

(at 220). Moreover, he often refers to interventionist antitrust and tax policies as the means by which material equality has been achieved in the past. For Moyn, it is unlikely that the human rights movement will become the torchbearer of egalitarianism. The movement's anti-statist and individualistic attitude and the focus on naming and shaming would rather make it unfit for 'redesigning markets or at least redistributing from the rich to the rest' (at 218). He maintains that even when the human rights movement did not focus on stigmatizing political atrocity and repression and 'accorded more importance' to social rights, these rights 'generally concern a threshold above indigence, not how far the rich tower over the rest' (at 217).

But does human rights law have to be powerless when faced with the growing gap between the rich and the poor? Is it unfit as a political programme for enhancing redistribution? I am not as sure as Moyn. He convincingly demonstrates that human rights in the past have not been used successfully for achieving material equality. Indeed, Amnesty International and Human Rights Watch have tended to focus on issues such as torture and political prisoners. However, embedding economic and social rights in the policies of international institutions could have some repercussions on wealth distribution. Also, the business and human rights treaty currently under negotiation – if realized – might be an avenue to compensate individuals for excesses of transnational businesses. Furthermore, Moyn's historical survey itself mentions examples of how human rights could be redesigned for distributive purposes. In 1944, George Gurvitch proposed the (vague) 'right to share in the distribution of the fruits and benefits of the national economy', which is informed by the idea of egalitarianism (at 56). Maybe, thinking along these lines could be a step into the direction of distributive justice. In any case, one lasting value of Moyn's study is that it invites us to ponder about how international lawyers can contribute to creating a just global order.

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Oisín Suttle. ***Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation***. Cambridge: Cambridge University Press, 2018. Pp. 420. £95. ISBN: 9781108415811

There is an inevitable myriad of theoretical preconceptions and disciplinary proclivities among academics and policy professionals currently deliberating reforms to the present institutional structures and legal content of the international economic system. Oisín Suttle's *Distributive Justice and World Trade Law* falls well within this universe. Suttle's analysis is a timely reminder for the interdisciplinary reformers of world trade law to pause with precision, reflection and caution. As aptly titled, his opus is not about distributive justice in the world trade law system but, rather, offers a conjunctive exploration of both topics. The result is a provocative and pragmatic defence of the current world trade system seen from Suttle's proposed explanatory theory of an 'equality in global commerce' (EGC) Principle, while narrowly criticizing some tribunals' substantive interpretations in different World Trade Organization (WTO) disputes. The book's core strength – and, at the same time, its potential weakness – is how it aspires to 'a rational moral critique of the trade regime' (at 7). To do so, Suttle takes up two fundamentally challenging questions: 'what does justice demand in the regulation of international trade ... [and] to what

extent does the existing regime for trade in goods respond to those demands?’ (at 9). To evaluate these questions, Suttle proposes an EGC Principle, which he disclaims as ‘not a grand blueprint ... [but, rather,] a standard for judging the justice or injustice of the most important institutions that we find in the world, namely states, and of the measures they adopt’ (at 19). Suttle focuses on what he calls ‘global distributive justice’, which ‘looks through the state, acknowledging the justice claims across political boundaries, including those of members of one political community against another or against the international system as a whole’ (at 33–34).

