled.³² They emphasize the need for global trade policies that benefit all and the need to forgive sovereign debt with a view to enable poor economies to address and attend to poverty alleviation. For Cosmopolitans, these examples represent the need to expand the arenas within which the pursuit of justice is possible. The international arena, therefore, supplements and sometimes challenges the notion that only states, democracies, or representative democracies permit the pursuit of justice.

The pursuit of justice across national boundaries through regional, global, and other supranational bodies arises from increased flows of global commerce and social and cultural interconnectedness. For Cosmopolitans, citizens belong to more than just their own states; they are connected to regional bodies that influence and affect their lives and to international organizations like the World Trade Organization, whose treaties on international trade directly affect them. Citizens may share in goals such as the promotion of global peace undertaken by bodies such as the United Nations. In this vision, bodies such as the European Court of Human Rights, similar regional human rights courts, and the United Nations General Assembly represent incipient efforts to multiply deliberative, judicial, and political decision making centers consistent with the increasing interconnectedness across national boundaries. For liberal

²⁹ U.N. Charter art. 2, para. 1.

³⁰ *Id.* art. 18, para. 1.

³¹ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization art. IX, para. 1, Legal Instruments—Results of the Uruguay Round, 33 L.L.M. 1125, 1148 (1994) [hereinafter Marrakesh Agreement].

³² See generally Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/840 (Dec. 12, 1948).

Cosmopolitans, these international institutions are in addition to the nation-state sites within which the pursuit of justice is permissible.³³ Perhaps Cosmopolitans see the World Trade Organization's Dispute Settlement Body as evidence of a growing effort to engage in justice across national boundaries. A primary challenge facing this Cosmopolitan vision is that such supranational efforts at seeking justice across national boundaries are often jurisdictionally limited;³⁴ when they are not, these bodies are often subject to imbalances in bargaining power such that the richest countries are not as limited in their power as poor countries are.

Cosmopolitans, therefore, justify international justice from a number of political theories ranging from rights-based theories to institutional and legal theories committed to global institutions engaging in achieving a moral commitment to justice, as well as utilitarian theories about how to maximize the needs of people everywhere. In addition, Cosmopolitans are likely to borrow from different cultural understandings in defining "the good life."³⁵ In so doing, those Cosmopolitans exhibit openness to different cultures rather than suggesting that the good life must take a particular approach.³⁶

C. John Rawls' Contractual Theory of International Justice

In his book, *The Law of Peoples*, John Rawls argues in favor of international justice between states, even among those that do not fully accept or subscribe to political liberalism.³⁷ Unlike Cosmopolitans, Rawls rejects liberalism as a tenet of international justice. Rather, he argues that decent, "well-ordered peoples"³⁸ who have their own conception of justice, though falling short of the core of political liberalism, could enter into international agreements with liberal democracies that embrace international justice

³³ See Martha Nussbaum, *Women and Theories of Global Justice: Our Need for New Paradigms*, in *THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY* 170-71 (Deen K. Chatterjee ed., 2004).

[T]he nation-state paradigm is not fully adequate to the modern world, where a host of complex relationships link people across national borders, and the accident of birth in a given nation now looks in some ways as morally arbitrary as the accidents of race, class, and sex. We need to devote ourselves to working out new theories that will prove more fully adequate to this world.

Id. at 171.

³⁴ For example, the jurisdiction of most international tribunals is subject to the exhaustion of domestic remedies, and the decisions of international tribunals are only binding between the parties to the dispute.

³⁵ See, e.g., Jeremy Waldron, *What is Cosmopolitanism?*, 8 *J. POL. PHIL.* 227, 227 (2000).

³⁶ SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 6 (2005).

³⁷ JOHN RAWLS, *THE LAW OF PEOPLES* 9-10 (1999).

³⁸ *Id.* at 46-48.

concepts such as non-intervention, respect for treaties, and human rights norms.³⁹ Rawls suggests that "well-ordered societies" might be societies in which the collective rights of peoples would prevail over the rights of marginalized groups, such as women.⁴⁰ In addition, by limiting international agreements to those between "well-ordered societies" and liberal democracies, Rawls excludes the extension of his vision of international justice to societies that are not "well-ordered." Excluded are what Rawls would term "outlaw states, benevolent absolutisms, and societies with unfavorable socio-economic conditions."⁴¹

Rawls bases his conception of international justice on an analogy to his veil of ignorance.⁴² Under that concept, liberal and "well-ordered" societies would enter into international agreements behind a veil of ignorance that would conceal their territorial size, strength, natural resources, and economic development.⁴³ However, the standard of international justice he subscribes to is not the liberal conception of justice centered on the individual as a moral agent, as in the domestic context, but rather one based on the idea of peoples.⁴⁴ Unlike Cosmopolitans, who are committed to a broad range of institutions as long as they engage in justice, Rawls remains committed to an international order of equal sovereign states as the best system within which to attain goals such as non-intervention.

