A "FAIR" TRADE LAW OF NATIONS OR A "FAIR" GLOBAL LAW OF ECONOMIC RELATIONS?

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This essay examines the dispute between advocates of free trade and those who support fair trade (the "fair" trade debate). This debate is explored in the context of globalization. The author argues that globalization has created, and continues to create, a new global identity and global social relationships that make "justice" both possible and necessary. Such relationships have fundamental implications for the nature of global social policy, particularly international law and international trade law. The author asserts that the fair trade debate presupposes two independent contending foes: "me" versus "you," and "mine" versus "theirs." He argues, however, that globalization has shifted the dialogue to one of "us" and "ours." Consequently, shared institutions are employed to determine what is best for this shared social space and disputing parties contribute to the creation and definition of this social space. The softwood lumber dispute is used to illustrate the author's argument in that though parties to the dispute pursue their own private agendas and public mandates, they are also creating and defining a new trans-border community. As such, the dispute does not concern ensuring trade law is "fair" for the United States or "fair" for Canada; rather, the aim is a fair settlement for an emerging trans-boundary community.

Cet article porte sur le différend entre avocats du libre-échange et ceux qui sont en faveur du commerce équitable (le débat sur le commerce « équitable »). Ce débat est examiné dans un contexte de mondialisation. L'auteur fait valoir que la mondialisation a créé, et continue de créer, une nouvelle entité mondiale et des relations sociales globales qui rendent la « justice » à la fois possible et nécessaire. De telles relations ont des implications fondamentales pour la nature de la politique sociale mondiale, surtout le droit international et le droit du commerce international. L'auteur affirme que le débat sur le commerce équitable présuppose l'existence de deux ennemis indépendants qui s'affrontent : « moi » contre « vous » et « le mien » contre « le leur ». Il fait valoir cependant que la mondialisation a modifié le dialogue vers « nous » et « le nôtre ». Par conséquent, les institutions partagées cherchent à déterminer ce qui convient le mieux pour l'espace social partagé, et les parties au différend contribuent à la création et définition de cet espace social. Le différend sur le bois d'œuvre illustre l'argument de l'auteur en ce sens que même si les parties à un différend continuent de suivre leurs propres idées et mandats publics, elles créent et définissent aussi une nouvelle communauté transfrontalière. À ce titre, le différend ne consiste pas à veiller à ce que le commerce soit « équitable » pour les États-Unis ou « équitable » pour le Canada, mais plutôt à arriver à une entente équitable pour la communauté transfrontalière émergente.

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I. INTRODUCTION

Our conference focuses on a particular international trade dispute — actually a series of interrelated cases — known as the Softwood Lumber dispute, and the institutions we have created to manage such disputes: international economic law, the World Trade Organization (WTO), the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*,[1] and national courts.[2] In particular, we are being asked to consider how this dispute reflects, and contributes to, the larger debate between those who advocate for free trade, and those who advocate for fair trade.[3] In this essay, I propose to offer the largest possible context I can in which to examine this dispute and this question, and what they both mean for the evolution of these institutions: that context is globalization.

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1 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

2 See Chi Carmody, "Softwood Lumber Dispute (2001-2006)" (2006) 100 Am. J. Int'l L. 664. The WTO cases considered are, in order: *United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* (2002), WTO Doc.WT/DS236/R (Panel Report); *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (2004), WTO Doc. WT/DS257/AB/R (Appellate Body Report); *United States—Final Dumping Determination on Softwood Lumber from Canada* (2004), WTO Doc. DS264/AB/R (Appellate Body Report); *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada* (2004), WT/DS277/R (Panel Report), all decisions available online: WTO <http://docsonline.wto.org/gen_search/asp>. The *NAFTA* cases considered are, in order: *Re Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, USA-CDA-2002-1904-02 (DOC), Decision of the Panel (17 July 2003), Decision of the Panel Respecting Remand Redetermination (5 March 2004), Decision of the Panel Following Remand (9 June 2005), Decision of the Panel Respecting Motions to Dismiss (5 January 2007) (Ch. 19 Panel); *Re Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, USA-CDA-2002-1904-03 (DOC), Decision of the Panel (13 August 2003), Decision of the Panel on Remand (7 June 2004), Decision of the Panel on Second Remand (1 December 2004), Decision of the Panel on Third Remand (23 May 2005), Decision of the Panel on the Fourth Remand Determination (5 October 2005), Decision of the Panel on the Fifth Remand Determination (17 March 2006) (Ch. 19 Panel); *Re Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Material Injury Determination*, USA-CDA-2002-1904-07 (ITC), Decision of the Panel (5 September 2003), Remand Decision of the Panel (19 April 2004), Second Remand Decision of the Panel (31 August 2004) (Ch. 19 Panel); *Re Certain Softwood Lumber Products from Canada*, ECC-2004-1904-01USA, Opinion and Order of the Extraordinary Challenge Committee (10 August 2005) (ECC), all decisions available online: NAFTA Secretariat <http:www.nafta-sec-alena.org>.

