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# Equality in Global Commerce: Towards a Political Theory of International Economic Law

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## Abstract

Notwithstanding International Economic Law's (IEL's) inevitable distributional effects, IEL scholarship has had limited engagement with theoretical work on global distributive justice and fairness. In part this reflects the failure of global justice theorists to derive principles that can be readily applied to the concrete problems of IEL. This article bridges this gap, drawing on existing coercion-based accounts of global justice in political theory to propose a novel account of global distributive justice that both resolves problems within the existing theoretical literature and can be directly applied to both explain and critique concrete issues in IEL, including in particular WTO law. By complementing existing coercion-based accounts with a more nuanced typology of international coercion, it distinguishes two morally salient classes of economically relevant measures: External Trade Measures (ETMs), which pursue their goals specifically through the regulation of international economic activity; and Domestic Economic Measures (DEMs), which do not. The distinctive intentional relationship between ETMs and the outsiders they affect means such measures require more stringent justification, in terms of global equality or other goals those outsiders themselves share; whereas DEMs can be justified under the principle of self-determination. Non-Product Related Production Processes and Methods (NPRPPMs) provide a case study to show how this framework can illuminate recurring problems in IEL.

## 1 The Inevitability of Distributive Justice

International economic law (IEL) has globally distributive effects. Border measures affect terms of trade and restrict transactional opportunities for both insiders and outsiders. Domestic measures have growth effects both within and between countries. Competition and state aid rules affect prices, changing incentives for market participants and the expected returns from economic activity. Further, those effects cannot

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be understood solely in terms of efficiency. While the theory of comparative advantage supports a general scepticism towards protectionist policies, few, if any, policy interventions can be condemned as unequivocally harmful in all circumstances.<sup>1</sup> Probabilistic empirical evidence bolsters theoretical claims, but cannot alone justify either the broad reach of WTO disciplines or the interest of outsiders in enforcing these.<sup>2</sup> It is only by invoking prisoner's dilemmas, and the language of externalities, that we approach a defence of the trade regime as globally efficient.<sup>3</sup> However, by invoking the language of tit-for-tat, such arguments concede both that there are multiple pareto-efficient regimes and (which amounts to the same thing) that a globally optimal outcome may not be locally optimal. In these circumstances, any rule necessarily benefits one group at the expense of another, taking us from the realm of efficiency to the realm of distributional fairness.<sup>4</sup>

That issues of distributive justice arise in the trade regime is not a novel claim. As a political token, 'fair trade' is frequently invoked to oppose 'free trade', whether by developing countries demanding special and differential treatment, by trade unions seeking protection from low-wage countries, or by civil society activists raising social, environmental, and human rights concerns.<sup>5</sup> In each case, 'fairness' is co-opted to support an argument that existing or proposed rules give insufficient weight to some important interest, usually that of its advocates, and that costs and benefits from international cooperation should be distributed differently. However, whereas fairness claims are inevitable and pervasive, there is little consensus on their implications for specific questions. In many cases, it seems, fairness appears on both sides of an issue. How should we reconcile developed countries' claims to equal treatment with developing countries' claims to policy space? How can we weigh the interests of threatened workers in developed countries against their low-wage competitors overseas? Should activists' concerns for environmental goods restrict exporting countries' rights to economic self-determination? If fairness can be invoked by disputants on both sides of such diverse issues, is it any surprise that critics dismiss fairness claims as devoid of content, a rhetorical flourish disguising vested interests or economic illiteracy?<sup>6</sup>

Part of this confusion can be explained in instrumental terms. Their rhetorical power gives political actors reason to cast purely self-interested arguments in terms

<sup>1</sup> J. Bhagwati, *Protectionism* (1988). For a critical view see Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform', 44 *J Econ Literature* (2006) 973.

<sup>2</sup> Regan, 'What Are Trade Agreements For? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers', 9 *J Int'l Econ L* (2006) 951.

<sup>3</sup> K. Bagwell and R.W. Staiger, *The Economics of the World Trading System* (2002); Ethier, 'Political Externalities, Nondiscrimination, and a Multilateral World', 12 *Rev Int'l Economics* (2004) 303; P.R. Krugman, M. Obstfeld, and M.J. Melitz, *International Economics* (2012), at 254–256, 283–285.

<sup>4</sup> On the justificatory limits of economics see Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime', 96 *AJIL* (2002) 94.

<sup>5</sup> See, e.g., R.E. Hudec and J.N. Bhagwati (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (1996); J.E. Stiglitz and A. Charlton, *Fair Trade for All: How Trade Can Promote Development* (2007).

<sup>6</sup> See, e.g., J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005), at 167–184.

of fairness and justice.<sup>7</sup> However, it also reflects a deeper problem. We lack a developed account of what distributional fairness means in international economic regulation. In the domestic context it has been a concern for both jurists and philosophers at least since Aristotle, and we have many well-specified theories expressed in terms like liberty, equality, welfare, and community. Internationally, on the other hand, with limited exceptions this question became a focus of theoretical study only in the last 40 years.<sup>8</sup> Empirical disagreements are starker, intuitions are less settled, and to the extent that progress is made at the level of theory, it struggles to inform applied work by legal scholars and policy practitioners. We simply do not know what distributive justice means in the international economy. The resultant scepticism of global fairness claims is reflected in the continued hegemony of legal positivism and economic analysis in world trade law.<sup>9</sup>

This article seeks to redress this balance, drawing on recent debates in global political theory to develop an account of distributive justice specifically adapted to international economic regulation. As a political theory, it applies the methods of political philosophy to derive a distinctive set of global distributive claims. However, as a theory of economic regulation, it seeks to specify those claims in ways that can directly inform questions addressed in the applied literature on world trade law, and indeed in international negotiations and dispute settlement procedures. A successful theory must achieve both goals: theory that cannot inform practice is normatively sterile; but practical applicability cannot compensate for a lack of theoretical rigour.

My conclusions can be stated in a few lines; the bulk of the article is devoted to defending these, and to briefly highlighting their implications for WTO law. Building on existing coercion-based accounts of global justice, I distinguish two normatively salient categories of economic regulation, which I label external trade measures and domestic economic measures. The former, I argue, establish a distinctive justificatory relationship between states and those outside their borders, evoking justification in globally egalitarian terms or in terms of values those outsiders are themselves committed to pursuing. Such measures, and their effects, are properly called unjust to the extent that they are not so justified. Domestic economic measures, by contrast, can be justified to outsiders without reference to the goals they pursue, subject to the side-constraints of basic rights and self-determination. Distributive justice thus means something quite different, depending on the kinds of measures considered. By taking this distinction seriously we can make sense both of our varied intuitions about economic regulation and global justice, and of recurring problems in international trade law.

Section 2 introduces a number of approaches to theorizing global distributive justice, emphasizing how global justice debates polarize around statist and cosmopolitan positions, and linking this to their failure to engage with concrete policy questions. It argues that the Coercion Approach, which links distributive justice to state coercion,

<sup>7</sup> Dunoff, 'The Political Geography of Distributive Justice', in C. Carmody, F. Garcia, and J. Linarelli (eds), *Global Justice and International Economic Law* (2012), at 153; Narlikar, 'Fairness in International Trade Negotiations: Developing Countries in the Gatt and WTO', 29 *World Economy* (2006) 1005.

<sup>8</sup> For a review of the problems see Nagel, 'The Problem of Global Justice', 33 *Phil & Public Affairs* (2005) 113.

<sup>9</sup> E.A. Posner and A.O. Sykes, *Economic Foundations of International Law* (2013), at 4, 263.

is most promising, but lacks a sufficiently nuanced understanding of coercion in the global system.

Section 3 generalizes the Coercion Approach, adapting a framework from John Rawls to reconceive that approach and its distributive implications as expressing an ideal of institutional justification. It further argues that structural differences between domestic and international systems recast the questions raised by Rawls, forcing us to consider the plural coercive relations in which institutions, peoples, and persons stand internationally.

Sections 4 to 6 develop a typology of institutional coercion and its justification that addresses the problems identified in sections 2 and 3. Three salient distinctions are drawn: between direct and indirect coercion; between inclusive and exclusive coercion; and between self-authored and external coercion. The form coercion takes affects the justification it evokes; and only a subset of globally coercive measures evoke justification in distributive terms.

Section 7 applies this typology to reconstruct the Coercion Approach and to derive two novel principles of international economic justice. The first, labelled the Principle of Equality in Global Commerce (EGC), claims that measures that pursue their goals specifically through the regulation of international economic activity (External Trade Measures or ETMs) are just if, and only if, they pursue global equality of individual opportunity, through improving the position of less advantaged persons, subject to a reasonable principle of self-determination. The second, a corollary of the first, provides that measures other than ETMs are just, regardless of their distributive implications, provided they do not impair the basic rights of outsiders or undermine the capacity of other peoples to become or remain well ordered. International economic inequality is thus relevant to the justification of some measures that states may adopt, but for many others their justice depends only on sufficientarian concerns of basic rights and collective self-determination.

Section 8 shows how the two principles derived in section 7 can be applied to analyse concrete problems in IEL. Taking environmentally motivated regulations on non-product related production processes and methods (NPRPPMs) as a case study, it shows how these principles explain the relationship between GATT Articles I, III, XI, and XX. It concludes by identifying a number of other problematic issues in WTO law that these principles can potentially illuminate.

## 2 From Global Justice to Justice in Economic Regulation

Many people believe that states should pursue, to a greater or lesser degree, economic equality among their citizens. Further, many states, through public services, welfare payments, and progressive taxation, do in fact pursue that goal, albeit to a lesser extent than many egalitarians might prefer. In political theory, the most influential statement of this goal is John Rawls' difference principle, which claims that in a just society, '[s]ocial and economic inequalities ... are to be to the greatest benefit of the least advantaged members of society'.<sup>10</sup> Starting from a baseline of strict equality, it permits economic inequalities only subject to fair equality of opportunity, and only to

<sup>10</sup> J. Rawls, *Political Liberalism* (1996), at 6.

the extent that such inequalities benefit the worst off persons in society. Gains for the more advantaged count for nothing, on this view, if they come at a cost for the less advantaged. It is only a slight exaggeration to say that this principle, once revolutionary, constitutes the conventional wisdom about distributive justice within the state.<sup>11</sup>

However, some of the earliest responses to Rawls's work observed that his argument for the difference principle within individual societies seemed to apply equally to the world as a whole.<sup>12</sup> Rawls argues from moral equality to the difference principle; but if respect for moral equality implies the difference principle, and assuming we are to respect the moral equality of all persons everywhere, why does the difference principle not apply globally? This is contemporary liberalism's boundary problem, around which much of contemporary global justice theorizing resolves. In so far as IEL addresses the interface between local and global, how we resolve this problem should profoundly affect our views on IEL.

