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## Conclusion to “Global Justice and International Economic Law: Opportunities and Prospects”

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## ☐CN Conclusion

### ☐CT **An Agenda for Research and Action**

We began this volume with three interrelated aims. First, there is the need to more closely integrate political theory on distributive justice matters into the study, critique, and reform of international economic law doctrine and institutions. The global justice debate has made it abundantly clear that the ready assumption that economic theory and political realism would together resolve all relevant normative issues in international economic law is now untenable (if it ever was tenable). Second, we recognize that political theory, for all its normative power, will ultimately fail to realize its full transformative potential without a more thorough and nuanced accounting of how institutions and rule systems – in all their messy human splendor – actually work. That is where justice will actually take place. Finally, we want to see how a closer conversation between international law and political theory might contribute to a clearer and more powerful analysis of global justice and its relationship to international economic law, thus strengthening both fields.

In practice, this has resulted in a series of challenging and innovative papers – conversations, really – linked together by their cumulative exploration of the following questions: How can the justice of global economic relations be enhanced and safeguarded by international economic law? What substantive or procedural principles of justice should organize our efforts to improve the efficiency and social welfare of the international economic law system? What limits do we discover in

prevailing accounts of global justice when we explore their claims and implications through the complexity of international economic law systems as we find them? What limits within international economic law scholarship does the global justice debate highlight?

The first section of the book advances several specific arguments on the nature of distributive justice and its relationship to global economic systems. Gould, Butt, and Hockett all offer egalitarian principles of justice, from within a broadly cosmopolitan perspective, and argue for their implementation through international law.

This raises a fundamental question central to the project of this book: If we take both global justice and the complex, stubborn reality of international institutions and their politics seriously, how can we acknowledge the often radically egalitarian principles and implications of political theory in a way that offers practical, realizable guidance toward global justice? Our authors collectively identify and employ three different types of answers to this question.

The first approach, employed by both Gould and Butt, is to offer a set of intermediate principles or mechanisms as bridging tools between political theory and institutional reality. For Gould, the key is human rights, but human rights understood as a set of benchmarks, prioritizing changes within domestic and international institutions rather than mandating radical redistribution. This results in a set of recommendations familiar to anyone conversant with the global justice literature, such as the use of human rights impact assessments, but with a difference. Instead of

a facile laundry list of changes, such prescriptions are grounded in a comprehensive theory of equal positive freedom, with human rights as an intermediate set of organizing principles rather than as an imagined shortcut to implementation.

Similarly, Butt argues for a robust cosmopolitan principle – the principle of equality of opportunity – while fully recognizing the gulf between the implications of this theory and contemporary global socioeconomic reality. In Butt’s case, rather than offer human rights to bridge the gap, he suggests careful attention to three sets of intermediate issues critical to the implementation of any normative principles by actual institutions: their normative desirability, practicality, and popular legitimacy. Recognizing that the specific nature of distinct institutions, and the particular socioeconomic context of the people they affect, influences the sorts of actions that can and should be taken toward global justice at different levels, Butt reminds us that global equality of opportunity does not require equal material conditions, just the conditions of equal substantive opportunity in the relevant society.

Thus we see two philosophers advocating ambitious theories, but within a framework that recognizes that implementation will be progressive, evolutionary, and grounded in the specific nature of actual institutions, the societies they affect, and the larger context of domestic and international politics. The corrective, if you will, against disengaged theorizing or facile prescription is through intermediate mechanisms – whether human rights principles or mediating concepts – that take into account the contextual reality of their target institutions.

Hockett, by contrast, offers us a different kind of corrective mechanism. He too pursues a broadly cosmopolitan principle of justice – that of fair distribution based on equal-opportunity-grounded welfare – but his focus is on the traps we create for ourselves within our own theoretical discourse. Arguing that all maximization models are distributive, equalizing–disequalizing, and reductive, but generally along the wrong criteria, he tries to make us self-conscious and critical of the assumptions in our formulae and their unexpected implications. The need for this kind of internal housecleaning for global justice theory may only become apparent as we try to apply it to concrete institutions and decisions.

These three theorists all operate through the same basic structure: Develop the broadest, most powerful principle of justice you can, then work out the issues that arise when you proceed to argue for its implementation through law and institutions. Their contribution is to suggest mechanisms whereby the application can be more gradual, nuanced, and in keeping with institutional and political realities. In contrast, what if we approach the issue from an entirely different perspective, one that does away with the need for such complex attempts at mediation? What if we looked for principles of justice *within* the systems and institutions we are studying, instead of outside them? That is the premise behind James' intriguing alternative approach to global justice theorizing offered in our fourth chapter.