3 For a recent comprehensive overview of the notions of "fair" versus "free" trade in the context of the Softwood Lumber dispute, see Gilbert Gagné, "Policy Diversity, State Autonomy, and the U.S. — Canada Softwood Lumber Dispute: Philosophical and Normative Aspects" (2007) 41 J. World Trade 699.

But first, a word about the question I pose in the title of this essay. Behind the debates over free trade versus fair trade, is the general assumption that the object of the inquiry is the fairness of any one state's position vis-à-vis another state. This is certainly a legitimate and important inquiry. However, I think this debate also reflects a deeper underlying assumption about the nature of trade law, economic relations, and global social relations generally. This approach has been called the "society of states" model of international relations, and it has been the dominant contemporary account of the social basis of international law for over three hundred years.[4] In this view, international law exists to order a community in which states are the members.

This is where globalization comes in. The phenomenon of globalization has been widely studied in recent years, and I will say more about it shortly. Let me just suggest at the outset that as a social process in which space is essentially eliminated as a factor in social relations,[5] globalization is altering the nature of global social relations. By lifting relationships out of the strictly territorial and placing them into the "global" or meta-territorial, globalization is subjectively altering our interpersonal experience, and shifting regulatory processes away from the nation state. Both these changes are contributing towards the emergence of something that could be called a global society, and perhaps even a global community.

The significance of globalization lies in its transformation and extension of social interactions beyond national boundaries. Thus, globalization itself is creating the kinds of social relationships at the global level that make justice both possible and necessary. This shift has fundamental implications for the nature of global social policy, particularly international law and international trade law, which brings me back to our subject today. The "fair" trade debate presupposes two independent contending foes: a "me" versus a "you," a "mine" versus a "theirs." If what I am suggesting about globalization is correct, then we are moving beyond such terms, and towards a realm of "us" and "ours." When viewed in this light, the Softwood Lumber dispute in fact demonstrates how we employ shared institutions to help us determine what is best for our shared social space, and, in the process, contribute to the creation and definition of that space.

II. BEYOND THE SOCIETY OF STATES

The dominant contemporary account of the social basis of international law has been the "society of states" model.[6] In this view, to the extent that international law constructs an ordered social space (a claim contested since Hobbes if not before),[7] it is a social space in

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4 For an overview of the society of states model of international relations, superseding the earlier Realist paradigm, see Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979) at 67-123.

5 On globalization as interdependence without differentiation of time and space, see e.g. Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990) at 64; David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Oxford: Basil Blackwell, 1989) at 240.

6 For an overview of the society of states model of international relations, superseding earlier Realist paradigm, see generally Beitz, *supra* note 4 at 67-123

7 In terms of equating international law with the law of nature, which is to say, no law at all but self preservation, see e.g. Thomas Hobbes, *Leviathan*, ed. by Richard Tuck (Cambridge: Cambridge University Press, 1996) at 244.

which states are the subjects. In other words, international law exists to order a community in which states are the members.

This view of international law as regulating a society of states has two important normative implications, both flowing from the model's core analogy of states to persons. First, it asserts a strong view of state autonomy: like persons in domestic society, states in international society are viewed as autonomous sources of moral ends, immune from external interference.[8] Second, there is no principle of distributive justice to which states are subject; they are presumed to be entitled to the resources they control.[9] Taken together, this approach is called the "morality of states" model of international justice.[10]

We can see the doctrinal impact of this approach in many key areas. For example, the core doctrines of non-intervention, self-determination, and state responsibility treat the state as the primary locus of autonomy, self-realization, and rights, and are thus framed largely in view of the interests and needs of territorial states. Even international harms to individuals have been traditionally understood within a framework of harm to a state's rights. In all cases, the analogy between states and persons controls, and it is the state's liberty and rights which are defined as primary subjects of the law.[11]

Pressure to shift away from this model began in earnest in the mid-20th century, through human rights, international economic law, and the emergence of international civil society, all of which render the society of states model increasingly deficient both empirically and normatively. Criticisms of current international law and institutions point to the changing role of the state, the emergence of new actors and networks, the lack of democratic participation and legitimacy, the lack of distributive justice, and the lack of basic welfare rights and security for all individuals.[12] All this points to the limits of the model, but what is to replace it?

III. GLOBALIZATION, GLOBAL SOCIETY, AND GLOBAL COMMUNITY

The dominant contemporary project reconfiguring international law at the theoretical level emphasizes the fundamental moral status of individual persons, drawing on the work of

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8 Beitz, *supra* note 4 at 65-66.

