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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. £95.00. ISBN 9781108235235.

I agree: ‘We live in an unequal world. This much is beyond dispute’ (p. 3). The unequal distribution of wealth within and between countries – the simultaneity of shocking poverty and stunning profusion – is one of the world’s most notable features. It is clear that there are reasons for these conditions that have nothing to do with international trade or international law; but it is also clear that international trade, and the way in which it is legally framed, has something to do with it. So, in *Distributive Justice and World Trade Law*, Oisín Suttle asks head on: ‘first, what does justice demand in the regulation of international trade? And second, to what extent does the existing regime for trade in goods respond to those demands?’ (pp. 9, 177). His answer dives into political theory in the wake of John Rawls to develop a principle of Equality in Global Commerce (EGC). That principle, Suttle clarifies, does not provide a ‘grand blueprint ... of a just global order’ but rather offers ‘a standard for judging the justice and injustice of the most important institutions that we find in the world, namely states, and the measures they adopt’ (p. 19).

The book takes significant steps in developing a principle for evaluating states’ economic measures – a tall order. Lucid argument and significant methodological reflection characterize the work. Canny discussions of political theory stand next to crisp analyses of legal practice and doctrine. For example, arguments to overcome Rawls’ own objection to applying egalitarian principles globally (pp. 69–115) contrast with an analysis of what amounts to a legitimate objective in Article 2.2 Agreement on Technical Barriers to Trade (TBT) (pp. 298–304).

Suttle has a point when he writes that much work on global justice argues in large distance from the laws and institutions that exist and is therefore of little help in the more fine-tuned work of international trade lawyers. And, more pragmatically, Suttle notes with a nice punch that international trade lawyers customarily turn to economic analyses for guidance. In his view ‘this is equally a function that a theory of justice can fulfil, particularly given the frequency with which economic explanations of [World Trade Organization] WTO rules break down in practice’ (p. 7).

There is a lot to be said for the task that Suttle sets himself and for the way in which he pursues it. At the same time, I see problematic drawbacks in the methodological choices he makes that, in spite of a critical intention at the

outset, ultimately turn at least parts of his argument into a justification of the status quo.

## I

The book's first part on *Foundations* places Suttle's argument within the context of an unequal world and defines the aim of developing a political theory for international trade law to explain, critique, and interpret that body of law (pp. 6–7). To pursue that aim, Suttle maintains, it is necessary to know what justice demands of states to then see how that squares with world trade law. He draws a distinction for that purpose between external trade measures (ETMs), which 'pursue their goals specifically through regulating international economic activity' and domestic economic measures (DEMs), 'which pursue their goals through regulating domestic economic activity' (p. 19). Echoing John Rawls' difference principle, Suttle offers the EGC principle according to which 'ETMs 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' (p. 25). In other words, the justification of ETMs depends on the effect that they have on the distribution of economic advantage (cf. p. 109).

A straightforward example for an ETM is a tariff. A tariff is just if it makes the less advantaged better off, otherwise it is unjust. Suttle introduces the principle of self-determination into the equation in order to acknowledge two possible carve-outs: first, when a measure protects peoples' capacity for effective self-determination and, second, when a measure advances shared goals to which particular states have committed themselves. Turning to DEMs, the threshold is lower. There is nothing wrong with them unless they 'impair the basic rights of outsiders or undermine the capacity of other peoples to become or remain well ordered' (p. 27). Chapter 1 introduces these core claims and Chapter 2 contrasts them with propositions of other theories of justice, especially Rawls' own international political theory in his *Law of Peoples* and Thomas Pogge's human rights based account.

Part two on *Justice* builds on those first distinctions to develop the principle of EGC. Given strong countervailing reasons, Suttle focuses most attention on the claim that egalitarian principles can at all apply internationally, and not only within the confines of states (Chapters 3–4). His argument strikes me as strong and, even if I might hesitate to follow him all the way to the EGC principle, this is a point I accept and do not want to tackle

on its merits. Chapter 5 then supports the way in which self-determination qualifies the egalitarian thrust of the EGC principle.

Part three on *Law* turns to a meticulous analysis of international trade law, always making sure to show how the EGC principle provides a better fit for explaining, critiquing and interpreting the law when compared to competing approaches. When it comes to border measures such as tariffs or quotas (Chapter 6) as well as to development provisions and the general exceptions (Chapter 7), Suttle offers a compelling argument that the EGC principle does a better job when compared to the existing approaches that either approach the law as an attempt to overcome a prisoners' dilemma (pp. 179–182) or to curb inefficient protectionism (pp. 182–185). Given how deep-seated those existing approaches are for making sense of the law, this is no small feat. Chapter 8 does the same for trade remedies and Chapter 9 for domestic regulation in the TBT Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), only that the EGC principle here faces different competitors.