D. A Structural View of Engaging in Justice Across National Boundaries

Some Cosmopolitans criticize Realists and theorists like Rawls for limiting the possibility of justice to within the nation-state or on the basis of cooperation between liberal and well-ordered societies.⁴⁵ For such Cosmopolitans, the possibility of justice across national boundaries arises precisely because the nation-state is no longer the only site of interactions between citizens of different countries. International organizations, non-governmental organizations, and government networks, among others, provide additional spaces within which the current repertoire of means for pursuing justice and democratic legitimacy is a possibility.

³⁹ CANEY, *supra* note 36, at 78-79.

⁴⁰ See Nussbaum, *supra* note 33, at 260; see also CANEY, *supra* note 36, at 81.

⁴¹ CANEY, *supra* note 36, at 79.

⁴² *Id.* at 78-85.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Some Cosmopolitans emphasize that the possibility of justice across national boundaries arises from a general, rather than a relative, moral duty to extend principles of justice as between states, institutions, and societies. They emphasize this for a number of reasons: first, because it is morally arbitrary to confine our concern for justice to within a nation-state;⁴⁶ second, because inequalities within one state can sometimes be traced to a second state or to a foreign entity;⁴⁷ and third, because individuals within each nation-state have a moral duty not to participate in domestic injustices that in turn result in injustices to non-citizens abroad and that might result in the domination and subordination of the disadvantaged or the unequal possession of wealth, education, and other social bases of self respect.⁴⁸ For those subscribing to this view, addressing the skewed nature of the international economic system to the extent that it more often than not benefits richer as opposed to poorer countries, is a critical starting point.

What distinguishes those who adopt a structural view from the Realists is that the former trace the manner in which powerful countries and institutions exercise structural power over weaker countries and institutions by setting the "rules of the game" in global trade. For example, Susan Strange has argued that "only by looking at the structural power exercised—often unconsciously—over other states, markets, private individuals, and firms by the agencies of the United States can the extent of the asymmetries of state power be appreciated."⁴⁹ This is illustrated by the manner in which a U.S.-led coalition of countries has managed to define and defend patent protection in the WTO's TRIPS Agreement in a manner that makes antiretroviral drugs for those afflicted by HIV/AIDS unaffordable and inaccessible.⁵⁰ Developing countries that have the largest number of people with HIV/AIDS are unable to facilitate access to patented antiretrovirals since developed countries have prevailed in defending the un-impeachability of patented antiretrovirals.⁵¹ These countries almost exclusively define patents in terms of the rights of patent holders while simultaneously limiting the obligations that patent holders may have to

⁴⁶ Adil Ahmad Haque, *Justice Without Borders: A Reply to Nagel* 19 (Jan. 2005) (unpublished manuscript, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=654941).

⁴⁷ Thomas Pogge, "Assisting" the Global Poor, in *THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY* 260 (Deen K. Chatterjee ed., 2004).

⁴⁸ See Haque, *supra* note 46 (manuscript at 19–20).

⁴⁹ Susan Strange, *The Defective State*, *DAEDALUS*, Spring 1995, at 64, 64.

⁵⁰ James Gathii, *The Structural Power of Strong Pharmaceutical Patent Protection in U.S. Foreign Policy*, 7 *J. GENDER RACE & JUST.*, 267, 269 (2003).

⁵¹ *Id.*

consumers of patented products.⁵² Thus, by silencing alternative conceptions of patents that balance the rights of patent holders with the obligations patent holders may have to consumers, these countries demonstrate their relative ability to impose their will on less powerful countries. This asymmetrical exercise of power through law and policy inscribes outcomes of life and death for millions infected with HIV/AIDS drugs outside the United States.⁵³

Thomas Pogge offers another example of a structural view of engaging in justice across national boundaries.⁵⁴ Pogge argues that "existing global inequality is in part traceable to rules promulgated by international organizations which benefit rich nations at the expense of poor nations."⁵⁵ He therefore argues that it is justifiable to have a system of redistribution to help developing countries have an equal voice within international organizations that might help avert unjust outcomes.

II. INTERNATIONAL JUSTICE WITHIN THE TRADING REGIME

A. *Beyond Instrumental Reasoning*

Part I traced the possibility of international justice from a variety of perspectives. Part II will explore a number of ways in which the possibility of international justice is currently embodied in the GATT/WTO regime. The goal is to uncover claims of justice within the interstices of international trade law and policy to take us beyond the lopsided nature of the trading regime. In doing so, this paper will demonstrate how it could be managed differently.