9 Beitz has analogized this to 19th century liberalism at the international level: "a belief in the liberty of individual agents, with an indifference to the distributive outcomes of their economic interaction" (*ibid.* at 66).

10 *Ibid.*

11 To cite just one example of the doctrinal pre-eminence of this view, the society of states model underlies the entire approach to international law taken in the *Restatement (Third) of the Foreign Relations Law of the United States* (1987). The *Restatement* asserts that "[i]nternational law is the law of the international community of states" (at 16) and states are the "principal persons in international law" (at 70). All other entities with any personality (international organizations and natural persons themselves) derive their personhood, and the extent of their legal rights in international law, from grants flowing from the primary persons: states.

12 See *Symposium: Globalization and Governance: The Prospects for Democracy* (2003) 10 Ind. J. Global Legal Stud.

Immanuel Kant and others, and goes by the name "cosmopolitanism."[13] Such efforts, however, run into a variety of theoretical problems, including important communitarian objections to the possibility of global justice, on the ground that justice is a virtue *within* political communities, not *between* them.[14] This objection fits well with the society of states model, freezes us in a bi-polar "fair" trade debate, and helps keep the justice conversation out of international law.

Globalization is, however, changing the nature of this debate. By effectively eliminating both time and space as factors in social interaction,[15] globalization is changing the nature of global social relations, and creating the basis for both society and community at the global level. Viewed from the perspective of political theory, globalization is lifting relationships out of the strictly territorial into the global or meta-territorial.[16] The political and legal significance of this change is immediate and fundamental: as the space in which we conduct our social relations changes, our manner of regulating those relations must change as well. To be effective, regulatory decisions must increasingly involve parties at the meta-state level. Globalization thus requires a fundamental re-examination of social regulation and governance at the global level, leading to a system in which states may still have a pre-eminent role, but not the only role.[17]

For the purposes of this essay, it is necessary to understand how globalization is changing the nature of social relations at the national and at the "global" levels, and paving the way for global society, global community, and for global justice, even on communitarian terms.[18] This change has a fundamental impact on the possibilities open to international law, and on the way we understand and manage disputes such as the Softwood Lumber dispute.

A. GLOBALIZATION AND THE CONDITIONS OF JUSTICE

First, as a threshold matter, it is important to understand how globalization is getting us to "society" before we consider how it might be getting us to "community." In order to do this in a preliminary fashion, I will use John Rawls's concept of the circumstances of justice, and apply it to globalization.

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13 For a survey of contemporary cosmopolitanism, see generally Charles R. Beitz, "Cosmopolitan Liberalism and the States System" in Chris Brown, ed., *Political Restructuring in Europe: Ethical Perspectives* (New York: Routledge, 1994) 123.

14 For general communitarian objections to global justice, see generally David Miller, *On Nationality* (Oxford: Clarendon Press, 1995); Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

15 For a comprehensive overview from a legal perspective of globalization as a phenomenon, emphasizing changes in the perception of time and space, see Heba Shams, "Law in the Context of 'Globalisation': A Framework of Analysis" (2001) 35 Int'l Lawyer 1589.

16 *Ibid.*; for a review of the evolution of meta-state institutions, see generally David Held *et al.*, *Global Transformations:Politics, Exonomics and Culture* (Stanford: Stanford University Press, 1999).

17 See e.g. Anne Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); Manuel Castells, *The Rise of the Network Society*, The Information Age: Economy, Society and Culture, vol. 1 (Cambridge, Mass.: Blackwell, 1996).

18 My treatment here draws on a fuller exposition of these issues in my working paper on globalization, see Frank J. Garcia, "Globalization, Global Community, and the Possibility of Global Justice" (2005) Boston College Law School Research Paper No. 56, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=661564>.

Globalization is bringing about at the global level the conditions that make justice both possible and necessary at the domestic level, conditions which Rawls calls the "circumstances of justice."[19] Rawls lists five circumstances: a moderate scarcity of resources, a shared geographical territory, a capacity to help or harm each other, and, on a subjective level, people are both non-altruistic, and hold conflicting claims.[20] These circumstances make it rational to cooperate for our mutual self-interest, and necessitate the elaboration of principles of justice, and the creation of institutions through which to allocate the fruits of such cooperation.

The key point is that globalization is bringing about the same circumstances of justice at the global level which Rawls described at the domestic level. To begin with, there is, of course, the same basic scarcity of resources at the global level. Through globalization, people are increasingly competing for the same resources on a global scale in a shared territory: our planet. That they are non-altruistic and assert conflicting claims over these resources does not need to be argued because it is a truism.