The EGC Principle, as Suttle coins it, appears at first glance to echo John Rawls’ difference principle in his opus *A Theory of Justice*: ‘[External trade measures] are just if and only if they pursue global equality of individual opportunity, through improving the position of less advantaged individuals, *subject to a reasonable principle of self-determination*’ (at 25; emphasis added).¹ What is particularly distinct in Suttle’s formulation is his focus on ‘distributing opportunities for economic activity’ (at 25) and what he conceives to be a ‘reasonable’ principle of self-determination. In his view, there is a ‘composite’ approach to self-determination ‘as a justification of measures adopted by *states*’ (at 151) as opposed to the right of self-determination under international law that specifically refers to peoples.² For Suttle, self-determination is ‘intrinsic ... [in regard to] an aspect of autonomy’, ‘expressive ... [in regard to] some other value ... [such as] fairness or equality’ and ‘instrumental ... because it makes more likely the realization of some other value’ (at 154). For Suttle, a reasonable principle of self-determination thus ultimately ‘concerns powers essential to the self-determination of the regulating people, and relies primarily on instrumental arguments ... [as well as] shared goals and standards, and relies primarily on the intrinsic argument’ (at 172). While Suttle briefly engages with the development of the right to self-determination in international law as it pertains to peoples (at 155–158), he uses the concept predominantly to justify state measures and thus jettisons aspects of the right to self-determination that he deems irrelevant to his theory of the EGC Principle.

Suttle explicitly draws from Rawls’ theory of justice, particularly ‘adopt(ing) Rawls’ conceptions of persons and peoples as free and equal, rational and reasonable’ (at 50). While his EGC Principle may mimic some language from Rawls, it is actually not substantively premised on the two key principles of Rawls’ theory of justice. To recall, Rawls’ two principles are: (i) each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, with the same scheme for all, and, in this scheme, the equal political liberties, and only those liberties, are to be guaranteed their fair value and (ii) social and economic inequalities are to satisfy two conditions: (a) they are to be attached to positions and offices open to all under conditions of fair equality of opportunity and (b) they are to be the greatest benefit for the least advantaged members of society.³ Unlike Rawls’ focus on assessing the justice of measures *vis-à-vis* individual persons, Suttle’s primary lens of analysis is the justice of measures *vis-à-vis* states that are members of the world trade system.

At the same time, however, Suttle’s book appears ambiguous on the method for assessing the elements of his EGC Principle, such as how a state’s external trade measures can indeed generate ‘global equality of individual opportunity’ or provide for the ‘improvement of the position of less advantaged individuals’. Instead, the book attempts from the beginning to set up an evaluation of how state measures could ‘protect peoples’ capacity for effective self-determination, including their capacity to provide essential public goods ... [and advance] contingently shared goals and projects to which particular states have jointly committed themselves’ (at 26), without purposely mapping these state measures in relation to outcomes faced by individuals, communities,

¹ J. Rawls, *A Theory of Justice* (1993).

² Common Art. 1(1) of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

³ Rawls, *supra* note 1, at 5–6.

groups, sectors or whole populations. This is because Suttle's theory simply assumes that 'members of a political community, *acting through their government*, are best placed to determine what measures are likely to be for their benefit' (at 26, emphasis added). It also runs consistently with Suttle's view that a theory of global distributive justice 'might subsume domestic distributive justice entirely, drawing no distinctions between relations among members of a community and relations with outsiders' (at 34).

Suttle then completes his theory of an EGC Principle with his own additional proviso on how to determine the justice of domestic economic measures (DEM Proviso), which he clarifies to be measures that 'pursue their goals through regulating domestic economic activity or through regulating economic activity generally' (at 19). The DEM Proviso, as Suttle frames it, states that '[DEM] are externally just, provided they do not impair the basic rights of outsiders or undermine the capacity of other peoples to become or remain well ordered' (at 27). From a formalist standpoint, Suttle's book is written with an almost entirely new vocabulary, riddled with far too many newly coined acronyms that are unfamiliar to trade specialists and even more so to students of international law or other disciplines. He appears to use a common discursive method throughout his book to validate his proposed EGC Principle and DEM Proviso as an authoritative theory of distributive justice in the context of world trade law. First, he tends to survey the landscape of existing theories and scholarly postulations on different topics, such as the theories of justice discussed in Part 1 (Foundations); the political theories on distributive justice, sovereignty and coercion discussed in Part 2 (Justice) and the current interpretive positions taken by tribunals in various aspects of world trade law in Part 3 (Law). The topographic survey tends towards a deconstructionist critique, often showing the inadequacies and deficiencies of the explanatory and predictive power of these theories. Thereafter, Suttle presents his theory and explains why it has greater explanatory force and rigour than its predecessors.

