CHAPTER 6

LAW AND THE GLOBAL DYNAMICS OF DISTRIBUTION

The legalization of global political and economic life has made legal expertise a predominant language of engagement in transnational struggle. Law offers a language of disagreement and justification nestled in a body of shared common sense and accepted facts, a set of roles and institutional practices giving form to their use, and modes for relating legal assertions to the material world of coercion and the social world of status or legitimacy. Legal rules constitute actors on a terrain of struggle by arranging entitlements and authorizations defining what it means to be a "corporation" or "state" or "citizen," each armed with a backpack of legal powers and vulnerabilities. Legal expertise then rules by articulation. People exercise powers, allocate funds, engage institutions and fire guns by expressing claims of entitlement or authorization. They use legal language to assert power, justify submission or allocate gains. When their articulations are effective, their assertions are confirmed. When legal materials register those outcomes as entitlements, they provide a baseline for the next round of struggle. Law seems to have a kind of social power to legitimate the operation both as a whole and in its particulars. As a result, we can read in legal norms and institutional arrangements both sediment of past struggle and the tools available for new projects.

In this chapter and the next, I explore two remaining puzzles, before turning to the role of law in modern warfare to illustrate the workings of legal expertise in contemporary global political life. Although people in struggle rapidly grasp the significance of law for the allocation of gains and losses or the consolidation of relative powers, the role of law in distribution remains underappreciated by scholars. In this chapter, I focus on law's distributive significance and the importance of legal rules and arrangements as stakes in

struggle to fill this gap. A second puzzle is the continuing skepticism in the scholarly community about the existence and "legality" of law at the global level given the dramatic spread of legal expertise as a vocabulary of global political and economic struggle over the past century. In the next chapter, I revisit the history of international law's reinvention by scholars and practitioners over the past century to suggest an answer: the legalization of global life accompanied a dramatic fragmentation and internal pluralization of legal expertise. As the legal field became more sophisticated, in the sense I have explored in the preceding chapters, it became more useful, if also less decisive or analytically compelling.

Although international legal scholars have rarely made the distributive significance of law the focal point of research, there is a long tradition of doing so elsewhere. In the United States, the tradition is often said to have begun with Oliver Wendell Holmes, who famously asserted that "the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage."[1] Among the American legal realists, many of whom took up Holmes's suggestion in one or another way, Wesley Hohfeld and Robert Hale were particularly influential on my own thinking. Hohfeld for disaggregating legal entitlements into pairs—right and duty, for example—that focused attention on their oppositional or distributional relationship; and Hale for his account of the role of reciprocal threats of coercion in the bargaining power of those who engage one another on the basis of legal entitlements.[2] The postwar embrace of sociology and economics by American legal scholars expanded the tools for understanding the process by which social conflicts become transposed into legal arrangements and vice versa.[3] More recent works by Duncan Kennedy and others in the "critical legal studies" movement are the direct source for the approach I develop here.[4]

THE POWER OF LAW: COERCION AND LEGITIMACY

In the first instance, people struggle over legal arrangements because law promises enforcement: it signals a promise by an authority to back up its statements with force. If you trespass on my property, I can call the police. If you enter my market without a license, the state will make you pay a fine. But this is not all there is to it. Not all official legal arrangements are enforced: much goes unpunished or is settled among people with the state only vaguely in the background. Some normative arrangements are not backed up by the state, but by customary authority. At the international level, there is no state

standing above the situation to enforce. Enforcement, when it occurs, is horizontal, undertaken by other states, by economic pressure, by media pressure, consumer boycotts, or military engagement. Some analysts have said that *only* where there is enforcement ought we to speak about law at all on the international plane. That makes some sense—a realistic prediction of coercion is central to normative authority. But rather than shrinking the domain of law, this approach has tended to expand it. Lots of social, political, economic, and military pressures have the effect of "enforcing" normative expectations transnationally. Reading back from them, we find lots of law.

The fact that so many people involved in global struggle do so in legal terms, seek legal gains, reframe their ideologies and interests in technical legal arguments seems to go beyond the coercive power law brings in its shadow. Or at least, we would need to understand that coercive shadow in very broad social terms. People sometimes use the word "legitimacy" to denote law's additional social power beyond the naked promise of coercion. Legitimacy in two senses: when people accept that something is "legal," it seems legitimate; and law itself has legitimacy as a mode of engagement, a set of procedures for dispute, a vocabulary of arguments for advocacy and persuasion.

In the first sense, law's power rests in its ability to create what we might call a "legitimacy effect." If you can get someone to accept that something is legal, you will create in them the feeling that it "should" be accepted. This allows law to serve as a force multiplier in international economic and political discussion. If bombing the city was legal—if the dead civilians were legally permissible targets—you can expect that fewer people with the influence to oppose the military action will do so effectively. If you can convince people that occupying the territory is "illegal," by contrast, it will take more political energy and will to sustain the occupation because fewer people will be disposed to let it continue and many who oppose it will feel empowered. This kind of power also has a dark cousin: the power that comes with violation. People who behead journalists undertake a strategic legal (or, perhaps better, illegal) maneuver, seeking the authority that comes from a perception that they are outside norms of legitimacy. They may pay a price: their struggle may become more difficult if opposition hardens its resolve in light of their violation of legal or ethical mores. But they may also gain a great deal: visibility, even "legitimacy" from others on the outside of what pass for universal norms.

It is a puzzle how law—private law, national law, international law, industry standards, corporate codes of conduct—came to have this legitimating power. Law's legitimacy is itself the ongoing outcome of struggle, over both

the authority to speak the law and the authority of legal speech. For the moment, the outcome internationally seems to be a broad dispersion of authority to speak in legal terms and a broad recognition of the prestige and authority of legal claims. Although this state of affairs may or may not turn out to be stable, it seems rooted in the background ideas elites have about how things work, alongside ideas about what an "economy" is, what a "state" is, or how politics and economics work.

At the same time, however, one unfortunate idea many people in the global elite share—with my own grandmother, as it turns out—is the sense that "international law" hardly exists. There are some treaties, there is the United Nations, and that's about it. One Christmas, when I told my grandmother how much I enjoyed studying international law, she calmly asked, "But David, do they even have that?" And yet, Grandma knew, as people everywhere instinctively do, that the suitcase she brought on board at home still belonged to her when the plane landed overseas. When she traveled, she expected to be able to reason with people when she arrived in familiar normative terms, just as confidently as she expected every country to have a flag, a national flower, and a typical souvenir. She might not know the local language, but she did know when the hotel had failed to meet its obligations or the local shopkeeper had pulled a fast one. She was not alone. People around the world have expectations about law's reach, significance, and availability as a common language for talking about who ought to do or get what that go far beyond the world of treaties and UN resolutions. This expectation has a lot to do with the ubiquity of legal rules and institutions themselves. So long as people struggling for advantage experience the power of legal arrangements, the persuasiveness of legal arguments, and the effect of legal authority, my grandmother will continue to be correct in her prediction that she will be able to rely on it in otherwise strange locations.

Although it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn. Even war today is an affair of rules and regulations and legal principles. Nor is the global market a space of commercial freedom outside of law. Global trade—even informal and clandestine trade—takes place in a dense regulatory environment among entities whose capacities and bargaining power are structured by legal powers, obligations, and privileges. The dispersion and fragmentation of economic and political power brought about by their globalization have only accelerated their legalization. The result has been a tremendous proliferation of

law and the vernacular of legal expertise. The multiplicity and ubiquity of rules contribute to their legitimacy and to the expectation that they will continue to be available and useful.

Yet global life is governed less by a functioning *system* of rules and institutions than by a hodgepodge of local, national, and international norms, made, interpreted, enforced, or ignored by all manner of public and private actors. We live in a world of conflicting and multiplying jurisdictions, in which people assert the validity or persuasiveness of all manner of rules to one another with no decider of last resort. The footprint—official and unofficial—of national rules and national adjudication extends far beyond their nominal territorial jurisdiction. Every sovereign territory is penetrated by the effects of rules made and enforced elsewhere. And then there are the many overlapping private arrangements, financial institutions, and payment systems, an alternate world of private ordering through contracts and corporate forms, standards bodies. It was, after all, a network of impenetrable private obligations that tied the global financial system in knots in 2008 and has yet to be unwound. Even global liquidity is as much a matter of private leverage and securitization as it is a function of central bank determinations about the money supply. Private entitlements hold public coffers hostage, whether to foreign bondholders or local pensioners. The informal sector is also global. Informal rules and customary normative expectations are significant for multinational businesspeople as well as small-scale traders and migrants. Remittances, barter, trade and exchange internal to families or firms, black markets, and corruption rackets all have rules and institutions—and enforcement mechanisms. Stigmatizing them, ignoring them—or utilizing them—is, for every public and private actor, a strategic choice. Law's capacity for both strong advocacy and reasoned compromise, and its plasticity to strategic novelty, seem rooted in the tremendous array of possible legal arguments, precedents, and procedures that emerge from this transnational normative hodgepodge.

All this law is relevant for the struggles through which global political life and economic life are carried out in three broad ways. First, legal claims are often an effective tool for defeating rivals and consolidating gains. Legal rules distribute value and foreshadow coercive enforcement where that distribution is not respected. Second, law provides a language for advocacy, negotiation, and conflict resolution. People struggling with one another argue about their entitlements and use legal arguments to discuss the meaning and applicability of broad principles and ideological commitments. My grandmother had no knowledge of the foreign law of public accommodation. The arguments she

expected to be able to make with a foreign hotelier had their roots in law as a repository of hegemonic meanings, moral injunctions, social rankings, and commercial expectations.

Finally, law is relevant for people in struggle because legal ideas, rules, and institutional arrangements structure the balance of power among individuals or groups, shaping the terrain on which they come into conflict with one another. Large and small countries, local regulators and global companies, central banks and global investors all confront one another on a terrain shaped by their respective quiver of powers and vulnerabilities. Over time, as legal rules and the outcomes of legal disputes consolidate winnings and lock in small differences of power, large dynamics of inequality can arise. In this chapter, I look at each of these in turn. In the next chapter, I consider the century-long transformation of international law that rendered it a sophisticated, comprehensive, and malleable tool for global struggle.

LAW: A MODE OF DISTRIBUTION AND THEREFORE STRUGGLE

Law's distributive role is no surprise to people engaged in transnational economic or political struggle. They work hard to understand and exploit legal arrangements favorable to their interests and to shape the regulatory landscape. Law distributes when it gives people entitlements and legitimacy that strengthen their bargaining power, either individually or as member of a favored group. Legal rules distribute when they consolidate gains, marking the line where coercion will enforce an allocation of value to us rather than to our competitors. Regulations alter patterns of distribution by changing relative prices. Law permitting some weapons and prohibiting others will advantage some armies over others. The fact that migration is more tightly regulated than movements of goods or capital affects the relative bargaining power of investors, workers, and manufacturers. Access to capital depends on a specific intersection of local and global financial rules and practices.

Despoiling the rainforest is not only an economic decision—it is the exercise of a sovereign legal privilege at the center of international environmental law. Each sovereign is legally privileged to exploit the resources and despoil the environment within its territory. When smoke crosses the border or harms become egregious, arguments for restraint can be mounted. The privilege (and its exceptions) allocates powers and responsibilities in a way that markedly weakens the leverage of all who would preserve the trees. Were the exceptions to expand effectively and the privilege shrink, the status of forces between

despoilers and preservers would shift. Because it distributes, law has value for people in struggle, and is often also at stake in conflict.

What is less obvious is how thoroughgoing this distributive function is in global political and economic life. The ubiquitous distributional significance of legal arrangements in world political economy can be illustrated by considering David Ricardo's famous analysis of the "gains from trade" in light of his analysis of "rent."[5] Ricardo demonstrated the potential for "gains from trade" with a simple model taught in every introductory college course on the economics of trade: two countries producing two products with different resource endowments or technologies. The theory is simple, if somewhat counterintuitive: even where one country needs more inputs than another to produce both products (is at an absolute disadvantage in the production of each), there will be gains from trade if that country exports the product in which it has a relative or comparative advantage.