Because of globalization, we also now have the capacity to help and to harm each other at the global level as well, to an unprecedented degree. Through globalization, we increasingly find that we have the capacity to respond effectively to the needs and concerns of others beyond our boundaries, through the transnational mobilization of information, power, capital, or public opinion.[21] Because of globalization, we also increasingly find that our state's policies, and our own political and consumer choices, are influencing the lives of others in direct and dramatic ways. The globalization of markets means that in many cases, we are directly profiting from the economic and social conditions in other parts of the world. Thus, we have the capacity to harm each other as well, thereby fulfilling the basic conditions outlined by Rawls.

Together, these global circumstances of justice offer one kind of argument for a global society, making justice both possible and necessary at the global level. A second, more ambitious argument is that globalization is going further than creating merely global society, and is creating global community, at least to a limited degree.

B. GLOBALIZATION AND COMMUNITY

For communitarians, concepts of justice depend upon the prior existence of social relationships, which create obligations of justice by defining the principles, subjects, and

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19 For an overview of circumstances of justice, see John Rawls, *A Theory of Justice* (Cambridge: Harvard Belknap, 1971) at 126-30.

20 *Ibid.*

21 Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999) at 9. Even David Miller, a communitarian critic of global justice, acknowledges that the "prosaic observation that the rich countries now have the technical capacity to transfer large quantities of resources to the poorer countries" makes a *prima facie* case that such transfers have become morally obligatory: see David Miller "The Limits of Cosmopolitan Justice" in David R. Mapel & Terry Nardin, eds., *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998) 164 at 165-67.

objects of justice.[22] In other words, society is more than the field of application for justice: it creates justice itself. No society means no justice.

To be more precise, communitarians speak of the absence of *community* at the global level as something deeper than mere society. Communitarians maintain that although we may share a common humanity and mutual interests, we do not share obligations of justice unless we already share certain kinds of social relations, usually identified with the nation, and generally expressed in terms of shared traditions, practices, and understandings.[23] Put another way, communitarians might acknowledge the existence of some kind of global society, consisting of associations for mutual self- interest, but as something distinguishable from true "community," which requires "something more," and justice is reserved for the latter.

That something more is generally expressed as a sense of common purpose, or solidarity.[24] For Michael Walzer, it is a society's shared life that determines justice, and not the other way around. Justice therefore requires a prior community, in which all relevant distributive decisions take place according to shared traditions, practices, and understandings of justice. In Walzer's words, "[j]ustice is rooted in the distinct understandings of places, honors, jobs, things of all sorts, that constitute a shared way of life."[25]

This is where globalization, once again, comes in. Essentially, my argument is that globalization itself is contributing to the emergence of such shared traditions, practices, and understandings at the global level, making global justice possible even for communitarians.

One basis for global community is the globalization of knowledge. Through globalization, we know so much more, immediately and intimately, about the plight of people in other parts of the world. One specific type of shared knowledge important to globalization is the growing recognition of the risks we share as human beings on this planet, and our shared interest in addressing those risks. In this sense, globalization is creating what has been called a "community of risk."[26]

Such knowledge satisfies a basic requirement for community: that we have the capacity to know one another's needs, concerns, and preferences. This kind of knowledge is the basis for creating solidarity, that leap of the moral imagination which says that your concerns are my concerns.

This community of knowledge and risk is also increasingly becoming a community of shared traditions, practices, and understandings; which grow, both spontaneously and

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22 See e.g. Miller, *supra* note 14; Walzer, *supra* note 14. The communitarian critique of cosmopolitan global justice is only part of its larger critique of liberal justice, and liberalism generally. For a summary of this critique, see Allen E. Buchanan, "Assessing the Communitarian Critique of Liberalism" (1989) 99 Ethics 852.

23 Communitarian theorists differ on the precise nature of these necessary relations, and in general this aspect of communitarianism is under-theorized. See Buchanan, *ibid.* at 867.

24 See *ibid.* at 856-57, where Buchanan argues that community requires more than association, it also requires shared common ends.

25 See Walzer, *supra* note 14 at 314.

26 Dirk Messner, "World Society — Structures and Trends" in Paul M. Kennedy, Dirk Messner & Franz Nuscheler, eds., *Global Trends & Global Governance* (London: Pluto Press, 2002) 22 at 24.

institutionally, out of our perception of shared needs and interests, our capacity to help and to harm, and our awareness of each other's plight. In short, these perceptions stem from our understanding of globalization as interlocking our fates.

C. GLOBALIZATION, MARKETS, AND META-STATE INSTITUTIONS

This essay focuses on two particular aspects of contemporary globalization: markets and the meta-state institutions that regulate them. These are particularly relevant to a discussion of the implications of the Softwood Lumber dispute, and particularly indicative of global shared practices and understandings and the emergence of global community, at least in their respective realms.