In addition, and in light of the justifications of international justice discussed in Part I, it is illuminating and persuasive to trace conceptions of justice in notions of compassion among WTO member states, corporate actors, and individuals who act beyond the immediacy of their local needs to address concerns of justice across national boundaries. Encouraging individuals to act beyond the immediacy of their local needs, however, appears to defy elementary human intuitions. The things we feel emotion or concern about are things that correspond "to what we have invested with importance in our account to ourselves of what is worth pursuing in life."⁵⁶ If "compassion

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Pogge, *supra* note 47, at 260.

⁵⁵ *Id.* at 263-65, 275-76.

⁵⁶ Martha C. Nussbaum, *Compassion and Terror*, DAEDALUS, Winter 2003, at 16, 16.

begins from where we are,"⁵⁷ then Martha Nussbaum poses an almost insuperable challenge for the pursuit of justice in the international trade regime when she argues:

Frequently, however, we get a compassion that is not only narrow, failing to include the distant, but also polarizing, dividing the world into an 'us' and a 'them.' Compassion for our own children can so easily slip over into a desire to promote the well-being of our children at the expense of other people's children. Similarly, compassion for our fellow Americans can all too easily slip into a desire to make America come out *on top* and to subordinate other nations.⁵⁸

Thus, while establishing a norm of leveling the playing field for global trade as between developed and developing countries at an abstract and indeed even at the formal level might sound intuitively attractive and morally justifiable, it is insufficient if compassion stops at the borders of Europe and the United States. In short, instrumental justifications of leveling the global trading regime because of its economic benefits as well as the formal commitments of fairness to leveling the trading framework between all countries, products, and produce, while important, are insufficient prerequisites for leveling global trading. Moral reasoning, which opens up debates of justice and injustice, gives us a compass to guide reforms and to help the most vulnerable members of the trading regime.

Having said that, there is an important weakness in this approach. One must be cognizant of the possibility that moral claims may be dismissed by designating them as occupying a non-legal or a political status that cannot trump legal obligations made between WTO member countries. The designation of otherwise defensible claims as not rising to enforceable legal claims that give rise to legal obligations might be used as an excuse from undertaking legally binding reforms that balance the trading regime for all countries. By failing to designate otherwise legitimate claims as rights is to effectively divest them of the moral legitimacy and transformative potential that rights have for disempowered peoples.

Thus, developing countries, individuals, and peoples ought not give up their legal claims and rights and solely appeal to the compassion and empathy of those in rich, industrialized economies. Rather, legal claims and rights may

⁵⁷ *Id.*

⁵⁸ *Id.* at 13.

be simultaneously pursued by recognizing that there are opportunities for moral reasoning in corporate boardrooms, in international economic institutions like the WTO, as well as among politicians and their constituents, even where it may seem to be inconsistent with their immediate interests or geopolitical ambitions. Thus, where the rules, policies, and players embed the trust and confidence in the force of a shared value of concern, especially for the weakest, the integrity of the global trading system is strengthened.

Ending the bias in the trading regime in favor of industrial products and services, including extremely strong protection of pharmaceutical patent rights, and against agriculture and other areas in which developing countries have a comparative advantage must be resolved simultaneously with the lack of accountability and transparency to adequately address the WTO's legitimacy crisis.⁵⁹

B. Moral Reasoning in the Trading Regime

What, if any, is the place of moral or ethical reasoning or international justice in the trading regime? To determine this, it is important to step back and make a few preliminary observations regarding the role of ethics and morals in business decision-making in the international context. These observations, influenced in part by the discussion in Part I, frame my conceptions of the place of ethical and moral considerations and why it is important to balance the playing field in world agricultural trade.

This challenge comes at a time when there is unquestioned attention to moral and ethical obligations in corporate boardrooms and international organizations. Gone are the days when business and economic matters were thought of as totally removed from ethical and moral considerations. After all, decision-makers in corporations and governments are individuals, and we should not be fooled by the conceptual distinction between artificial and natural persons created by the law to attribute moral or ethical responsibility only to artificial entities to the exclusion of individuals behind international organizations and entities, such as corporations. In addition, in the business context, profits are not the only motivation that managers have. In fact, the most elemental lessons of human behavior are filled with evidence that human agency is not solely motivated by self-interest. As the economist and Nobel Laureate Amartya Sen has argued, a concept of rationality that claims that

⁵⁹ See James Gathii, *Process and Substance in WTO Reform*, 56 RUTGERS L. REV. 885, 888 (2004).

individual behavior is driven primarily by self-interest is overly narrow since it presupposes that individual preferences can be represented in a one-dimensional scale that excludes personal goals motivated by moral standards as well as long-term versus short term goals.⁶⁰ Above all, a notion of human agency that is exclusively focused on self-interest ignores the complexity and contingency of human nature;⁶¹ and when we are talking about global business and international organizations such as the WTO, the stakes of complexity and contingency are only higher. In other words, it would be inaccurate to argue that self-interest drives individuals on a day-to-day basis in most societies. It would also be inaccurate to say that people from developing countries are overwhelmingly altruistic in their day-to-day interactions between themselves or in relation to others.