The fourth and last part is titled *Progress* and contains a short chapter on what's next. Right at the beginning of this finale, Suttle acknowledges that the book's 'emphasis on explanation and interpretation has risked importing a conservative tendency to an otherwise critical set of principles' (p. 323). The closing Chapter aims at mitigating that risk but still stays close to the law as we have it, focusing on the possibilities of trade liberalization through preferential trade agreements to the benefit of the less advantaged (Chapter 10).

## II

The risk of importing a conservative tendency is real. While I am conscious not to criticize *A Political Theory of International Trade Regulation* for what it wants to be, I first of all want to draw attention to the consequences of more specific methodological choices that Suttle makes. Only then do I want to say something about the travails of international political theory more generally. The fact that Suttle also pays considerable attention to issues of methodology, and the fact that he makes a programmatic argument about how the disciplines of political theory and international (trade) law can better interact, may further justify such a relatively fundamental critique.

The book's method, on Suttle's account, is constructivist: 'we identify principles of justice by inquiring what principles agents would accept under ideal conditions' (p. 49). One of the main, if not the main, advocates of such a

method in political theory was, of course, John Rawls who thought of the principles that agents would accept under the veil of ignorance. One noteworthy feature of such a method is its take on the relationship between normative propositions and practical realities. On the one hand, the constructivist method sets itself apart from internal critiques that rely on standards that a certain practice already contains. That route is said to lead towards relativism and conservatism (pp. 44–5). On the other hand, the Rawlsian way recognizes that justice principles need to be attuned to particular institutional realities and, like Stuttle's EGC principle, it also aims at explaining institutional practices. What is more, Suttle maintains that justice principles must work in spite of uncertainties about how the global economy exactly ticks. Otherwise they would be practically mute until we had that exact knowledge (p. 43).

A whole lot could be said, and has already been said, about the relationship between normative propositions and practical realities. Here I only want to highlight three intertwined drawbacks of the choices that Suttle makes. First, he puts himself in a rather strong bind that leads him to fish for justifications of practices. For example, it seems straightforward that many obviously protectionist tariffs, especially those of developed countries, would fail the justice test for ETMs. It is equally clear that international trade law unequivocally permits these practices. Suttle acknowledges that 'EGC does thus not fit this central aspect of the GATT/WTO system' (p. 187). But instead of highlighting, here or elsewhere, how international trade law, and the practice it allows, chops up global production and value chains in ways that perpetuate or increase distributive injustice, he offers four responses that make the bad look good: there is, after all, an aspiration of progressive trade reduction; such reductions can realistically only be pursued in an iterative fashion; existing tariffs might even preserve an important aspect of self-determination; and we might see here 'the accommodation of normative principles to inhospitable political realities' (p. 188). Suttle readily concedes that especially the last point is unsatisfactory, and he adds in a footnote a reference '[o]n the risk that normative argument obscures realities of power in international negotiations' (p. 188). But it is not until the very last pages when he writes loud and clear that '[t]he bulk of protectionist measures still maintained by developed countries are simply unjust *vis-à-vis* developing countries' (p. 326).

Second, Suttle's argument leads him away from any consideration of the reasons for the present state of affairs – and thus also from considerations of justice in production and allocation, rather than distribution. The book's cover features a painting from 1824 of opium ships before the Chinese coast, but the book's contents makes no reference at all to practices of colonialism, or any other real life practices of economic exchange for that matter. This is not a matter of oversight, to be sure, but an expression of methodological choice.

Rawlsian political theory asks about justice principles under ideal conditions and is thus inherently unrelated to history. The EGC principle is not about – and cannot be about – rectifying past wrongs. It is about distributive, not corrective justice (p. 31). It is not troubled by the need to consider the dynamics that have led to the present distribution (p. 147). There may be a critical edge of Rawls' strategy in the context of domestic debates, especially when compared with the Robert Nozick's argument emphasizing just historical entitlements. But the discursive and practical terrain of global distributive justice renders an abstraction from reasons for inequality more questionable. As Rainer Forst and others have argued, it cuts theories of justice into half.<sup>1</sup>

Third, the EGC principle is supposed to be practically workable in spite of uncertainties about how the global economy ticks. The principle's application then again requires quite a bit of knowledge in that regard. It would be difficult to know what is (un)just without a much better understanding of the effects trade measures – allowed or prohibited by international trade law – have on the ground. That might indeed be left for a later day. Such uncertainty, however, draws attention to an open question: Who are the less advantaged? For Suttle, the points of reference are, I think rightly, both peoples and individuals (e.g. p. 84). But measures that may be most helpful for developing countries may simultaneously be the most harmful for the less advantaged in developed countries. I do not see a suggestion on how to resolve such a tension. In the last pages, Suttle quotes former WTO Director General Pascal with the fitting question of whether China is a poor country with many rich or a rich country with many poor (p. 326). This question also suggests that thinking about distributive justice may not so easily escape further analysis of how state measures relate to inequalities between and within states. Many stories have been told in that regard and it is a doubtless difficult terrain, but it does not seem possible to withdraw from that terrain and to then still know which measures work to the advantage of the least disadvantaged.