1. MARKET SOCIETY AS A SET OF SHARED PRACTICES

To the extent that globalization is creating a global market society, this in itself is a shared practice or set of practices, albeit quite complex, that contributes to a community of interests. The advanced capitalist form of market society practiced by the most developed countries is not, of course, implemented in identical ways in all market societies.[27] Nevertheless, a market society has certain attributes: the need for bureaucratic regulation, recognition of private property, and functioning civil courts, to name a few, which, by virtue of their significant spill-over effects, contribute to the formation of shared interests among participants.[28] Not the least of these is an interest in developing institutions that supplement and mitigate the rigors of capitalism, compensating the "losers" through some form of wealth transfer.

2. SHARED UNDERSTANDING OF THE NEED FOR META-STATE INSTITUTIONS

Perhaps the strongest force for, and evidence of, an emerging global limited community involves our shared need to look to institutions beyond the state in order to frame an adequate social response to many of the problems and challenges we face. In other words, the need for increased global governance is itself a shared understanding, and the reality of global governance by its nature constitutes a shared practice. The prominent role of meta-state institutions in the Softwood Lumber dispute is a particularly apt illustration of this trend.

Globalization's many aspects are together pushing us towards increased cooperation at the meta-state level. According to Rawls's account of the circumstances of justice, our response to these circumstances is to enter into systems of social cooperation for mutual advantage. Through this cooperation we create the "basic structure," the institutions we employ to allocate resources and opportunities, and which thereby directly affect our life prospects.[29] By leading us to create new institutions and shift responsibility for many social allocations

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27 Indeed, markets have been touted on instrumental grounds precisely because they can facilitate efficient transfers among people who do *not* share conceptions of the good: see Jon Mandle, "Globalization and Justice" (2000) 570 The Annals of the American Academy Political and Social Science 126 at 130.

28 See e.g. Don Slater & Fran Tonkiss, *Market Society* (Cambridge: Polity Press, 2001) at 92-116: the authors survey a range of institutions which markets require and in which they are embedded.

29 Rawls, *supra* note 19.

to the meta-state level, globalization is creating a global basic structure.[30] Social allocation today is increasingly conducted through a complex partnership, consisting of states and their constituent units, international organizations, and non-state actors through mechanisms such as the market, all of which are regulated or established through international law.[31] Through globalization we find ourselves in precisely the sort of cooperative venture for mutual advantage that is the subject of justice, and allocating the fruits of social cooperation (trade opportunities, for example) through meta-state institutions such as the WTO, the *NAFTA*, and the European Union (EU).

This move to the meta-state level could be seen as merely tending towards the creation of global society, which, in the communitarian view, does not entail global community. However, I would like to suggest three ways in which this shift towards the meta-state level has profound communitarian consequences.

First, this shift indicates that the communitarian assumption of bounded distributive communities no longer holds at the nation-state level, and thus necessitates a shift to a higher or more inclusive level of community in which all relevant distributive decisions are taken — the global level. Walzer describes the political community of justice as one "capable of arranging [its] own patterns of division and exchange, justly or unjustly."[32] When a community is no longer capable of fixing its own patterns of division and exchange, it is no longer sufficient to analyze the justice of that community soley in reference to itself.[33] In other words, unable to fix its own distributions entirely itself, it is not capable of delivering its own justice. We must therefore look to that further level of institutions affecting that community's distributions, and consider its justice.

This process is precisely the effect of globalization.[34] From a distributive perspective, globalization is revealing domestic society to be an incomplete community, incapable of securing the overall well-being of its members by itself, leading to a higher level of

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30 For an interesting analysis of the issues presented by the possibility of a global basic structure, see Simon Caney, "The Global Basis Structure: Its Nature and Moral Relevance" (Paper presented at the Chicago Annual Meeting of the American Political Science Association, delivered at the Palmer House Hilton, Chicago, 2 September 2004), online: all academic <http://www.allacademic.com/meta/p58933_index.html>.

31 The many players and institutions involved in the Softwood Lumber dispute — trade associations, national courts, regional institutions, and multi-lateral institutions — dramatically illustrate this point. All of these institutions, both within their individual jurisdictions and in some sense together, were involved in allocative decision making concerning fair or unfair lumber practices in the North American lumber industry. See cases cited in *supra* note 2; see also Jones, *supra* note 21 at 9: "The institutions and quasi-formal arrangements affecting persons life prospects throughout the world are increasingly international ones." Note that here the author cites as examples international financial institutions, multi-national corporations, the G-8, and the WTO.

32 *Supra* note 14 at 31.

33 This argument also resembles the point raised earlier about the tenability of Rawls's assumption of self-contained national distributive communities that he provides in his analysis of domestic justice. See Rawls, *supra* note 19.