In the classic demonstration, illustrated in figure 6.1, although country B takes more inputs to make both radios and televisions, if country B exports four televisions to country A, country A can release two units of input, apply them to the production of radios, and export six radios to country B, which can use them to release six units of input. Applying those six units to TV production allows for the production of six televisions, a gain of two televisions overall. Country B has a comparative advantage in television production. By exporting four televisions and importing radios, it can gain value equivalent to two televisions. The principle could, of course, be equally well demonstrated from the perspective of country A, which has a comparative advantage in radio production. In this case, as illustrated in figure 6.2, country A exports six radios, allowing country B to release six units of input, apply them to television production, and export six televisions. Country A, in turn, is able to release

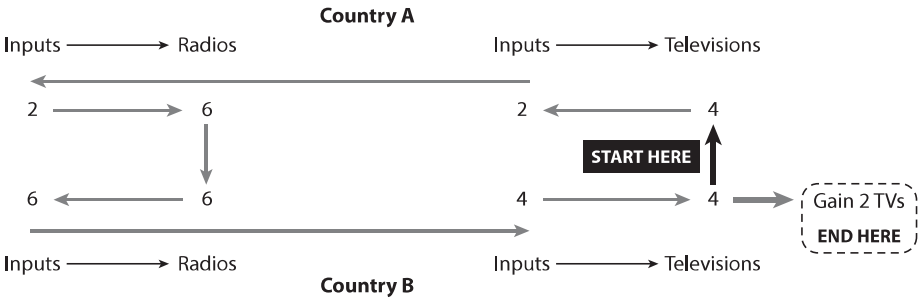

Figure 6.1 Ricardo: Gains from Trade to Country B

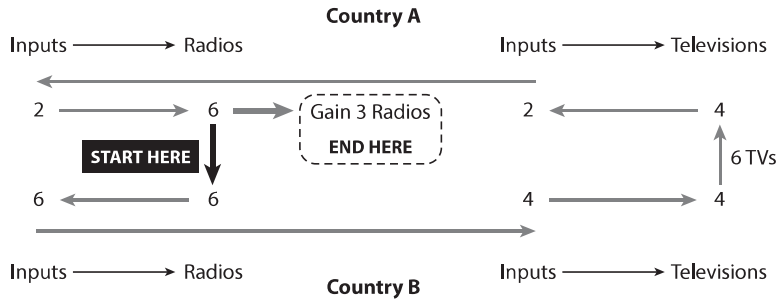

Figure 6.2 Ricardo: Gains from Trade to Country A

three units of input from television production, apply them to radios, and achieve a gain of three radios. This is all quite straightforward.

The struggle arises when the gains from trade are distributed. Will we end up with the equivalent of two more televisions in country B or three more radios in country A? This will depend upon an enormous number of variables which it is customary to treat as matters of "bargaining power" or as a kind of automatic consequence of things like the relative "productivity" of factors, "competitiveness" of economic actors, "price elasticity" of supply and demand in markets for these products. If lots of countries make similar radios at similar prices but country B is the only other place you can get televisions, for example, we would expect country B's bargaining power to be higher and a larger portion of the gains to end up there. What does the distributing is the market, setting prices for factors based on their productivity and for products based on supply and demand.

But what economists call "competitiveness" and "substitutability" depend in part on the legal and institutional arrangements that affect things like costs of production and barriers to entry in the two industries, the structure of these (and other) industries in both countries, the relative power of labor and capital invested in the two industries, the monopoly power of producers in each industry, the distribution of preferences and the process by which preferences are shaped in the two countries, and so on. Most obviously, if country B is the only place A's consumers can get televisions because B holds the patent for televisions, the relative competitiveness of the two products can be traced directly to a legal entitlement closing production to other nations who might otherwise bid down the price and shift gains from B toward A. Changing arrangements that have this kind of market-shaping effect could change a country's bargaining power, the competitiveness of its products, or the productivity

of its factors and thereby affect the distribution of gains. As a result, they are worth struggling over.

Economic words like "competitiveness" and "productivity" have their parallels in political terms like "leverage" or "persuasiveness." They obscure the institutional arrangements that went into the bargaining power sausage. Each of these apparent facts ("he had more leverage, she was more persuasive") rests on legal entitlements, institutional arrangements, and vernaculars of persuasion that could be organized in different ways and are therefore themselves worth struggling over. Bargaining power depends on many things we associate with "power": relative size, prestige, wealth, or military might. Bringing relations of power to bear on the bargain occurs through institutions of one or another sort.

Consider colonialism. Regardless of who makes how many radios, if B is a colony of A, we would not be surprised to find the gains ending up with A. The colonial center, we would say, has the power to extract the gains. But how exactly? The "power" in a colonial relationship needs to be exercised through institutions, whether social, military, or legal. Did country A take the televisions by force? Did A preclude B from trading with other countries? Did it compel purchase of radios from A at above market prices? Perhaps there was a complex tax system—or set of currency controls and licenses—that ensured the prices paid in the two countries distributed the gains to consumers—or the tax office—in the imperial center. Or perhaps the institution doing the work is a social one: colonial elites so enamored with products branded in the mother country that they were willing to pay more. And things could be arranged the other way around: perhaps consumers in the mother country were compelled to purchase colonial products at higher prices as part of the overall colonial arrangement.

Ricardo recognized the significance of background social and legal institutions when he identified the centrality of "rents" to the distribution of gains from land. He was interested in how landlords holding highly productive land were able to charge more than the cost of production as demand increased and less productive land came into use. He wanted to explain how people deploying equal quantities of labor and capital in agriculture could nevertheless obtain different returns. Presuming the labor and capital were provided on parallel competitive terms in all locations, some land, he observed, was simply more productive. At any given time, the price of food would reflect the costs of labor and capital needed for its production on the least productive land in cultivation. Otherwise that land would not have been brought into cultivation.

If you put your labor and capital there, you would earn nothing. If you put it on the most productive land, you would earn the difference between your costs and those on the least productive land in cultivation. He called that difference "rent," which he attributed to "the original indestructible powers of the soil" over and above the labor and capital that had been applied equally in the most and least productive plots. The landlord had exclusive access to this "rent" because of property law: the landlord can call on the enforcement powers of the state to ensure that he alone receives the return above the cost of labor and capital necessary to produce the food on the most productive land.

Ricardo thought this was a bad arrangement. He thought landlords were less likely to make good use of those gains than other pluckier folks. They would consume it, waste it, sit on it, spend it abroad. One way to unravel landlord privilege as demand for food rose, he reasoned, would be to open Britain to grain produced elsewhere more cheaply. The price of food would no longer be set by the least productive plot in Britain, and the landlord would no longer have a free ride on his property in better land. In this sense, the landlord's rent was the product not only of property law, but also of the Corn Laws and all the other legal arrangements that kept the price of food high enough for him to reap this benefit. That is one reason he favored their repeal.

Ricardo's analysis had limits. As a theoretical matter, it is notoriously difficult to say what portion of the price of anything represents "rent" as opposed to the "cost" of production. It depends on what you attribute to "cost" and what you attribute to the "indestructible powers." If there is a market for land, the cost of acquiring the property right might as well be treated as part of the capital brought to the endeavor. Obtaining and securing a property right—an entitlement to rent—could be seen as another cost of production or the purchase of a needed service and the return a reflection of those costs.

But Ricardo was on to something. For one thing, there are situations in which there is no market for a landlord's entitlement. Suppose he and all the other landowners had inherited their land and they were not permitted to sell, by law or custom. Although it might seem reasonable to treat the cost of acquiring the property as a cost of capital if the landlord had paid for it or in retaining the land forwent equivalent investment opportunities, where law forbids that, we see more clearly the hand of power and it seems reasonable to call the gain an unearned rent, arising not from the soil but from the legal and social arrangements. Sovereignty is somewhat like this: there is no market for countries. What the elites of a "rentier state" have to play with are sovereign entitlements in a territory. They can license production, control the flow of

labor, tax the proceeds, encourage or tolerate all manner of informal coercive demands for side payments, but they cannot sell out and buy another country. What they obtain reflects the indestructible powers of sovereignty.

There turn out to be lots of background legal rules that affect the landlord's ability to enjoy the full difference between the cost of production on his excellent land and on the least productive land. Perhaps agricultural workers are prohibited—or required—to unionize. Perhaps they are tied to the land as serfs. Perhaps some workers can move and others cannot. Perhaps banks are forbidden—or encouraged—to make loans in the agricultural sector. Just as the law of inheritance and property empowered the landlord to extract gains, workers (and bankers) will also be able to wield their entitlements (not to be enslaved, to exit for the next farm) to extract something. The gains arise not as a natural return on capital or reflection of the productivity of labor, but from the legal arrangements. Property, labor and sovereignty have no intrinsic value or indestructible powers. When those acting with the legal entitlements and vulnerabilities of property owners, laborers and state officials struggle with one another over value, the gain accruing to some at the expense of others reflects the relative strength of the legal powers they each brought along in their backpack.

In a sense, any economic gain could be understood to arise from the entitlement to exclusive use of the return from something. The soil, after all, has no economic power: it is just there. People have to add capital, labor and know-how to get food, the food has to be sold and the proceeds parceled out. Like the land, wealth, technology and labor are also just there: they have no inherent productivity or generative powers. A person has to have the entitlement, under some conditions, to use those things and retain the gain. Those conditions could be set in many ways: labor might be slaves, technology might be more or less exclusively owned, capital might be rationed, allocated or subsidized, and so on. And then the people who have these entitlements have to figure out among themselves how to divvy up the gains, bargaining in the shadow of their various powers and vulnerabilities vis-à-vis one another. Land, wealth, knowledge, and labor become economically productive only as legal institutions. The "indestructible power" in each case is the power of law.

To formulate this as a general proposition: legal arrangements distribute when they effectively exclude some people from participation in gains in the shadow of a promise of coercive enforcement. The landlord can have the trespasser imprisoned—or may have legal permission to shoot where his exclusive entitlement to the bounty of his land is threatened. A requirement that

landlords bargain with a state-sponsored labor union or sell to a state marketing board is equally coercive, forcing the landlord to accept less favorable terms than he could with individual peasants or buyers A prohibition on agricultural unions—or the law of serfdom—would coerce a bargain the other way. The law would not have to be official to do this work, nor would the coercion need to come from the state. In lots of situations, business practice and local custom are far more effective in conditioning access to gains from economic activity. In so doing, all such arrangements permit "rent" in the sense Ricardo identified as the consequence of property rights to productive land. Globally, constraint on participation in gain is ubiquitous, and differential access to returns is everywhere reinforced by entitlement.

When economists use the language of rent today, however, they have a more limited class of situations in mind: returns that arise when markets diverge from "optimal" or "competitive" prices and returns. Rent arises as a result of something "abnormal" or "distortive." In this picture, the image of a normal—or ideal—baseline of market transactions unimpeded by power is crucial. Without it, all returns would be as much a matter of Ricardian rent as a return on investment or recovery of cost.

In the legal field, for example, law and economics scholars Bebchuk, Fried, and Walker describe the potential impact of "managerial power" on executive compensation this way: "Managers with power are able to extract 'rents'—value in excess of that which they would receive under optimal contracting—and managers with more power can extract more rents."[6] The word "optimal" does a great deal of work here. They have in mind a normal situation in which managers are the transparent agents of shareholders, disciplined by a competitive market in managers to work in the interests of shareholders and minimize agency costs associated with the need to hire managers in the first place. Rent, they explain, is the "excess of the pay obtained by him over what he would have received under a contract that maximizes shareholder value."[7] The authors then identify a series of social and legal arrangements that permit the exercise of manager power to divert to their own pocket part of what should be returned to shareholders, even in the face of shareholder supervision of pay by the board.