### III

The above drawbacks are consequences of a primary choice for a specific strand of political theory. Suttle writes boldly that '[t]he modern political theory of global justice arguably begins in 1979, with Charles Beitz's *Political Theory and International Relations*' (p. 38). How can that be true? First, I wonder what that makes of the wealth of political action and theory from the Third World. Not

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<sup>1</sup> Rainer Forst, *Normativität und Macht* (Suhrkamp 2015); in English: Rainer Forst, *Normativity and Power: Analyzing Social Orders of Justification* (OUP 2017).

only does it seem that Beitz is indebted to the drive of the New International Economic Order (NIEO) in his turn to issues of global justice,<sup>2</sup> but there are numerous works that speak on precisely that issue, that speak specifically on the international trade regime and that speak in the language of justice.<sup>3</sup> Still other debates preceded them at Bretton Woods and elsewhere.<sup>4</sup> In addition to questioning a beginning with Beitz in 1979, considering those earlier debates also makes Suttle's critique of international trade law seem rather narrow – not only in the kind of political theory he adopts, but also in his imagining of how the international trading regime could look differently.

For instance, Suttle refers to the establishment of the United Nations Conference on Trade and Development (UNCTAD) in 1964 and to the NIEO when writing about the introduction of Part IV on 'Trade and Development' into the GATT (p. 207). But in his analysis of the development provisions that came with it, he repeats the argumentative pattern that I already highlighted with regard to tariffs: Indeed, 'Part IV GATT creates no significant obligations [, which] seems difficult to reconcile with EGC's understanding of these provisions as expressing duties of justice' (pp. 218–9). '[T]he objection can be answered' (p. 219) – but answered in a way that once more makes the bad look good. There is thus a real risk that the unequal world gains a rational justification which, in turn, makes it much more difficult to change because for that, it would above all need to be shaken precisely in its rational justification.<sup>5</sup>

Suttle is considerate and circumspect in developing his argument and in many of the choices he makes, but his primary choice for Rawlsian political theory, to which Beitz gave an international dimension, is surprisingly dogmatic and in want of further support, either from more general theoretical preferences or from the specific purpose of the present book. And there are strong, unacknowledged competitors from the South or the North. In particular, renown theorists have argued strongly that justice needs to begin with an

2 See Samuel Moyn, 'The Political Origins of Global Justice' in Joel Isaac, James Kloppenberg, Michael O'Brien and Jennifer Ratner-Rosenhagen (eds), *The Worlds of American Intellectual History* (OUP 2016) 133–53.

3 Seminally, Mohammed Bedjaoui, *Towards a New International Economic Order* (UNESCO 1979); see also Antony Anghie, 'Legal Aspects of the New International Economic Order' (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 145–158.

4 See, for example, Eric Helleiner, *Forgotten Foundations of Bretton Woods* (Cornell University Press 2016).

5 See, fundamentally, Max Horkheimer, 'Materialismus und Moral' (1937) 6 *Zeitschrift für Sozialforschung* 162–197. And more specifically with regard to the effect of legal analysis, Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso 1996).



analysis of injustice, with an analysis of real conditions of economic production and distribution.<sup>6</sup> That is something that Suttle does not consider.

In sum, my criticism is two-fold: First, I question the primary choice for Rawlsian rather than another political theory and suggest that this choice should, in any event, have been better supported. Second, I have placed attention on the drawbacks that follow from the more specific methodological choice. I do not think that these choices should be put off as matters of taste on which a reviewer better refrain from commenting. Here I can say that this is an excellent book which shows great acuity and depth in both political theory and trade law. It takes important, heavy steps in a lucid argument to bring considerations of justice to bear in an unequal world shaped by trade measures. And yet, the problem remains that Suttle's choices lead him to justify much of the status quo that he, too, wanted to overcome.

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6 Cf Forst (n 1) 55. See more generally Jörn Reinhardt, *Der Überschuss der Gerechtigkeit* (Velbrück 2009).