34 See Alberto Tita, "Globalization: A New Political and Economic Space Requiring Supranational Governance" (1998) Journal of World Trade 47 at 49, where the author argues that globalization leads to internal pressures on states "traditional macroeconomic [policy tools] … are becoming less and less capable of being determined at a national level by democratically elected governments."

community as part of group efforts to secure well-being.[35] This is exactly the pattern we see in the Softwood Lumber dispute, as participants are forced by evolving international legal obligations and the changing nature of the market itself to seek definitive resolution of this issue beyond the national courts level, and instead at the level of meta-state institutions. In a similar sense, the many anti-globalization protests focused on multilateral institutions indicates the growing awareness that these institutions are increasingly constraining allocative decision making at the national level, as well as themselves engaging in positive distributive functions, through the allocation of trade benefits, critical currencies, and development aid, for example.

Second, the fact that globalization is forcing us to look to international institutions such as the *NAFTA* and the WTO for global policy solutions has a community-building effect as well. The role played by common institutions sharing a common language in building polities out of disparate peoples has long been recognized in domestic politics as "nation-building."[36] For example, the United States reinforces its shared identity as a nation when it looks to the federal level for resource allocations and policy responses, as in the case of natural disasters or security crises. Similarly, the tendency in North America and Europe to look at least in part to meta-state institutions for responses to global social and environmental problems reflects a shared understanding that such institutions play an increasingly prominent role in formulating or channeling social policy decisions and orchestrating social welfare responses, and that few states can act without them on any important social issue.[37] Even the many recent anti-globalization protests, by turning up on the doorsteps of the same international institutions again and again, emphasize the emergence of this shared understanding.

Third, this shift to meta-state institutions represents the emergence of a shared understanding with respect to regulating global social conflict. In domestic communities, one answer to the problem of conflict is to change the level of analysis to "understandings about understandings," or "shared public cultures."[38] When responding to the fact of social conflict, particularly conflict over what are purportedly "shared" understandings, communitarians shift the level of analysis to a secondary set of practices and understandings, a system for managing conflicts over understandings and their application.[39]

This tendency suggests that communitarians are actually linking justice to a kind of shared institutional culture, rather than a true community of shared primary beliefs.[40] If so, this shift

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35 See also Robert P. George, "Natural Law and International Order" in Mapel & Nardin, *supra* note 21 at 54.

36 Will Kymlicka, "Territorial Boundaries: A Liberal Egalitarian Perspective" in David Miller & Sohail Hashmi, eds., *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 2001) 249 at 256.

37 The public nature of the Softwood Lumber dispute has contributed to a broader shared understanding of how regional trade and integration have linked U.S. and Canadian social policy and even politics. See Gagné, *supra* note 3 at 700-701.

38 Walzer, *supra* note 14 at 313, suggests that disagreements over the meaning of social goods, cases in which a given social understanding is controversial, trigger a sort of "second order" set of understandings concerning how disputes are to expressed, managed, and adjudicated.

39 *Ibid.*

40 Perhaps what communitarians are identifying when they speak of the common good is really a commitment to this second-order set of understandings about disputes: the rules about rules, the public culture.

to meta-state institutions has profound consequences for global justice. In the development of new forms of meta-state institutional governance, a new form of shared understanding, or rules about rules, at the global level is also being developed. When global social relations involve conflicts between incomplete national communities of justice over allocative decisions, globalization bumps us up a level, invoking a new shared understanding that the meta-state level is the place to resolve this conflict, according to new understandings regarding appropriate distributions at the global level. Insofar as these global practices deepen and extend, we see stronger shared traditions and practices of global social policy formation and allocative decision making.

Disputes like the Softwood Lumber dispute and the *NAFTA* panel process generally, can thus be seen as forming part of the meta-state level of shared understandings concerning conflicting global claims. Both the dispute and the institutional processes that managed it are part of an emerging community involving Canada and the U.S. If so, then the dispute is in some important sense an *internal* one, which by its very nature reinforces and is constitutive of community.

IV. IMPLICATIONS OF GLOBALIZATION FOR INTERNATIONAL LAW AND FOR THE FAIR TRADE/FREE TRADE DEBATE

I am not suggesting that at this point in our history global social relations *in toto* form the sort of fully-established political community that communitarians point to in domestic social relations as their exemplar. In my view, however, globalization is creating a third alternative: global society understood as containing "limited" degrees of community in specific functional areas.[41] If we disaggregate the notion of community, it is possible to see that globalization is creating certain *elements* of community at the global level, such as knowledge of inter-connectedness and the circumstances of the other, as well as creating true community in certain *areas* of global social relations, such as humanitarian relief and transboundary economic relations by establishing that degree of social bond necessary to support justice. This means that global society taken as a whole may not rise in all cases to the level of community that communitarians prefer, but has *enough* elements of community, and contains enough *pockets* of community, to support an inquiry into justice in at least in some areas of global social relations.

