

Legitimacy and the International Trade Regime

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Issues of global justice and trade are usually dealt with in terms of what a just system of trade is like and what the distribution of income, opportunities, or welfare ought to be. But the question I address and explore is what a legitimate way of making decisions in the international

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realm is. This issue has arisen acutely in the case of the formation of the World Trade Organization (WTO) and other international institutions. In particular, many have complained that developed countries engaged in hard bargaining with developing countries in the conferences that led up to the formation of the WTO, thereby engaging in unfair and undemocratic methods for reaching agreements between developing and developed societies.¹ They have complained that these methods have damaged the legitimacy of the WTO.² I want to try to understand the nature of this complaint by attempting to elaborate and defend some basic principles of fair negotiation.

In this Article, I will lay out a conception of legitimacy in international institutions. The basic framework from which I proceed is morally cosmopolitan and democratic. Therefore, the conception of legitimacy will include an egalitarian method for making decisions. The main purpose here will be to explore the shape of this egalitarian method and what it would mean for the case of interstate negotiation. This has proven to be a hard nut to crack so the results of this paper will be exploratory and will not issue in a complete account, but rather in a set of observations and partial principles about what a just method of decision might be. The account is somewhat fragmentary and it does not give much in the way of guidance as to how to implement the principles in actual rules for collective decision-making.

First, I lay out a conception of legitimacy for the international system that is broadly cosmopolitan and democratic, though it attempts to start with the idea of state consent. The basic project here is to explore how the process of state consent, which is after all the most important source of legal legitimacy in the international system, must be qualified and modified in order for it to satisfy some basic democratic and cosmopolitan principles. I defend the centrality of state consent and consensualism generally against various majoritarian approaches to international collective decision-making. I then set forth some principles for evaluating the fairness of individual agreement making. From there I attempt to see how far this idea can be extended to interstate negotiation. I point out the insights and limits of this extension. I then discuss the formation of the WTO, highlighting some of the difficulties of legitimacy and then articulate some basic power apportionment principles for international negotiation. This account is still incomplete and does not yet shed light on how to apply

1. See Thomas Christiano, *The Legitimacy of International Institutions*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 380, 386 (Andrei Marmor ed., 2012).

2. Amrita Narlikar, *Law and Legitimacy: The World Trade Organization*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 294, 294–302 (David Armstrong ed., 2009).

the principles so as to construct collective decision-making mechanisms for international treaty making.

I. LEGITIMACY

We need a preliminary account of legitimacy in the international system to work with. The account of legitimacy that plays a central role in international law is the idea that states are obligated to comply with international law in the normal case only when they have consented to it.³ There are, of course, important exceptions to this having to do with customary international law and general principles of international law. States inherit their obligations under customary international law, though they can change it in concert with other states. Moreover, there are some elements of customary international law that cannot be changed such as *jus cogens* norms.⁴ Nevertheless, state consent plays the main role in the formation of international law and it is seen as the main ground of legitimacy.

II. THE IDEA OF LEGITIMACY

I will say that a process of decision-making is legitimate, morally speaking, when it can impose content-independent moral duties to comply with the decisions on those who are directed by the decisions. Content-independent duties are duties an agent acquires by virtue of the source of the duties and not the content of the duties. I have a duty to meet you for lunch on a certain day at a certain place, which I have promised to do, because I promised to do it and not because I have any prior duty to have lunch with you. To be sure, it is possible to have a content-independent duty to do what I have promised in addition to a content-dependent duty. The content independence of the duty does not preclude there being other content-dependent duties to do the thing that I promised.

In the case of a legitimate decision-making process, such as a process of treaty making, the legitimacy of the process implies that the decisions create content-independent duties in the subjects of the decision-making.⁵

3. Christiano, *supra* note 1, at 381.

4. *Id.*

5. Thomas Christiano, *Climate Change and State Consent*, in *CLIMATE CHANGE AND JUSTICE* 17 (Jeremy Moss ed., 2015).

They have duties to do what they are directed to do because they have been directed by the decision-making process.

The basis of the demand for legitimate authority arises when common action among parties is necessary and when there is disagreement among the parties as to how to structure the common action. The common action may be morally necessary as when some group must pursue morally mandatory aims. It may be morally needed because individuals within the group are imposing costs on others and the group needs some way to determine the extent to which this is permissible and the extent to which the imposition of costs ought to be prevented or limited, or when compensation is owed the victims from the benefits gained by the perpetrators. Alternatively, common action may be necessary to pursue the interests of the members, but there are controversial issues about how to divide the costs and benefits of the common action. The common action for public purposes will often involve imposition of costs and burdens on persons.

There are a number of important kinds of controversy that legitimate institutions are supposed to resolve. They need to resolve disagreement on the best interpretation of morally mandatory aims, such as the alleviation of severe global poverty.⁶ They need to decide how to achieve the mandatory aims. They resolve disagreement on the proper distribution of benefits and burdens of common action. The point of legitimate institutions is that they provide a morally satisfactory way to resolve disagreement and conflict among different agents when there is a need for common action. They impose costs and benefits usually by imposing rights, duties, and liabilities on the relevant parties. Sometimes legitimate authorities grant permissions to agents to impose costs when normally these agents are not permitted to do so.⁷ This converts the imposition of costs into rightful action even when a controversial action is chosen and it implies that sometimes legitimate decision-making processes will give reasons for complying with the decisions even when the decisions are themselves problematic.

There are various grounds for attributing legitimacy to institutions. One ground is that the institution is reasonably effective at bringing about morally desirable action and the compliance of subjects with its directives are essential to that effectiveness. This is a results-based ground of legitimacy. The two classical bases of legitimacy are democratic legitimacy

6. Christiano, *supra* note 1, at 388.

7. As the Security Council purports to do when it authorizes humanitarian intervention or as the Dispute Settlement mechanism of the World Trade Organization does when it permits states to impose trade restrictions on other states that have been found in violation of their trade commitments. Christiano, *supra* note 5, at 6 n.11.

and consent-based legitimacy.⁸ In my view, democratic decision-making is the gold standard for the legitimacy of states. The legitimacy of international institutions can be seen as a consequence of consent by representative states, or so I shall argue.

III. STATE CONSENT

Here is a brief defense of a kind of modified state consent account of the legitimacy of international law. It makes sense, even from the standpoint of a cosmopolitan and broadly democratic conception of legitimacy, to start with state consent. I start with a brief account of why state consent is a plausible necessary condition of democratically legitimate international law and then I will articulate some modifications of such a view that accommodate cosmopolitan and democratic concerns and that also accommodate recent developments in international administrative law that seem to go against the idea that state consent is central.

The main reason why state consent is the principal basis of the moral legitimacy of international law is that the state remains, by far, the most important institutional mechanism for making large-scale political entities directly accountable to people.⁹ Other supranational political arrangements may one day have this kind of accountability, but now and for the medium-term future, they will continue to be quite unaccountable directly to ordinary persons. The only accountability they have to persons is through states. To be sure, the thin international civil society that exists in international Nongovernmental Organizations (NGOs) does help with this accountability. But this only plays an enabling role in assuring accountability of international law to persons. Decision power is invested in states; they are the mechanisms ultimately responsible for accountability. Now, accountability to persons is one of the common principles shared by consent and democratic conceptions of legitimacy. They both assert the centrality of the idea that persons have some kind of equal voice in the process of the exercise of legitimate authority.¹⁰ Hence, if there is to be any legitimacy at all in

8. Christiano, *supra* note 1, at 382.

9. See Thomas Christiano, *Is Democratic Legitimacy Possible for International Institutions?*, in *GLOBAL DEMOCRACY: NORMATIVE AND EMPIRICAL PERSPECTIVES* 69, 70 (Daniele Archibugi et al. eds., 2012) (“[L]egitimacy is possible for international institutions in a world where states are the main players and the main vehicles of accountability of political power to persons.”).