The idea that managers ought optimally to attend only to shareholder value is, of course, also a reflection of legal arrangements. It would be easy to structure corporations to ensure that managers were responsive to the state, to the community, or to workers as well. Or we might think the arrangements of power that permit managerial capture of corporate profits are themselves normal: were

shareholders to institute rules to force departure from them, they would be extracting rent from the poor managers. If we think of rent as the reflection of the power to exploit scarcity—here the power to divert corporate gains either toward or away from shareholders—then it would be rent all the way down. Economic returns always reflect a power to exclude, often a legal one conferred by contract or property or office or status or regulation of some kind.

The development economist Raphael Kaplinsky uses "rent" to analyze the distribution of gains in global supply chains, urging developing nations to improve their ability to extract rent by "upgrading."[8] His capacious conception of rent focuses on comparison rather than normality. For Kaplinsky, rent arises from any arrangement that permits firms to garner a larger share of the gains from production *than others* by excluding competitors from a source of value. He sees rents arising within firms when they invent or adopt new technologies, develop unique or improved skills, adopt new forms of organization, or institute changes in design and marketing that give them an edge over the competition. Some rents, he argues, are endogenous to the sector but are difficult for any one firm to obtain on its own: the ability to foster and operate networks, speed logistics, develop some kinds of quality, design, or human resource advantages. Clustering firms in an industry or relying on similar infrastructure can lead to competitive advantages for all firms in the cluster, Silicon Valley being perhaps the most well-known contemporary example. On a larger scale, Kaplinsky identifies rents that are exogenous to the industry as a whole: resource rents (the country has oil), policy rents (the government supports national champions at home and abroad), infrastructural rents (someone else paid for the harbor), and financial rents (institutions have been arranged to ensure credit is more readily available than it is elsewhere). His book is a plea for developing nations to adopt institutional arrangements that will permit their own firms to exclude others from gains generated across value chains. Firms, cities, regions, industries, and nations should all seek to upgrade their position in global value chains by increasing their privileged access to one or another moment in the production of value.

This approach is enormously useful because it denaturalizes the failure to capture gains. The gains from trade in radios and televisions are not distributed between country A and country B by the operation of economic forces. They are distributed among all kinds of players—the respective industries, their labor forces, their bankers, the consumers of each product—through struggle over the authority to exclude others from access to parts of the process through which value is generated. The issue is not your "competitiveness" or the inexorable

laws of "supply and demand," but your inability to arrange things to exclude the other guy from the gains arising in a global value chain in which you participate. You have bargaining power if you can get the corner on one or another indispensable link in the chain, erect barriers to entry around the piece of global production you dominate, exercise relative monopoly power, and exclude competitors. The bargaining power of everyone involved—workers, investors, suppliers, distributors, suppliers of transport, retailers, consumers—depends on their ability to exclude others and coerce others to surrender gains. By definition, if you are not extracting rent, the others are.

Like many economists, Kaplinsky says little about the role of law in the battle for rent. He does acknowledge that rents endogenous to the firm "may be protected by unwritten process know-how or by formal entry barriers such as trademarks, copyrights and patents." Yet each form of rent he discusses depends on formal and informal legal or institutional arrangements. The bargaining power advantages he sees in the structure of firms, of finance, of labor relations, of consumer entitlement, and much more have their basis in legal arrangements. In some industries, intellectual property does provide the crucial lever. In others, it is the relative concentration of monopoly power at one place in the global chain—the large automotive manufacturer and credit institutions vis-à-vis both suppliers and retailers; or the major consumer product retailers through their dominance of access to large chains of retail stores and the contractual terms that structure relations with everyone else. Protection for innovation or access to an educated labor force may be crucial. So might privileged access to energy or transport, or privileged access to low-wage labor, or the privilege to despoil the environment. All kinds of technical standards relating to health or safety may affect who can secure the gains to be had from an exchange of televisions and radios.

"Rentier economies" are appropriately named: their development path is rooted in the access their elites have to value arising in their territory. But it is not the "indestructible power" of oil or natural gas that pours money into the sovereign wealth fund. It is the authority of legal arrangements. Were those arrangements to change—from sovereignty over natural resources to local formal and informal licensing, citizenship rules, taxation, and corruption schemes—there would be no reason to anticipate that a particular subset of the people who happened to live on top of an oil reserve would end up so rich. The division of gains among the Qatari government, Chevron, and the immigrant workers in Doha is the product of innumerable local and international, public and private legal arrangements.

The impact of legal rules on the allocation of rents between economic actors depends on the context—and on a network of other legal arrangements. Where compliance by suppliers with a new technical standard gives a large auto manufacturer a quality edge in their market, the resulting gain—and costs—will need to be distributed across the production chain. A large American or Japanese manufacturer may have effective monopsony power over their parts suppliers in Thailand or Mexico for any number of reasons: their size, know-how, prior investments, government support, location in a free trade zone, and so on. If so, they may have the "power" in negotiating contracts with suppliers to force acceptance of the new technical standard, imposing the cost on suppliers and capturing the full gain for themselves. But even here, the supplier may have cards to play. Perhaps they can "upgrade" to meet the standard at a lower cost, more quickly, more verifiably than their competitors, effectively excluding them from a new opportunity to contribute to gains generated when the manufacturer sells the cars. Perhaps they have a license for components necessary for quick compliance, receive subsidized credit to facilitate their upgrade, benefit from technology transfer and training programs enabling their labor force to make the change, or are simply the only firm permitted to sell to the manufacturer in the "free" trade zone. Contracting to comply with the new standard will represent an opportunity to upgrade and capture gains, rather than a new cost. The struggle over legal requirements—whether imposed privately or by regulation, adopted voluntarily or under pressure—occurs in the shadow of strategic assessments of this type. Will compliance offer a new opportunity to exclude and capture gain, or would it impose a cost and represent submission to the successful "upgrading" strategy of my competitors or business partners?

If you leave law out of the picture, it is easy to underestimate the potential to rearrange access to rent. Many economists speak about the strategic imperative for companies—and countries—to enter and hold "high-value" segments of the global production process. It is common to think of a ladder running naturally from natural resource exploitation through processing to assembly, manufacturing, design, branding, and invention. It seems a rule of thumb that high-wage "innovation" or "knowledge-based" activities will offer opportunities to retain a greater portion of the overall gain from economic activity in the value chain than low-skill manufacturing. Law is an important tool for encouraging people to move up the ladder.

But it is also important to understand how much this hierarchy of value itself depends on legal arrangements. A shift in intellectual property law and labor law, for example, might sharply diminish the exclusivity of innovation-based

activities and reduce the availability of the privilege to access low-wage labor. At the margin, regulatory shifts in the many rules governing access to returns from different activities in global value chain can alter what is and is not a "high-value" activity. It is no wonder, therefore, that we also see intense struggle over those rules, undertaken in an extremely unruly and disparate fashion, among producers, consumer groups, investors, firms, cities, and nations.

By definition, not everyone can succeed—that's why it is a struggle. Upgrading is a relative accomplishment. A country might think that securing a low-wage niche through a special tariff arrangement would offer the opportunity to upgrade from agricultural to industrial labor only to find that others have easily secured the same advantage and compete viciously on price. A firm may think that locating the industrial capability to process logs into plywood close to the forest will secure it a privileged position, only to find those who finance the lumbering of the forest locked into a long-term contract with foreign plywood manufacturers. The local government may have gotten a cut for ensuring the exclusivity of their access to the trees. If there is a constitutional struggle in global economic governance, it is over the authority to allocate and secure privileges and other entitlements. At stake are not only economic gains, but the power to allocate in the next round.

The struggle over rent is not waged among nations alone, but through a complex set of struggles among domestic and foreign firms and governments. Although people speak about "Mexico" and "China" competing on price in low-wage manufacturing, the dynamics are more complex. Firms "within" each country and different offices "within" each government will have different interests—often aligned with other social groups or economic entities, whether inside or outside the nation. Nor will the impact of rule changes on "China" or "Mexico" be clear. Is a tariff reduction properly understood as a "concession" to foreign business or as an advantage for local consumers and the national economy? Short-term obstacles can often spur longer term advantages.

A few years ago, I visited a number of maquiladora firms in Mexico. They were creatures of development policy: situated in industrial parks constructed with government assistance and advice, purchasing inputs and exporting under licenses in free trade zones, individual owners receiving training from their government supported industrial association. All were concerned about Chinese competition: despite proximity to the US market, they simply could not compete on price. As we talked, it became clear that they had no clear strategy to compete with Chinese low-wage manufacturing other than to hope the government would come up with a different protected niche for them

to occupy. Their strategic mentality was that of franchisers: astute managers of businesses whose design, cost structure, production method, and market had been provided by others. In China, meanwhile, development policy was aiming to upgrade: export-oriented firms should turn to the internal market and raise wages. The government's tools were regulatory, financial, and administrative adjustments. And they were pouring resources into universities, knowledge-based industries, and high tech. The market spaces opened up for others by these policies spurred economic activity in other countries. I had met assembly and textile factory owners in Thailand and Brazil who were far more nimble in their search for rents as the terrain shifted. In this sense, "Mexico" could not compete. But back in Mexico City, maquiladora manufacturing was last year's fad. I heard no sympathy for the plight of the owners I had been visiting. Mexican government policy was to upgrade: the energy was in high-tech, knowledge-based industry. At the same time, a nimble factory bread company was buying outdated cookie factories across the American South while a Mexican cement company embarked on a program of Asian and European expansion intended to circumvent quotas blocking access to the US market and ended up becoming a leading global player. A new division was opening between Mexican firms with access to global finance and those without.

Even the countries we call "rentier states" may or may not be able to capture the rent. Despite—or within the framework of—collective action through OPEC, oil-extracting countries compete with one another to offer a competitive rate of return to big oil. They have the normal tools of taxation, regulation and rules about foreign investment, alongside public spending powers of inducement at their disposal, and the informal mechanisms of coercion and corruption in which extractive industries are often embedded. Some may tax heavily while others may force the oil majors to invest in local firms or hire and train local labor. Some may promise to build infrastructure—or charge for infrastructure. Local militias and senior politicians may need to be paid off. The labor force will have some power to capture gains, depending on citizenship and migration law, family law, welfare law, labor law, and much more. Some may have the capacity to mobilize domestic savings or finance for exploration and development, others not.

Meanwhile, oil multinationals will have know-how, technology, expertise, access to capital, relationships with others in the chain of production, transport, refining, and distribution that will be protected by property, contract, corporate structure, and regulations of many sorts. From the perspective of big oil, it will come down to rate of return, a calculation of future gains and

costs relative to other opportunities after factoring in the relevant risks. Their leverage will change over the course of an investment: at first, perhaps they compete with others for the license, later they will be the only game in town. Or the reverse: at the start, their power to withhold investment gives them leverage that will be foregone once the development is under way. They, the government, and all the local parties will seek to lock in their entitlement to rent—and will seek to renegotiate that entitlement whenever their leverage seems to strengthen.

In the end, the gains from trade will be distributed across these many claimants: inside the rentier state, inside big oil, among firms further along in the production process, suppliers, corporate home states, and consumers. In all these locations, the invulnerability to competition that comes with the ability to exclude allows someone to capture the gain. Whether that ability arises within the firm, within the sector, or within the nation, it will rest on entitlements, even where it looks like a quality or price advantage. It is in this sense that entitlements are the stakes in struggle.

LAW AS EXPRESSION: ADVOCACY AND RESOLUTION

Legal differences between and within countries at the most detailed level are contested by people who believe they unfairly exclude them from participation in economic gain. All countries now understand that you have to strategize your insertion into the global economy by arranging the institutions over which you have some control to enable economic actors you prefer to get and keep the gains. As a result, people have ample incentive to argue about the relative appropriateness of rules favoring themselves and other people and to develop a vocabulary for doing so. When legal reasons are effective in reallocating gains, law distributes by force of argument.