A. INTERNATIONAL LAW OR GLOBAL PUBLIC LAW?

If we look at international law as not the law of nations, but as the law of an emerging global community, then we see two fundamental gaps: the absence of effective mechanisms for global wealth transfers at the scale necessary to support the global basic package, and the

[41] Moreover, the trend is towards increasing community. See Bruno Simma & Andreas L. Paulus, "The 'International Community': Facing the Challenge of Globalization" (1998) 9 Eur. J. Int'l L. 266. The authors list Rwanda and Somalia as examples of a weak solidarity which can suggest that the concept of global community is either half-full, or half-empty. They decide it is half-full, asking "after all, who would have cared — and how — a hundred years ago" (at 276).

absence of effective political representation or voice at the global level.[42] How to arrive at this, and in the process complete the transformation from international law to global public law, will require a profound re-examination of core international legal doctrines and institutions such as boundaries, sovereignty, legitimacy, citizenship, and the territorial control of resources.

As a starting point, it is necessary to re-think the role of territorial political boundaries. Territorial boundaries now serve as the frame on which we hang various concepts of distributive justice, such as citizenship and the territorial control of resources, that profoundly influence the lives of all affected individuals. By privileging citizens over non-citizens in terms of access to basic rights, the political boundary of citizenship dramatically affects our quality of life on the basis of one of the most arbitrary aspects of our natural condition: the place we are born. In the words of one commentator, "citizenship in western liberal democracies is the modern equivalent of feudal privilege — an inherited status that greatly enhances one's life chances."[43]

Citizenship thus illustrates how the current society of states model of international law permits territorial boundaries to function at the global level as one of the main obstacles to the delivery of basic rights. If global community is possible, and as I have argued, emerging, then the discretion given states to use boundaries as primary determinants of global justice must be reconsidered.[44] A model for the international delivery of the basic package — a concept of effective global citizenship if you will — in which the accident of birthplace, or the vagaries of naturalization law, do not fundamentally affect each person's life prospects, needs to be developed.

In order to do so, global public law needs to tackle distributive issues both between and within states. The society of states model placed the question of justice outside the realm of international law. Globalization means that the problem of inequality is a central problem of global social relations, in the same way it is a central problem of justice at the domestic level.[45]

What should the role of the state be in a global public order? Global community demands a new view of this role, in which the state no longer holds a monopoly on the delivery of

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42 Jay R. Mandle and Louis Ferleger refer to this as the need for institutional mechanisms for compensation and control, two fundamental elements of the regulation of global market society: see Jay R. Mandle & Louis Ferleger, "Preface" (2000) 570 The Annals of the American Academy of Political and Social Science 8 at 16.

43 Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders" in Will Kymlicka, ed., *The Rights of Minority Cultures* (New York: Oxford University Press, 1995) 33.

44 As things stand, there is a pernicious anomaly: free movement of capital but no free movement of persons, which could be seen as a deliberate attempt to keep labour costs from equalizing. A global economic space demands something approaching the free movement of persons, subject to some notion of carrying capacity or assimilation rate. The very idea conjures images of unsupportable mass migrations, which are not inevitable, nor are they the necessary result of changes in border policies. The primary reason for such shifts would be economic inequality, a subject that poses a central challenge to global public law.

45 For a discussion arguing for a central role for inequality in contemporary international economic relations, see generally Frank J. Garcia, *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade* (Ardsley, N.Y.: Transnational, 2003).

basic public goods, but must nevertheless play a central role in such delivery, including that of the guarantor of last resort.[46] However, this does not mean that global institutions must be modeled on domestic institution, a sort of world state. Rather, in normative terms, global institutions must be justifiable according to the same principles applied in domestic political theory, whatever their shape. Their legitimacy can no longer rest entirely on their creation by states along duly authorized treaty lines, but will require some increased form of public participation, reflecting normative principles of political theory in the same way that domestic institutions must.[47]

B. THE ROLE OF INTERNATIONAL ECONOMIC LAW

As a field, international economic law needs to move beyond the question of if or whether international economic law is a form of global governance and ask instead how and to what end are we governing? It is no accident that international economic law is *the* site for addressing questions of institutional design, legitimacy, and distributive justice. This is so because regulatory globalization is central to globalization as a whole, and because it is in economic relations that the strongest international organizations today are found.

1. GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC INSTITUTIONS

If international economic law is a core part of the global basic structure for delivering economic justice, it needs to be analyzed, negotiated, and structured with reference to appropriate normative principles. Is international economic law facilitating the kinds of wealth transfers that global justice might require? Is it allocating social goods in a normatively defensible manner? Meeting this challenge has several implications.