10. I develop the underlying theory behind democratic legitimacy in THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS*

international institutions that is grounded in the right of persons to have a say in the collective arrangements they live under, state consent will have to play a central role.

In addition, consent can create content-independent duties on the part of the consenter.¹¹ And it creates content-independent duties to all the other parties to whom consent is given.¹² In the case of multilateral treaties, the consent of a state creates duties to all the other states in the treaty. It is a clear and public method of creating these duties. The basic ground of the consent requirement is that it protects the fundamental interests of the prospective consenter. It gives the consenter a voice in the arrangement that regulates its behavior and thus enables the consenter to pursue its aims and its interests in the process of cooperating with others. From these observations, if our concern is to construct institutions that advance and protect the interests of human beings generally, our best bet remains state consent.

IV. STATE CONSENT DEMOCRATIZED

We need to make at least four modifications to the traditional doctrine of state consent to make it live up to the idea that it is a conception of legitimacy grounded in the interests of persons in an equal voice in their shared institutional framework. The first two I will mention only for completeness but I will put aside in the rest of this paper. First, the states that consent must be highly representative of the people in the state. The motivation for state consent is the accountability of states to people.¹³ The full realization of this idea involves the consent of reasonably democratic states. In this way, individuals participate in the making of international law through participating in the determination of the positions of the state that is negotiating the law. This way, the idea that individuals are bound by international law, directly or indirectly, can be vindicated.

The second modification needed is that we must make room for the role of expertise in the making of international law. What is known as global administrative law¹⁴ in the making of international law has some independence from states, though ultimately they are responsible for it

46–130, 231–59 (2008), and the importance of consent in Thomas Christiano, *Equality, Fairness, and Agreements*, 44 J. SOC. PHIL. 370, 379 (2013) (arguing that consent is not a suitable basis for the legitimacy of states, though it can provide a basis of content-independent reasons generated by agreements among persons).

11. Christiano, *supra* note 1, at 385.

12. *Id.* at 382.

13. Christiano, *supra* note 5, at 7.

14. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 25–26 (2005).

and bound by it. I think that this can be legitimated from within the idea of state consent in much the same way that expertise in democracy can be accorded a legitimate role in the making of law. It does not need to be directly accountable to persons, but it must be constrained so that it genuinely and effectively pursues the aims and realizes the principles of the principal parties.¹⁵

The third modification, which will be the principal focus here, is that the process of negotiation by which treaties are created must be a fair process of negotiation in which the parties are treated as equals in the process. Obviously, coercion and fraud are normally ruled out by this standard, but so are the kinds of pressure that result from very different levels of economic and military power. Without some way to temper the effects of differences in economic and military power, the process that produces treaties cannot but be seen as greatly favoring the interests of the more powerful parties.

V. THE MORALLY MANDATORY AIMS OF THE INTERNATIONAL COMMUNITY AND THE LIMITS OF STATE CONSENT

The fourth modification sets the framework within which the discussion of this paper will take place. The global community is currently facing some fundamental moral challenges, which can be recognized as such on virtually any scheme of morality. The aims of the preservation of international security and the protection of persons against serious and widespread violations of human rights are already recognized in Article One of the *Charter of the United Nations*, which lays out the purposes of the United Nations.¹⁶ In addition, there are aims of equally great moral importance that must be pursued by the international system. First, it must pursue the avoidance of global environmental catastrophe. Second, it must pursue the alleviation of severe global poverty. Third, it must establish

15. I have tried to lay out a theory of how to make democracy compatible with the need for expertise and specialization in the modern state in THOMAS CHRISTIANO, *THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY* 165–201 (1996) and in Thomas Christiano, *Rational Deliberation Among Citizens and Experts*, in *DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE* 27, 47–48 (John Parkinson & Jane Mansbridge eds., 2012). Robert Keohane, Stephen Macedo and Andrew Moravcsik have argued that significant independence of international institutions from states can be compatible with democracy in Robert O. Keohane et al., *Democracy Enhancing Multilateralism*, 63 *INT'L ORG.* 1, 1–31 (2009).

16. U.N. Charter art. 1, ¶¶ 1–4.

a decent system of international trade. At the very least, meeting these challenges will require significant cooperation from many of the world's states. Consequently, there are moral duties on the part of states, and the people who are members, to attempt to achieve effective cooperation with other states in pursuing these mandatory aims.

The morally mandatory aims do not exhaust the moral requirements on people in the world. What they do is specify certain aims that it makes sense to require the international community to pursue, given its current capacities. Even these aims are hard to achieve and it is very uncertain how they are to be achieved. But we do know that all states have signed on to these aims.¹⁷ Moreover, these aims make sense from the standpoint of any moral theory that takes the promotion, protection and respect for the fundamental interests of persons to be essential to a well-ordered political system. For a cosmopolitan theory, these aims must be regarded as provisional in the light of the limited capacities of the international system. The long run aims must involve the universal realization of distributive justice and basic freedoms. But these are far beyond anything the system is capable of pursuing now. Hence, this political view might be called a progressive cosmopolitanism.

The morally mandatory character of the aims and the necessity of general cooperation in the pursuit of the aims imply that there are certain tasks that are morally mandatory for states to participate in.¹⁸ This suggests a set of moral imperatives that are not the usual context for voluntary association. The usual context of voluntary association is that the parties are morally at liberty whether to join, and even if some associations do pursue morally important aims, there are enough of them that one may choose among them without moral cost. But the need for large-scale cooperation to pursue morally mandatory aims is what makes the international system a peculiar kind of political system. It relies on consent, but cooperation is required to pursue morally mandatory aims.

17. For evidence of this universal acceptance of these aims, see U.N. Charter art. 56; G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2000), <http://www.un.org/millennium/declaration/ares552e.pdf> [<https://perma.cc/D7RR-RWV7>] (aiming to reduce extreme poverty); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 17–39; United Nations Framework Convention on Climate Change art. 11, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107, <http://unfccc.int/resource/docs/convkp/conveng.pdf> [<https://perma.cc/38CX-NR4K>]; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 10, 1522 U.N.T.S. 29, <https://treaties.un.org/pages/showDetails.aspx?objid=080000028003f7f7> [<https://perma.cc/96QE-TBDV>] (aiming to reduce ozone-depleting substances); General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

18. Christiano, *supra* note 1, at 388.

So what is the role for state consent? Consent as a necessary condition on certain kinds of obligation usually implies that there is a kind of moral liberty to refuse consent and thereby refuse the particular obligation at issue. This is protected by a moral immunity to be free of obligations. I have argued that there are certain mandatory aims that must be pursued by means of cooperation. So what moral liberty can there be? There is significant room for the moral liberty that state consent protects in international society but it must be heavily bound by constraints. The justification for the state consent requirement, and thus some moral liberty to say no, is grounded in the fact that though we are morally required to cooperate in solving these fundamental moral problems, there is a great deal of uncertainty as to how these problems can be solved. Though there is general agreement among scientists that the earth is warming due to human activity, there is disagreement as to how much and how quickly this is happening.¹⁹ There is also substantial disagreement about how to mitigate global warming and what a fair and efficient distribution of costs might be.²⁰ The same uncertainties attend thinking about how to alleviate global poverty and how to protect persons from widespread human rights abuses. And though there is a fair amount of consensus that a great deal of free trade is essential to a decent system of international trade, there is significant disagreement about the limits of free trade and the methods for opening up trade as well as how to deal with the relationship between uneven development and trade.