Legal materials offer people the opportunity to express particular gains in universal terms. Legal arguments sometimes pass smoothly into effective reception, articulation a decisive resolution of past struggle that others feel unable or unwilling to challenge. At other moments, they can be sharply contested by people preferring other outcomes. The vocabulary for struggle may be both narrowly technical and broadly principled and can often be associated with ideological alternatives and images of national interest common in general public discussion. As law has become an ever more global vocabulary of assertion and dispute, the lexicon of possible arguments has grown broader and more flexible.

Nevertheless, like other professional vocabularies of dispute, law reflects the shared experience that some kinds of arguments are inappropriate—and likely to be ineffective—on the international stage. It rarely seems appropriate in international affairs, even among determined adversaries, to argue that God intended us to win—or, for that matter, that our superior power means we can just take what we like. People may think that, may say it at home, but in transnational argument people shy away from asserting their interests this directly. They come up with "reasons": historical reasons, economic reasons, legal reasons, reasons rooted in common ideas about justice or utility. When representatives of the Islamic State of Iraq and the Levant spoke about their gains as confirmation of the will of God, it confirmed their outsider status almost as clearly as the beheadings that accompanied the video message.

It seems to be a quality of professional disputation to frame one's claims in an ostensibly general language. The result is often a somewhat—but not too—technical vocabulary of arguments: claims about what will work, how much things will cost, what the impact on health or growth or the environment will be. Many of the arguments people bring to bear have their roots in professional or academic fields like economics, development policy, political or social theory, or history. By the time they are brought to bear in policy discussions, rigorous analytics and careful research have often given way to a looser vulgate of "rules of thumb" and "best practice." When these arguments are effective, people experience them as analytically sound. When consensus weakens, they are more likely to be experienced as ideologically driven or the transparent expression of opposing interests. To function as a shared vocabulary of debate, law needs to be capacious enough for advocacy in both directions while creating the effect of decisive resolution frequently enough to seem both useful and legitimate.

I was first struck by this in the late 1980s when a young partner from a law firm I had worked for in Washington was asked to assist in the development of what became the Reagan and later Bush administration's Structural Impediments Initiative, a bold effort to get Japan to change aspects of its internal legal, institutional, and cultural landscape that were thought to disadvantage American companies seeking to do business in Japan. The job was to help frame the obstacles faced by these American companies so that they could be presented by the US trade representative in negotiations with the Japanese.

There was, of course, an element of bareknuckle demand for market access: we want more of the gains or we'll exclude you from our markets. But that left a great deal to be discussed. For one thing, how ought the USTR to distinguish between strong and weak claims by American industry for inclusion in the

initiative? Everyone claimed that without government help, jobs would be lost in key congressional districts. Rather than simply assess their lobbying budget, it seemed useful to have a way of analyzing their claims in technical terms. The United States also needed a way of assessing the rule changes in Japan for which their arguments were strongest. This seemed to require some kind of common vocabulary for discussion with Japanese experts. It was not enough to say simply: we just want this more than you want that. Negotiation seemed to require principles, reasons, and some kind of distance between positions and interests. We needed a way to say that the rule changes we wanted would align things properly while their preferences would not.

The broad framework for thinking this through was provided by trade law. The existing trade agreements were too general to determine the outcome—and besides, the United States was hoping to extend those agreements, breaking new ground in its demands for changes by Japan. In a very general way, however, the trade system did offer a way of talking about legal and cultural arrangements. It begins by imagining that the governments of "Japan" and the "United States" aggregate political and economic interests of their respective societies and confront one another as representatives of those interests. At stake in the discussion are legal rules—tariffs and other regulations—that may be said to favor home country interests. To determine which rules can stay and which must go requires people to distinguish those rules that are part of the background necessary to support market activity and are presumptively legitimate from those that distort normal economic exchange and permit the extraction of rent and are presumptively dubious. Market-supporting rules should be enforced while market-distorting rules that functioned as "non-tariff barriers" to trade or otherwise rendered trade "unfair," ought not to be promulgated.

These terms did not have clear or settled meanings. There were a number of specific regulatory regimes constructed in the shadow of this idea, and people had a general sense about the distinction between market-supporting and market-distorting. There were clear cases on both sides: private law rules of contract and property, police protection, and stable financial arrangements, on the one side, subsidies for local business and regulations that explicitly excluded foreigners, on the other. From there, people could intuit a landscape of plausible and implausible arguments. They could imagine people pushing back and forth on the distinction: your rules distort, those favoring me support. There was a kind of loose background regime where these arguments could engage one another, located in a complex interaction among industrial lobbyists, academic experts, government officials (institutionally structured in different

ways in Washington and Tokyo) participating in intergovernmental negotiations, all in the shadow of the General Agreement on Tariffs and Trade, other trade agreements, and the background consensus of the professional communities devoted to their interpretation.

And so the team went to work. Was the requirement that cars be outfitted to drive on the left in Japan a distortion permitting Japanese manufacturers already tooled up to produce them to capture gains that would otherwise flow to Detroit? What about the requirement that consumer products be labeled in Japanese? That technical manuals be written in Japanese? What about the regulations covering the teaching of English in Japanese primary schools? Each of these ideas was seriously discussed, along with hundreds of others, from Japanese land use arrangements, public infrastructure finance, and retailing practices to the American budget deficit and domestic savings rate. Since it is rules and rents all the way down, there is no principled or analytically precise way of figuring out what is background and what is distortion. It depends on what you think is normal.[9] Nevertheless, the Japanese were willing to undertake the discussion in these terms, and so were the Americans. The result was a satisfying and useful vernacular for struggling over the claims of American and Japanese industry for favorable rules. The seemingly unlimited potential to reinterpret elements of a nation's legal arrangements as "non-tariff barriers to trade" because of their differential impact on local and foreign actors was part of what made the legal vocabulary so appealing.

Many of rules that differed in Japan and the United States did not arise for discussion, either because everyone assumed they were part of a normal market-supporting rule system or simply because no one in industry thought to contest them. Lots of those rules allocated gains among different actors involved in economic activities linked to trade: between creditors and debtors, large and small enterprises, financiers and producers, and so forth. These battles had already been won and lost. After the Structural Impediments Initiative was concluded, it would have been possible to reassess the situation and search for regulatory tools that had escaped contestation but that could now be adjusted to strengthen the "bargaining power" or change the "competitiveness" of various actors: perhaps antitrust rules, labor law, environmental law, taxation, and so on. Looked at with new eyes, perhaps these also departed from the normal, permitted the extraction of unearned rent. And so the struggle would continue.

We might reimagine Ricardo's picture of trade to foreground the role of law in the distribution of gains, attending both to the uncontested arrangements

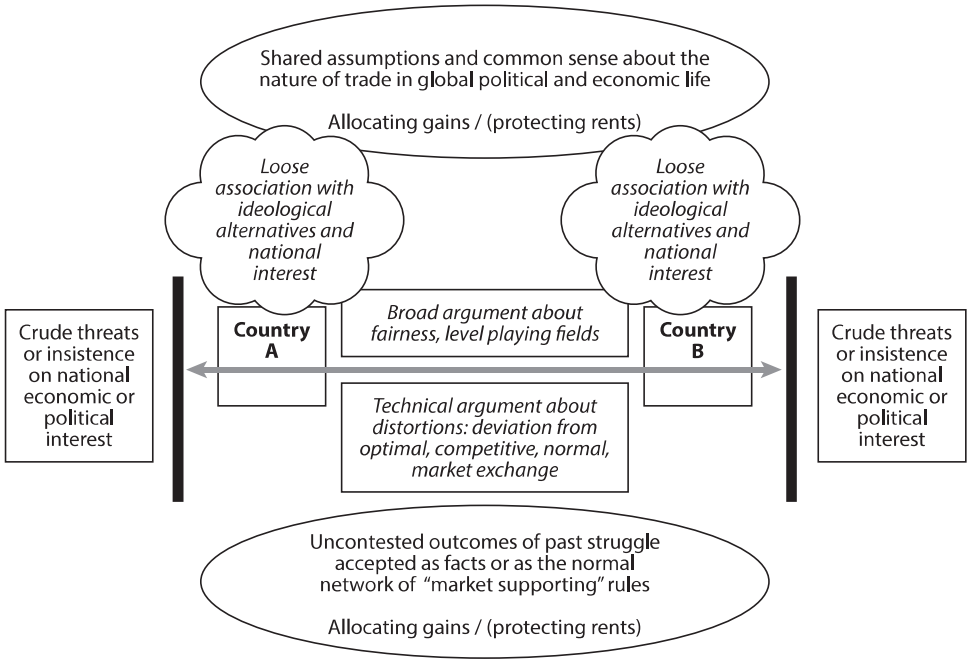

Figure 6.3 Professional Argument over Rules Distributing Gains from Trade

allocating gains and to the language for disagreement about whether those allocations are normal rules supporting market competition and productivity or illegitimate intrusions of political power distorting competition to permit the extraction of "rent."

We can speculate about what makes the "rent" versus "cost" or the "market-supporting versus -distorting" vocabularies attractive for people struggling over the gains. One factor seems to be the analytic chiasma on which they rest. All gains could be said to reflect costs, if we include opportunity costs and the costs of acquiring, defending, and utilizing the entitlements to exclude others. In this sense, "rent" is simply a pejorative for profit or gain: other people's profits recast as unearned "rents" rather than reflections of their contributions. In another sense, it is rent all the way down: everyone's bargaining powers arise from the distribution of entitlements. There is no generally accepted and decisive analytic for drawing a line between background rules that support costs and those that generate rents. It depends on what seems ordinary and what seems the result of power. Similarly, all rules that affect relative prices might be seen either as "unfair barriers to trade" or as the normal regulatory infrastructure for market activity.

Another factor that made this vocabulary attractive was the subtle link between this apparently technical—if analytically not very robust—way of arguing and differing national and ideological visions of normal economic activity. It is clear that the opposing interests of Japanese and American business were at stake. People referred to what was going on as a "trade war." But neither party needed to say directly, "I'd like more of the gains, thank you." They could appeal to a purportedly neutral or shared analytic of "fairness": everyone should support and no one should distort the conditions for trade. The word "fairness" itself operates in at least two registers: as a technical synonym for trade based on market-supporting rules, and as a general normative expression of disapproval. Although this may seem an idiosyncratic case, the association of "war" with technical argument is routine. Even when presidents speak about "defeating" the enemy or, as Vice President Joe Biden put it, "follow[ing] ISIS to the gates of hell," a military campaign takes shape and acquires legitimacy in arguments to Congress, to allies, or to the press, in a technical vocabulary of appropriate and proportional force.

The trade vocabulary is also open-ended in a way that makes it easy to associate with larger ideological commitments. The market-supporting/-distorting distinction is loosely linked to ideological disagreement over the appropriate scope of government. To someone who favors disembedding the global economy from political life, lots of rules (particularly in other countries) will seem like distortive licenses to extract rents. For others, more regulatory arrangements (at least at home) will seem part of the normal background to market bargaining. A trade war fought in these terms will accommodate a vicious struggle over the allocation of gains—as well as over large-scale ideological positions—while also remaining sufficiently technical to permit a wide range of intermediate resolutions. After all, once the matter has been settled, the outcome will be normal: anything else would be an illegitimate distortion.

The outcome of arguments tethered, however loosely, to national interests and ideological positions also distributes power among those interests and positions. The persuasive power or legitimation effect of Japanese and American demands in future struggles was affected by their relative success in the Structural Impediments Initiative. While the initiative was under way, people were assessing—and reassessing—the relative "power" of American and Japan. Was Japan's spectacular success in penetrating American markets—and America's dismal record in reverse—a sign of American decline? Or had Japan been cheating, burdening its economy with government interference for short-term gains in ways that set the stage for a future decline or postponed an inevitable

reckoning with American manufacturing prowess? The ideological stakes were also clear. The East Asian Tigers were being touted at the time as examples of the economic development success that comes with neoliberal policies of deregulation and trade liberalization. Japan was chastised for the reverse: unfairly structuring their internal market and supporting their export leaders for advantage. If it turned out that the Japanese legal and institutional arrangements targeted by the initiative were acceptable, the persuasive effect of arguments for market liberalization would be reduced and the legitimacy of strategic government intervention as a tool of economic development increased.