Additionally, since human agency is contingent and complex, the behavior of international organizations such as the WTO, just as much as that of corporations and governments, must be contingent and complex, meaning that they are not entirely driven by self-interest. This is notwithstanding the fact that, for the most part, international organizations such as the WTO are sometimes inaccurately regarded as self-contained institutions isolated from public international law.⁶² Similarly, by virtue of their sovereignty, states argue that they are only bound by rules and laws that they have expressly consented to.⁶³ According to this claim, to the extent that positive law (like international and corporate law) is influenced by ideas of power and interest, ideas of subjectivism and morality are distanced from legal norms and rules both domestically and internationally.⁶⁴ However, to argue that abstract ideas of sovereignty and consent, which are hallmarks of positive law, are the sole template guiding the behavior of international organizations, states, or corporations is to ignore the fact that the corporate shield, just like sovereignty, is a veil behind which the motivations and the conduct of states and corporations are directly traceable to individuals. Most important, however, is the idea that power and interest are not the only motivations guiding the conduct of international organizations, states, or corporations, unless one holds

⁶⁰ PETER SELF, *GOVERNMENT BY THE MARKET? THE POLITICS OF PUBLIC CHOICE* 9 (1993).

⁶¹ See Howard Stein & Ernest J. Wilson III, *The Political Economy of Robert Bates: A Critical Reading of Rational Choice in Africa*, 21 *WORLD DEV.* 1035 (1993).

⁶² James Thuo Gathii, *Re-characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis*, 7 *WIDENER L. SYMP. J.* 137, 139 (2001).

⁶³ *Id.*

⁶⁴ OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 35-37 (1991).

the view that these entities are only guided by set ends without any values⁶⁵ of right and wrong.

Those who overstate the primacy of positive law overlook the fact that even in the area of international trade law, corporate law, and other fields of private law, notions of fairness are a part of the innumerable doctrines of equity often invoked to moderate the rough contours of positive law.⁶⁶ Below are examples from the WTO's international trade law mandate. Examples in corporate law include directorial duties to avoid conflicts of interest that are now legislatively required, duties to ensure fair dealing and not merely fair prices in situations where a director is involved in a transaction involving a conflict of interest, and duties that controlling shareholders in a corporation have to minority shareholders.⁶⁷ The point is simply that notions of fairness are wired into the very fabric of both domestic and international private law — that is why insider trading is prohibited, so that cheats do not take advantage of unsuspecting investors; that is why directors can now go to jail for "fixing" accounts; that is why everyone has a right to a fair trial before an adverse judgment is made against them or their property.

However, here a question arises: If it is true that such fairness claims are intrinsic to a variety of private law systems around the world, does it follow that such fairness claims are therefore applicable across borders irrespective of national and other differences? In other words, does such fairness establish a minimum content of a universal standard? In a recent book, Raj Bhala uses Catholic and Islamic religious principles to analyze issues of social justice in the international trading regime without making such a transcendental claim.⁶⁸ Rather, he challenges us to awaken from our reluctance to "diagnose and treat matters of the heart as such" so that political leadership and corporate chieftains do not sound incongruous when they "talk openly about the application of religious concepts to policy and business problems, and about the effect of their faith on their approach to these problems."⁶⁹ These are

⁶⁵ See, e.g., TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* 19 (1983); JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER* 40 (2002).

⁶⁶ See F. HODGE O'NEAL & ROBERT B. THOMPSON, *O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND F.I.C. MEMBERS* 79 (2d ed. 1997). Although courts vary in their definitions of oppression, some link it directly to a breach of fiduciary duty to which minority shareholders are entitled. See *id.* at 80 (recognizing that many courts find the fiduciary duty of good faith and fair dealing as an enhanced duty owed to minority shareholders in a close corporation setting).

⁶⁷ See *id.*; see also HARRY HENN & JOHN ALEXANDER, *LAWS OF CORPORATIONS* 1037 (3d ed. 1983).

⁶⁸ RAJ BHALA, *TRADE, DEVELOPMENT, AND SOCIAL JUSTICE* 138-53 (2003).

⁶⁹ *Id.* at xxv.

certainly controversial questions. Take fairness for example. Its content is contested. In fact, fairness can refer either to equitability in the sharing of resources and benefits or to distributive justice. Additionally, as a justification for economic and social arrangements for redistribution of wealth, fairness can be associated with principles such as natural justice or with equitable principles, such as those precluding self-interestedness on the part of individuals that stand in fiduciary relationships as directors stand in relation to shareholders.

However, this lack of precision does not take away from the possibility that engaging in international justice within the trading regime is morally justified. The claims made about the international trading regime similarly raise issues covering the entire range of fairness conceptions. If this is so, then engaging the advocacy of the trade and justice movement is not beyond what the WTO might do in addressing its legitimacy deficit.