This kind of uncertainty, together with the centrality of states in making power accountable to persons, provides a reason for supporting a system of state consent with freedom to enter and exit arrangements because it supports a system, which allows for a significant amount of experimentation in how to solve the problems. Experimentation within different regional associations as well as within competing global arrangements may be the best way to try to solve many of the problems we are facing. And democratic states are the ideal agents for this kind of experimentation because of their high degrees of accountability and transparency.²¹

19. *Id.* at 389.

20. *Id.*

21. *Id.* For a discussion of how uncertainty plays a role in motivating and perhaps justifying fragmentation of regimes attempting to deal with global problems, see Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change* 9, 12, 15 (Harvard Kennedy Sch. of Gov't., Discussion Paper No. 10-33, 2010), http://belfercenter.ksg.harvard.edu/files/Keohane_Victor_Final_2.pdf [<https://perma.cc/APD9-4T9T>].

But the system of state consent must be heavily bounded given the morally mandatory need for cooperation. In the usual case of treaties, refusal of entry and exit are permissible and require no explanation.²² In the cases of treaties that attempt to realize a system of cooperation that is necessary to the pursuit of morally mandatory aims, the refusal to enter or exit from it would require an acceptable explanation that lays out the reasons for thinking that the treaty would not contribute to solving the problem and that some alternative might be superior.²³ Exit or withdrawal is permissible, but only with an adequate explanation. By “adequate explanation,” I mean an explanation that is not irrational, unscrupulous or morally self-defeating and that displays a good faith effort to solve the problem at hand. The explanation must be in terms of the morally mandatory aims or in terms of a crushing or severely unfair cost of cooperation. The explanation need only be adequate not in the sense that it need be the correct explanation, but it must fall within the scope of what reasonable people can disagree on. An irrational explanation goes against the vast majority of scientific opinion. An unscrupulous explanation free rides on others’ contributions to morally mandatory aims or it refuses to shoulder any share in a morally mandatory pursuit. A morally self-defeating explanation is one that insists on a different coordination solution, defeating a coordination solution that in the circumstance advances everyone’s aims.

The justification for these constraints on state consent derive from the need for cooperation on morally mandatory aims together with the need for fairness in the pursuit of these aims. Both these considerations are central to determining the legitimacy of a process of creating international law.

Let me situate this claim within the larger framework of international law. The system already recognizes that states’ agreements are null and void when they consent to something that is in violation of *jus cogens* norms.²⁴ These pose significant limits to state consent. Furthermore, there are some treaties that are very hard if not impossible to exit, such as the treaty founding the United Nations. In addition, some treaties are ones that states can get out of only if they have very good reason, such as the nuclear nonproliferation treaties. It seems to me that there is a natural progression from these propositions to one that denies states the right to refuse consent to agreements that pursue morally mandatory goals on the

22. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1598, 1644 (2005).

23. Christiano, *supra* note 1, at 389.

24. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [<https://perma.cc/5HXH-EWMP>].

basis of the above problematic reasons, especially in the light of the ever deepening cooperation in the international system.

These boundaries of consent pose genuine limits on the sovereignty of states. They authorize other states to come together to pressure, and in some cases even coerce, unscrupulous or irrational states to cooperate in pursuit of mandatory aims. Again, we see how the international system is a peculiar kind of political system in that states can be authorized to force or pressure other states to cooperate or to provide a reasonable explanation for non-cooperation. These are legitimate and rightful exercises of power on the part of states when in pursuit of morally mandatory aims.²⁵

VI. FAIRNESS AND STATE CONSENT

I have outlined a conception of the political system of international society and a view about what makes international decisions legitimate. When states consent to arrangements, they are bound except if that consent is to a treaty that violates a *jus cogens* norm. When states refuse to consent to an arrangement for the pursuit of mandatory aims, they have no good reason for it, and they do not specify a reasonable alternative, the other states have permission to insist on their cooperation and pressure them. To satisfy the democratic and cosmopolitan concerns, the states must be highly representative states and the arrangement must be arrived at in a fair way. The problem I am most interested in addressing in this paper is what the notion of fairness consists in and in particular, what a fair process consists in.

VII. FAIRNESS AND MAJORITARIANISM

My interest here is in developing a conception of a fair consensual process, for reasons I have suggested, but I will add some important reasons by considering an alternative conception of fair collective decision-making. A natural thought here is that a fair process of decision-making among states would be a majoritarian one. But this majoritarian idea can take different forms. One can imagine a majoritarianism of states such as is exemplified in the General Assembly of the United Nations. Here, the rule might be one state, one vote. There are two problems with this approach that I think attend many of the majoritarian approaches to international rule making. The first problem is that states are of very different size and

25. For further elaboration of these ideas, see generally *id.*

so a majoritarian rule would not conform to the more fundamental principle that we want power apportioned to individuals in a way that treats individuals as equals.

The second problem is that a majoritarian rule of this sort violates in some way the political and legal integrity of political societies. Let me explain what I mean here. Despite the arbitrariness of the origins and boundaries of these societies, many of the political societies within these initially arbitrary borders have developed highly integrated legal systems with integrated economic and social arrangements, as well as systems of accountability for transforming and adjusting these arrangements. States have arisen to establish justice and protect the basic needs of persons within limited areas. Within those limited areas states have developed legal systems, civil society, elaborate bureaucratic apparatuses for administering justice, educational systems, systems of redistribution of wealth and income and systems that make these institutions accountable to those are subjected to them. These institutions have developed over a number of centuries and have been moderately successful in establishing justice and prosperity for large numbers of people. Though borders arose more or less arbitrarily, they now separate fairly well defined units and help define the spheres in which those units operate. States have some interest in protecting the borders and the integrity of the systems operating within those borders to the extent that such protection is necessary for them to carry out their core responsibilities.²⁶

From an international perspective, the way to think about this situation is that it is a kind of division of labor in which the world is divided into units that are capable of establishing justice in each unit.²⁷ What this means is that, aside from the states that pursue justice and the common good for their societies, there is no other entity that is presently, and for the medium-term future, capable of carrying out the tasks states carry out. On a cosmopolitan view, justice ultimately must relate all persons in a single framework, but it would be extraordinarily premature to suggest that we should wish away the state as it is currently constituted in order to achieve cosmopolitan justice.

I think we must hope and press for more cosmopolitan political institutions in the long term, within which states will become less powerful federal

26. To be clear, I think that this idea is compatible with a great deal more openness to migration than contemporary developed states permit. In addition, the mandatory aim of alleviating severe global poverty, I think, argues strongly for much greater openness to migration. I make this argument in detail in Thomas Christiano, *Democracy, Migration and International Institutions*, in *NOMOS: MIGRATION AND IMMIGRATION* (forthcoming 2015).

27. See Robert E. Goodin, *What Is So Special About My Fellow Countrymen?*, 98 *ETHICS* 663, 681 (1988).

units. But for the time being this is what we have. If cosmopolitan political institutions are to arise, they will probably and hopefully arise through the activities of states acting to create them because that will ensure that the process of creating those institutions will be somewhat accountable to those who will be subject to them.

For the time being, the thought is, a system of state majoritarianism threatens the political integrity of political societies by threatening to impose alien and unworkable legal requirements on these societies that are inconsistent with their legal and political traditions. This is not meant to be a nationalist or even a contractarian argument for respecting the integrity of political societies. It is meant to be a cosmopolitan argument in the sense that it relies on the thought that the world's best bet for realizing justice among persons remains, and will remain for a significant period, with states. But this can only be secure in the case that the integrity of political societies is respected. Disruption of the legal and political traditions of current political societies cannot be justified on the basis of democracy on the global scale because the latter is still a far off possibility. We would be replacing an admittedly imperfect arrangement dependent on a division of labor that does not work in all places with an arrangement that will not work at all.