It remains a puzzle how experts experience their engagement in argument using a vocabulary with these characteristics. That it would be useful to have a vocabulary for advocacy and resolution that was linked, but not displaced, by interests and ideological commitments, and that was technical in feel but plastic enough to permit a range of positions and resolution, is clear. Using the vocabulary leaves a feeling that one both is and is not speaking about interests and ideologies, and that resolutions are analytically defensible but not analytically required. When I have discussed the "market-supporting/market-distorting" framework with trade professionals over the years, I have found a kind of looseness in their relationship to the rhetorical tools of their profession. The most sophisticated players in some way know—and don't know—that the distinction rests on a commonsense baseline understanding of the normal relationship of government to economic life about which there is no consensus. They know their apparently technical discussion is also—or ultimately—about ideology and interest in just the ways the technical distinction assumes away. But somehow all this conduces to a kind of sophisticated satisfaction. The point is not that it makes sense analytically, or that it avoids ideological and political commitments, but that it is useful, is shared, functions as a way to discuss and resolve differences—perhaps precisely because it straddles the technical and the political. Theirs is a sophisticated disenchantment.

Whatever the experience of using this kind of technical-strategic vocabulary in struggle, all kinds of people have learned to do so. It is not only—or even primarily—the US trade representative and his or her counterpart in Japan who debate these assessments. People everywhere in transnational economic life argue to change the rules so they can capture gains. They identify points in the production process where value is generated and try to position themselves to exclude others by deploying entitlements. They urge the government to take a stand against their adversaries and defend what they have extracted from governments at home and abroad. Some of their successes sink into the

background while others come to be contested by their adversaries as "unfair" departures from normal market arrangements.

No authority stands in the background overseeing, adjudicating, and enforcing the outcomes of these battles over the distribution of gains. The World Trade Organization, often imagined as providing a governance framework for global trade, is simply one space among many for carrying on the struggle, where the uncertain line between market-supporting and market-distorting rules can be argued out. Nor is the WTO itself structured as a governing institution above member states. At best it provides a framework for horizontal bargaining among governments about tariffs and regulations that can be understood to function like tariffs, along with a dispute resolution mechanism whose enforcement depends on the relative willingness and ability of member governments to exact or bear costs vis-à-vis one another.[10]

The common framework for discussion is more vocabulary than institution. People contest rules favoring their adversaries by expanding an analytic frame loosely rooted in what they understand to be "trade law": part national statute, part precedent from other disputes and other regimes, and part simply what they imagine any law worth the name would stigmatize as "unfair." In this they are not unlike my grandmother confronting a foreign hotelier. The non-tariff barrier discussion is characteristic of many international struggles undertaken in legal language: at once technical and open to association with broader ideological positions and interests, sufficiently malleable to permit a range of possible (strong) arguments for various positions, and yet capable of defending outcomes in terms that sound at once principled and analytically sound.

LAW AND THE STATUS OF FORCES AMONG GROUPS

The countless individual struggles that drive global political and economic life leave patterns in their wake. The winners and losers are not only individuals or companies, but nations, regions, social groups, economic sectors, and ideological positions. The Structural Impediments Initiative was intended to adjust the relative power of industries, labor, commercial, and financial interests between Japan and the United States. It was widely understood as a test of the two nation's relative powers and of the persuasive authority of an ideological commitment to deregulation. It affected the relative positions of importers and exporters, Japanese and American manufacturers, consumers and producers as they looked ahead to future conflicts of interest.

Legal arrangements everywhere affect the balance of power between groups, changing the bargaining power of individuals and firms in ways they are not able to change or negotiate away on their own. The status of forces between debtors and creditors, investors and public authorities, consumers and producers, both across national boundaries and within them, rests on legal rules and institutions that may be the product of intense conflict or simply an unintended byproduct of arrangements made for other reasons. Airline regulations affect costs and relative powers of consumers and airline industry players, banking regulations those between debtors and creditors, laws of war those between well-equipped modern armies and insurgents. Large firms and financial institutions often find it easier to exercise and enforce their entitlements transnationally than small firms, consumers, and workers. On the other hand, patterns of extraterritorial antitrust and international administrative cooperation may strengthen some medium-sized companies at the expense of large monopolies.

Third parties and struggles are also affected. Things the United States failed to achieve in negotiations with Japan were harder for others to achieve in parallel negotiations elsewhere. How far it seemed possible to go in questioning the distortive impact of Japanese background rules abroad affected the appetite of trade negotiators and commercial interests in other places. Success in challenging a Japanese background rule as a non-tariff barrier emboldened people to try similar arguments elsewhere. And there was also a backlash—perhaps the United States had pushed things a bit far and a greater respect for regulatory differences should be encouraged.

At stake is not only the distribution of gains, but the large-scale direction of society. Economies configured differently will operate differently, just as different allocations of legal capacities and authority will generate divergent polities. By tracing the impact of legal forms on the economic and political actors and activities they constitute, people can identify choices among different political and economic trajectories. They can struggle to identify and build alternative, even equally efficient or democratic, modes of economic and political life with diverging patterns of inequality, alternate distributions of political power and economic benefit, more or less space for experimentation or contestation.

Although the significance of legal arrangements that shift power among groups is widely understood, the responsibility of those arrangements for economic and political outcomes is routinely overlooked. In September 2010, I traveled to Yaroslavl, Russia, for a meeting organized by then Russian President Medvedev's office to consider the efforts necessary to lay the foundation

for a "knowledge-based" Russian economy to reduce dependence on extractive industries. In 2011, in Astana, Kazakhstan, I heard a great deal about the president's plans to develop a more diversified economy. In 2012, planners in Doha described their plans to lay the foundations for a "knowledge-based" economy by 2022 to reduce their reliance on natural gas. Mexico had this in mind as they moved from low-wage manufacturing to high tech. So did China. In all these cases, the tools were legal and administrative changes to reallocate opportunities to garner rent in the name of social transformation: adjusting rules on credit, education policy, immigration, intellectual property, local autonomy, export and import licensing: turning the levers of state power to allocate gains to those who would innovate as they had once been turned to those who would industrialize. By changing the rules, the privileged sectors—investors, innovators, entrepreneurs, national champions—would be strengthened.

Although people feel confident they can identify the levers necessary to change the allocation of power and wealth among social groups, economic sectors, or individual firms, this rarely translates into the feeling that something could be done about inequality, whether locally, nationally, or globally. People who readily understand allocations among firms, industries, or nations as the outcome of struggle nevertheless interpret patterns of inequality as in some way natural. People intended to move people from the country to the city, transform peasants into factory workers, remodel low-wage industries into innovation clusters, but no one intended inequality. People intended to liberate capital here, expand liquidity there, open these markets, restrict access to credit somewhere else, manage exchange rate fluctuation, and expand opportunities for securitized investment, but no one intended fiscal "imbalances."

One answer may be the tendency of past wins and losses to sink back into the "normal" or even the "constitutional." Large changes that emerge from struggles sometimes do seem "constitutional": they shift the institutional terrain, settle some debates while opening others, strengthen some political and economic actors while weakening or excluding others. The powers of a sovereign wealth fund that began as an instrument of policy can come to seem part of a nation's constitutional separation of powers. Within the European Union, a change in the institutional structure for managing bailouts—like the 2012 European Stability Mechanism—may consolidate a distributive settlement of risk among economic players and narrow the channel for political debate within and between member nations. The invention of new legal instruments—the "credit default swap"—may destabilize settled expectations and risk allocations. Over time, they may come to seem indistinguishable from

property rights with longer historical pedigrees. Calling a result of struggle "constitutional" may also help to make it so. Constitutionalization—locking some things in, locking some actors out—is as much a strategy of engagement as a map or foundation for government.

The background common sense of expert vocabularies may constitutionalize inequality in this sense. International lawyers, for example, typically share an unstated presumption that the world of international politics is somehow prior to and more real than the artificial net of international rules they have created: the member states are somehow more real than the international institutions in which they are members. Real states like Israel are somehow automatically more legitimate and solid than legal "entities" like the Palestinian National Authority. On a larger scale, the idea that religion is part of the prehistory of international law helps consign religious ideas and institutions to the margins of international politics, just as international law's understanding that the commercial world of the market and the private world of the family lie outside its purview distributes power over families to states while disempowering states relative to the global economy. All these ideas generate narratives and institutions and expectations that shift the powers and statuses of people. When international law speaks in the language of universals, it acts as a cloak covering the distributive practices it authorizes and accepts.

The relative status of law itself may also be a factor in the distribution of power and the consolidation of inequality. In the field of development policy, for example, the relative authority of economics has outpaced that of law or other social sciences for more than fifty years. When development economics supported strong development states pursuing import substitution industrialization, there were sociolegal strands of thought in law that might have raised questions about the plausibility of a development program so dependent on an effective administrative state. In later decades, when development economics supported weak states, deregulation and open markets, legal expertise might again have raised questions about the plausibility of bringing market-ready institutions into being by calling for them in legislation. The relative hegemony of economic ideas—and the absence of robust legal objections—influenced the balance of forces among elites who favored and disfavored particular policies. The result encouraged the opening of markets without countervailing policies to blunt the potential for sudden changes to unravel local capabilities further or allow new kleptocrats to retain whatever gains were captured.

To say that international law is a "game of the middle powers" is to say that European nations more readily find themselves occupying the symbolic "center"

of the global legal order than of the global military or even economic system. By contrast, when the United States speaks in the name of national security, it places an issue on a terrain where Americans are accustomed to deference from European allies. When the world's elites understand an issue like torture in legal terms, European positions may seem more compelling. If they can be reinterpreted in security terms, American positions may have more weight. As war becomes increasingly something to be debated in legal terms, the Europeans find themselves able to punch above their weight in global debates about the legitimacy of one or another campaign. The increasing hegemony of human rights and international adjudication as a framework for diplomacy seems to have deepened inequalities between African and European states.

When people feel their powers reflect a constitutional settlement, the status of forces wrought in the last battle is not only maintained, but also naturalized. This tendency to interpret relative power as a fact of the situation rather than the outcome of prior struggle takes us back to rents. Or, perhaps better, to the obverse of rents: all those arrangements through which gains are distributed that recede from view into the "normal" world of competitive costs and comparative productivity. But global poverty and inequality, like spectacular wealth and military prowess, are not just facts to overcome. They are byproducts of struggle underwritten by legal arrangements and defended in legal terms.

THE DYNAMICS OF DISTRIBUTION AND INEQUALITY: CENTERS AND PERIPHERIES

Global inequalities rest not only on the legal outcomes of individual and group struggles settling the status of forces among them but on arrangements that affect the dynamic interactions among those who lead and those who lag. Indeed, the link between inequality and the legal arrangements among groups is most visible when differences compound dynamically: when the rich get richer, the poor, poorer. People readily intuit that winners rig the game. Although the mechanisms differ, in every society winners find ways to change the rules to make future gains easier to garner. That is why they play for rules. That also happens globally. Large transnational investors and corporations, for example, have used their leverage with their home and host countries to promote treaties guaranteeing the enforcement of commercial arbitral awards, thereby disempowering host state national judiciaries, shifting authority to a professional community of well-paid international arbitrators, and empowering the commercial interests most well represented in the arbitration process.

But the legal foundations for dynamic gains are not only a matter of rigging the rules. Legal arrangements structure patterns of interaction between rich and poor in a variety of ways that encourage the compounding of gains. A conventional way to imagine this would be to shift the focus from people to a larger structure: winners don't rig the rules, the system is already rigged in their favor. This is a common and very useful way to conceptualize global political economy, not as an endless series of struggles among people and groups, but as a biased system or structure. Nevertheless, a midlevel focus on struggle to capture gains, such as I have proposed here, also has much to contribute to our understanding of law's implication in the dynamics of inequality.