First, normative principles that are appropriate for application at the global level in a context of pluralism need to be identified. There is increasing interest within political theory on the question of global justice, at both the private party/transaction level of justice, and at the level of public or structural principles of justice.[48]

To complement this, there needs to be more work within the legal academy applying principles of justice to economic law institutions. There is an increasing interest in the normative aspects of the WTO.[49] The basic work on trade and justice should be extended to other international economic institutions such as the World Bank and the International Monetary Fund, in order to develop a comprehensive theory of justice in international economic relations.[50]

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46 Indeed, Manuel Castells has argued that globalization is bringing about a new form of nation-state, the "network state," whose principle duty is to successfully manage on our behalf this web of networks. See Manuel Castells, *The Power of Identity*, The Information Age: Economy, Society and Culture, vol. 2 (Malden, Mass.: Blackwell, 1997) at 243-73.

47 See Lea Brilmayer, *Justifying International Acts* (Ithaca: Cornell University Press, 1989).

48 See e.g. Frank J. Garcia, "Why Trade Law Needs a Theory of Justice" (2006) 100 American Society of International Law Proceedings 214 at 379, nn. 6-9.

49 *Ibid.* at nn. 10-12.

50 See e.g. Frank J. Garcia, "Global Justice and the Bretton Woods Institutions" (2007) 10 J. Int'l. Econ. L. 461; Robert Hockett, "From 'Mission Creep' to Gestalt-Switch: Justice, Finance, the IFIs, and Globalization's Intended Beneficiaries" (2005) 37 Geo. Wash. Int'l L. Rev. 167 at 179-81.

2. THE EFFECTIVENESS AND LEGITIMACY OF GLOBAL ECONOMIC INSTITUTIONS

This converges with the need for increased attention to the legitimacy and effectiveness aspects of international economic law institutions. As lawyers, we have a special responsibility when it comes to such multilateral institutions, which are created to deliver basic public goods independent of nationality, even if still often administered through national units. The central questions in the Softwood Lumber dispute about how these various levels of institutional process should best interact with, defer to, or supersede each other, illustrate the kinds of questions we as lawyers are best equipped to address, particularly insofar as we understand them in the largest possible context.

I have argued in this essay that this context is globalization, and within this context such questions should be seen as the working out of meta-state governance systems for an emerging global community. If this is so, then our political tradition requires that the legitimacy of such institutions no longer rest entirely on their creation by states along duly authorized treaty lines, but depend upon some increased form of public participation, reflecting normative principles of political theory in the same way that domestic institutions must.[51] This is part of the constitutionalism debate currently carried out in international economic law.[52]

V. CONCLUSION

To summarize, I have argued that in global relations today we see, both inter-subjectively and at the regulatory level, the constitutive elements of a limited global community emerging. Globalization itself is a process of creating a new global identity, consisting of shared understandings, practices, and traditions capable of supporting obligations of justice. Members of this new global space are increasingly aware of each other's needs and circumstances, increasingly capable of effectively addressing these needs, and increasingly contributing to these circumstances in the first place. They find themselves involved in the same global market society, and together these members look to the same organizations, especially those at the meta-state level, to provide regulatory approaches to addressing problems of global social policy. These organizations, in addressing such needs, are involved in allocating the benefits and burdens of social cooperation, such as rights, opportunities, privileges, membership, resources, and activities that have been traditionally understood in the domestic sphere to make justice both relevant and necessary.

All of this is not to argue that global community has emerged fully formed, with the richness and force of the national community. However, taken together, these developments allow us to begin to speak in important ways of limited degrees of community, or "spheres

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51 See Brilmayer, *supra* note 47.

52 On the constitutional and law-making function of trade institutions, and their shortcomings in this regard, see Ernst-Ulrich Petersmann, "Constitutionalism and International Organizations" (1997) 17 Nw. J. Int'l L. & Bus. 398; but see Jeffrey L. Dunoff, "Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law" (2006) 17 Eur. J. Int'l L. 647, where it is argued that Petersmann's account is descriptively inaccurate and normatively undesirable.

of justice"[53] to borrow Walzer's phrase, with respect to different issues, institutions, or sets of social relations within the global social space. Thus we can speak of limited global community in the economic sphere, as embracing that level of community necessary to support relations of justice, even if it does not manifest that level of community necessary to speak of global community in the fullest communitarian sense.

Returning to the Softwood Lumber dispute, a globalization perspective allows us to see that the many private and institutional participants in the dispute, by pursuing their private agendas and public mandates, have been doing far more than resolving a particular trade dispute.[54] They have been participating in, creating, and defining a new trans-border community, and elaborating the meta-state institutions that both mediate, and help constitute, such a community. In this sense, the dispute is not about ensuring that trade law is "fair" for the U.S. or for Canada, but that it is fair as the public law of an emerging transboundary community.

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53 *Supra* note 14.

54 See *supra* note 1.

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