Disruption of the integrity of political societies would not only undermine those societies and their efforts to fulfill their core responsibilities, it would also undermine the long-term realization of justice in the world. The reason for this is that the long-term realization of justice in the world as a whole will depend essentially on democratic states creating cosmopolitan institutions slowly but surely. However, these states will not create those institutions if their political integrity and their capacities to fulfill their core responsibilities are threatened or so I would hypothesize. The creation of international trade in the post war era was dependent on the creation of a strong welfare state at home in the case of both the United States and Europe. A state that could not take care of its citizens would have a hard time convincing them to join organizations that might further erode the capacity of their state to carry out its core responsibilities.²⁸

28. This is the historic package of embedded liberalism achieved by the New Deal in the United States and by the European Community in the second half of the twentieth century. See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 392-98 (1982).

For these reasons, state majoritarianism cannot be the way to create a fair decision process for international society. I think similar considerations undermine the achievement of other more transnational forms of majoritarianism. For instance, imagine a majoritarian system across societies such as China and Vietnam as they engage in treaty making. Suppose we allow the choice to be that of the majority of the group composed of Chinese and Vietnamese. But here, though the principle in favor of apportioning power across persons equally might be satisfied, the political integrity of Vietnam would be very much threatened. We could, of course, try to diminish this effect by normalizing the votes of China and Vietnam so that the peoples have equal power in the aggregate. This would undermine the equal apportionment of power to persons and it would not do a great deal for the political integrity of these different countries. All it would do would be to threaten the integrity of China's political system.

VIII. FAIRNESS AND CONSENT

The consensual method better respects the political integrity of political societies because it requires the political society as a whole to negotiate and consent to international arrangements. They can then figure out how to integrate the new international commitments with their domestic commitments. At the same time, because the consensual method is bounded in the way I described above by the requirement to cooperate in pursuit of the morally mandatory aims, it is the basis of a genuinely political system. But we do not have a clear idea of how to think about fair negotiation in this kind of case.

To be sure, a state's consent to a treaty must not be coerced by the other party and must not be the consequence of fraud by the other party. These requirements are stated clearly in the Vienna Convention.²⁹ And of course, states cannot validly create obligations that violate the *jus cogens* norms.³⁰

However, I think we have reason to accept stronger norms for the evaluation of agreements. The avoidance of force and fraud are compatible with the most appalling unfair advantage taking. Free and fair agreements require stronger background conditions than merely the absence of force and fraud. The general idea that stronger background conditions are required is recognized quite generally in the legal systems of the West. The doctrine of unconscionable contract is an example in common law systems and requirements of fairness are built into civil law traditions of contract as well.

29. See Vienna Convention on the Law of Treaties art. 53, *supra* note 24, 1155 U.N.T.S. at 331, 344.

30. *Id.* at 344.

IX. FAIRNESS IN INDIVIDUAL TRANSACTIONS

If we think about negotiation and agreement making, we can think of the purpose of the agreement at two levels. The immediate object of the agreement is an arrangement of rights—understood broadly to include liberties, claims, powers and immunities—and duties among those who make the agreement. The participants can set up a system of rules of interaction, which establish a complex of rights and duties and to which they are committed. Alternatively, they can merely exchange rights and the associated duties to particular things. The further purpose of the agreement is the production of benefits and burdens among the parties. The parties shape the social world they live in in terms of basic rights and duties and they alter it to bring about benefits and burdens that the social world can achieve. We can think abstractly about the benefits minus the burdens as the surplus the agreement brings about above the level of benefits the status quo realizes. The transaction takes place in the context of a prior set of conditions, which might be thought of as conditions of the process of transaction. Among these are the absence of force and fraud and other background conditions that enable the participants to treat each other as equals.

I have defended in other work a conception of fairness in individual exchange.³¹ The view attempts to avoid the classical natural law approach of equal exchange in value and attempts, rather, to develop a procedural conception of fair exchange that goes beyond the standards of absence of coercion and fraud. The reason for the procedural approach is that the benefits of transactions can be quite heterogeneous and hard to compare outside the points of view of each of the participants. Therefore, it may be very unclear in many circumstances whether the goods exchanged are equal in value in some more objective sense.³²

31. See, e.g., Thomas Christiano, *Equality, Fairness, and Agreements*, 44 J. SOC. PHIL. 370 (2013).

32. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 80, 88 (Lesley Brown ed., David Ross trans., Oxford Univ. Press paperback ed. 2009) (c. 384 B.C.E.) (demonstrating the classical version of equality in exchange). See also THOMAS AQUINAS, 11 *THE SUMMA THEOLOGICA* 379–700 (Daniel J. Sullivan ed., Fathers of the English Dominican Province trans., Encyclopædia Britannica 1952) (c. 1265 C.E.) (displaying the medieval version). Marx may also be committed to this ideal of equality in exchange. See 1 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (Ben Fowkes trans., Penguin Books 1976) (1867). Alan Wertheimer is the contemporary defender of a version of this view. See ALAN WERTHEIMER, *EXPLOITATION* 207–46 (1996).

I argue that if we take an individual exchange as if there were only one exchange for each person's whole life, then the appropriate background fairness conditions for such an exchange consist in the realization of equal capacities for that exchange. This breaks down into two components: equal access to cognitive conditions relevant to one's interests and concerns, and equal opportunity for exiting or refusing entry into the arrangement.³³ When we extend the principle to the usual case in which each person engages in a series of many exchanges, the persons must have equal capacities globally in the sense that they start from background conditions that ensure equal capacities for all. This equal background condition need not be fully maintained throughout the series because earlier agreements persons have entered into may curtail opportunities they might have in later agreement making. If this is done knowingly, the later agreement making in which there may be some inequality of opportunity is not unfair. Furthermore, individuals may choose to focus on some agreements in which they think of themselves as having much at stake and focus less on other exchanges in which they think of themselves having a lot less at stake. This stake sensitivity in agreement making will have some importance later.

I have argued that this realizes a kind of democratic value in everyday life because the two conditions in the one shot case, in effect, specify circumstances in which persons have an equal say in the structuring of their relations with each other.³⁴ They specify a kind of condition of global equal bargaining power between parties such that each person has an equal say in the formation of the content of the agreements they enter into.³⁵ The global principle of equal capacity gives persons a kind of equal say in the formation of their social lives together with others.³⁶ This will not imply equal bargaining power in each agreement-making context, but only in some sense over the total amount of agreements, a person enters into.

This principle of equal capacity is meant to give persons equal power in the process of the creation of the informal social world they live in. This is partly justified because their interests are, roughly speaking, equally at stake in the system of agreement making overall. This is also somewhat like the idea of equality in democratic collective decision-making in which persons are to have equal power because we think that, for the most part, their interests are equally in play in the political system. We achieve this condition of equal power by making sure that people have the resources

33. See Christiano, *supra* note 31, at 385.

34. See *generally id.* (arguing that the ideal of fairness gives persons "an equal say in the formation of this world analogous to the equal say that is afforded in the democratic account of collective decision making").

35. See *id.*

36. See *id.*

that enable them to exit or refuse transactions and enter others that advance their interests. Education, basic needs provision, and other goods give people opportunities to choose among transactions by enhancing their bargaining power.

Here, I want to introduce terminology that will be of some importance as we go on. The stakes a person has in an agreement or set of agreements consists of the range of potential legitimate interest affecting outcomes of that agreement.³⁷ This will include the effect on interests if there is no agreement and the effects on interests of the various agreements available in the circumstances. We must distinguish between different ways of conceiving of the stakes a person has in a transaction or in a system of transactions. On the one hand, there are what I will call the *ex ante stakes* a person has in a transaction or system of transactions. This is just the extent to which the transaction or the system can advance the legitimate interests of each party independent of the distribution of resources among the parties. This will vary according to context in the sense that it depends on the real possibilities of the system or the transaction. On the other hand, there are the *actual stakes* in a particular transaction. This will depend on the interests in the transaction as well as the distribution of resources among the parties, which will determine what each party brings to the transactions. In the context of a particular transaction, a person with very few resources will have higher actual stakes in the agreement because she has fewer resources to fall back on or to offer others in alternative transactions. The transaction matters all the more. A person with many resources has less need for the particular transaction and so has a lesser stake.