Responses to this problem can be loosely divided into three groups, none entirely satisfactory: first, strong cosmopolitans, who accept that the logic of liberalism extends beyond the state and argue for the same distributive principles globally that they favour domestically;<sup>13</sup> secondly, communitarians, who reject the liberal derivation of distributive justice from moral equality, instead grounding distributive principles in social meanings and obligations within communities;<sup>14</sup> and thirdly, liberals who defend Rawls's arguments domestically while arguing that specific features of social cooperation within the state distinguish the domestic and international contexts, making the difference principle appropriate to the former but not the latter.<sup>15</sup> Features emphasized have included coercion, cooperation, joint production of public goods, political cooperation, and the presence of basic institutions or a basic structure.<sup>16</sup>

Among those who reject the strong cosmopolitan position, a further distinction appears between those who deny any duties of economic justice beyond the state<sup>17</sup> and those who, while denying that identical principles apply within and beyond the state, advocate lesser, generally sufficientarian, principles of global economic justice. Depending on whether they emphasize duties to nations, peoples, or persons, theories

<sup>11</sup> For an overview of the vast literature on this question see Lamont and Favor, 'Distributive Justice', in E.N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (2013), available at: <http://plato.stanford.edu/archives/spr2013/entries/justice-distributive/>.

<sup>12</sup> B. Barry, *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in a Theory of Justice by John Rawls* (1973), at 128–133; Scanlon, 'Rawls' Theory of Justice', 121 *U Pennsylvania L Rev* (1972–1973) 1020, at 1066–1067.

<sup>13</sup> See, e.g., C.R. Beitz, *Political Theory and International Relations* (1999); S. Caney, *Justice Beyond Borders: A Global Political Theory* (2005); T.W. Pogge, *Realizing Rawls* (1989).

<sup>14</sup> See, e.g., D. Miller, *On Nationality* (1995); M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (1983).

<sup>15</sup> See, e.g., S.R. Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (2007); J. Rawls, *The Law of Peoples* (1999); Blake, 'Distributive Justice, State Coercion, and Autonomy', 30 *Phil & Public Affairs* (2001) 257; Nagel, *supra* note 8; Sangiovanni, 'Global Justice, Reciprocity, and the State', 35 *Phil & Public Affairs* (2007) 3.

<sup>16</sup> For a critical review of these approaches see Barry and Valentini, 'Egalitarian Challenges to Global Egalitarianism: A Critique', 35 *Rev Int'l Studies* (2009) 485.

<sup>17</sup> See, e.g., Nagel, *supra* note 8.

of the latter type are characterized as liberal nationalist,<sup>18</sup> social liberal,<sup>19</sup> or moderate cosmopolitan,<sup>20</sup> and collectively as moderate theories.<sup>21</sup>

These internal divisions explain in part political theory's limited success in informing debates amongst international economic lawyers and policy-makers. However, more problematic is the difficulty these theories have in engaging with concrete problems of IEL.<sup>22</sup> Strong cosmopolitans, denying the moral distinctiveness of the state, struggle to provide principled accounts of international law for a world where states remain the fundamental units.<sup>23</sup> Moderate theorists, on the other hand, require contestable causal arguments to link specific economic measures to breaches of their preferred sufficientarian standards,<sup>24</sup> while their rejection of comparative standards risks sidelining them in many forums of international economic regulation.<sup>25</sup> Further, international economic regulation (as opposed to redistribution) has not been a prominent focus for political theorists;<sup>26</sup> and where they have addressed specific issues in economic regulation, it can be difficult to see how their practical recommendations derive from their theoretical claims.<sup>27</sup> The result has been the effective exclusion of political theory from debates about IEL, which have instead been informed primarily by legal positivism and utilitarian economic theory;<sup>28</sup> even when the limits of those approaches are recognized, lawyers have rarely looked to political theory for guidance.<sup>29</sup>

A successful account of distributive justice in international economic regulation must therefore find a middle path between these positions, combining statist pragmatism with the critical power of cosmopolitans' commitment to moral equality. Its prescriptions for

<sup>18</sup> See, e.g., Miller, *supra* note 14. Cf. D. Miller, *National Responsibility and Global Justice* (2007).

<sup>19</sup> See, e.g., Freeman, *supra* note 15, Rawls, *supra* note 15.

<sup>20</sup> See, e.g., A.E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004); T.W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002); L. Valentini, *Justice in a Globalized World: A Normative Framework* (2011).

<sup>21</sup> S. Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (2001), at 116.

<sup>22</sup> A. James, *Fairness in Practice: A Social Contract for a Global Economy* (2012), at 9–14.

<sup>23</sup> See, e.g., D. Moellendorf, *Global Inequality Matters* (2009), at 96–103; F. Garcia, *Trade, Inequality, and Justice: Towards a Liberal Theory of Just Trade* (2003), at 147.

<sup>24</sup> See, e.g., Howse and Teitel, 'Global Justice, Poverty and the International Economic Order', and Pogge, 'The Role of International Law in Reproducing Massive Poverty', both in J. Tasioulas and S. Besson (eds), *The Philosophy of International Law* (2011), at 437 and 417, respectively.

<sup>25</sup> Consider, e.g., debates about addressing development in the trade regime: S.E. Rolland, *Development at the World Trade Organization* (2012), at 1–9.

<sup>26</sup> Teson and Klick, 'Global Justice and Trade', in Carmody, Garcia, and Linarelli (eds), *supra* note 7, at 217.

<sup>27</sup> See, e.g., the comments on international trade regulation in Rawls, *supra* note 15, at 42–43.

<sup>28</sup> Garcia, Barry, and Esserman, 'Why Trade Law Needs a Theory of Justice', 100 *ASIL Proc* (2006) 376; Hockett, 'Human Persons, Human Rights and the Distributive Structure of Global Justice', in Carmody, Garcia, and Linarelli (eds), *supra* note 7, at 68.

<sup>29</sup> Howse, *supra* note 4. Human rights law has instead provided the most prominent critical perspective on WTO law: see T. Cottier, J. Pauwelyn, and E.B. Bonanomi, *Human Rights and International Trade* (2005). Notable exceptions include Garcia, *supra* note 23; Carmody, Garcia, and Linarelli (eds), *supra* note 7; Linarelli, 'What Do We Owe Each Other in the Global Economic Order? Constructivist and Contractualist Accounts', 15 *J Transnat'l L and Policy* (2006) 181; Moellendorf, 'The World Trade Organization and Egalitarian Justice', 36 *Metaphilosophy* (2005) 145; F.J. Garcia, *Global Justice and International Economic Law: Three Takes* (2013); Trachtman, 'Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid"', 6 *J Int'l Econ L* (2003) 3.

international distributive justice must be derivable, through parallel reasoning, from the assumptions that ground strong distributive principles domestically, but those prescriptions must also have something meaningful to say about international economic regulation as a concrete practice in which we are collectively engaged.

Given my focus on distributive justice in economic regulation, one position in the global justice debate seems especially promising. This is the Coercion Approach, which argues that duties of distributive justice, understood as a concern for relative rather than absolute shares, derive from the nature of coercion in the domestic context; and that the absence of coercion of the relevant type explains why such duties are not applicable internationally. By linking coercive regulation and economic distribution, the Coercion Approach seems best adapted to shed light on the distributive implications of the international economic regulation addressed by WTO law. I therefore introduce below one version of that approach, proposed by Michael Blake, before addressing criticisms of this approach, and considering how it might be adapted to address the specific problem of this article.<sup>30</sup>

Blake argues that concern for relative shares reflects the need to justify coercion to those who are subject to it. He builds his theory from a principle of autonomy that is violated when individuals are subject to coercion. While he does not define coercion, his focus is on situations where the options available to individuals are subject to the will of another.<sup>31</sup> Recognizing that state coercion, as so understood, is both pervasive and necessary, he argues that the violation of the principle of autonomy that this implies requires justification through the hypothetical consent of those who are subject to it.

In the domestic context, he emphasizes the continuous nature of coercion, the unitary nature of the legal system, and the role of private law in defining entitlements in society, including how citizens may hold, transfer, and enjoy property.<sup>32</sup> Egalitarian concerns derive from this role of the legal system in defining returns to individuals, and from the fact that the legal system applies to all individuals within a society. In consequence, it must offer to all individuals who are subject to it, including those who do least well, reasons to accept it. It is this need to justify the legal system to all, including the least advantaged, that generates the difference principle, as the only principle that the least advantaged could be expected to accept. Thus, Blake argues, the concern for relative shares in domestic theory in fact derives from an underlying concern for autonomy.<sup>33</sup>

While Blake provides a plausible reconstruction of Rawls's argument for the difference principle domestically, his argument is weaker when he seeks to distinguish between international and domestic contexts. At one point, he suggests that:

To insiders, the state says: Yes, we coerce you, but we do so in accordance with principles you could not reasonably reject. To outsiders, it says: We do not coerce you, and therefore do not apply our principles of liberal justice to you.<sup>34</sup>

<sup>30</sup> Blake, *supra* note 15. Further examples of the Coercion Approach include Valentini, *supra* note 20; Nagel, *supra* note 8; Risse, 'What to Say about the State', 32 *Social Theory and Practice* 671.

<sup>31</sup> Blake, *supra* note 15, at 268, 270–272.

<sup>32</sup> *Ibid.*, at 280–281.

<sup>33</sup> *Ibid.*, at 283.

<sup>34</sup> *Ibid.*, at 287.