C. Applying Fairness and Moral Reasoning to the Trading Framework

So far, the case has been made that fairness, ethical, and moral reasoning provide an important perspective on issues of justice within the international trading framework. Let us see how notions of fairness may help us to do this. First, conceptions of fairness can help, and have helped, the trade and justice movement express the need for the WTO to make the basic rules of the global trading framework apply equally to all products, industrial or agricultural, and responsive to the needs of all countries, developed or developing. In fact, following the Doha Ministerial conference of the WTO in 2001, there already is a unanimous international commitment to the goal of leveling the playing field of global trade.⁷⁰

Second, such an ethic of fairness in my view would encourage states, corporate actors, and others to take steps beyond the immediacy of their local

⁷⁰ World Trade Organization, Implementation-Related Issues and Concerns, WTO Doha Ministerial Decision of 14 November 2001, WT/MIN(01)/17, pmb1 (noting that WTO members ought to ensure that the trading system "responds fully to the needs and interests of all participants"). In the WTO Doha Ministerial Declaration, members pledged to "reject the use of protectionism," "to place [the] needs and interests [of developing countries] at the heart of the Work Programme adopted" in Doha, and to commit themselves "to addressing the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system." World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, ¶¶ 1-3, 41 I.L.M. 746 (2002). [hereinafter Doha Declaration]. The Doha Declaration also reiterated and reaffirmed the commitment to establishing a fairer and more open and non-discriminatory trading system in the Marrakesh Agreement Establishing the WTO. See *id.* ¶ 13; Marrakesh Agreement, *supra* note 31, ¶ 2.

needs by regarding the needs of others, even if they are across national boundaries, with empathy and compassion.

Third, reference to an ethic of fairness necessarily goes beyond current efforts to address issues such as human rights within the regime of exceptions contained in Article XX of the GATT. Those who argued that there was a place for human rights within the GATT/WTO regime have maintained that human rights concerns could be accommodated as special exceptions to the basic obligations of liberalizing trade. The specific provisions that are cited to support a place for human rights in the trading regime include Articles XX (a), (b), and (c) of the GATT. Under these provisions a country may take measures "necessary to protect public morals," take steps to protect human life or health, and restrict measures "relating to the products of prison labor."⁷¹ Article XIV of the General Agreement on Trade in Services makes provision for a public morals exception.

These provisions, and the measures they authorize, are understood as exceptions to the basic obligations undertaken by members of the GATT/WTO regime. Thus, the best way to understand the circumstances under which countries may take measures to protect human rights is to appreciate that such measures must conform to the more primary obligations of free trade. The opening paragraph of Article XX is designed to prevent the *abuse* or *misuse* of the exceptions in a manner that departs from the free trade mandate. In fact, in the 1970s and 1980s, GATT dispute settlement panels restrictively interpreted the opening clause of Article XX, thereby ensuring the ineffectiveness of using these provisions to promote human rights and other so-called non-trade values such as environmental protection.

By adopting a very rigorous standard of review—that a measure taken pursuant to Article XX can only be justified if no less trade-restrictive alternative exists to achieve the policy objectives—the dispute settlement system of the old GATT made it virtually impossible to protect human rights within the global trading regime. In the recent past, the WTO's Appellate Body has shown more willingness to justify measures for countries to take under the Article XX exceptions. However, there has been no case where a measure to protect human rights has been upheld. This may be in part because, to the extent that such measures also protect the economy of the country

⁷¹ General Agreement on Tariffs and Trade art. XX (a), (b), (c), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

invoking the exception, the WTO's dispute settlement system is almost certainly likely to strike them down.

In my view, a discourse that frames the question in terms of introducing human rights into an almost inflexible commitment to free trade within the WTO is inherently limited. That is why efforts to introduce issues of international justice within the trading regime must go beyond attempts to read the exceptions to Article XX more broadly. The next section addresses how claims of fairness may inspire and guide the pursuit of international justice while exploring the extent to which the text of a variety of GATT/WTO Agreements and constitutive agreements might help in that pursuit.

D. Fairness as Fidelity in Making the Rules of Global Agricultural Trade Work for All

Since the establishment of the WTO in 1995, the objective of ensuring a fairer, more open, and transparent international trading framework has been expressly recognized in the founding texts of the WTO.⁷² In fact, several WTO agreements also expressly mention fairness as a criterion for the application of WTO rules by national authorities and adjudicatory bodies. For example, the Agreement on Agriculture has as an objective a "fair and market-oriented agricultural trading system."⁷³ Article 2.4 of the Agreement on Implementation of Article VI of GATT provides that "a fair comparison shall be made between the export price and normal value."⁷⁴ In addition, Article 2.4.2 provides that

[s]ubject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.⁷⁵

⁷² Marrakesh Agreement, *supra* note 31.