The principle of equal capacity is based on the idea that persons have equal *ex ante* stakes in a system of transactions. It then requires that the distribution of resources be adjusted to achieve equal capacity. This is a special case of the more general principle that persons ought to have capacities that are proportionate to their *ex ante* stakes. Someone who has a lot less stake in a transaction ought to have less power over it than the one who has more stake.³⁸

37. See Thomas Christiano, *Democratic Legitimacy and International Institutions*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 119, 131 (Samantha Besson & John Tasioulas eds., 2010).

38. There is a worry here, pointed out by Robert Nozick, that this gives people power over the intimate choices of others. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 172 (1974). I think we should allay this worry with the idea that some interests are protected

One of the most fundamental puzzles in a system of free transactions is that this principle of power proportionate to stakes can easily be violated. For example, if you have two persons who depend on making an agreement to advance certain interests, the one who has the least stake will often have more power. This is because they can more easily afford no agreement. But this means that power is often inversely proportioned to stakes in a scheme of free transactions, while the normative principle tells us that power ought to be proportioned to stakes. This is the fundamental puzzle that Marx pointed to in the relations between capital and labor.³⁹ The laborer has a great deal at stake in a transaction because her life depends on it, while the capitalist has a lot less at stake. The consequence is that the capitalist has more bargaining power and can deprive the laborer of all but the basic means of existence.⁴⁰

A scheme of equal opportunity attempts to avoid this in the following way. It attempts to rectify the kinds of resource differences that produce this kind of actual inequality of stake in order to equalize capacity to apportion capacity to ex ante stakes. Now, in a particular transaction, if two parties have roughly equal capacity overall and one party has more at stake actually than another because of difference of interest, the usual consequence is that the one with less at stake will devote less attention to the issue, in order to devote more time to other issues, while the one with more at stake will devote more time. In this way, the overall proportion between capacity and interest is maintained. What Marx was concerned with was that the capitalists, who have less actual stake in each particular transaction with a particular worker, also have much more resources to devote to the making of the transaction.⁴¹ This compounds the initial disproportion. We will see later how this problem occurs in the case of the transactions among states in the creation of a regime of international trade.

This is a conception of fairness as a background condition for agreement making. Another idea is the notion of unfair advantage taking. A person takes unfair advantage of another, I have argued, when she benefits from an interaction with another as a result of that other person doing things and by violating a duty to that other person.⁴² The key is getting another to do something for you by violating a duty you have to them. What is added

interests in the sense that a person may choose to fulfill these interests without the leave of others. This might be the case, for example, in choices of friends or life partners.

39. See 1 MARX, *supra* note 32, at 451.

40. See *id.*

41. See *id.*

42. See Thomas Christiano, *What Is Wrongful Exploitation?*, in 1 OXFORD STUDIES IN POLITICAL PHILOSOPHY 250 (David Sobel et al. eds., 2015).

here is the idea that one enters a transaction with another person wherein one has a prior duty to that other.

The two notions of fairness are partially independent of each other. One can interact with another in such a way that one does not take unfair advantage of that person even under very unfair circumstances that disfavor that other person. One does this as long as one acts in accordance with one's duty to that other. This duty may require that one do something to ameliorate that other person's unfairly unfavorable circumstance, but it may not require that one undo the unfairness altogether—because one is not duty bound to rectify all unfairness. One can take unfair advantage of a person's situation even if there is no background unfairness generated by society, as in the case of taking advantage of the person in danger of drowning in a pool who one can save at little cost.

These two ideas help us understand the obligation generating character of consent in that significant defects in an exploitative person's action can diminish the weight of the obligation of the other party to comply with the agreement. A highly exploitative agreement such as the requirement to pay a very high price for being saved from drowning by someone who can do it for little generates little by way of obligation to comply. In the law, highly exploitative contracts are often unenforceable and this registers some of the conviction that these agreements do not generate serious obligations.⁴³

X. FAIRNESS AND INTERNATIONAL NEGOTIATION

These two ideas of unfair background conditions and unfair advantage taking are the starting points of reflection on the problem of international negotiation. They are usually invoked when observers complain of unfairness in the creation of the WTO. But as we will see, they are not easy to apply to the case of negotiation between states.

There are four key differences directly relevant to fairness between states and persons that complicate the application of the above ideas of fairness to interstate transactions. First, states come with different size populations; second, states have very different levels of wealth for which the present generation cannot be held responsible—usually; third, these conditions occur against a background in which there are no higher order political institutions with the capacity to rectify serious differences of opportunity and information; fourth, the negotiations that create a regime of international

43. See, e.g., U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAWY COMM'N 1977).

trade are morally deeply fraught issues or at least more so than most ordinary negotiations. Two important structural differences also mark the transactions among states. They involve more complex strategic games than ordinary individual exchange. They are what Robert Putnam describes as two level games: there is the strategic interaction among states and there is strategic interaction within states and both of these determine the outcome of international negotiation.⁴⁴ Second, there are a small number of states so the interactions among states never replicate the conditions of competitive markets, which sometimes play a large role in equalizing bargaining power among individual persons.

Let us start with the morally fraught character of interstate negotiation. The development of an international regime of trade is deeply morally fraught because it implicates morally mandatory aims.⁴⁵ The regime is, in effect, an attempt to create a kind of new legally structured society among persons across the world. It is created by states and it imposes duties on states to lower tariffs or to open up trade in other respects as well as to establish a partial system of enforceable property rights across the world. The official purpose of all this is to increase economic growth for the whole world and in part to increase growth for poor countries.⁴⁶ The most important moral concern that animates a concern for international trade is the possibility that international trade, when properly arranged, can play a large role in reducing world poverty. This aim can be advanced by the right system of trade, but problematic features of a trade regime can also threaten it. The most frequently mentioned issue in this context is the intellectual property regime established with the WTO.⁴⁷ It can potentially put life-saving medicines out of reach for poor people in poor countries. Trade in agriculture also poses a large problem in that advanced economies continue to protect their agricultural sectors through subsidies, which appear to undermine the ability of poor countries to trade in the areas in which they have a comparative advantage.⁴⁸ Free trade in other areas such as services

44. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 435–36 (1988).

45. See Amrita Narlikar et al., *Introduction* to THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 1, 3–4 (Amrita Narlikar et al. eds., 2012).

46. See the opening clauses of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, that show a concern for growth, in particular the growth of developing countries, and a concern for environmental issues.

47. See *id.* at 157 (creating the “Council for Trade-Related Aspects of Intellectual Property Rights,” or “TRIPS,” to oversee the functioning of the Agreement on TRIPS and to establish “rules of procedure”).

48. See Tim Josling, *New Trade Issues in Food, Agriculture, and Natural Resources*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION, *supra* note 45, at 655.

and industrial products may damage the capacities of poor countries to develop their own domestic industries.

I only want here to register some of the prominent issues that a trade regime faces. I do not want to take a stand on them here. The important thing for these reflections is that there are important moral issues at stake in deciding on a trade regime. Moreover, there are disagreements on all of these issues. For example, there are disagreements on the question of the importance of protecting infant industries in developing societies,⁴⁹ on the significance of agricultural subsidies,⁵⁰ on the effects of the patent regime.⁵¹ Many of these disagreements focus on how to help developing societies solve their problems of severe poverty while others focus on what is a fair system of property rights.