However, he does not ultimately deny that coercion is present in the international context. Rather, he denies that international coercion is such as to require justification in distributive terms, primarily because it is not ongoing or directed against individual human agents in the way that domestic coercion is.<sup>35</sup> It is only coercion of this type, and particularly coercion tied to the definition of economic returns to individuals, that requires egalitarian justification.

As an argument against strong cosmopolitanism the Coercion Approach has faced sustained criticism. In the form advanced by Blake, it is challenged as relying on a straightforwardly false empirical claim, namely that states do not coerce outsiders, or that their coercion is not directed against individuals on an ongoing basis.<sup>36</sup> In so far as Blake accepts the existence of international coercion, he fails to explain convincingly why domestic coercion is distinctive and gives rise to distributive obligations.<sup>37</sup> Even in its narrowest form, focusing on the role of domestic coercion in defining economic returns, it is difficult to argue that international coercion does not also fulfil this function.<sup>38</sup> More generally, it has been suggested that the Coercion Approach depends not on coercion, in the narrow sense, but on a broader concern for ‘the non-voluntary, de facto authority of a legal system’,<sup>39</sup> or the non-voluntary ‘imposition of societal rules’.<sup>40</sup> This reading makes it even harder to distinguish the international and domestic contexts in a convincing way, leading Sangiovanni to characterize the ‘voluntarist’ turn in global justice theory as a dead end.<sup>41</sup>

There are, however, good reasons to maintain the focus on coercion, understood broadly as subjection to non-voluntary institutions. The imposition on persons of non-voluntary institutions and the effects those institutions have are essential in motivating Rawls’s account of domestic justice.<sup>42</sup> Blake is right in arguing that it is in large part because the institutions of the basic structure are non-voluntary that we must rely on the hypothetical consent of persons, as modelled in the original position, to identify appropriate principles of justice.<sup>43</sup> Indeed, in the domestic context it has been argued that the justification of coercion, so understood, is the central problem

<sup>35</sup> *Ibid.*, at 280–281. Blake does note in a footnote that ‘the entire international system might be based on coercion’, but does not pursue this point except to suggest that the justification offered for that coercion would differ from the justification offered by a state to its own citizen.

<sup>36</sup> Abizadeh, ‘Cooperation, Pervasive Impact, and Coercion: On the Scope (Not Site) of Distributive Justice’, 35 *Phil & Public Affairs* (2007) 318, at 350–351.

<sup>37</sup> *Ibid.*, at 354–356.

<sup>38</sup> *Ibid.*, at 355–356.

<sup>39</sup> Sangiovanni, *supra* note 15, at 12–14.

<sup>40</sup> *Ibid.*, at 15. The breadth of Valentini’s definition of coercion arguably reflects a similar move.

<sup>41</sup> *Ibid.*, at 19. I do not take up here an alternative challenge that Sangiovanni makes to the Coercion Approach’s underlying logical form: Sangiovanni, ‘The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice’, 40 *Phil & Public Affairs* (2012) 79. I have elsewhere suggested a preliminary response to that challenge in my *unpublished conference paper*, ‘Coercion and Cooperation: Towards a Mixed Theory of Equality in Global Commerce’, presented at Brave New World 2013, Manchester Centre for Political Theory, 27 June 2013.

<sup>42</sup> Rawls, ‘Kantian Constructivism in Moral Theory’, 77 *J Philosophy* (1980) 515, at 517.

<sup>43</sup> J. Rawls, *Justice as Fairness: A Restatement* (2001), at 10, 20, 40–41, 55.

of contemporary liberalism.<sup>44</sup> Thus, before abandoning the Coercion Approach, we might look to reconstruct it in ways that avoid the problems noted above. Given that the main weakness of the Coercion Approach is its failure plausibly to identify how international and domestic coercion differ, and how this difference explains the different distributive obligations that apply internationally and domestically, it is here that we should start in seeking to reconstruct this approach. That is the task of the following sections.

### 3 The Coercion Approach and the Plurality of Global Institutions

Drawing on Rawls's discussion of the basic structure, we might first recast the Coercion Approach as focusing on non-voluntary subjection to institutions that distribute fundamental rights and duties and determine the division of advantages from social cooperation.<sup>45</sup> As well as tying the argument to a canonical account of contemporary liberalism, this formulation captures Blake's central concern with cases where the options open to individuals are shaped by the will of another. Its focus on institutions reflects Rawls's own starting point, which is shared by coercion theorists;<sup>46</sup> but by emphasizing subjection rather than participation it avoids the *status quo* bias criticism levelled at some institutional theories.<sup>47</sup> A person or people is subject to an institution whenever that institution shapes its fundamental rights and duties or determines the division of advantages from cooperation in which it participates. As a definition of coercion, this might be criticized for under-emphasizing effects on the coerced's will, which constitutes coercion as a violation of autonomy. However, on closer examination we generally find such non-voluntary institutions supported by coercion in this narrower sense.<sup>48</sup> Further, notwithstanding Blake's argument, the link to autonomy is not essential to a Rawlsian approach, which asks not 'how can coercion of the will be justified given the principle of autonomy?', but rather, 'how can coercion through non-voluntary institutions be reconciled with the respect due to individuals as free and equal moral persons?'.<sup>49</sup>

Coercion, so understood, is obviously not limited to the domestic context. International examples include territorial sovereignty,<sup>50</sup> structural competition,<sup>51</sup>

<sup>44</sup> Gaus, 'Coercion, Ownership and the Redistributive State: Justificatory Liberalism's Classical Tilt', 27 *Social Philosophy and Policy* (2010) 233.

<sup>45</sup> J. Rawls, *A Theory of Justice* (1972), at 7; Rawls, *supra* note 10, at 258.

<sup>46</sup> Although for a non-institutional coercion-based approach see Julius, 'Basic Structure and the Value of Equality', 31 *Phil & Public Affairs* (2003) 321; Julius, 'Nagel's Atlas', 34 *Phil & Public Affairs* (2006) 176.

<sup>47</sup> Valentini, 'Global Justice and Practice-Dependence: Conventionalism, Institutionalism, Functionalism', 19 *J Political Philosophy* (2011) 399.

<sup>48</sup> Rawls, *supra* note 43, at 40.

<sup>49</sup> On the move from autonomy to respect and its implications see Nussbaum, 'Perfectionist Liberalism and Political Liberalism', 39 *Phil & Public Affairs* (2011) 3.

<sup>50</sup> C. Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (1999).

<sup>51</sup> K.N. Waltz, *Theory of International Politics* (1979).

border controls,<sup>52</sup> the internal laws of other states,<sup>53</sup> the global market economy,<sup>54</sup> and the system of international law and treaty institutions.<sup>55</sup> Further, these are not simply a function of non-ideal conditions or indeed political choices; as this list illustrates, even under ideal conditions the international order is necessarily coercive.

However, the mere fact that the international system is coercive need not evoke egalitarian justification. Recall Blake's starting point: coercion must be justified in terms that those subject to it can reasonably accept. For Rawls, this is the function of deliberation in the original position, which seeks to model fair agreement amongst participants conceived as free and equal moral persons.<sup>56</sup> In the domestic context, the first subject of justice is the society's basic structure; and amongst free and equal persons symmetrically situated subject to that structure, the difference principle is selected as the only basis on which it can be justified to all. Rawls's egalitarianism is thus a consequence of his approach to justifying domestic institutions. Once we move to the international context, however, the situation becomes more complicated. Agents are no longer symmetrically situated; rather, we must consider the different positions of insiders and outsiders, each of whom is subject to institutions in different ways. To the extent that they are subject to institutions, those institutions must be justified to them. But the form of justification may vary across persons.

Domestically, we start from the basic structure, understood as 'the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages and disadvantages that arises from social cooperation'.<sup>57</sup> As the basic structure is responsible for the distribution of advantages and disadvantages, we can assess its justice in terms of distributive outcomes. In the international context, however, while there are institutions that assign fundamental rights and duties and shape the division of advantages and disadvantages from social cooperation, these do not fit together in the way that Rawls envisages the basic structure and Blake the legal system. Rather than a unified scheme, we find a plurality of institutions, which together have pervasive effects on agents' life prospects, but each of which may alone have only limited power to affect outcomes. Distribution is effected by a range of different and largely uncoordinated institutions, some domestic, some international, and not subject to any common political authority.<sup>58</sup> Therefore, rather than asking whether the coercion of the system as a whole can be justified, as we do domestically, we must approach each institution separately, while always recognizing that whether one institution can be justified will necessarily depend on its interaction with others. Further, as no institution is wholly responsible

<sup>52</sup> Abizadeh, 'Democratic Theory and Border Coercion', 36 *Political Theory* (2008) 37; Miller, 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh', 38 *Political Theory* (2010) 111.

<sup>53</sup> D.W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (2007); Freeman, *supra* note 15, at 306–308.

<sup>54</sup> Inayatullah and Blaney, 'Realizing Sovereignty', 21 *Rev Int'l Studies* (1995) 3.

<sup>55</sup> Buchanan, *supra* note 20; Maffettone, 'The WTO and the Limits of Distributive Justice', 35 *Phil & Social Criticism* (2009) 243.

<sup>56</sup> Rawls, *supra* note 43, at 6. Cf. Rawls, *supra* note 42, at 528.

<sup>57</sup> Rawls, *supra* note 10, at 258.

<sup>58</sup> Freeman, *supra* note 15, at 287–288.

for the distributive outcomes of persons or peoples, its justification cannot depend solely on those outcomes; although it may depend on how it affects them.<sup>59</sup>

In the international economy, the most important institutions for these purposes are the 200 sovereign states whose actions, individual and collective, constitute the framework within which economic life proceeds.<sup>60</sup> International institutions in the conventional sense, including in particular the WTO, undoubtedly play an important role; but they do so primarily through coordinating the regulatory choices of states. It is only by first justifying the state that we can hope in turn to justify broader international economic institutions. It is therefore on state measures that I concentrate in this article. However, when we consider the state as an institution of the international economy, we must consider it from the perspective of both insiders and outsiders, each of whom is subject to it, albeit in a different way.