The main challenge with this methodology is that deconstruction does not, conversely or automatically, lend superior force or persuasive interdisciplinary rigour to Suttle's proposal of an EGC Principle and DEM Proviso for assessing distributive justice in the world trade system. While Suttle has asked the reader not to take his proposal as a 'grand blueprint', he effectively nudges us to see his proposal in that way, given that he expends considerable space in the book to pointing out the profuse shortcomings of existing theories and approaches. The extensive deconstructionist discussion sacrifices any deeper construction and application of his proposal to the entirety of world trade law. The methodology also does not meet the expectations generated for the laudably ambitious set up of the book as a 'rational moral critique of the world trade regime'. If existing approaches are indeed as inadequate as Suttle deftly argues, he less ambitiously aims to 'tell a story about liberal equality and the trade regime, answering competing liberal stories ... [without claiming] these are the only stories' (at 52). After boldly setting up his questions on what justice demands of international trade at the start of the book, Suttle ultimately pares it down to a state-centric question of 'whether, and under what conditions, states and the measures they adopt are reasonably acceptable to those, whether insiders or outsiders, subject thereto' (at 54). Flowing from this narrower question, Suttle then provides a crisp technical analysis of four aspects of the trade in goods regime under the General Agreement on Tariffs and Trade (GATT), namely: (i) border measures, discrimination and external trade measures in Chapter 6; (ii) development provisions and general exceptions in Chapter 7; (iii) trade remedies and competitive fairness in international trade regulation in Chapter 8 and (iv) domestic regulation, self-determination and domestic economic measures in Chapter 9.⁴

⁴ General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

Using his EGC Principle (with or without the DEM Proviso), the fairly surprising result is that Suttle appears to marshal a robust defence for the existing world trade system. In his view, his theory:

provides a plausible account of GATT nondiscrimination rules ... [accounting] more readily than [protectionist theory or terms of trade theory] for both the relation between those rules and [GATT Article XX], and the distinctiveness of [non-product related production processes and methodologies], and provides a basis for identifying legitimate and illegitimate distinctions among products that more closely tracks practice under the Agreements. (at 202)

His theory also shows ‘how far the exceptions and qualifications to the [GATT core disciplines] can be understood as tracking the justifications that [equality in global commerce] suggests apply to [external trade measures]’ (at 240). Suttle declares that his theory ‘provides a better explanation than competing theories for key features of the trade remedies rules, and can serve as an interpretive aid, potentially informing teleological interpretation of those rules’ (at 283). Finally, with respect to ‘the relevant rules, and the approach adopted by [the Appellate Body in disputes involving sanitary and phytosanitary measures in the Agreement on Sanitary and Phytosanitary Measures and technical barriers to trade in the Agreement on Technical Barriers to Trade]’, Suttle insists that the state of WTO jurisprudence would be ‘more readily reconcilable with [equality in global commerce], albeit requiring further development in the case law’ (at 319).⁵ Given the scope of these conclusions, one is left to wonder how these are not indicative of a theory that does seek to provide a ‘grand blueprint’ for determining the justice of the world trade system.

Perhaps because Suttle sets up his theory to invite a ‘rational moral critique of the trade regime’, his book – at least as it appears from the application of the EGC Principle and/or the DEM Proviso in his four illustrative case studies – inadvertently seems to create a new space for justifying the world trade system as it stands. Suttle does not provide a counter-factual case study that shows when the existing world trade law regime is distributively unjust according to his theory. That in itself is a difficult result to digest for today’s state and non-state critics, reformers, practitioners, agents and scholars of the world trade regime, especially where a dense academic and policy literature has long emerged not just on the roles of human rights, fairness, local participation, transparency and other concepts of legitimacy in relation to trade⁶ but also on the direct role that trade can play in creating distributive inequalities for peoples, groups and individuals impacted by the Schumpeterian creative destruction that trade and globalization can also bring.⁷ That the book appears to convey satisfaction with the justness of the world trade

⁵ Agreement on Sanitary and Phytosanitary Measures 1994, 1867 UNTS 493; Agreement on Technical Barriers to Trade 1994, 1868 UNTS 120.