These disagreements are about morally important goods that are recognized throughout the international system as major concerns. The disagreements also seem to be allied with differing interests. These are what establish the political character of the system and what distinguish the system from a simple system of voluntary association. This is not a context in which the parties can be solely concerned about advancing their interests even though their interests have a legitimate role to play in defining the regime.

Related to this is the fact that the fundamental moral issues that states must attempt to solve in the international trading system are not ones that are resolved by some higher order political entity. This contrasts with much of life in ordinary political systems in which there is some rough division of labor between the activities one engages in as a private person and the activities of the state, which are of concern to citizens. We allow individuals to pursue their own well-being and that of those around them without too much thought given to others because we think that as citizens they can attempt to advance the common good and justice for all. Hence, the activities that people engage in in ordinary economic and other private associations can be to some significant degree engaged in without concern

49. See Andrew G. Brown & Robert M. Stern, *Fairness in the WTO Trading System*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION, *supra* note 45, at 677, 695.

50. See Helen Coskeran et al., *Trade in Manufactures and Agricultural Products: The Dangerous Link?*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION, *supra* note 45, at 343.

51. See Keith E. Maskus, *Trade-Related Intellectual Property Rights*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION, *supra* note 45, at 411.

for the wider society. By contrast, when states engage in treaty making regarding international trade, or at least the basic framework, they do not have such a background and so the state parties to agreements must be concerned with advancing the common good and justice in their voluntary arrangements, given the important effects these arrangements have.

Therefore, even though we are looking to develop a conception of a fair process of negotiation on international trade, the issues in dispute are not the ordinary ones involved in the usual cases of fair exchange, which are normally focused on the interests of the parties. The issues under negotiation in international trade disputes concern not only interests but also morally significant disagreements. Thus, the outcomes may not turn out to be the standard outcomes of ordinary exchange where we expect some kind of equality in exchange because of fair dealing. The outcomes of negotiation on international trade should reflect a decided tilt towards the interests of the worst off in the world. The interests of the poor should be advanced more significantly from a reasonable system of international trade. Indeed, we do see some lip service given to this concern in the principle that trade preferences ought to be accorded to poor countries. Obviously, there is a lot of ambivalence about this in actual trade negotiations, but it is clear that people generally accept the principle that the development needs of the poor ought to have priority over those of others.

The two other problems have to do with the very structure of the idea of fair negotiation. The conception of fair agreement making I sketched earlier applies to individuals, but fair agreement making in the international system applies to states that represent populations of very different sizes. This poses problems for the account of fairness that I have given. From a cosmopolitan point of view, it does not make sense to insist that groups with radically different sized populations ought to have the same power. It would seem to make sense to think that a society with a much larger population ought to receive a greater share of the total surplus that results from an agreement and in some sense they ought to have more power over the agreement.⁵²

In contrast, it may make some sense to suggest that the informational resources that give access to information relevant to the advancement of interests and other concerns might be equalized between states. Although even here, larger populations may exhibit greater heterogeneity in interests

52. This poses problems for applying standard bargaining theory solutions to the issues of state negotiation (at least for normative purposes). The standard approaches of the Nash bargaining solution, the Kalai-Smorodinsky solution, and the Rubenstein solution all require symmetry among the bargainers, which is violated by populations of different sizes. See Sebastian Zimmeck, *A Game-Theoretic Model for Reasonable Royalty Calculation*, 22 ALB. L.J. SCI. & TECH. 357, 361–75 (2012) (discussing each of these three approaches).

and concerns and so more information may be needed for them to advance their interests.

The other difficulty is that the size of an economy is usually a very good determiner of the bargaining power of a society in economic negotiations. Wealthy and large societies have large internal markets so they often depend less on trade with others than do smaller, poorer societies. Furthermore, they have more to offer and so usually have more options than poor societies. Hence, they have a greater ability to threaten exit from an arrangement than poorer societies. When large economies such as the United States and Europe decide to cooperate on bargaining, such as happened in the Uruguay Round that produced the WTO and the TRIPS and GATS agreements, they can sometimes be close to irresistible even when they are only a fraction of the total population.⁵³

The two structural conditions of interstate negotiation have different impacts on this phenomenon. On the one hand, the fact that there are a small number of states implies that the bargaining power of the wealthy is enhanced since there are not a lot of other wealthy states to go to. On the other hand, the two-level game feature of interstate negotiation tends to lessen the bargaining power of the wealthy. This is because the elites of a poor society do not experience the same desperation as the poorer members. It is also because elites can always use the strong preferences of their members to solidify their bargaining stances.

If we think purely in terms of the outcome of the agreements, we can think in terms of the amount of surplus that arises from an agreement and of the distribution of the elements of the surplus. Here the picture is complex. The surplus of a negotiated trade agreement partly is going to be the aggregate of the surpluses of the various trades that are enabled as a consequence of the trade agreement minus whatever losses there might be due to displacement of persons in each economic system. Another part of the surplus may arise from a superior system of rules for enforcing trade agreements already in place, which in turn may enable more trades that were not previously enabled.

53. See JOHN H. BARTON ET AL., *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO* 11 (2006).

XI. BARGAINING IN THE FORMATION OF THE WTO

The formation of the WTO included a renewal of the various elements of the GATT that had been negotiated over the previous forty-seven years, a new system of enforcement, an intellectual property agreement, a general agreement on trade in services, and some agreement on developed countries limiting the agricultural subsidies to their farmers.⁵⁴

Many have complained that although the intellectual property and the services agreements have proven to be quite strong, the agreement to limit agricultural subsidies has proven to be quite weak and there has been little progress in improving the problem of agricultural subsidies.⁵⁵ Thus, developed countries, whose comparative advantage lies in services and intellectual property gained a great deal while developing countries, whose comparative advantage lies in agriculture, did not fare so well. Furthermore, the Doha development round, which was intended to deal in significant part with the agricultural subsidies, has not made much progress.⁵⁶ The difficulty seems to continue to be that the developed countries cannot come to an agreement on how to limit their agricultural subsidies.⁵⁷ The consequence of this is said to be that developing country exports in agricultural goods has not increased nearly as much as had been hoped, though there is variation in this. For example Mexico, which participates in the WTO and in NAFTA, has not seen much growth in its economy or in its agricultural exports.⁵⁸

Richard Steinberg, a prominent analyst of the GATT and WTO negotiating process, has observed bluntly:

Studies have shown high variance in the net trade-weighted concessions given and received: some territories, such as the United States, received deeper concessions than they gave; other territories, such as India, South Korea, and Thailand, gave much deeper concessions than they received. Moreover, several computable general equilibrium models have shown that the Uruguay Round results disproportionately benefit developed country GDPs compared to developing countries, and that some developing countries would actually suffer a net GDP loss from the Uruguay Round—at least in the short run. More broadly, it is hard to argue that developing countries uniformly enjoyed net domestic political benefits from the nontariff agreements: they assumed new obligations in the TRIPs and TRIMs agreements,

54. See Narlikar et al., *supra* note 45, at 7.

55. See *id.*

56. See *id.* at 2 (“Their most visible symptom can be found in the deadlocks that have marred the negotiations of its Doha Development Agenda . . .”).

57. See Jennifer Clapp, *WTO Agriculture Negotiations and the Global South*, in *THE WTO AFTER HONG KONG: PROGRESS IN, AND PROSPECTS FOR, THE DOHA DEVELOPMENT AGENDA* 37 (Donna Lee & Rorden Wilkinson eds., 2007).