⁷³ Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 20(c), Legal Instruments—Results of the Uruguay Round, http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm.

⁷⁴ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.4, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9,650.

⁷⁵ *Id.*

Most importantly, with reference to agriculture, there is an unmistakable formal commitment to reform. Here is how the Doha Ministerial Declaration reflects that commitment:

We recall the long-term objective referred to in the Agreement [on Agriculture] to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.⁷⁶

E. Fairness as Empathy for Others

In addition, the rules of the WTO that presently favor developed countries at the expense of developing countries are not the last word on the purposes and functions of the WTO. As a Canadian trade diplomat has noted:

Trade rules and trade regimes are important, but they are far from the whole story. Trade patterns also have to do with factors other than trade . . . Europe trades more with Europe; Asia more with Asia. That reflects political and cultural realities more durable than market theories or trade initiatives. They are a reminder that even global villages have neighborhoods, and their legacies endure. The

⁷⁶ Doha Declaration, *supra* note 70, ¶ 13.

challenge to policy makers is to respect those local realities while building a larger community of interests.⁷⁷

When such neighborhoods establish special privileges and economic "apartheid," they need to be reformed. In fact, this is the challenge of an ethic of fairness embedded in compassion and empathy since its goal is to encourage states, corporate actors, and others to act beyond the immediacy of their local needs, even across national boundaries.

In short, instrumental justifications of leveling the global agricultural trade because of its economic benefits as well as the formal commitments of fairness to leveling the trading framework between all countries and products, while important, are insufficient prerequisites for achieving justice in global agricultural trade. The reason to me seems obvious: eliciting the empathy and compassion for farmers in Africa and other developing countries presupposes that farmers in Western Europe and in the United States are willing to give up the agricultural subsidies they presently enjoy on the understanding that in receiving these subsidies they hurt other farmers in places removed from them. In other words, the view that organizational and procedural reform to promote transparency to enable the trading system to benefit everyone is in itself insufficient to elicit the compassion that may be needed to mobilize individuals in one country to give up privileges so that individuals in another country can be better off.

This capacity for empathy among farmers, corporations, politicians, and others in these rich industrial economies is also critical because it gives them a moral compass to guide their actions. A few examples illustrate my claim. The examples I have in mind have to do with the difficulty (perceived and real) of persuading the U.S. government and the pharmaceutical industry to become deeply involved in leading the campaign to address the global HIV/AIDS pandemic, which has affected Africa the hardest. It seems to me that legislators, celebrities, and top government officials who have visited Africa and witnessed the AIDS scourge first-hand have often shifted positions from being opposed to or reluctant to committing resources to becoming champions of the anti-AIDS crusade.⁷⁸

⁷⁷ Joe Clark, *Preface to REGIONALISM, MULTILATERALISM, AND THE POLITICS OF GLOBAL TRADE*, at x-xi (Donald Barry & Ronald C. Keith eds., 1999).

⁷⁸ Jesse Helms, Editorial, *We Cannot Turn Away*, WASH. POST, Mar. 24, 2002, at B7. In this editorial, Helms wrote:

The most significant shift was that of former Senator Jesse Helms when he chaired the Senate Foreign Relations Committee.⁷⁹ His conversion in favor of further U.S. funding for HIV/AIDS initiatives in Africa came after decades of opposing foreign aid to the continent.⁸⁰ Senator Helms' change of heart was central to the Bush administration's decision to focus on mother-to-child transmission of the virus.⁸¹ A May 2005 visit to the continent by former Treasury Secretary Paul O'Neill and Bono, lead singer of the rock band U2,⁸² further highlighted the fact that support for more U.S. assistance addressing the HIV/AIDS crisis in Africa would depend, in part, on leaders taking a personal interest in the matter, just as the activists had stirred the administration to begin to get more actively involved.⁸³ As Jesse Helms wrote in the *Washington Post*:

Some may say that, despite the urgent humanitarian nature of the AIDS pandemic, this initiative is not consistent with some of my earlier positions. Indeed, I have always been an advocate of a very limited government, particularly as it concerns overseas commitments. Thomas Jefferson once wrote eloquently of a belief to which I still subscribe today: that 'our wisdom will grow with our power, and teach us, that the less we use our power the greater it will be.'⁸⁴

In February I said publicly that I was ashamed that I had not done more concerning the world's AIDS pandemic. I told this to a conference organized by Samaritan's Purse, the finest humanitarian organization I know of. Indeed, it is their example of hope and caring for the world's most unfortunate that has inspired action by so many. Samaritan's Purse is led by Franklin Graham, son of Billy Graham—both of whom I count as dearest friends—but the organization was founded by the late Bob Pierce. Dr. Pierce's mission was to 'Let my heart be broken with the things that break the heart of God.' I know of no more heartbreaking tragedy in the world today than the loss of so many young people to a virus that could be stopped if we simply provided more resources.