⁶ See, among many others, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order (Mr. Alfredo de Zayas), Doc. A/HRC/33/40, 12 July 2016, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/151/19/PDF/G1615119.pdf?OpenElement>; Organization for Economic Co-operation and Development, *Making Trade Work for All*, May 2017, available at www.oecd.org/trade/making-trade-work-for-all.pdf; World Trade Organization, International Monetary Fund and the World Bank, *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment*, April 2017, available at www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf; J. Harrison, *The Human Rights Impact of the World Trade Organization* (2007); J. Stiglitz, *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump* (2017); S. Joseph, *Blame It on the WTO? A Human Rights Critique* (2011).

⁷ See, among others, Klimek, Hausmann and Thurmer, ‘Empirical Confirmation of Creative Destruction from World Trade Data’, 7 *PLOS One* (2012) 6, available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0038924>; N. Pavcnik, ‘The Impact of Trade on Inequality in Developing Countries’, US National Bureau of Economic Research Working Paper no. 23878, September 2017, available at www.nber.org/papers/w23878.

system now is the most surprising (albeit doctrinally well-argued) result of all, in what would have been a timely attempt to invite a 'rational moral critique' of today's trade regime. (It also invites the reader to wonder if there was any sample selection bias with respect to the chosen case studies.)

To be sure, Suttle does acknowledge that 'human rights claims are claims of distributive justice ... but they are not the whole of distributive justice' (at 36). Suttle's theory purposely distances itself from pre-existing work on human rights and distributive justice. Neither is he seeking to simply extend or apply Rawls' theory to the context of world trade law because, in his view, 'Rawls simply has nothing to say' when it comes to the 'content of the agreements that states make, rather than simply the fact of their having been agreed' (at 42). While he invokes 'premises and appl(ies) methods familiar from reasoning about domestic distributive justice, and specifically Rawls' approach, to identify principles appropriate to regulating the international economy' (at 52), Suttle purposely focuses on 'one institution in particular: the state', because 'the state remains the most important institution in the international system, including the international economy' (at 53). His focus on the state is also because he prefers to 'avoid contestable empirical premises ... about the power of either transnational corporations or international institutions' (at 54) and because 'states play valuable roles in persons' lives ... [i]t is the state, in the first instance that makes social life possible, stabilizes rights and expectations, and (ideally) instantiates the distinctive virtues of freedom, equality, and democracy' (at 54).

Reading Suttle's doctrinally well-argued opus, one gets the sense that the author is competently and credibly answering technical questions on the justice of existing arrangements under world trade law between states and from the prism of states. Suttle reflects that distributive justice in trade regulation thus 'becomes a question of whether, and under what conditions, states and the measures they adopt are reasonably acceptable to those, whether insiders or outsiders, subject thereto' (at 54). Without a doubt, that is a rich, rigorous and conceptually valuable contribution to institutional analysis that speaks powerfully to upholding the current design of trade regulation today. But it purposely speaks to a nuanced narrower space of technical trade interactions and trade arrangements between states in the world trade system, instead of the reality of its many non-state stakeholders, such as peoples, populations, groups and individuals. Individuals, groups and peoples do not take part in the trade decisions that states make on their behalf, but they are all expected to absorb the impacts of these decisions.