To whom must these disparate institutions be justified? In the final analysis, they must be justifiable to those subject to them, persons and peoples as they are, in the world as it is; but in the first instance we consider their justification to idealized persons and peoples, modelled as free and equal, rational and reasonable. The purpose of this abstraction is to help to identify the reasons that apply to persons and peoples as they in fact are, the justifications they have reason to accept, and the ends they have reason to share.<sup>61</sup> I draw my conceptions of persons and peoples from Rawls's construction of the original position in domestic and international theory.<sup>62</sup> As moral persons, persons have two higher order interests, represented by their capacity for an effective sense of justice and their capacity to form, revise, and rationally pursue a conception of the good.<sup>63</sup> Peoples' interests are similarly modelled save that liberal peoples, lacking a comprehensive conception of the good, substitute their reasonable conception of political justice, as identified in the domestic original position.<sup>64</sup> As rational, they seek to advance these higher order interests, which leads to their valuing basic liberties (at the level of persons), self-determination (at the level of peoples), and social primary goods, as the all purpose means to advance their conceptions of

<sup>59</sup> *Ibid.*, at 308; Meckled-Garcia, 'On the Very Idea of Cosmopolitan Justice: Constructivism and International Agency', 16 *J Political Philosophy* (2008) 245.

<sup>60</sup> Freeman, *supra* note 15, at 306–308.

<sup>61</sup> Rawls, *supra* note 42, at 516–517.

<sup>62</sup> Rawls, *supra* note 15, at 30–35; Rawls, *supra* note 43, at 80–89; Rawls, *supra* note 42, at 522–554. Rawls himself does not transpose the concept of the person as free and equal from domestic to international theory, a move that has been heavily criticized: K.C. Tan, *Tolerance, Diversity, and Global Justice* (2000). This reflects Rawls's commitment to a theory that is political not metaphysical, and a view that the concept of the person as free and equal is not shared by non-liberal peoples, and specifically by Rawls's 'decent hierarchical societies'. My rejection of this move can be justified on any of three bases: first, that in so far as one can describe an internationally shared public reason, it necessarily includes the myriad human rights treaties that themselves express this concept of the person; secondly, that regardless of whether non-liberal peoples share this concept of the person, a theory of justice for liberal peoples cannot deny it; and thirdly, that the attraction of political liberalism as an account of justice is limited to contexts where this concept of the person is shared, and to the extent that it is not liberals must instead ground their judgements in comprehensive liberal world views.

<sup>63</sup> Rawls, *supra* note 42, at 525.

<sup>64</sup> Rawls, *supra* note 15, at 34.

justice and of the good.<sup>65</sup> As reasonable, they recognize the equal status of others, and are prepared to cooperate on fair terms provided others do likewise.<sup>66</sup> Rawls relies on the veil of ignorance, symmetry of persons, and the focus on the basic structure to build reasonableness into the original position; persons are modelled as rational while their situation enforces reasonableness.<sup>67</sup> However, given the move, noted above, away from symmetry and the unified basic structure, I cannot rely solely on structural constraints to model reasonableness, and must instead make it a more explicit element in the justification of principles. What does this require? While Rawls does not generally define reasonableness,<sup>68</sup> it implies at least the following: recognition of the equality of persons/peoples and willingness to cooperate on fair terms;<sup>69</sup> acceptance of the principle of fair reciprocity, ‘that all who cooperate should share in the benefits and burdens of cooperation in some appropriate fashion as judged by a suitable benchmark’;<sup>70</sup> acceptance of the burdens of judgment; and acceptance of generality and universality as formal constraints on the concept of right.<sup>71</sup> Where the concept of reasonableness appears below it is used in this minimal sense. Our idealized persons and peoples are not therefore wholly egoistic. Rather, they have ends deriving from their conception of justice and their status as reasonable that give them reason to accept, under appropriate circumstances, justifications deriving from the interests of others with whom they are linked through unavoidable coercive institutions.<sup>72</sup>

What form do those justifications take? The next three sections develop the justificatory framework sketched above into a typology of international coercion and its justification. Section 7 draws these together to derive the principles of justice in international economic regulation identified above.

#### 4 Direct Coercion, Moral Equality, and Self Determination

We first distinguish between being directly subject to an institution, such that the institution directly involves a person or makes them an intentional focus of its action; and being indirectly subject to an institution, such that the institution, while affecting the rights, duties, obligations, or opportunities of a person or determining the division of advantages from cooperation in which they participate, does not directly involve them or make them an intentional focus of its action.

This reflects the distinction between intending and foreseeing that grounds the doctrine of double effect (DDE). DDE is a controversial principle;<sup>73</sup> but I argue in this

<sup>65</sup> *Ibid.*, at 39–45; Rawls, *supra* note 42, at 526–528.

<sup>66</sup> Rawls, *supra* note 43, at 6–7.

<sup>67</sup> Rawls, *supra* note 42, at 528.

<sup>68</sup> Rawls, *supra* note 43, at 82.

<sup>69</sup> *Ibid.*, at 6–7.

<sup>70</sup> Rawls, *supra* note 42, at 528.

<sup>71</sup> Rawls, *supra* note 45, at 130–133; Rawls, *supra* note 43, at 85–86.

<sup>72</sup> Rawls, *supra* note 42, at 530, 532.

<sup>73</sup> For critical evaluations from deontological and consequentialist perspectives see McIntyre, ‘Doing Away with Double Effect’, 111 *Ethics* (2001) 219; J.F. Bennett, *The Act Itself* (1995), at 194–225. For a defence of the slightly reformulated doctrine on which I rely see Quinn, ‘Actions, Intentions, and Consequences: The Doctrine of Double Effect’, 18 *Phil & Public Affairs* (1989) 334.

section that its underlying rationale is relevant to the justification of international coercion, and that its relevance here is not limited to those who accept the principle in its conventional form.

DDE claims that the difference between foresight and intention may mean the difference between an action that is permitted and one that is prohibited. Specifically, as articulated by Warren Quinn:

[DDE] distinguishes between agency in which [foreseeable] harm comes to some victims, at least in part, from the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved (agency in which they figure as *intentional* objects) and harmful agency in which either nothing is in that way intended for the victims or what is so intended does not contribute to their harm.<sup>74</sup>

Agency of the first kind is viewed as particularly troubling; and the fact that the victim is an object of the agent's intention ('the agent's deliberately involving him'), and that the agent pursues its objective by a causal chain that runs through the victim ('in order to further his purpose precisely by way of their being so involved') explains this. But why is harmful agency of this type (which Quinn terms Direct Agency) particularly troubling? Quinn offers two arguments:

First, he suggests, Direct Agency shows 'a shocking failure of respect for the persons who are harmed'.<sup>75</sup> There is undoubtedly also a lack of respect in cases of Indirect Agency, where individuals are harmed as a side effect rather than as a means; but the disrespect in cases of Direct Agency is greater, because it involves the agent taking up a particular attitude towards his victims: '[h]e must treat them as if they were then and there *for his purposes*'. By contrast, where victims are harmed as a side effect, they 'are not viewed strategically at all and therefore not treated as for the agent's purposes rather than their own'.<sup>76</sup> Ideally, we should treat individuals not as mere means to an end but as ends in themselves. Indirect Agency, in so far as it harms individuals incidentally on the way to achieving some goal, does not treat them as ends and is to that extent objectionable; but at least Indirect Agency does not treat individuals as means, which is regarded as worse than bracketing their interests entirely.

Secondly, Quinn argues that the doctrine:

reflects a Kantian ideal of human community and interaction. Each person is treated, so far as possible, as existing only for purposes that he can share. ... People have a strong *prima facie* right not to be sacrificed in strategic roles over which they have no say. They have a right not to be pressed, in apparent violation of their prior rights, into the service of other people's purposes.<sup>77</sup>

The claim is thus that (i) persons should be treated as ends, not means, and to treat a person as a means is more objectionable even than discounting them entirely in pursuit of a goal; and (ii) persons should be treated as existing for purposes in which they can share, so that making use of a person instrumentally

<sup>74</sup> *Ibid.*, at 343.

<sup>75</sup> *Ibid.*, at 348.

<sup>76</sup> *Ibid.*

<sup>77</sup> Bennett, *supra* note 73, at 350–351.

for some collateral purpose is more objectionable than simply discounting that person's interests in pursuit of that same purpose.<sup>78</sup> As Kagan notes, in cases of Direct Agency 'I am using [a] person – and it might plausibly be claimed that [he] is not mine to use'.<sup>79</sup>

This idea that persons should not be used to serve the ends of others features prominently in liberal thinking on justice from Kant through Rawls to contemporary theorists. In Kant, it is reflected in the claim that persons should be treated not as means only, but as ends in themselves. Thus, discussing contract, an archetypal case of instrumental use by one of another, Kant argues that the contract right must derive from the will of the promisor. My deed is quintessentially my own, so that the right of another to its use must derive from me, and indirectly from my own ends. In claiming rights under contract, a promisee does not reduce the promisor to an instrument of his will; rather, he enforces their joint will, and their shared end, as expressed in their prior agreement. A right to make use of another that does not derive ultimately from them is incompatible with respect for their freedom.<sup>80</sup>

A similar concern motivates Rawls's account of socio-economic inequalities in domestic justice; but hypothetical consent replaces the prior act of will in linking the use of another to ends they have reason to share. The symmetrical situation of persons in the original position reflects the way each is directly subject to the institutions of the basic structure; as such, reflecting Quinn's argument, each must be able to share in the ends for which they are so subject, a requirement that for Rawls implies the difference principle.<sup>81</sup> This may seem difficult to reconcile with our daily practice, as citizens and market participants, of making use of our fellow citizens to meet our needs without asking them to share our ends, just as we similarly are used by them. However, for Rawls the liberal basic structure itself does not pursue any end except the freedom of those subject to it; and the difference principle, by maximizing the position of the least advantaged, ensures that the basic structure can be justified to each as advancing their freedom to pursue their own ends to the greatest extent compatible with the like freedom of others.<sup>82</sup> Thus, while as persons we may turn others to our own purposes, their use is ultimately referable to a coercive structure that serves ends

<sup>78</sup> My categorization of Quinn's arguments reflects the treatment in *ibid.*, at 220–221.