For a long time, global inequality was interpreted against the background of a relatively stable relationship between a "first world" of developed nations and everyone else. The main players in the story were the developed nations of the North Atlantic, whose balance of power (or balance of terror) stabilized their domination of a world system before, during, and after colonialism. This arrangement was both naturalized and critiqued. Many global elites—even those most concerned about poverty—tended to imagine that differences between rich and poor reflected a historic fact: some nations "had developed" through an industrial revolution, while others had not yet done so. Once political equality was ensured through decolonization, it seemed appropriate to expect economic inequality to be addressed nationally, if with a bit of foreign aid and expert guidance. Global inequality was an unfortunate fact, rather than the product of ongoing institutional arrangements.

Many social scientists—sociologists, economists, historians—responded to this elite sensibility by developing interpretations of the linkages between wealth in the first world and poverty elsewhere. Historians and anthropologists reexamined the institutional, social, and economic structures associated with colonialism and found parallels in contemporary patterns of global trade, production, and diplomacy.[11] Development economists formulated a range of theories linking underdevelopment in the South to development in the North in a relationship of "dependency."[12] Immanuel Wallerstein drew on these strands, starting in the 1970s, to develop a mode of analysis rooted in the identification and description of "world systems."[13] The aim was to build an interpretation of the relationships among political, economic, and cultural changes on a global scale over long periods: power, knowledge, and capital are exchanged worldwide in structures that generate and reproduce inequality. The central image associated with world systems analysis is the relationship between a "center" and a "periphery." The analytic project is to identify the institutions and social

arrangements through which unequal patterns of exchange are enabled and to trace changes in those arrangements over time.

Although the economic fault line between an "underdeveloped" third world and a "modern industrialized" first world no longer defines global economic relations, the intellectual tools generated by these critical traditions remain useful for understanding the process by which the outcomes of struggle generate patterns of inequality. Global political economy is characterized by social and economic dualisms between leading and lagging sectors, regions, economies, nations, and populations every bit as entrenched as the old line between an industrialized "center" and an underdeveloped "periphery." Dualism now crisscrosses national boundaries in a variety of directions, generating inequality within and among national economies along many different axes. The schism of leading and lagging rends the political economic life of nations, cities, and regions as much as it divides the world. And things remain remarkably unequal.

Political authority aggregates in leading cities, regional powers and global hegemons, each with a hinterland of subordinate powers. Economic gains also aggregate as firms or industries capable of extracting a disproportionate share of gains are able to invest, attract talent, raise wages, sustain financial institutions, raise property values and support government services while those with whom they interact at the periphery face competitive pressures that diminish their capacity on each of these dimensions as it becomes ever more unaffordable to break into the geography, institutional system, or mode of production characteristic of the center.

Conventionally, center-periphery analytics have been associated with social science traditions that emphasize the dynamics of a *system*. It has seemed necessary to identify the "center" and "periphery" *of something*: a field, a geography, a history, or world system within which something is the center and something else is the periphery. The system provides the coherence, holding the center and periphery in a relationship, raising the temptation to treat the system as the agent of inequality: the system permits the center to exploit and dominate the periphery. I propose to focus on dynamics of struggle without framing them in a constituted order or system. Imagine the global situation as a kind of dualism without system, generated by the continuous struggle through which gains are distributed. Which legal and institutional arrangements permit gains to aggregate, empower some and not others in future struggle, lock in differences in knowledge, bargaining power, or leverage? Detached from a "system," the asymmetric or hierarchical relationships may be spatial, temporal, or just a matter of mental emphasis. The crucial point is relational: inequality between

them compounds as a result of legal and institutional relations affecting their interaction.

This kind of dynamic is easy to see in global value chains, which are often organized around a lead firm or firms able to capture and hold gains disproportionately.[14] Global distributors like Walmart and Carrefour, for example, might be understood to be at the "center" of a value chain running from clothing manufacturers in Bangladesh to consumers in Europe or America. Parts suppliers who must adjust production to meet standards demanded by global automakers may find themselves in the "periphery" of their supply chain. We would not be surprised to learn that lead firms are able to extract a disproportionate share of the gains from trade within the chain, just as first world consumers may have more rent-extracting power vis-à-vis global retailers than their suppliers in Bangladesh.

The dynamic question is whether these differences become self-reinforcing. Leaving aside, for the moment, the legal arrangements that make this possible, it is easy to imagine that lead firms will be able to invest in "upgrading" unavailable to firms at the periphery operating on thinner margins. Firms in the center may be able to use relative monopoly power to intensify competition among potential suppliers or extract know-how generated at the periphery for use elsewhere while protecting their own intellectual property in ways that intensify their bargaining advantage. Suppliers spread across the "periphery" of the global productive system may lack the knowledge, confidence, or experience to utilize the bargaining power they have. As gains fail to come their way, they may find themselves ever less able to figure out how to capture rents, competing in a race to export at the lowest cost, further eroding their share of the gains and their ability to upgrade. Scale often matters a great deal. Large firms with large transaction volume may have access to different financing terms or technical expertise, for example. Lead firms may have greater influence over the public hand across the value chain. Prestige may also play a role. Actors positioned at the "center" may come to be treated as having more bargaining power than their stock of entitlements and authorities would support were they put to the test. When gains at the center are self-reinforcing and firms at the periphery find themselves increasingly unable to extract rents, the global value chain has unleashed a dualist dynamic of downgrading at the periphery and upgrading at the center.

Gunnar Myrdal's loose analytic framework for thinking about economic and social dynamics is useful here.[15] He starts with economic inequality between regions within one country and aims to understand the tendency of

differences to become more pronounced over time. In the normal course, he suggests, gains in one region are self-reinforcing.

> The system is by itself not moving toward any sort of balance between forces but is constantly on the move away from such a situation. In the normal case a change does not call forth countervailing changes but, instead, supporting changes, which move the system in the same direction as the first change but much further. Because of such circular causation a social process tends to become cumulative and often to gather speed at an accelerating rate.[16]

Movements of labor, capital, goods, and services are media through which the cumulative process evolves.[17] This is a tendency, not an iron law. In the relationship between the wealthy North and the poorer South, the inner city and the suburbs, the industrial and agricultural sectors, it is difficult to know how change will compound. Expansion in one locality may have "backwash effects" in other localities. The wealthier region may draw further investment, people, and energy from poorer regions toward it, making it ever more difficult for a poorer region to move ahead. Migrants with skills may leave the poorer area, further reducing its potential. But it is also possible for new wealth in one region to stimulate growth elsewhere. Accumulation in one region may generate "spread effects" elsewhere. Mrydal anticipates that the "whole region around a nodal center of expansion should gain from the increasing outlets of agricultural products and be stimulated to technical advance all along the line."[18] What might seem like a backwash effect—outward migration of the talented—may also have countervailing spread effects—the return of remittances or know-how. Centrifugal spread effects may affect localities farther away, where favorable conditions exist for producing raw materials for the growing industries in the centers; if a sufficient number of workers become employed in these other localities, even consumer goods industries will be given a spur. Spread effects may stir sufficient expansionary momentum to overcome backwash effects from the older centers allowing new centers of self-sustained economic expansion to emerge.[19]

Myrdal emphasizes that there is no reason to anticipate that these forces will cancel one another out, or that spread—or backwash—effects will dominate. It depends, he says, on all kinds of social, institutional, and other conditions. In the same way that Kaplinsky expanded the range of factors that might contribute to "rent," Myrdal opens the analysis to a wide range of "institutional" factors that might link what happens in leading and lagging areas. His method is less an analytic than a list: a checklist of salutary and perverse effects that can

arise and an evocation of the vicious and virtuous cycles that can unfold. He orients the analysis to identification of linkages, potential positive and negative effects, vicious and virtuous cycles, relatively stable situations and tipping points at which good or bad things compound quickly. As a planner, one can only remain attentive to the emergence of positive or negative movements and adjust conditions as best one can.

Myrdal has relatively little to say about the specific role of law in the dualist dynamics between unequal regions.[20] He does consider the importance of the welfare state where "state policies have been initiated which are directed toward greater regional equality: the market forces which result in backwash effects have been offset, while those resulting in spread effects have been supported."[21] He contrasts this with developing nations where the absence of such policies has allowed differences between regions to accelerate or where a state functions as a force multiplier for the wealthy.

> The term "state" is used here to include all organized interferences with the market forces. . . . The traditional role of the "state" in this inclusive sense was mainly to serve as a means for supporting the cumulative process tending toward inequality. It was the economically advancing and wealthier regions and social groups which were the more active and effective in organizing their efforts, and they usually had the resources to stop organizational efforts by the others. And so the "state"—which stands here for organized society—usually became their tool in advancing their interests.[22]

At the global level, Myrdal notes that the absence of a world state to counteract backwash effects makes the global situation more like that within those developing nations where an ineffective state allows inequalities to grow. Although this is worrisome, he is at least reassured that the global situation is not akin to the historically more common situation of an "oppressor state" linked to the interests of the wealthy interfering so as to heighten and confirm inequality.

On that score, he may have been too optimistic. If we take his invitation to consider the "state" as the sum of "organized society," and consider legal arrangements across the world, there is a great deal of "state" in global political and economic life. Law is present whenever gains are distributed, facilitating their aggregation or ensuring their dispersion. Legal entitlements constitute actors, allocate opportunities for gain, and establish patterns of bargaining power in these midlevel relationships of differentiation and influence. By placing the Ricardian/Kaplinsky analytics of rent alongside Myrdal's analysis of the dynamic relationships among centers and peripheries, it is possible to trace the

role of law not only in the distribution of gains, but in the process by which inequalities are reproduced or exacerbated.

At the simplest level, whenever law distributes gains or reinforces differences among social, economic, or political groups, it may initiate a center-periphery dynamic if the winners are able to use their rents to capture further gains out of reach to those who lost out in the first round. Those with monopoly power in the initial round have resources their competitors do not when it comes time to invest in all the things Kaplinsky identifies as rent enhancing: new organizational arrangements, new technology and skills, economies of scale, and so forth. Similarly, legal arrangements facilitating rent capture at the periphery will facilitate upgrading there in the second round. Beyond its initial distributive impact, law affects center-periphery dynamics in at least three other ways. Law can link or delink economic activities in the center and periphery. The most obvious example is tax and transfer from leading to lagging. Another would be legal rules that aim to integrate productive activity in leading areas with productivity elsewhere such as local content, employment, technology transfer, or investment requirements that link firms benefiting from privileged market access arrangements or free trade manufacturing zones to firms and people in the periphery. Of course, legal rules can also tilt the other way, as when lead firms are prohibited from discriminating in favor of local or lagging providers.

Legal arrangements may also speed or retard flows between a center and periphery. Most obvious would be citizenship and immigration rules that facilitate or impede migration, or banking and currency regulations that impede or expedite the flow of capital in one or the other direction. The impact of law on center/periphery flows may not be immediately visible. Anticorruption enforcement, for example, may stigmatize off-budget transfers that benefit the periphery, consolidating the center's lead in access to more formal financing. Family law, social security, and labor law may have as important an impact on migration as law explicitly regulating immigration.

Finally, law may affect the relative powers of centers and peripheries to play for rules that would affect their relations in these various ways. Firms at the center may be permitted to lobby and contribute to campaigns and gain preferential access to regulators. Firms at the center may themselves be the regulatory authority. Firms at the periphery may find their efforts stigmatized as corruption or may be too small and numerous to find leverage with rule makers. Or they may be national champions with powerful government allies. Constitutional arrangements may also enhance the powers of peripheral regions in the way states with small populations are privileged in the US Senate.