Id.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Will Helms, *Conversion Brings \$500 Million for AIDS*, *NEWSDAY* (N.Y.), Mar. 29, 2002, at A38.

⁸² *O'Neill, Bono Outraged by AIDS Inaction*, *CHI. TRIB.*, May 25, 2002, at 10; *'Odd Couple' Decries Soweto AIDS Revelations*, *TORONTO STAR*, May 25, 2002, at A33.

⁸³ Activists criticized the Bush Administration's mother-to-child initiative because the assistance would be channeled bilaterally as opposed to through the Global Fund to Fight AIDS, TB, and malaria. See Jim Lobe, *Activists Slam Bush AIDS Initiative*, *INTER PRESS SERVICE*, June 19, 2002, <http://www.aegis.com/news/ips/2002/ip020611.html>. According to the activists, the Administration was worried that the Fund would use the money to buy the patented drugs from generic companies in the third-world rather than from the patent holding companies in the West. *Id.*

⁸⁴ Helms, *supra* note 78, at B7.

Finally, as I have already noted, one of the ways that moral claims have been made by developing countries in contexts such as debt forgiveness are often designated as occupying a non-legal or a political status that cannot trump contractual obligations these countries entered into when they borrowed finances from Western institutions in the 1970s.⁸⁵ Designating such claims as not rising to enforceable legal claims that courts might use to excuse these countries from obligations that they have been unable to meet because of supervening factors like major economic dislocations, war, and the HIV/AIDS epidemic is unfortunate.⁸⁶ Failing to designate developing country claims as rights effectively divests them of the moral legitimacy and transformative potential that these rights have for disempowered peoples.⁸⁷ There is another reason to be skeptical of compassion where it is not made in good faith. For example, the Bush administration's \$15 billion announcement for HIV/AIDS work in Africa raises questions of credibility due to the fact that it is accompanied by uncompromising support of patents. Hence, the announcement, which is yet to be fully funded, has been subjected to enormous exceptions and simply disguises the United States' priorities of ensuring that its multinational pharmaceutical companies acquire markets for their drugs without any threat to their profitability, even in the face of heart-wrenching human need.⁸⁸

However, it is not my claim that developing countries necessarily ought to give up their legal claims and rights and instead solely appeal to the compassion and empathy of those in rich industrialized economies. My assertion is that those legal claims and rights may be simultaneously pursued by recognizing that there are opportunities for moral reasoning in corporate boardrooms, in international economic institutions, and among politicians and their citizens, even where it may seem to be inconsistent with their immediate interests.

The broad lesson to draw from this discussion is that given that some countries are more cost-efficient at producing certain products, trust and confidence in international commerce can best be attained where the rules are fair between all products, irrespective of their origin. This would ensure two

⁸⁵ James Thuo Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties*, 15 HARV. J.L. & TECH., 291, 315-16 (2002).

⁸⁶ *Id.* For further elaboration, see James Gathii, *The Sincerity of Sovereign Debt Contracts and Its Origins in Enforcement Litigation*, 38 GEO. WASH. INT'L L. REV. (forthcoming 2006).

⁸⁷ See generally Gathii, *supra* note 85.

⁸⁸ See Gathii, *supra* note 50, at 268.

things: First, countries would engage on fair terms in international trade and business; second, by engaging in international business on such fair terms, every country, farmer, investor, or business stands to gain.⁸⁹ Where the rules and the players undermine the trust and confidence embedded in the shared value of the rules and how the players conduct themselves, the integrity of the system is called into question and it potentially threatens to undermine its very essence. Sadly, where the rules themselves embrace values inconsistent with norms of fairness that sustain a level playing field, the force of shared values that undergirds international business is similarly called into question.

CONCLUSION

The WTO is a highly secretive organization in which decision-making processes are still dominated by its richest members: the United States, the European Union, Canada, and Japan (referred to as the Quad), just as in the old GATT.⁹⁰ Decisions on important issues are made without broad-based consultation with the entire WTO membership⁹¹ and the domestic constituencies of member countries. The decision-making process at the WTO is further hobbled by the fact that most of the least-developed countries are not even represented in Geneva, where these decisions are made.⁹² Even developing countries that have representation in Geneva are stretched too thinly to attend the more than 1,000 formal and informal meetings, symposia, workshops, and seminars held under the auspices of WTO bodies to negotiate or discuss new or existing trade rules or disputes about the application and interpretation of these rules.⁹³ Organizational and procedural reforms are therefore necessary to address the negotiating and decision-making process

⁸⁹ These ideas are greatly influenced by John Rawls' idea of social cooperation. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 5-7 (2001).

⁹⁰ FATOUMATA JAWARA & AILEEN KWA, *BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS/THE LESSONS OF CANCUN* 56-59, 149 (2004).