<sup>79</sup> S. Kagan, *The Limits of Morality* (1989), at 132. This recalls, in the distributive justice context, Nozick's challenge as to whether social product is really society's to distribute: R. Nozick, *Anarchy, State and Utopia* (1974), at 199.

<sup>80</sup> I. Kant, *Practical Philosophy* (1996), at 421–426. Kant's concern to reconcile the rights we have over one another with the freedom of each to define our own ends is also reflected in his discussion of 'Rights to Persons akin to Rights to Things': *ibid.*, at 426–432. For commentary on this point see Rauscher, 'Kant's Social and Political Philosophy', in Zalta (ed.), *Stanford Encyclopedia of Philosophy* (2012), available at: <http://plato.stanford.edu/archives/sum2012/entries/kant-social-political/>.

<sup>81</sup> Indeed, Rawls explicitly links the difference principle to Kant's injunction to treat persons as ends not means: Rawls, *supra* note 45, at 180. See also and more generally Rawls, *supra* note 42.

<sup>82</sup> The relationship between the way persons within a society may seem to treat one another as means only and the way the basic structure treats each as ends is reflected further in Rawls's discussion of background fairness: Rawls, *supra* note 10, at 265–271.

that are their own; and it is that structure, rather than our individual projects, that we are concerned to justify.<sup>83</sup>

The direct coercion of persons thus plays an important role in explaining the principles of justice within the state. However, while persons are necessarily directly subject to the basic structure of domestic societies, internationally much coercion is indirect. Outsiders may be affected by a people's institutions, but these impact on them as side effects rather than as means to the desired ends, and so may be justifiable even where the relevant end is not one that those affected have reason to share. This does not mean that such coercion does not require justification, but only that it may be in different terms. In particular, the principle of self-determination provides a basis for justifying much indirect international coercion.

Self-determination itself may be justified on various grounds:<sup>84</sup> Miller defends it as a means of enforcing social justice, protecting a national culture, and expressing individuals' interest in collective autonomy;<sup>85</sup> Beitz interprets arguments for self-determination as grounded in domestic social justice;<sup>86</sup> while for Rawls, self-determination expresses a fundamental interest of peoples 'to preserve their free political institutions and liberties and free culture of their civil society'.<sup>87</sup> Howsoever justified, in its conventional form self-determination asserts that communities are entitled to a sphere of autonomy, invoking 'the right of individuals to a public sphere, thus implying that individuals are entitled to establish institutions and manage their communal life in ways that reflect their communal values, traditions and history'.<sup>88</sup> It asserts that there is a sphere of communal activity that is uniquely the concern of the relevant community, within which the community is entitled to govern its own affairs with minimal reference to outsiders. Further, in its liberal form it asserts that all persons have an interest in self-determination.

This sphere of autonomy provides a basis for justifying indirect coercion that has no analogue in the domestic context.<sup>89</sup> Where a community acts to regulate its own affairs, this may indirectly affect the rights and duties of outsiders, or shape the distribution of benefits from transnational cooperation involving them. Indeed, in the context of economic interaction, such indirect coercion is almost inevitable. If self-determination is an end that all have reason to share then respect for a community's right to self-determination provides a basis for outsiders to accept the indirect coercion

<sup>83</sup> Julius uses the similar concept of 'framing', understood as acting with the intention of leading another to act in a way that advances one's interests, to reconstruct Rawls' argument domestically, and to suggest a 'sliding scale' approach globally: Julius, 'Basic Structure', *supra* note 46, at 328; Julius, 'Nagel's Atlas', at 190–192.

<sup>84</sup> A. Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (2007), at 27–29.

<sup>85</sup> Miller, *supra* note 14, at ch. 4.

<sup>86</sup> Beitz, *supra* note 13, at 92–109.

<sup>87</sup> Rawls, *supra* note 15, at 29, 35, 111.

<sup>88</sup> Y. Tamir, *Liberal Nationalism* (1993), at 69.

<sup>89</sup> A parallel is sometimes drawn between national self-determination and individual freedom. However, whereas persons can be regarded as constituting self-validating ends for themselves, not subject to external justification, the same cannot plausibly be claimed for collective institutions. While self-determination provides a ground for justifying institutions, freedom pre-empts the need for such justification with respect to the ends persons choose for themselves.



that flows from it. Such indirect coercion does not ‘use’ outsiders, in the problematic sense identified by Quinn; and so provided the underlying principle of self-determination is justified, those outsiders cannot argue that they are being made to serve ends that are not their own.

However, this justification cannot be extended to direct coercion. Self-determination asserts a right to self-government. It does not express any claim to govern others, and to the extent that a community purports to do so, respect for the moral equality of outsiders requires that their coercion be justified by reference to ends they have reason to share. Self-determination may be relevant to such justification where the direct coercion is specifically intended to protect that end; but in that case, the structure of the justification is different from that invoked in the case of indirect coercion. Rather than arguing that self-determination provides a basis for indirectly coercing outsiders in pursuit of ends that are not their own, it claims that self-determination is an end that all have reason to share, providing a justification for the specific direct coercion.

The distinction is that between respecting another people’s right to pursue a particular end and having reason to pursue that end oneself. If all peoples have reason to value self-determination, then we can justify direct coercion that pursues that end. But the ends that self-determining peoples in turn pursue are their own, and need not be shared by others. Others have reason to respect those ends, as a consequence of their valuing self-determination, and this provides a basis for justifying the resulting indirect coercion; but they have no reason themselves to share those ends, and so cannot be directly coerced in pursuit of them.

The upshot is that, internationally, indirect coercion may be justifiable in circumstances where direct coercion is not, even though the actual effects of indirect coercion are the same as those of direct coercion. In particular, indirect coercion may be justified by invoking the principle of self-determination, provided that principle is itself justified, and provided the negative effects of the indirect coercion are not such as to outweigh it.<sup>90</sup> Direct coercion, on the other hand, must be justified to those who are subject to it by reference to ends that they themselves have reason to share.

## 5 Inclusive Coercion and the Fruits of Social Cooperation

We next distinguish exclusive coercion, whose effect is to exclude those subject to it from participation in some productive cooperative practice, from inclusive coercion, which governs participation in such a practice and the distribution of the benefits therefrom.

<sup>90</sup> As with the classical doctrine of double effect, it is not suggested that indirect agency will always be justifiable. The negative effects of indirect agency may be such that it cannot be justified. The claim is only that it can be more easily justified, and by a different route, than direct agency. As discussed further below, self-determination cannot justify coercion the effect of which is to prevent outsiders from themselves enjoying self-determination or living minimally decent lives. It is an open question how far this limits states in the world as it is.

To show the significance of this distinction, it is necessary to rehearse briefly Rawls's treatment of distributive justice in the domestic context. Rawls characterizes the problem of distributive justice thus:

The problem of distributive justice in justice as fairness is always this: how are the institutions of the basic structure to be regulated as one unified scheme of institutions so that a fair, efficient and productive system of social cooperation can be maintained over time, from one generation to the next? Contrast this with the very different problem of how a given bundle of commodities is to be distributed, or allocated among various individuals whose particular needs, desires, and preferences are known to us, and who have not cooperated in any way to produce these commodities.<sup>91</sup>

Justice as fairness is fundamentally a theory of how the benefits of productive cooperation should be distributed amongst participants by the non-voluntary institutions that govern it. The difference principle is proposed as a basis on which we can justify that coercion to all participants.

In so far as society constitutes a scheme of cooperation, and that cooperation gives rise to benefits that would not otherwise exist, there is a need for some principle of distribution.<sup>92</sup> The selection of equality as a baseline reflects the equal status of persons, and the absence of any respectable alternative distributive principle. Rawls's arguments against alternative candidate principles do not require repetition here; suffice it to note that the parties in the original position are expected to reject any departure from equality unless it is to the benefit of the least-advantaged member of society.

In developing his argument, Rawls rejects distribution based on the contributions that individuals make, or based on their natural talents. In part, talents are rejected because they are regarded as 'morally arbitrary'. However, both contribution and talents are also rejected because they are regarded as in a more concrete sense irrelevant to the distribution of the benefits of cooperation. Rawls does not deny that individuals are entitled to their natural talents, and to the benefits that flow from them.<sup>93</sup> The benefits of social cooperation, however, flow not from the natural talents of any individual, but rather from cooperation between them.<sup>94</sup> They are a function of 'complementarities between talents', both in degree and kind, which make possible benefits that simply are not available to individuals. It is for this reason that we cannot regard any individual as having a prior claim on those benefits, and so cannot justify their distribution except on a basis that starts from equality, reflecting the moral equality of the participants.<sup>95</sup>

It has been suggested that international economic activity does not constitute cooperation of this kind, being better regarded as mere 'exchange'.<sup>96</sup> This position

<sup>91</sup> Rawls, *supra* note 43, at 50.

<sup>92</sup> Rawls, *supra* note 45, at 62.

<sup>93</sup> In this he does not invoke the luck egalitarian argument against natural talents, a point elided in Beitz's argument for the moral arbitrariness of natural resources: Beitz, *supra* note 13, at 138.

<sup>94</sup> Rawls, *supra* note 45, at 101.

<sup>95</sup> It is this claim that Nozick rejects when he argues that it is not for society to distribute goods that are in fact produced by individuals.