According to James, rather than engage in traditional political theory we should focus on internal principles of justice, namely principles tied to the internal structure of actual economic arrangements themselves. Within international

economic relations, he identifies internal principles of fairness, which he calls principles of structural equity. These internal principles of justice depend for their normative force on an underlying shared social practice of market reliance, rather than an overarching theory of distributive justice. The promise of this approach is that it does away with the need for intermediate mechanisms, because the theory comes from within the institutional arrangements themselves, thus improving the fit between theory and social reality. Insofar as it begins with a close analysis of the structure and operation of international economic law institutions themselves, James' work is itself a type of bridge between the more explicitly normative offerings of the other theorists and the institutional context in which global justice reforms must occur.

Taken together, the work of these four theorists suggests the need for more careful, formal attention to the relationship between normative theory and social facts *from the theoretical side*. In the case of external principles of justice, this can mean employing mediating structures such as human rights, but in a more nuanced or open structure as Gould does; or exploring in a philosophically rigorous manner the practical implications of mediating concepts, as with Butt's account of popular legitimacy; or critically monitoring the institutional implications of our own theoretical language, as Hockett urges. Alternatively, one can follow James and locate the normative project entirely within the social context by seeking internal principles of justice and thereby obviating the need for mediation. Whatever approach one takes, what is essential is that theorists help do the extra work of

bringing their ideas across the practical threshold – it cannot be left solely to those approaching the issues from the institutional or doctrinal side.

For their part, those coming from within the institutional perspective have their distinctive contribution to, and responsibility for, the overall success of the enterprise as well, as is typified by the authors in our second section. All three academic lawyers are, characteristically, deeply immersed in the nuanced particularity of international economic law and its institutions. Together, they raise a second fundamental question for this project: If we agree on the priority of global justice, what is the most effective way for us as theorists and lawyers to integrate the messy contingency of human life and political reality within our efforts to articulate and pursue normative aims in an institutional context? Too many theorists are content to resolve the matter with gestures toward “nonideal” conditions, and too many academic lawyers seem to disdain theory or mistakenly assume that facts can refute ideas. What distinguishes these three offerings from much other scholarship – in addition to their careful and sophisticated use of normative theory – is their shared assumption that the best normative analysis, and therefore the best avenue toward increased justice, is *through* this particularity, not over or around it.

Drawing on a meticulous review of the debate over trade preferences, Lim argues that although moral claims within institutions are messy, complicated things that need different treatment than normative claims in ideal theory, with much more care taken to characterize their social, historical, and political context, they are moral claims nonetheless. Lim calls this “middle-level” theorizing, reminiscent of Blake’s

institutional theory.<sup>1</sup> In contrast, Dunoff looks at the same debate and the same history but reaches opposite conclusions, questioning whether developing countries have in fact been making moral claims at all, or rather adopting strategic positions for historically contingent political and economic reasons. For Dunoff, arguments in favor of trade preferences should be evaluated empirically, strategically, and contextually, because what matters most is not the moral language in which a claim is made, but whether the sought-for policy actually works to achieve the stated goals.

The dialogue between Lim and Dunoff reminds us that specific claims have specific histories and strategic implications in the fora within which they are raised, and they demand specific policy responses in those fora. Injustice takes place in specific concrete instances of time, place, and person, and so justice and the remediation of injustice must be similarly specific and grounded. Both Lim and Dunoff, in their different ways, agree that states' moral claims are to be taken seriously, and that means contextually. And yet, we cannot easily dismiss the concern raised by Dunoff (echoing generations of realists) that states employ moral language for a variety of tactical reasons, and the mere use of moral language or justification should not settle any policy arguments. However, to remain with the example raised by both Lim and Dunoff, it cannot be that the simple existence of strategic realities affecting state positions with respect to trade preferences would by itself eliminate or render superfluous the moral claims that states do make, or (even more importantly) the moral significance of the positions they take. Our concern over the justice or injustice of the global trading system is not exhausted by the claims that states

happen to make or not make, nor is it settled by the concrete results states accept or contest.

It is this process of claim, counterclaim, and contestation by states that is at the heart of Thomas' contribution to the volume. Thomas argues that distributive justice is best approached through democratized governance procedures. She reminds us that the discourse of states in the WTO, like anywhere else, is complex and contradictory and makes broad substantive aims and programs difficult if not suspect. Add transaction costs and the reality of both policy differentiation among least developed countries and the proliferation of trade fora, and you get an idea of the complexity of the politics of trade and the coordination problems that states face.