⁹¹ The exclusion of developing countries from behind the scenes negotiations and the disquiet among them dates as far back as the Kennedy and Tokyo GATT rounds. See GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION* 354 (1986) (noting that pyramidal bargaining caused resentment among developing countries). Winham also notes that:

The major political difficulty in concluding the Tokyo Round was the opposition of the developing countries. This opposition was a product of several specific disputes and of a more generalized belief that the overall benefits of the accords were not sufficiently in the interests of developing countries to warrant their acceptance.

Id. at 303.

⁹² JAWARA & KWA, *supra* note 90, at 22, 274, 293.

⁹³ *Id.* at 22.

within the WTO. Democratizing the decision-making of international trade rules might involve not only permitting the submission of amicus briefs by non-governmental groups but possibly perhaps individuals in cases where particular constituencies are especially affected. A case in point concerns the more than ten million cotton farmers in West and Central Africa affected by cotton subsidies in the United States and Europe.⁹⁴

This example of the effects of cotton subsidies reflects the fact that the global trading regime is rigged and distorted, particularly to the extent that for over fifty years the comparative advantage that developing countries enjoy in agriculture has been undermined by policies that permit developed countries to restrict their markets to agricultural imports from developing countries or by subsidies to farmers in rich, industrialized countries who are not the lowest cost producers.⁹⁵ Current negotiations in the Doha Round continue to demonstrate inattentiveness to questions of development, although the negotiating mandate presupposed that issues of development would be at the center.⁹⁶ The dispute settlement process has largely helped entrench the trading benefits of rich countries that can afford to participate as repeat players that in turn shape the WTO's jurisprudence.⁹⁷ In addition, the place of the principle of special and differential treatment for developing countries has weakened particularly among the richest members of the WTO. Two of the last three WTO ministerial conferences have broken down.⁹⁸ In the meantime, a vigorous trade and justice movement has arisen, challenging the WTO at every turn and bringing into focus moral, ethical, and economic concerns at the center of the WTO's legitimacy crisis.⁹⁹

This movement has helped bring into sharp focus the significance of moral and ethical reflection in considering what to do about imbalances in global trade. Moral and ethical reflection about the uneven impact of trade policies has opened up areas of inquiry that supplement instrumental justifications

⁹⁴ See James Thuo Gathii, *A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 179 (2003).

⁹⁵ See Gathii, *supra* note 59; see also Gathii, *supra* note 94, at 179.

⁹⁶ See James Thuo Gathii, *The High Stakes of WTO Reform*, 104 *MICH. L. REV.* (forthcoming 2006).

⁹⁷ GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* ix-xi (2003).

⁹⁸ See Gathii, *supra* note 96.

⁹⁹ A selection of the literature here includes KAMAL MALHOTRA, *MAKING GLOBAL TRADE WORK FOR PEOPLE* (2003), available at <http://www.undp.org/dpa/publications/globaltrade.pdf>; JAWARA & KWA, *supra* note 90, at 56-59, 149; and Susan Esserman & Robert Howse, *The WTO on Trial*, 82 *FOREIGN AFF.* 130, 138 (2003).

about the mutual benefits of free trade. By borrowing from the insights of Cosmopolitan and other theorists, the trade and justice movement has begun to challenge Realist and technocratic views of the WTO as a specialized economic institution removed from the realities of millions of individuals around the world.¹⁰⁰ Indeed, by recognizing the connections between states, peoples, and individuals created by international trade, the possibility of pursuing justice to address the short end of trade rules and policies becomes apparent. The first paragraph of GATT 1994 provides that trade should be conducted "with a view to raising standards of living."¹⁰¹ Part IV of GATT 1947 on the preferential treatment of developing countries acknowledges that imbalances in trade capabilities of the different trading states reflect an expectation of assisting poorer economies through measures such as non-reciprocal access to developed country markets.¹⁰² These and other rules of the trading framework anticipate the agenda contemplated by the variety of approaches to international justice. This Article has argued that there is much possibility for moral reasoning with regard to the role of international economic institutions like the WTO as well as among politicians and their citizens, even where such reasoning may seem to be inconsistent with their immediate interests, their geo-political ambitions, or the immediate political expediencies of the powerful. Ultimately, where the rules, policies, and players embed the trust and confidence in the force of a shared value of concern, the integrity of the global trading system is strengthened; and, where the opposite is true, it is called into check and potentially threatens to undermine its very essence.

¹⁰⁰ Similarly, Aristotle argued that shareable goods, like justice, are simply better for the members and the community than any satisfaction that may come from power and wealth. See Thomas W. Smith, *Liberalism, Communitarianism, and the Common Good*, RESPONSIVE COMMUNITY, Summer 2000, at 16-17.

¹⁰¹ Marrakesh Agreement, *supra* note 31.

¹⁰² GATT, *supra* note 71.