<sup>96</sup> Barry, 'Humanity and Justice in Global Perspective', in J.R. Pennock and J.W. Chapman (eds), *Nomos XXIV: Ethics, Economics and the Law* (1982), 219 at 232–233.

is difficult to sustain, however, once we recall that international trade, rather than simply representing the exchange of products and services between communities, facilitates the production of goods and services that would not be produced in its absence. We do not need to invoke the mutual dependencies of transnational production under globalization. The simplest two-product equilibrium models show the increase in overall output that results when peoples with different comparative advantages trade;<sup>97</sup> this is one of the few uncontested claims in international economics. Like domestic cooperation, this trade dividend is a product of the differences between the parties involved; no people could have achieved it without the cooperation of others. There may be differences between cooperation in the international economy and domestic cooperation, both in the intensity of interactions and the nature of the goods produced;<sup>98</sup> but it still raises the fundamental problem of justifying the distribution of social goods that would not exist without cooperation.<sup>99</sup>

Furthermore, it is institutions, rather than some pre-institutional entitlement, that determine how the benefits of cooperation are distributed. This is the essence of Rawls's anti-libertarian argument, and applies equally in international and domestic contexts. If we accept that different institutions would result in different distributions, then the mere fact that a particular distribution emerges under one system provides no basis for those so benefited to object to an alternative system under which they receive less. Entitlement arises only within an institutional system, and is a function of that system. This is why the justification of inclusive institutions is intimately connected to their distributive effects.<sup>100</sup>

It is the fact of productive cooperation that creates the need for a distributive principle; and the claim that benefits accrue from the differences between participants, rather than the participants' own resources, makes equality the appropriate baseline. However, the logic of this argument need not extend to non-participants. It is because participants make a contribution that they have a claim on the resulting social product, which must be reflected in the justification of the institutions that govern it. We

<sup>97</sup> Krugman, Obstfeld, and Melitz, *supra* note 3, at 64–65; D. Ray, *Development Economics* (1998), at 647–650.

<sup>98</sup> This is the central argument advanced in Sangiovanni, *supra* note 15.

<sup>99</sup> We find little recognition of this problem in Rawls' own work. While he rejects egalitarian principles of international distributive justice he makes little effort to put anything in their place. This reflects his assumption that most, if not all, significant social cooperation takes place within, rather than between, peoples: Rawls, *supra* note 15, at 39.

<sup>100</sup> Rawls' view that distributive justice is about how institutions distribute goods amongst participants, rather than the transfer of resources from one party to another, is difficult to reconcile with his arguments against international distributive justice. Those arguments seem more concerned with allocative than distributive justice, although this may simply reflect the positions against which he is arguing: *ibid.*, at 113–120. Pogge argues convincingly that Rawls, in so far as he adopts a distributive principle internationally, has implicitly endorsed the libertarian principle of entitlement: Pogge, 'An Egalitarian Law of Peoples', 23 *Phil & Public Affairs* (1994) 195, at 211–214. While Freeman challenges this view it is difficult to find textual support for any other principle, although some of Rawls's references to free trade can be read as endorsing an unstated moderate egalitarianism: Freeman, *supra* note 15, at 285–286, 310; Rawls, *supra* note 15, at 42–43.

cannot distinguish between the claims that various participants have on the benefits of their cooperation; but we can distinguish their claims from those of non-participants.

The justification of exclusion, therefore, need not refer to the benefits accruing to participants. Indeed, given the basis of participants' claims it would be surprising if outsiders could make similar demands. In particular, the mere fact that if they were admitted outsiders would be entitled to make distributive claims does not mean that their exclusion can only be justified in distributive terms. We may accept that whether someone is included or excluded is morally arbitrary; but in so far as distributive claims depend on participation and contribution, the mere fact of moral arbitrariness is insufficient to require egalitarian justification.<sup>101</sup> Exclusive coercion must be justified, but its justification need not mirror the justification of inclusive coercion.

What constraints apply to the justification of exclusive coercion? Like all coercion, it must be justified in terms that those subject to it can reasonably accept. Further, having regard to the moral equality of peoples and persons, the justification must accord with the principles of generality and reciprocity; in so far as it invokes the value of some end for one party, it must acknowledge its equal value for others.<sup>102</sup> Finally, building on the discussion in the previous section, in so far as it is direct, it must be justified in terms of ends those subject to it have reason to share.

What does exclusive coercion look like in the international context? Without pre-judging whether it may also be inclusive, the most obvious example is border coercion, and specifically restrictive immigration policies.<sup>103</sup> Refusing a migrant entry excludes them from the scheme of productive social cooperation within a state; further, it may significantly restrict their opportunities and leave them significantly less advantaged than participants who benefit from that scheme. In short, the effect of this coercion is often significantly anti-egalitarian.

However, this does not mean that the coercion cannot be justified in terms that the frustrated migrant can reasonably accept. As with the direct/indirect distinction, the principle of self-determination is relevant here. If we assume that persons and peoples value self-determination, and recognize its equal value for others, then this can provide a justification for border controls that migrants can reasonably accept.<sup>104</sup> However, it will not suffice in all cases. Where, for example, the effect of exclusive coercion is to prevent the frustrated migrant living a minimally decent life, the excluding people's interest in self-determination cannot provide a sufficient justification. Similarly, if the effect of exclusive coercion is to prevent another people from itself enjoying self-determination (for example, because it is prevented from accessing essential resources) then it would be unreasonable for the excluding people to justify its coercion on this basis.

<sup>101</sup> On the limits of the moral arbitrariness argument see Sangiovanni, 'Global Justice and the Moral Arbitrariness of Birth', 94 *Monist* (2011) 571.

<sup>102</sup> On generality see Rawls, *supra* note 45, at 130–132. On reciprocity see Rawls, *supra* note 10, at xliv–xlix, 16; Rawls, *supra* note 43, at 6–7; Rawls, *supra* note 42, at 528–530.

<sup>103</sup> On the coercive nature of border controls see Abizadeh, *supra* note 52; Miller, *supra* note 52.

<sup>104</sup> That some border control is necessary to facilitate self-determination is accepted by most theorists who see it as a value: Miller, *supra* note 14, at 128–130; Rawls, *supra* note 15, at 8–9, 38–39; Walzer, *supra* note 14, at 42–63.

What is important about these justifications, and their limits, is that they are sufficientarian rather than egalitarian. There are, we may assume, minimum prerequisites for a person or people to enjoy the good of self-determination. If a person lacks basic resources or is subject to gross human rights violations, they cannot enjoy self-determination. Similarly, if a people lacks the resources to organize itself internally and to provide for the basic needs of its members, it cannot be said to enjoy self-determination. To the extent that exclusive coercion leaves persons or peoples in these circumstances, it cannot be justified by reference to self-determination.<sup>105</sup> However, above these minimum thresholds it is irrelevant that the excluding people is significantly more prosperous than the migrant's home community.<sup>106</sup> Their exclusion is justified by an end that both enjoy and both have reason to share. Notwithstanding the adverse distributive consequences, the frustrated migrant can reasonably accept this justification, even if it leaves him worse off than he might otherwise be, and than those who are excluding him already are.

## 6 External Coercion and the Interpersonal Test

A final aspect of international coercion that is relevant to its justification is the identity of the authors of that coercion, and those on whose behalf it is adopted.

The ideal liberal state can be understood as one wherein individuals become the authors of their own coercion. The justificatory apparatus of the original position models individuals' choices in respect of matters that they cannot in fact choose, with a view to reconciling the non-voluntary institutions to which they are subject with their status as free and equal. For the same reason democracy and political rights are valued as giving persons a stake in their political institutions. At each level, we assume that such self-authored coercion can be more readily reconciled with equal respect than coercion whose subjects have no stake therein. We thus have reason to be more concerned about coercion by others than we have about coercion in which the subject is also in some sense the author.

There may be some aspects of international coercion that can properly be regarded as self-authored in this sense, but in most cases we are concerned with coercion exercised by one political community against members of another.<sup>107</sup> A useful device for capturing this concern is Cohen's interpersonal test:

This tests how robust a policy argument is by subjecting it to variation with respect to who is speaking and/or who is listening when the argument is presented. The test asks whether

<sup>105</sup> This point may be limited to circumstances of moderate scarcity. Under absolute scarcity, where resources are insufficient for all peoples to be well ordered, it may be that the self-determination justification would apply, provided the excluding people took all possible steps to vindicate the rights of those excluded, having regard to their own limited resources.

<sup>106</sup> I have assumed for the purposes of this article that the relevant minimum is that at which Rawls locates the duty of assistance. For a different view see Tasioulas, 'Global Justice Without End?', 36 *Metaphilosophy* (2005) 3. Regardless of the exact threshold, the key point is that it is an absolute, rather than relative, standard.

<sup>107</sup> Valentini's concept of interactional coercion goes some way to capturing this idea: Valentini, *supra* note 20, at 130.

the argument could serve as a justification of a mooted policy when uttered by any member of a society to any other member. ... If, because of who is presenting it, and/or to whom it is presented, the argument cannot serve as a justification of the policy, then whether or not it passes as such under other dialogical conditions, it fails (tout court) to provide a comprehensive justification of the policy.<sup>108</sup>

Cohen proposes the test as a general constraint, but it has particular relevance in the international context, where we are significantly concerned with coercion of the members of one community by another. In these circumstances, the interpersonal test prompts us to consider not only whether that coercion can be justified in terms that the subjects could reasonably be expected to accept; but also whether they could reasonably be expected to accept the proposed justification when advanced *by the authors of that coercion*.

In what circumstances might a justification fail the interpersonal test? Cohen highlights cases where a justification invokes a factual premise for which the speaker is responsible, and the speaker cannot in turn justify their making that premise true. Consider, for example, the political economy arguments commonly invoked to justify safeguards; it is claimed that, in their absence, greater protectionist pressures would result in even more restricted market access.<sup>109</sup> To the extent that this is true, it provides good reason for outsiders to accept such measures. However, if we consider this argument as articulated by the protectionist state, we recognize the factual premise (i.e., the risk of protectionism) as attributable to the people making the argument, in so far as it is its own citizens who pose this risk, and it is not obviously justified in making this premise true. It may constitute a good argument for accepting safeguards, but it cannot constitute a *justification* for imposing them.

A second way a justification may fail the interpersonal test is where, while a measure is desirable in itself, its author is not the appropriate person to adopt it. Again, the principle of self-determination is relevant. In its standard form, that principle would in most cases preclude a measure adopted by one people from being justified by the benefits it confers on another, not because the effects of the measure are objectionable, but because of the relative positions of those adopting and accepting it. For example, the threat by a more developed people to restrict market access for less developed peoples unless they open their markets on a reciprocal basis cannot be justified on the grounds that such market opening would benefit the less developed peoples.<sup>110</sup> This may in fact be true, but it is not an argument that it is open to the more advantaged people to make.