In analyzing the overall impact of legal arrangements on center-periphery dynamics, Myrdal's typology of "welfare states," "oppressor states," and the "absence" of a state is helpful. In the first instance, one can canvass each of the four kinds of legal arrangements—allocating gains to a center, linking/delinking centers and peripheries, speeding/impeding flows, allocating power over rules—to determine which function to strengthen the center's grip on resources ("oppressor state" analogs) or distribute capabilities and resources back to the periphery ("welfare state" analogs). Globally, as Myrdal recognized, the legal arrangements that influence economic activity in the "absence" of a state will often be more important.

Myrdal's "welfare state" has an analogy at the global level in the many rules that affect bargaining power or determine which economic activities will be relatively "high value," "productive," or "competitive" in the sense I explored in earlier chapters whenever these rules encourage the capture of rent at the periphery. Measures to link leading and lagging sectors or regions productively with one another are common in national legal regimes: local hiring or content requirements, corporate mandates that prioritize links with communities or unions alongside shareholders, lending requirements and incentives targeting credit to peripheral actors, zoning practices linking permits to an office tower downtown with the establishment of a shipping facility in the ghetto, and so on. Many could be translated to the transnational level. Corporations could be discouraged from offloading workers on the state for tax and transfer welfare and encouraged or required to find something these workers might productively do. Many international regimes—the WTO, the European Union, the United Nations—contain rules, administrative arrangements, and explicit policies that aim to strengthen the world's economic and political peripheries and disrupt the backwash effects of economic mobility. Specialized systems of trade preference entitle some poor countries to exclude others from their export markets, capturing more of the rent than would be possible in direct competition with other global producers.

It is also easy to imagine international legal arrangements designed to encourage global spread effects and counteract the tendency of gains to compound in centers. Many aspects of the 1970s project for a "New International Economic Order" aimed to link economic gains in the industrialized world with transfers to less developed regions, encourage the spread effects of technology transfer and local control, ensure access to credit at the periphery, and strengthen the participation of peripheral nations in the machinery of international rule-making.[23] Legal arrangements designed to stabilize commodity

prices, whether through administered buffer stocks or liquid futures markets, could alleviate the disproportionate impact of price fluctuations in peripheral markets. Where capital flight is restrained or skilled labor is prevented from leaving peripheral regions, sectors, and nations, spread effects will be stronger than otherwise. They would be stronger still if unskilled labor could move freely across the world, if capital investment in developing regions was required or trade structured to compensate for bargaining power advantages accruing to industries in wealthier economies. Go-slow provisions preventing rapid in- and outflows of speculative capital in thin peripheral markets are intended to serve the same function. Investment rules designed to slow repatriation of profits and ensure local equity participation, labor training, and transfer of technology all aim to mitigate backwash effects.

At the same time, many aspects of the global legal order function as a Myrdalian "oppressor state." Global political and economic winners are given extraordinary powers: the UN Security Council veto for World War II victors is the most visible, but weighted voting arrangements across the international institutional system distribute rule-making power in ways that consolidate the capabilities of the center. The relative powers of creditor and debtor nations in international financial institutions is a striking example. Legal arrangements also affect the tendency of Myrdal's forces of "migration, capital movements and trade" to impoverish poorer regions. Capital mobility rules that permit rapid capital flows in and out of smaller economies, immigration laws that favor the movement of highly skilled workers to the center and prohibit unskilled labor migration, corporate and antitrust laws that encourage consolidation of large distribution chains and discourage the emergence of "national champions" in the periphery or that favor global investors and the "public-private partnerships" of the center but stigmatize the state-owned enterprises of the periphery, intellectual property rules that force global protection for the center's innovations while disfavoring trade in generics and innovations based on copying at the periphery may all generate backwash effects in poor countries. Intellectual property regimes protecting global pharmaceutical and entertainment industries from competition in the developing world and targeted immigration policies reinforcing brain drain are only the most well known.

Many have argued that the trade system compounds the advantages of the leading states who designed it by easing free movement of industrial products while exempting agricultural goods, by focusing on access to markets rather than access to capital, and by focusing on free movement of capital rather than stable public or private access to credit. These rules address challenges to the

rent-capturing capacities of firms and nations in the center while leaving challenges at the periphery unaddressed. The WTO's most-favored-nation-based bargaining structure may advantage large economies with multiple trading partners who can force concessions from smaller markets they seek to enter while resisting pressure to open their own market by offering offsetting concessions. Over time, this may consolidate the emergence of market leaders in large economies and impede their emergence elsewhere. At the same time, interests of concern to big powers get on the agenda for global negotiation more easily and more powerful players are able to bargain for rules that support their existing strengths while shielding their weaknesses. The relative success of the global North in placing trade in services and intellectual protection on the world's trade agenda and the failure of the Doha Development Round of trade negotiations are illustrative. Nor is it surprising that as the leading economies negotiated ever lower tariffs among themselves on manufactured goods in the context of the General Agreement on Tariffs and Trade, trade in textiles continued to be covered by a different and more restrictive legal arrangement, the Multi-Fiber Arrangement.

A broad focus on liberalization and deregulation by global rule-making institutions may exacerbate dualist tendencies. Joseph Stiglitz and Andrew Charlton argue that the WTO's insistence on liberalization has a differential impact on poor countries with less capacity to adjust internally.[24] If factors cannot be readily shifted from radios to televisions in country B, opening the economy to the import of radios will not lead to expansion of exports in televisions. It will either demolish the domestic radio sector or place pressure on returns to inputs—here, predominantly wages. If international arrangements force an opening to imports while prohibiting internal arrangements to ease the shift toward television production—perhaps by stigmatizing them as "unfair" or "market-distorting"—country B may not only fail to participate in gains from trade, but may end up worse off. These conditions are pervasive in poor economies, they argue, and without reform, the WTO will continue to distribute gains disfavorably for poor nations and place them in ever more ruthless competition with one another for low-wage manufacturing. Again, where this compounds the relative difference in rent-capturing ability, there will be dualism.

To identify the precise mechanism by which the WTO "forces" countries to liberalize requires an assessment of the socioeconomic impact of rules. Stiglitz and Charlton argue that the pressure to open developing economies arises in part from the most-favored-nation requirement that bilateral concessions be granted to all members of the global scheme. This, they claim,

discourages the more specialized arrangements that might shield poor economies while they adjust internally to be able to take advantage of gains from trade. They suggest a corrective: a new global legal arrangement in which all nations would commit to provide "free market access in all goods to all developing countries poorer and smaller than themselves."[25] This seems plausible, although a great deal depends on how the most-favored-nation requirement and the many exceptions to WTO requirements are interpreted and applied over time, as well as how their alternative would fare once professionals began to argue about its meaning and scope of application. My own sense is that Stiglitz and Charlton underestimate the extent to which the existing texts of trade law leave room to defend internal policies.

They are not alone: a shared elite understanding that the WTO "requires" liberalization has tightened the effective meaning of the WTO's rules. Particularly in the heyday of neoliberalism, elites in the developed and developing world expected the rules to require deregulation—may even have favored it themselves—and forewent investment in the technical capabilities to assert otherwise.[26] Deregulation is also easy to negotiate: contravening rules, like tariffs, can be costed out and traded. It may also be easier for negotiators to identify distortive rules in the developing world where administrative capacity is thin and industrial policy relies more directly on state ownership, tariffs, subsidies, and licensing schemes than in the more complex regulatory regimes of the industrialized North. In the WTO training sessions for third world bureaucrats that I observed during this period, I was struck by the focus on training participants from poor countries to translate internal policies into the kind of non-tariff barriers to trade that could be negotiated away. Very little attention went into training for offense.

A focus on overtly "welfarist" or "oppressor" legal arrangements is a helpful starting point for identifying the role of rules in global inequality. The more common international situation, however, is the one Myrdal identifies: the absence of a global state intending either to strengthen gains by leading sectors or mitigate backwash effects. All kinds of legal arrangements nevertheless distribute gains, affect the links between leading and lagging regions, speeding or retarding flows of various sorts between them, or distribute authority to play for rules. The easiest way to imagine the impact of law in the absence of a global state is to think about the legal geography or terrain on which economic activities occur. As in any real estate market, it is clear location matters. And as in any city, what matters about location is a function of legal rules determining who can do what where in relation to whom.

Sometime in the 1990s, I heard a London finance maven advising a conference of the superrich on the significance of 1989. His theory was simple: from 1929 until 1989, the terrain on which one could securely and productively invest capital was small. Lots of places were behind the iron curtain, others lacked institutions capable of protecting investment or its productive use. In the terrain open to investment, capital was plentiful relative to labor, and therefore labor was dear while capital faced low returns. After 1989 and the development of liberal institutions across the world of "emerging markets," the terrain for productive investment expanded enormously. The result: capital shortage and labor surplus in the space relevant for productive investment. Time to get out of labor and into capital. It was a dubious story in many ways, but his basic instinct was correct: geography matters. And geography is a legal construct.

The legal geography of the world affects the distribution, flows, and linkages between centers and peripheries as well as returns to capital and labor. In a legal world in which banking, finance, Internet construction and management, and high-tech communication sectors were national monopolies regulated as public utilities in the national interest, the global clustering of these resources and capabilities in "global cities" and "silicon valleys" might be less pronounced. The absence of a global capacity to mitigate backwash and enhance spread effects is itself legally enforced. The legal privilege of every nation to dissent from global arrangements raises an insuperable hurdle in front of efforts to defeat national efforts to consolidate advantage at the periphery by appeals to global norms as well as international efforts to adopt welfarist legal reforms. The territorial separation of public law jurisdictions and the global enforceability of private law together ease the mobility of factors (other than labor) and reduce national capacity to adjust regulations to capture gains, making backwash mitigation more difficult and spread effects harder to encourage from the periphery.

Although many nations seek to give their local industries and national champions a bargaining and rent-capturing advantage, states differ radically in their ability to do so—or to resist efforts by other nations to prioritize competitors. Powerful economic actors often have greater capacity to press for rules both globally and transnationally, particularly where their interests align with powerful states. This is not only the result of disproportionate power in global rule making. A few powerful national regulators write rules in collaboration with leading industrial players that officially or unofficially regulate their industries worldwide.[27] The influence of American (and European) regulators on global

airline, entertainment, pharmaceutical, software, and other high-technology industries is clear. Countries with political capacity, energy, and recognized expertise can often expect cooperation with and submission to the extraterritorial effect of their preferred regulation in a world where the extraterritorial effect of each nation's jurisdiction is legally a function of a willingness to assert jurisdiction and the ability to generate cooperation or acquiescence in its exercise.

Single jurisdictions that are home to dominant players in a global industry or sector often have an outside impact on rules governing that industry everywhere. Banking and tax havens that draw capital disproportionately to places like Switzerland, Bermuda, and Luxembourg are the classic examples: small states using their regulatory capability in a world of mobile capital and territorially restricted taxation and criminal prosecution to capture rents. As that happens, the voice of the banking industry in those capitals strengthens, the sophistication of the industry there rises, the reputation of the tax haven grows, and ever more capital flows in. Global cities and their national government have enhanced capacity to tax and redirect those revenues to amenities—including regulatory oversight—conducive to an ever stronger financial sector. Although more capital may flow to tax havens from wealthy centers, the impact on the periphery where capital is scarce may be larger, particularly if reinvestment occurs disproportionately at the center. What is a tax collection headache for large wealthy economies may drain gains wholesale from more peripheral economies. Nations able to rely on effective income or value-added tax administration are less vulnerable and able to consolidate the advantages that accrue to nations that can afford an effective public administration. Tax havens can also have a massive backwash effect when they encourage corruption and the leakage of gains from poor countries with weak public fiscal controls.

Against the background of a global regime of sovereign independence and free capital movement, it has proved incredibly difficult for far larger states, even in collaboration with one another, to reverse the incentive for capital flight. Public international law makes collective response difficult, requiring near unanimity to restrain the sovereign privilege not to enforce foreign tax obligations. Meanwhile, the ubiquity of private work-arounds made possible by permissive national corporate, property, and contract law regimes further encourages backwash effects in places whose only potential for public policy of upgrading depends on effective taxation of corporate entities or wealthy individuals. The passive sociological impact of national rules—heightened by a global legal regime that facilitates the free movement of goods, services, and capital while discouraging distortive national regulations—varies with scale.