58. See Nathaniel Parish Flannery, *More Bad News for Mexico's Economy*, FORBES (July 30, 2015, 9:43 AM), <http://www.forbes.com/sites/nathanielparishflannery/2015/07/30/more-bad-news-for-mexicos-economy> [<https://perma.cc/MB78-3UC5>].

the GATS, and the Understanding on Balance-of-Payments Provisions of the GATT 1994—which most long opposed; they gained nothing of significance from the revised subsidies and anti-dumping agreements⁵⁹

How is such an outcome possible when the GATT operated by consensus decision-making that affords each country equal veto power? The usual explanation is quite simple and is a straightforward implication of the massively greater bargaining power of the United States and Europe in the early 1990s. The basic strategy was called the Single Undertaking.⁶⁰ The United States and the EC, realizing that developing countries were not going to sign on to the intellectual property agreement, the trade in services agreement, and the weak versions of agreements on agricultural subsidies, essentially threatened a kind of exit from the whole of the GATT, thus threatening the developing countries with the gains that had been made from the previous forty years of agreements.⁶¹ The basic strategy was to exit the GATT 1947, with all the agreements that had been made since then, and reconstitute it as the GATT 1994 along with the intellectual property, services, and weak subsidies agreements and the WTO.⁶² This left the developing countries with the choice of either losing all the agreements that had been made or accepting those agreements with the new elements that they did not want. They decided that they would be better off with the new package than with nothing and so they accepted it.⁶³ Developing countries did benefit, but the lion's share of the benefits went to the developed countries.⁶⁴

The United States and Europe were able to threaten exit because of the huge size of their markets. They combined to create half of the world's GDP in 1994, though they were not even close to half the world's or the GATT member countries' total population.⁶⁵ The outside option for them was considerably more attractive—especially when cooperating with each

59. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 366 (2002).

60. *See id.* at 360 (providing a basic description of the “single undertaking approach to closing the round”).

61. *Id.*

62. *Id.*

63. *See id.*

64. *See id.* at 359–60.

65. For the size of the US and EC economies, which combined were about fifty percent of the world's GDP in 1994, see CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* 533–38 (1995).

other—than to the developing countries. Therefore, they managed to bargain for a disproportionate share of the benefits.⁶⁶

XII. FAIRNESS

When we reflect that much of international economic agreements are the result of the consent of states and we want to determine the principle by which power is to be allocated in the process of treaty making, there are a number of considerations to be taken into account. Here, I am partly following intuitions developed in the case of the democratic institutions' domestic societies.

First, simplifying initially as if there were only one issue to negotiate for all time, it makes some sense for bargaining power to be allocated in proportion to population. This seems like a reasonable analog of the case of one person, one vote that one sees in democratic institutions. This suggests that although the underlying principle is a democratic principle, negotiation among states must not imply equal power as some have suggested.⁶⁷ This is because states have different stakes in negotiation and one measure of these different stakes is size of population. Equal power among the state parties would violate the underlying democratic rationale.

Second, we need to think about how bargaining power ought to be apportioned relative to wealth. This question is not straightforward. The initial judgment is that power ought not to be apportioned to wealth. This seems a straightforward analog to thinking in democratic societies. The reason for this principle in domestic democratic institutions is that the ex ante stakes persons have in the ruling of a modern democratic society does not depend on the level of wealth of persons. Given the pervasiveness of the activities of modern states, all the fundamental interests of all persons are, broadly speaking, implicated in the decisions of a democratic society. Here the expression, "the poorest he . . . has a life to live, [just] as the greatest he"⁶⁸ seems to be the determining consideration. When we consider the whole package of issues that a democratic state deals with, then the fundamental interests of all citizens are roughly equally implicated. Hence, the principle of oligarchy or apportioning power to wealth has been decisively rejected in modern societies as a matter of principle if not in practice.

66. See Steinberg, *supra* note 59, at 360.

67. See Mark E. Warren & Jane Mansbridge, *Deliberative Negotiation*, in *NEGOTIATING AGREEMENT IN POLITICS* 86, 101 (Jane Mansbridge & Cathie Jo Martin eds., 2013), for the articulation of an equal power view of fair negotiation.

68. *Extract from the Debates at the General Council of the Army, Putney*, CONST. SOC'Y (Oct. 29, 1647), http://www.constitution.org/lev/eng_lev_08.htm [<https://perma.cc/P9XW-ZSPC>].

But one might think that this judgment does not extend so easily to collective decisions about international trade since the trade regime does not exert as pervasive an impact on the lives of all people as the modern state does on its citizens. We might be tempted to think that the stakes people have in international trade negotiations should be measured more in terms of the amount of wealth that is at stake for each person in the negotiation since other issues relevant to the person's welfare can be dealt with in other ways. That is, one might think that an international trade agreement is a bit more like a joint investment decision. In joint investment decisions, other things being equal, we apportion power and benefits partly in proportion to the relative shares of the investors and the relative stakes of the parties such as labor.⁶⁹

But this would be too quick as well. Here we need to recall that though a particular society may not have as much wealth at stake in a particular trade negotiation, the wealth that is at stake may be of much greater significance to it than is a similar amount of wealth to a wealthier society. In the case of a poor society, an increase in wealth of a certain amount may mean the difference between that society being able to afford to give a primary education to its citizens or not. More generally, the welfare impact of a small amount of trade openness of a poor society may be much greater than the welfare impact of such a similar opening of a wealthy society.

To be sure, if we take two societies of roughly equal population and wealth that are such that one is very much dependent on a certain amount of trade while the other is not, we might think it reasonable for the first to have more of a say in determining the conditions of trade than the second. This would accord with the general principle of apportioning power to stakes.⁷⁰

The above reflections on poor societies and the greater dependence of their welfares on smaller amounts of trade can be supplemented with the thought that, as I argued above, it is one of the mandatory aims of the international political system to try to find ways of alleviating severe global poverty. Poverty is looked at as one of the key categories of issues that the system should be concerned with. The way stakes are measured in the international system should be in terms of basic generic interests. To the extent that poverty is singled out as of special concern to the system,

69. See the definition of joint venture in BLACK'S LAW DICTIONARY (9th ed. 2009).

70. See Harry Brighouse & Marc Fleurbaey, *Democracy and Proportionality*, 18 J. POL. PHIL. 137, 138–41 (2010), for an articulation of this general principle.

the interest in alleviating poverty should clearly be among the generic interests that are given heightened concern. This may enhance from a political point of view our conception of the ex ante stakes the poorer society has in the negotiation.

One consideration that may sometimes tell against the idea that wealth ought not to influence the apportionment of bargaining power is that some societies may be responsible for their low levels of wealth. By this, I mean that within a generation a particular society may be responsible for its situation because of unwise economic policies that were knowingly taken. I do not think that this consideration applies across generations since it is not reasonable to make later generations responsible for the poor behavior of earlier generations. However, this could apply in some instances within a single generation. In that case, the responsibility of the society for its own prior choices would be similar to the responsibility of an individual for her own prior choices. The limitation of subsequent opportunities would then not be unfair. So also, the diminution of bargaining power might not be unfair either. To be sure, this would require that the society was somehow behaving collectively badly and that a very wide group of persons could be said to have a share in the responsibility for the problems. Usually this would require that the society be democratic.

The principle of ideal justice here is that power be apportioned to the ex ante stakes of societies in the relevant area of collective decision. Power ought to be apportioned in accord with population, other things being equal. It ought not to be apportioned in accord with wealth per se. Indeed, in some circumstances, because of the great wealth and population of a society, a society may have a sufficiently large internal market and consequently less dependence on international trade than other societies, at least if we are thinking on a per capita basis.⁷¹ This may imply that the power it has based on population ought to be discounted by its lesser average integration with the world economy.