<sup>108</sup> G.A. Cohen, *Rescuing Justice and Equality* (2008), at 42. For a critique of the interpersonal test see Lippert-Rasmussen, 'Inequality, Incentives and the Interpersonal Test', 21 *Ratio* (2008) 421. Elements of the interpersonal test are developed in more detail in Cohen, 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?', 58 *Royal Institute of Philosophy Supplements* (2006) 113.

<sup>109</sup> Crowley, 'Why Are Safeguards Needed in a Trade Agreement', in K. Bagwell, G.A. Bermann, and P.C. Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (2010), at 379.

<sup>110</sup> Arguments in this form are not uncommon, and were particularly visible in the context of recent negotiations between the EU and the ACP Countries: P. Mandelson, *The Third Man: Life at the Heart of New Labour* (2010), at 400.

The interpersonal test constitutes a justificatory safeguard rather than an additional substantive requirement.<sup>111</sup> It forces us to step outside the impersonal abstraction of hypothetical consent to consider how the justifications generated by that abstraction translate to the world as it is, and to agents and institutions as they actually are. It addresses directly the point made earlier about the plurality of internationally coercive institutions, and the plural relations in which individuals stand to those institutions. While original position reasoning can never be the whole of justification, which must always be translated from thought experiment to concrete practice, insider/outsider cases are more prone than closed situations to elide important considerations in this transition. The interpersonal test serves as a useful check on our reasoning in such cases.

## 7 From Coercion to Equality in Global Commerce

In the previous sections, I identified three aspects of international coercion that are relevant to its justification. First, I argued that the effects of indirect coercion can, within limits, be justified by reference to the principle of self-determination, whereas direct coercion must be justified to those who are subject to it in terms of ends that they themselves have reason to share. Secondly, I argued that exclusive coercion may be justified in sufficientarian terms, whereas inclusive coercion requires justification in distributive terms. Finally, given that international coercion is rarely self-authored, I highlighted the need to examine its justification from the perspectives of both its objects and its authors.

How do we move from this typology, through the Coercion Approach, to the two principles of international economic regulation identified at the beginning of this essay?

Recall, first, the definition of ETMs as measures that pursue their goals specifically through regulating international economic activity. They will include such measures as tariffs and quotas, trade-distorting subsidies, and many non-discriminatory regulations that pursue their goals through their effects on foreign producers or consumers. However, the essence of the distinction between ETMs and DEMs lies in the means by which measures of each type pursue their goals, rather than the formal status of the measures or the nature of the goals pursued. Measures are understood in terms of (i) the specific actions that they require or prohibit; (ii) the goals that they pursue; and (iii) the anticipated causal chain linking the two. For example, a tariff on imported widgets might be understood in terms of the specific action it requires, namely the payment of a duty on imports of widgets; the goals that it pursues, for example the protection of livelihoods in the domestic widget sector; and the proposed causal chain linking the two, namely an increase in the price of imported widgets leading to increased market share for domestic widgets and increased prices in the domestic market to the benefit of the domestic widget industry. As described, this would clearly constitute an ETM, as there is no plausible account of the goals it pursues or the means by which it pursues

<sup>111</sup> In Cohen's approach, the interpersonal test provides a mechanism for applying the discrete value of community, which forms no part of my argument.

them that does not involve the regulation of international economic activity. However, it is an ETM because of the goal it pursues, and the means by which it pursues it, not because it falls within a pre-defined category of ‘tariff’ or ‘trade barrier’. While tariffs and quotas will often constitute ETMs, they may not always do so; and many other forms of regulation, including apparently domestic and non-discriminatory measures, will constitute ETMs under this definition.<sup>112</sup>

As so defined, ETMs necessarily constitute direct coercion of outsiders. They pursue their goals specifically through the regulation of international economic activity and, by extension, by involving and affecting the interests of outsiders. ETMs logically presuppose the existence of international trade; in the absence of such trade, they would be meaningless. Further, it is only by changing patterns of international activity that they pursue their objectives. In so far as international economic activity necessarily involves the activities and interests of outsiders, ETMs address those outsiders as intentional objects. They need not intentionally harm them; but they are intentionally and instrumentally used in the context of ETMs, in a way that they are not by DEMs.

To illustrate, consider again the example of a tariff on widget imports, intended to promote an importer’s domestic widget industry. Such a tariff achieves its objective by raising the price of imported products, thereby reducing the profits available to a foreign importer, reducing his sales volume, or shutting him out of the market entirely. It is not open to the people imposing the tariff to claim that the effects this has on importers are merely unfortunate side effects of a policy intended to improve the position of domestic industry, or to claim that it did not intend to damage their interests; the effect on their interests is the causal mechanism whereby the tariff pursues its objective. The causal path runs from the tariff through the effects on importers’ interests to the benefits for domestic industry.

Further, the coercion effected by ETMs is, in general, inclusive. As argued above, international economic activity constitutes productive cooperation, raising the problem of distributive justice. In so far as ETMs regulate international economic activity, they necessarily govern participation therein and the distribution of benefits therefrom. Thus, the effect of the widget tariff in our example is to divert opportunities from outsiders to insiders, conferring greater benefits on domestic widget producers or imposing costs on foreigners. The tariff, and ETMs generally, is distributive in the sense discussed above.<sup>113</sup>

<sup>112</sup> In determining whether particular measures constitute ETMs or DEMs, I adopt Dworkin’s method of constructive interpretation: see generally R. Dworkin, *Law’s Empire* (1998), at 52–68. We are concerned to assess the justice of institutions adopted by peoples. To the extent that goals and means are part of that assessment, constructive interpretation provides a way to attribute these to institutions, as products of peoples as collective agents, without reducing to the plans of particular persons. Dworkin’s justification criterion must, however, be modified to consider the interpretation that is best from the perspective of the relevant people, which in turn suggests having regard to the values of that people’s public culture: *ibid.*, at 107. Alternative approaches that might be adopted to make this judgment include examining the subjective preferences of legislators and aggregating the preferences of citizens; however, problems of attribution and aggregation lead me to prefer Dworkin’s approach.

<sup>113</sup> A more direct argument for viewing tariffs as inclusive coercion, albeit less relevant in practice, would focus on their terms of trade effects: Krugman, Obstfeld, and Melitz, *supra* note 3, at 255–256. Cf. Bagwell and Staiger, *supra* note 3, at 13–41.



A contrary view might claim that many ETMs constitute exclusive coercion, in so far as they exclude foreign products from the domestic market, preventing productive cooperation in the relevant area. In a limited number of cases, this may indeed be the case.<sup>114</sup> However, in most cases we can assume that the effects of ETMs are inclusive for one of two reasons. First, the international economy cannot be simply divided into products or indeed industries. Each area of the economy affects many others.<sup>115</sup> Excluding imports or exports of a particular product does not prevent economic cooperation. It merely changes its profile so that cooperation is concentrated in some areas rather than others, with consequent distributive effects.<sup>116</sup> With the exception of an entirely closed economy, restrictions in one area should therefore be regarded as inclusive. Secondly, the effects of ETMs cannot be entirely understood at the point of application; their objects and effects are usually dynamic rather than static.<sup>117</sup> Thus, the purpose of the widget tariff in the above example might be to increase the scale and in consequence the efficiency of the domestic industry, with a view to competing more effectively in international markets. By temporarily limiting cooperation, its goal is to shift the distribution of benefits from the wider scheme of cooperation in favour of the relevant people.

Contrast this with the position of DEMs, which can be defined as measures that pursue their goals through regulating domestic economic activity, or through regulating economic activity generally. These do not specifically regulate international economic activity, and as such cannot be said to directly coerce outsiders in the way that ETMs do. They may have effects on international economic activity, but these are side effects of their primary purpose, which is to regulate domestic economic activity.

Given these characteristics of ETMs, and bearing in mind the interpersonal test, we next ask how such measures can be justified. What reasons can a people adopting such measures offer to those persons and peoples that it thereby coerces, reasons that they can themselves be expected to share, and that justify the distributive effects of these measures? In the Rawlsian constructivist scheme equal freedom, expressed at the individual level in terms of individual liberties and social primary goods, including economic advantage, and at the collective level in terms of the self-determination of peoples, exhausts the ends that persons and peoples necessarily share. It is thus in terms of that equal freedom that ETMs must be justified in the first instance. However, as outlined above, self-determination can play only a limited role in justifying direct inclusive coercion. We must therefore look instead to the egalitarian considerations evoked by equal access to social primary goods, and in particular economic advantage. ETMs must be justified, if they can be justified at all, in terms of the effects they have on the distribution of economic advantage. However, such justifications will be available only where the interests invoked are those of the globally less advantaged. Principles of reciprocity, generality, and moral equality combine to preclude the justification of ETMs adopted in order to benefit globally more advantaged individuals

<sup>114</sup> Space limitations preclude fuller discussion of this point here.

<sup>115</sup> Krugman, Obstfeld, and Melitz, *supra* note 3, at 142–146.

<sup>116</sup> *Ibid.*, at 146–157.

<sup>117</sup> Ray, *supra* note 97, at 650–700; Krugman, Obstfeld, and Melitz, *supra* note 3, at 286–298, 302–309.

at the expense of those less advantaged; while those same principles preclude those more advantaged individuals from objecting to ETMs adopted by others in pursuits of globally egalitarian goals. The Coercion Approach thus leads us directly to the EGC Principle:

**Principle of Equality in Global Commerce:** ETMs are just if and only if they pursue global equality of individual opportunity, through improving the position of less advantaged persons, subject to a reasonable principle of self-determination.

If equal freedom exhausts the ends that persons and peoples necessarily share, it also exhausts the grounds on which unilateral ETMs may be justified. Whereas a given person or people may be firmly committed to other ends, for example animal rights, they have no basis for directly coercing others in pursuit of them. Others may share that commitment, which they may jointly pursue through international cooperation; but it can provide no basis for coercing outsiders, and to do so is incompatible with their status as free and equal moral persons.<sup>118</sup> Therefore, in the absence of clear evidence that the relevant end is in fact widely shared by the relevant international community, it is difficult to see how such ends could justify ETMs.