The size of the Chinese economy makes whatever approach they take to environmental regulation or wages of tremendous significance for relative costs elsewhere. A Chinese decision to lower manufacturing wages or devalue its currency may set off a cycle of effects in European and American markets, consolidating outsourcing and hollowing out domestic manufacturing capability.

In principle, regional trade agreements may heighten or lessen these effects, just as states may, from Myrdal's perspective, be either oppressive or welfarist in orientation. Unfortunately, trade agreements are not written by a global sovereign hand in the public interest: they emerge from hard bargaining among states that are nominally equal and substantively anything but. The balance of benefits in such agreements will not be equal, although the impact on center-periphery dynamics can be unexpected. The impact of Mexican wage regulation on wages in the United States was heightened by NAFTA, along with the impact of US corn production on Mexican peasant farming. Just as the agreement stimulated peasant migration to the United States by lowering the price of corn in Mexico, it also shifted Mexican manufacturing capacity to export industries both within and beyond earlier free trade zones. These shifts affected the relative returns to agriculture and industry in the two nations, reshuffling what had been centers and peripheries within each national economy.

Uniform transnational legal regimes may affect rich and poor in ways that encourage backwash effects. A UN-sponsored commitment to promote the "rule of law" and criminalize bribery or corruption will have a different impact on states with different national administrative capabilities or economic patterns of formality and informality. Some states may enforce effectively, giving their industries a handicap in some markets and a bargaining advantage in others. In others, anticorruption enforcement may become an opportunity for leading families, social groups, or industries to instrumentalize the state against their foreign or domestic rivals. Informal arrangements and unofficial or off-budget transfers that may perform functions less expensively than the administrative apparatuses that are affordable in the center may be stigmatized. Their suppression may reduce productivity at the periphery while new administrative controls may require funds better spent on arrangements more likely to enhance the potential to capture rent and upgrade.[28]

It is difficult to assess the likely overall impact of the diverse rules and rule systems that constitute the legal geography for global economic activity. But it is possible to develop speculative interpretations that may open new possibilities for strategy. Duncan Kennedy has argued, for example, that the fragmentation of Africa into numerous independent "nations," each with its own elite,

may have set in motion political and economic dynamics both within African states and in their relationships with the economic powers of the North that undermined development.[29] Capture of the local political machinery by economic elites was easier, he imagines, while bargaining power vis-à-vis global economic players, whether multinationals or trade negotiators from the United States and Europe, was correspondingly weaker. For heuristic purposes, he contrasts this with China's rise as a single political and economic unit, able to engage the global economy on quite different terms. The objective of such a thought experiment is less reform—fragment the EU and unite Africa—than an opportunity to highlight the significance of background legal and political arrangements in ways that might lead to a reassessment of the potential for well-worn reform strategies and open the way for more dramatic rethinking.

His argument echoes themes introduced by Cardoso and Faletto for Latin America in the early seventies.[30] They argued that internal and transnational structures and patterns of political influence matter for economic development and may systematically disadvantage entire regions. The assimilation of Latin American elites into a hub and spokes global economy encouraged what they termed "dependent" development. Rents were captured and shared (if unequally) between local elites and foreign capital. This locked in patterns of production and trade that relied on foreign capital, reinforcing the hub and spokes model of trade and diminishing the potential for the development of Latin America's own internal market. Inequalities at home increased as elites participating in gains from trade used state power to reinforce their dominance. As a result, Latin American economies grew less robustly than they otherwise might, while entrenching economic and political arrangements that reproduced this development pattern. Although Cardoso and Faletto say relatively little about the role of law in dependent development, the linkages they examine between local elites and global capital, the control local elites exert on national policy, and the background conditions for foreign investment, import substitution industrialization, and participation in trade were all established in legal terms. Had those arrangements been different, the opportunities for rent sharing to compound as dependency may have been less. This kind of continent-wide sociological speculation aims to identify elements of the background legal and institutional geography affecting the political and economic relations of centers and peripheries that might be reimagined or contested.

In any large-scale story, there will be elements of Myrdal's welfare and oppressor states alongside the less visible rules of background geography. The power of center-periphery dynamics within the EU, for example, is only beginning to

be understood. Although experts long thought the EU—like free trade—was everywhere a contributor to spread effects, it is now recognized that powerful backwash effects were also unleashed between regions by everything from trade and labor policy to the structure of monetary union. I was practicing law in Brussels as the post-1989 negotiations to link the ex-Soviet societies of Central and Eastern Europe to the European Union got under way. In the first phase, the ex-Soviet economies were encouraged to experience the "shock" of global market prices and placed in the bracing winds of the global free trade order, while member states in the European Union continued to benefit from a variety of national and regional arrangements to encourage spread and discourage backwash effects. As the ex-Soviet states moved from association toward membership, the framework for discussion was an extreme version of the Structural Impediments Initiative. The Eastern/Central Europeans would need to dismantle their entire legal and institutional structure and replace it wholesale with the *acquis communitaire* of existing EU laws and regulations alongside "state of the art" and "best practice" laws imported from one or another EU member state for everything from corporate forms to banking, investment, labor, and consumer protection. It was surprising how little attention was paid to the potential that doing so would initiate backwash effects, hollowing out such industrial, institutional, and human capital as had been built up in the East.[31] Similar rules in different locations—often without countervailing buffers and social safety nets—were likely to have very different impact. The integration of the German Democratic Republic into the Federal Republic offered a similar lesson in Myrdalian dynamics, despite massive efforts to resist the forces of backwash by public investment and subsidization in the East.

Recent work suggests that backwash dynamics continue to be encouraged by apparently neutral principles of European Law as they are interpreted and applied. Damjan Kukovec, for example, argues that general legal principles—"free movement" or "social considerations"—at the core of the endeavor are applied in ways that heighten the inequality between the economies of the European center and periphery.[32] The devil here is in the details—in the precise ways that universal principles turn out to have diverse meanings and get applied in ways that contribute to dualism. For Kukovec, the "free movement" principle is applied so as to open economies in the East, unleashing classic backwash effects, while the "social considerations" principle meant to limit or balance free movement is interpreted to protect labor in the West from competition, weakening the spread effects of growth to the East. Ermal Frasheri has argued that the structural and cohesion funds intended to reduce

inequality across Europe in fact effected a net transfer from the periphery to the center, while general policies adopted in the name of "democratization," "rule of law," or "economic development" had the effect, at the periphery, of undermining parliamentary democracy, encouraging deindustrialization, and strengthening the security state.[33] In this way, a universal program designed to equalize relations across the EU turned out to accentuate the political and economic distance between the European center and periphery. Analysis of the differential impact of austerity policies mandated by the European Central Bank after the global financial crisis on economies at the periphery of Europe for which they meant compulsory internal devaluation and wage suppression has brought center-periphery analytics into popular discussion.

In each case, inequalities were deepened as people pursued political and commercial interests in the shadow of entitlement structures that set up an asymmetric and disempowering dynamic, legitimated by a cloak of self-narration that what is going on is either a natural and inevitable adjustment driven by economic facts or a hopeful kind of win-win upgrading across the EU. In some sense, "Brussels" is to blame. But it would be more accurate to pin the blame on the routine ways in which these principles were interpreted and policies applied by professionals without attention to their dynamic impact on inequality.

The dualist dynamics of inequality in global political and economic life are not fundamentally different from center-periphery dynamics in other settings. Inequalities arise and are deepened by a complex combination of powers and ideas within a legal framework within countries between regions, sectors, and social groups. Although it may have seemed that Myrdal's categories of oppressive states and welfare states paralleled the distinction between the developed and underdeveloped worlds, the situation was always more complex. State power has everywhere been exercised through a mix of formal and informal arrangements that actively encourage, discourage, and simply ignore spread or backwash effects. Since Myrdal wrote, many peripheral nations have developed more complex state machinery, while the national welfarist commitment of advanced nations has attenuated. In one sense, all nations are postdevelopmental, sitting on top of a history of development policy failures and successes. All countries today have political characteristics and face economic challenges once thought characteristic of underdeveloped societies. Politics has become a diminished shadow of economics as political institutions have been instrumentalized by economic interests. All face strategic choices among modes of insertion in the global economy, find their economies riven with market failures and information and public goods problems for which they lack instruments

to respond, and find themselves talking about new strategies for growth rather than the efficient management of a relatively stable business cycle. And all states are a mix of "welfarist" and "oppressor" elements atop a complex background legal geography. As a result, the challenges of inequality and structural dualism are as present within as among nations.

In the metropolitan Detroit region where I grew up, the slow—and then very rapid—dynamic of inequality between the city of Detroit and its many suburbs arose as people struggled in their own lives for economic advantage against a background of racism, social expectations about the racism of others, and a legal structure that fragmented authority among dozens of small communities, each with independent responsibility for schools, police, zoning, and taxation. With only very weak regional or statewide mechanisms to encourage spread effects, backwash effects predominated as one after another suburb found itself pushed up or pulled down by the intense residential segregation by income, race, and ethnicity that resulted from the struggles of individual families to advance and preserve their property values and mobility expectations for their children. Without the racism, the results may have been different. With different regional legal arrangements, they would certainly have been different.

As everyone realized, for example, with "cross-district bussing," the capacity of families to capture educational rents by purchasing property in a slightly more exclusive suburb would have been seriously diminished. It is an open question whether enough wealthy whites would have moved even further out to consolidate their control over the most productive schools. Lots of law would have shaped the outcome, from commuter charges, gasoline taxes, and the structure of towns and school districts in outlying counties to the network of highways. At the global level, the interaction of social arrangements, political interests, ideological commitments, and legal arrangements are more difficult to untangle. But the situation is parallel. As in Detroit, the global potential for backwash effects rests on a combination of legal arrangements and attitudes. The world's elites share ideas—including ideas about one another's ideas—just as Detroit residents had varying background notions about the relationship between race and privilege. The power we call political "leverage" or economic "bargaining power" is a condensation of moves made possible by a context of expectation and interpretation as well as entitlement.

Tracing the spread and backwash effects enabled by legal arrangements shifts our focus away from "who did it" to "how did it happen." If we are looking for agency in the reproduction of inequality, it may be most useful to say that it rests with the system of entitlements and expectations that link people in

relationships of relative privilege and vulnerability, with the habits of society, with the ideas, aims, and identities of the participants themselves, and with the objectives and enforcement authority of the state. These are the "indestructible powers" that give rise to rents and facilitate spread or backwash effects. As people act in the shadow of these authorities and constraints, the complex reciprocal relations between centers and peripheries unfold.

Law is important for people engaged in struggle because it enables the capture of gains, distributes power and resources between groups, and structures relations between leading and lagging regions, firms, and nations. Nevertheless, the distributive impact of law has rarely been a focal point in mainstream international legal scholarship. Several generations of international legal scholars from the world's political and economic peripheries have engaged the mainstream to identify and remedy patterns of disadvantage. Feminist legal scholars have done likewise. Important and insightful as their contributions have been, they have so far not succeeded in placing distributive issues at the center of mainstream concern. Part of the explanation is the mainstream conviction that political economy issues lie outside international law's mandate. Economics is for economists and politics is what one hopes to beat into the plowshares of legal order. World political economy seems to require large-scale narratives of historical necessity—the nature of capitalism—or ethnographies and micro-sociological study of globalization's impact on very particular communities and transactions, neither of which lie within the skill set of most international legal professionals. And they have been more interested in other things: whether international law exists, how it binds sovereigns, and adds up to a workable and potentially universal legal order. As they have pursued these interests, however, they have reformed and reimagined international law in ways that have made it a sophisticated tool in distributive struggle. In the next chapter I explore this surprising turn. Worried about law's frailty and faithful to its universal and humanist promise, experts in the field have encouraged an increasingly sophisticated vocabulary for political and economic struggle.