This brings us back, I think, to the central puzzle concerning the normative implications of voluntary agreement. The puzzle can be stated in terms of a basic opposition between two propositions. The first normative proposition is that, other things being equal, power ought to be apportioned in accordance with ex ante stakes—where we are thinking in terms of legitimate and unprotected interests.⁷² Those who have a greater stake in a decision or whose interests are much more at stake in a decision, ought to have greater power in shaping the decision. The second, empirical, proposition, however, is that in voluntary agreement making those who

71. See BARTON ET AL., *supra* note 53, at 11.

72. See Christiano, *supra* note 31, at 386.

have less actual stake in an agreement have more bargaining power with respect to that decision to the extent that the two parties must come to an agreement together.⁷³ This is because they can afford to hold out or they can better afford non-cooperation than those who have much more at stake in the agreement. Hence, those who have less actual stake have more power in a scheme of voluntary exchange. This seems to be the inverse of what ought to be and yet seems also to be a basic feature of voluntary agreement.

Recall that often the imbalance created by lesser stakes is partially or maybe completely rectified by the fact that the party with lesser stakes also puts a lot less resources into the process of negotiation because it matters less to them. This can happen when we have negotiation among equals. If I do not care much between two options or even between the two options and no agreement, I will let you decide when we have to decide. I have better things to do with my time and I may recognize the stakes principle.

But what we see in many cases of agreement making in the international system is that the party that has less at stake also has a lot more resources.⁷⁴ In this case, they may care less or have less reason to care but they have a lot more resources with which to pursue what they care about. In that case, the better off may have much more power than the worse off and more power than the person with much more stake in the agreement. It is in this context that we may see a problem above. This seems to be the situation between wealthy developed societies and developing societies. Developed countries come to the multilateral conferences with armies of experts in the law, economics, and politics of trade while poorer countries often cannot afford more than one representative, if even that.⁷⁵ Hence, the power imbalance is extraordinary.

A further principle that is important in this context is a principle for defensible inequalities in the apportionment of power. This too is inspired by the example of democratic theory and by a more general principle of equality. We may think that in some cases, some greater inequality than is justified by differences in stakes can be justified if this is necessary for the international community as a whole to make decisions efficiently and expeditiously. This is a kind of parallel with the desirability of representative

73. See Christiano, *supra* note 37, at 136.

74. See BARTON ET AL., *supra* note 53, at 11.

75. See Steinberg, *supra* note 59, at 365.

democracy over direct democracy even from an egalitarian standpoint. The idea is that if an inequality helps bring about a greater capacity to make good decisions for the whole of the international community, this may be justified.⁷⁶

XIII. POWER APPORTIONMENT PRINCIPLES AND RULES

The above remarks give us some indication as to a set of power apportionment principles for fair international negotiation. They are merely a start in trying to apply cosmopolitan and democratic principles to the process of international negotiation. They are also an attempt to give an interpretation of the problem of legitimacy that many have pointed to in the formation of international regimes of international trade.

The principles help us get some grip on what it takes for international negotiation to be fair. To the extent that fairness is an element in grounding the legitimacy of these international institutions that are so formed, violation of the principles to one degree or another may diminish the legitimacy of the international institution.

There is one necessary step in the account of legitimacy that I have not yet taken. That step consists in trying to elaborate rules of collective decision-making that could plausibly implement the principles. The idea would be to construct institutional mechanisms that tend to counterbalance the effect of differences of wealth, for example, in determining bargaining power.

There are really two things that we know can rectify, to some extent, the power imbalance we see in the making of international trade regimes. The first is that the multilateral conferences that create these agreements can attempt to disseminate information among the participants. This can rectify some of the informational incapacity of the poorer countries and enable them to secure better treaties. This was clearly one problem with the conference that shaped the WTO. Poorer countries were not fully informed about the nature of the agreements on agricultural subsidies that were made. In particular, they did not know how weak they were.⁷⁷

Nevertheless, this will not solve the problem we saw above. There are still the major bargaining advantages for wealthy states that are not correlated with population or stakes more generally. The only way in which this can

76. See generally Thomas Christiano & Will Braynen, *Inequality, Injustice and Levelling Down*, 21 *RATIO* 392 (2008) (arguing that the levelling down objection to the principle of equality can be conclusively rebutted by the common good conception of the principle of equality).

77. See Amrita Narlikar, *Collective Agency, Systemic Consequences: Bargaining Coalitions in the WTO*, in *THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION*, *supra* note 45, at 184, 187.

be, and has been, partially rectified in the international system is through the creation of strong coalitions among developing countries. Indeed, this was part of the problem in the formation of the WTO. Developed countries were able to peel off individual developing countries one at a time by means of small side payments because the coalitions that were formed were not as strong as they could have been.⁷⁸ They have gotten stronger since then and this is one of the reasons we see deadlock and not worse outcomes in the Doha round.

To be sure, the coalitions of developing countries, even with all their population advantages, have not been sufficient to set up many changes in the direction of developing country interests. They have helped soften the effect of the TRIPs agreement.⁷⁹ But, for the most part, the Doha round has been a disappointment. Furthermore, though developing countries are generally represented in coalitions, many states among the least developed have felt that they were not very well represented by coalitions that consist mainly of India, China, and Brazil.⁸⁰ Still, there have been gains from these coalitions. In significant part, they are due to the large populations that are represented by these coalitions.

In addition, coalitions economize on information costs and, thus, enhance the positions of developing countries in terms of the first principal component of capacity.⁸¹

In general, I think we have reason to believe that multilateral treaty making is going to enhance the capacities of developing countries in shaping the trade regime. It tends to encourage coalitions, which can bargain more effectively with developed countries, and it tends to economize on information costs for developing countries. Furthermore, multilateral conferences can help make the process of bargaining more transparent, by bringing international NGOs into the process, thus exposing hard bargaining by powerful countries.⁸² Since powerful states have some desire to be seen as good international partners, this may lessen the intensity of hard bargaining. It has brought about some improvement in the trade positions of the least-

78. *See id.* at 187.

79. *See id.* at 194.

80. *See id.* at 197 (describing concerns expressed by African ministers that in the Group of Seven, “not one African country was represented in a round that purports to be about development”).

81. *See id.* at 185.

82. *See* Jens Steffek, *Awkward Partners: NGOs and Social Movements at the WTO*, in *THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION*, *supra* note 45, at 301, 301.

developed countries and this seems to be in part because of the more active roles these countries are playing in the negotiations of the WTO.⁸³

XIV. CONCLUDING REMARKS: LOOSE ENDS

I have attempted to lay out some of the groundwork for elaborating a principle of fair negotiation among states with regard to the trade regime. However, the progress has been slow. The basic principle of the need for power to be apportioned to the ex ante stakes participants have in the system has been articulated. But the principle of fair negotiation among states has yielded only very abstract sub-principles such as the thesis that states with greater population have greater stakes and the thesis that states with greater wealth do not have greater stakes. I have articulated only very general rules for international negotiation to realize these principles. Partly, this is because the principles are not elaborate or precise enough.

Furthermore, the observation that power should be apportioned to ex ante stakes, however normatively satisfying, comes up against the basic observation that power is, as a matter of empirical fact, normally inversely related to actual stakes when an agreement must be made between parties. This problem can be partly mitigated in domestic societies when they attempt to change the actual stakes for people by bringing about a regime of equal opportunity by means of an effort to achieve a certain distribution of resources. But this idea is not available in the international order, as we know it. States themselves must realize whatever political institutions there are. In addition, the international system does not have the capacity to realize a distribution of resources.

This observation could make us skeptical about the very idea of fair negotiation in the international system. We may be inclined to think only of outcomes as a way of evaluating international negotiation. However, this would be too quick. More work needs to be done in trying to assess the possibilities for institutional checks on the dynamic that leads power to be inversely related to stakes. Furthermore, there are also many uncertainties and disagreements about how to evaluate outcomes as well, which is one of the main reasons for attempting to construct an account of fair negotiation.

83. See Shishir Priyadarshi & Taufiqur Rahman, *Least-Developed Countries in the WTO: Growing Voice*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION, *supra* note 45, at 275, 295–96.