Since Suttle launched his EGC theory on the assumption that states (or their authoritative decision-makers) best articulate the interests of their populations (and all sectors and communities therein), the book regrettably misses significant opportunities to frontally examine current pathologies in the world trade system. In particular, Suttle's book does not contemplate the possibility of dysfunctional state decision-makers or those who poorly respond to the welfare interests (and, more so, the civil, political, economic, social, cultural, labour, environmental and indigenous rights) of their respective populations. Suttle emphatically declares that the 'ends of individual freedom and collective self-determination are the only ones that persons and peoples necessarily share' (at 112), but there is little room in this book for any discussion of the lexicon and practice of fundamental human rights and of what ought (or ought not) to be its role in the normative decisions states make for their populations when they design either external trade measures or domestic economic measures. Significantly, Suttle sees the trade and human rights discourse as futile, given that 'in building justice on outcomes for individuals, the human rights approach requires contestable empirical premises ... [rather,] we need principles that can be applied notwithstanding such uncertainties' (at 43). His choice to 'focus elsewhere thus reflects, not logical form, but a substantive judgment about the prominence, fit, and attractiveness of the intrinsic human rights approach' (which he somehow singularly ascribes mainly to the work of Ernst-Ulrich Petersmann) (at 63). As such, Suttle describes his theory as 'explanatory and

interpretive' (at 63). The theory is not at all limited to description but, rather, deliberately aspires to assessment and guidance of policy actions (at 63), such as having WTO tribunals use the EGC theory in the task of treaty interpretation in world trade law as well as in guiding state decisions 'to do or refrain from particular actions' in the world trade system (at 66).

The paradox of the book arose from the methodology chosen for writing a new theory for distributive justice in the context of trade regulation. Suttle describes his constructivist approach in the book as one where 'we identify the principles of justice by inquiring what principles agents would accept under ideal choice conditions' (at 49). If the agents chosen by Suttle for his analysis are states, then, necessarily, the principles of justice identified are those principles that states would accept under such 'certain ideal choice conditions'. It is ultimately unsurprising that the arrangements under the trade-in-goods system are in accord with distributive justice from the lens of states that created the system as it stands today. But the world trade system is not just a constellation of states anymore, and if the current explosion and flux of terminating and rewriting existing trade treaties and negotiating new trade treaties is any indication, it is precisely a world trade system where more non-state actors seek to protect their rights and interests precisely because states (or political leaders and trade treaty negotiators) may routinely fail to do so over a longer time horizon. Because Suttle deliberately avoids engaging with what principles of justice would be acceptable to individuals, groups and communities in the world trade system (and distinctly from how states supposedly articulate their 'representative views' of those constituencies), the book conveys a somewhat outworn sense that 'global distributive justice' means that states in the world trade system can still just proceed as usual, so long as they can readily justify their trade measures as somehow 'pursuing' (not necessarily achieving) the 'global equality of individual opportunity', or incrementally 'improving the position of less advantaged individuals', under what the state deems as a reasonable exercise of its own self-determination.

The irony of Suttle explicitly grafting elements from Rawls' theory is that Rawls took full account of equal and basic human rights in his *Theory of Justice*, seeking to allocate inherent social and economic inequalities according to the 'fair equality of opportunity' and redirecting such inequalities in a manner that would favour 'the greatest benefit of the least advantaged members of society'. Suttle's EGC theory purposely ignores the salience of basic human rights (other than his reconceptualization of 'self-determination') and does not put forward any method of assessing social and economic inequalities arising from the world trade regime as they pertain to individuals, communities and populations. There is little reassurance that states' mere pursuit of 'global equality of individual opportunity', or of improving the position of (some) less advantaged individuals, or of examining state measures as 'reasonable' exercises of the principle of self-determination will indeed be enough to somehow achieve Rawls' vision of distributive justice for individuals, communities and peoples. If it were, I highly doubt that the international economic system would be mired in its deep mission crises and institutional upheavals today. Suttle provides a technically well-accomplished argument of global distributive justice between states, and that itself is a rich contribution. To his credit, Suttle admits that 'a comprehensive account of justice in international economic regulation would go beyond [his] largely doctrinal focus to examine the multilevel domestic and international political discourses on these issues' (at 333). Perhaps an updated sequel of this initial attempt at a 'rational moral critique of the world trade regime' can do more in the future and return to its originally bold normative moorings.

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