The constraints on justifying ETMs do not, however, apply to DEMs. In so far as these do not directly coerce outsiders, they do not require justification in terms of ends outsiders themselves have reason to share. The principle of self-determination provides a basis on which the effects of DEMs on outsiders can be justified, provided they respect outsiders' equal right to self-determination. Therefore, in considering DEMs we can pursue our collective goals without concern for the effects they have on outsiders, subject to an appropriate self-determination side constraint such as Rawls' Duty of Assistance.<sup>119</sup> The Duty of Assistance, with its negative corollary, imposes constraints on peoples to consider the implications of DEMs for outsiders, but only where the effect of the relevant measure would be to impair basic rights or to deprive another people of the resources it requires to become or remain well ordered. This may preclude a

<sup>118</sup> This does not imply that states may not adopt regulations to reduce animal cruelty, but only that they may not use ETMs for this purpose. However, in many cases regulations that on their face appear unrelated to international economic activity may in fact constitute ETMs where the specific good they are intended to promote will be affected only through the effects of the relevant measure on international economic activity. For an alternative view see Howse and Langille, 'The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values', 37 *Yale J Int'l L* (2012) 367. Cross-border pollution and climate change are more difficult as these represent cases where outsiders may directly harm members of a community. The prevention of physical harm to members of a community resulting from the actions of outsiders may provide a legitimate basis for coercing outsiders. However, these arguments can often be better expressed in egalitarian or self-determination terms. This has the benefit of bringing into view the equal claim of outsiders to be protected from polluting activity by insiders, and potential historic claims of climate injustice. Human rights are another case where ETMs might be justifiable when directed against repressive regimes; again, however, these often reduce to self-determination or egalitarian claims. Their added significance is that they represent a case where ETMs might be adopted by one state for the benefit of persons in another state, pushing the limits of the interpersonal test.

<sup>119</sup> In so far as the indirect coercion of outsiders implicit in DEMs is justified under the principle of self-determination, the Duty of Assistance can be regarded as a necessary element of that justification which vindicates the equal right of outsiders to self-determination as well ordered peoples.

people from adopting certain measures or (more commonly) require that measures be adapted to minimize the adverse effects on the relevant outsiders. This is not a general obligation, however, and applies only below the threshold where the effect of the measure would be such as to engage the Duty of Assistance.

The consequence of this argument, then, is that ETMs will be just only to the extent that they comply with the EGC Principle; while DEMs require justification only at the margin where they impact on the basic rights or self-determination of others. These two claims combine to provide a comprehensive account of the justice of state action in the international economic sphere.

## 8 EGC and the Justice of NPRPPMs

The Coercion Approach, when complemented by a more nuanced account of international coercion, thus implies the EGC Principle and its DEM corollary. It remains to consider how these principles might illuminate the problems and practices of international economic regulation, and in particular of world trade law. In this section, I consider non-product related processes and production methods (NPRPPMs) as an example of a problem that can be analysed under EGC.

NPRPPMs are regulations adopted by a state, whether as border measures or domestic regulations, which treat products differently depending on the methods used in their production, even though these methods have no effect on the physical constitution of the relevant product. The most prominent NPRPPMs have been environmental regulations that restrict the sale of products produced by methods deemed to have unacceptable environmental costs. The US regulations considered in the *Tuna/Dolphin* and *Shrimp/Turtle* disputes are clear examples. Two GATT Panels in *Tuna/Dolphin* concluded that such measures constituted quantitative restrictions prohibited under Article XI of the GATT, that they could not constitute domestic regulations under Article III, and furthermore that they could not benefit from the general exemptions in Article XX.<sup>120</sup> In *Shrimp/Turtle* the AB took a different approach.<sup>121</sup> No argument was made in that case that NPRPPMs could constitute domestic regulations under Article III. Rather, the AB assumed that the measures constituted quantitative restrictions, but found that they could in principle benefit from the general exemptions, albeit that in the particular circumstances of the initial complaint they did not meet the requirements of Article XX.

The approach to NPRPPMs in these cases has faced significant criticism. Critics argue that there is no textual basis for excluding such measures from either Article III or Article XX, that as a matter of treaty law the relevant question is whether differences in production methods affect the likeness or competitive relationship between products, and that as a matter of economic principle there is no basis for treating

<sup>120</sup> GATT Panel Report, *US – Restrictions on Imports of Tuna*, 3 Sept. 1991 (GATT/DS21); GATT Panel Report, *US – Restrictions on Imports of Tuna*, 16 June 1994 (GATT/DS29).

<sup>121</sup> WTO Appellate Body Report, *US – Import Prohibition on Certain Shrimp and Shrimp Products*, 12 Oct. 1998 and Art. 21.5 Appellate Body Report, 22 Oct. 2001 (DS58/WTO).

NPRPPMs differently from other measures.<sup>122</sup> It is not my purpose here to review this criticism, but only to show how EGC understands NPRPPMs, and how it would suggest resolving the issues in these cases.

NPRPPMs will generally constitute ETMs. To the extent that they concern themselves with the means whereby imported products are produced, they are concerned directly to regulate international economic activity in particular. Their concern for foreign production is not a side effect of their concern for domestic trade or consumption; rather, the latter are regarded as a means of affecting the former.<sup>123</sup> Further, their effect is inclusive, affecting the distribution of costs and benefits accruing from international trade in the relevant products. They do not simply prevent cooperation in a relevant sphere; rather, they dictate the terms on which that cooperation will proceed.

As such, whereas regulations on tuna or shrimp imports that are concerned with the safety, or indeed the cosmetic appearance, of products can be justified directly under the principle of self-determination, NPRPPMs must be justified to those subject to them, namely foreign producers, in terms of ends they themselves have reason to share. While domestic regulations that are genuinely domestically oriented are, on this view, not the proper concern of those foreign producers they affect, NPRPPMs clearly are. This does not depend on any contestable claim that environmental practices cannot be a proper concern for an importing people. Rather, it emphasizes that to the extent that they are such a concern, justification is owed to affected producers in exporting states in a way that it is not for purely domestic regulations. Further, EGC claims that, *ceteris paribus*, an acceptable justification must invoke global equality of individual opportunity, subject to a reasonable principle of self-determination. The fact that an importing people values the lives of dolphins or sea-turtles cannot alone provide a sufficient justification.

However, EGC also recognizes that where ends other than equal freedom are in fact shared amongst relevant communities, this may provide a basis for action in pursuit of those ends. This raises a contingent factual question about the extent to which those coerced do in fact share the relevant end. In a legalized context such as the WTO, we might find such evidence in bilateral and multilateral treaties to which the relevant states are parties, or in soft-law instruments such as declarations and resolutions of competent international bodies. Whatever evidence is chosen, the key point is that the inquiry seeks an internationally shared standard against which to judge the relevant measures, whereas in the case of purely domestic measures, the appropriate standard is the values of the regulating community.

How can this argument inform the interpretation of the relevant WTO provisions? It suggests that purely domestic measures, of the kind regulated under Articles I and III, are properly judged by domestic standards, provided they are genuinely domestic in orientation. A non-discrimination principle, complemented by a modified 'aims and

<sup>122</sup> Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality', 27 *Yale J Int'LL* (2002) 59; Howse and Regan, 'The Product/Process Distinction – an Illusory Basis for Disciplining "Unilateralism" in Trade Policy', 11 *EJIL* (2000) 249. More generally see C.R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (2011).

<sup>123</sup> There may be marginal cases where this does not hold: Howse and Regan, *supra* note 122, at 279.

effects' test of the kind arguably adopted by the AB in *Asbestos* serves to ensure that domestic measures do not covertly address international economic activity.<sup>124</sup> On the other hand, measures that pursue their goals through their effects on trade, whether conventionally 'protectionist' measures or NPRPPMs, will violate Articles I, III, and/or XI, and will be justifiable only where they pursue some shared goal, whether the *a priori* shared end of equal freedom or some contingently shared goal as evidenced by the practices of the relevant communities. A number of GATT provisions can be understood as addressing measures in pursuit of equal freedom, most obviously Article XVIII (Governmental Assistance for Economic Development), Part IV (Trade and Development), and the Enabling Clause. On the other hand Article XX, particularly if complemented in future by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, can be understood as addressing measures potentially justified in pursuit of contingently shared goals including in particular environmental goals. The chapeau to Article XX and the nuanced application of that provision in the AB decisions in *Shrimp/Turtle* can be understood as expressing the terms on which states can adopt ETMs in pursuit of goals that all have in fact identified as worth pursuing.

EGC thus tells a plausible story about the function of the relevant provisions, and the reasons for being particularly concerned about ETMs. It explains why, despite textual ambiguity, NPRPPMs should be regarded as in general prohibited under Articles I, III, and/or XI, and how the various exception provisions should be interpreted in their application to such measures. It thereby brings valuable conceptual clarity to this area, making sense of principles that have resisted purely economic explanation.

The critical and explanatory power of EGC derives from its distinctions amongst categories of measure, and its close attention to the coercive relations between persons and institutions, and the justifications those relations evoke. Further, its explanatory power is not limited to the specific case of NPRPPMs. Thus, EGC provides a novel account of the problem of protectionism more generally, seeing it not in terms of inefficiency, but rather as a case where peoples adopt measures that pursue their goals through their effects on outsiders, without being justifiable to those outsiders. It accounts for the various Special and Differential Treatment provisions in the WTO covered agreements as expressing, albeit imperfectly, the claim of less developed countries to adopt ETMs in pursuit of equal freedom, understood in terms of their own economic development. It explains the problematic field of trade remedies disciplines as policing the justificatory boundary between egalitarian concerns of equal freedom and sufficientarian considerations of self-determination. A full treatment of these issues within the EGC framework constitutes a fully-fledged research agenda, and is beyond the scope of this article. It therefore suffices to note, in conclusion, that in being able to address these questions at all EGC represents a significant advance on existing accounts of distributive justice in international economic regulation.

<sup>124</sup> Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test', 32 *Int'l Lawyer* (1998) 619; Porges and Trachtman, 'Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects', 37 *J World Trade* (2003) 783.