Adopting a procedural approach to substantive reform is one very lawyerly response to the complex realities Thomas catalogues. An intelligent use of historical and empirical data is another way to more effectively mesh theory with institutional reality, as both Dunoff and Lim suggest. Taken together, all three of our academic lawyers suggest a second important principle: When theorizing institutional reform, normative theory must undergo a "step change" or downshift if it is to effectively integrate with the very institutional realities it seeks to reform. This argues for a much more cautious and contextual approach to normative theorizing about institutional reform along global justice lines, reflecting both political theory and concrete differences in politics, resources, and conceptions of equality.

All of this assumes that our normative language is an effective tool through which to identify injustice and prescribe remedies. This brings us to the third set of

contributors, each of whom in their different ways pose the third major question of this volume: Is the normative project of global justice as currently defined sustainable or even coherent?

Tesón and Klick argue that much contemporary philosophy on the global justice question misses the mark on trade policy and distributive justice, because it ignores empirical reality in favor of ideal theory. Insofar as empirical work demonstrates that free trade is the most effective approach to alleviating world poverty, then free trade should be the policy prescription behind which all theories of global justice line up. The fact that it is not, and that free trade is often the target for global justice theorists, suggests to Tesón and Klick a dangerous level of confusion, disingenuousness, or worse.

That “worse” is what Stark’s contribution is all about. She is deeply skeptical of the transformative capacity of contemporary global justice theory and its sincerity, but for different reasons. In her view, trade theory and international economic law cannot deliver justice because they are both fatally embedded in the neoliberal political, moral, and economic system, which is class based and essentially opposed to wealth redistribution. Moreover, the whole narrative of “development” is flawed for similar reasons. All a reformer can hope to do is expose these ideological constructs for what they are, opening up the possibility for something more honest to take its place.

Trachtman also finds contemporary global justice theory to be lacking, but not on the basis of its ideological underpinnings. Instead, he analyzes the problem in

terms of the methodological limits of the discipline, leading philosophers to overpromise and the rest of us to overrely on normative theory beyond what it is capable of delivering. However, because all the other disciplines involved in the global justice inquiry – economics, law, and psychology to name three – have their own complementary blind spots, the solution when it comes to global justice lies in a consistent commitment to interdisciplinarity. In this way, each discipline working on global justice can support and reinforce the others.

In an interesting way, the chapters in this section reflect three of the most salient positions on the larger debate concerning globalization itself. One tends to find that global opinion concerning the fairness problems in globalization divides itself into three camps. On one end of the spectrum, there are those who would agree with Tesón and Klick (Bhagwati foremost among them<sup>2</sup>) that the failures of globalization are attributable in large part to an inadequate commitment to liberalism – we need more free trade, not less, and the problem is well on the way to being solved. At the other end of the spectrum are those who would agree with Stark (Bourdieu is perhaps the most striking exponent<sup>3</sup>) that the problems of globalization cannot be fixed because globalization works exactly how those in power want it to, namely by enhancing the returns to capital on a global scale. In the middle are those of a more technocratic or policy-oriented nature (Stiglitz comes to mind<sup>4</sup>), who both see the problems and believe they can be fixed but would suggest (as does Trachtman) that it is a matter of “getting it right” – better policy *can* lead to fairer globalization.

Whatever one's view of this globalization debate or the three contributions to this section, one can at least agree that they each offer important cautionary tales as we set about addressing the manifest suffering of the global many. Together, their injunctions constitute a third principal theme of this volume: When theorizing global justice and institutional reform, pay close attention to empirical theory, whatever one thinks of the politics associated with it; acknowledge the reality and limits of one's own ideology and the pervasive effects of power inequalities; and avoid disciplinary hubris.

This brings us to the conclusion of the conclusion. In our view the chapters in this volume underscore, despite their differences, that on matters of global justice our discourse is not so much confused with regard to what justice would look like, at least in its rough contours, as it is overwhelmed by the degree of injustice and the seeming intractability of current institutions and politics when it comes to real reform. Together, the offerings in this volume argue that rather than remain embarrassed at the audacity of the claims of justice, our often feeble responses, and the seeming impossibility of the obstacles, we can and should form a clear, coherent, and multidisciplinary agenda of research and action.

First, we need several clear, powerful, well-argued principles or ideas that can inspire, animate, and organize our efforts toward a more just global economic system. This is the preeminent task of political theory. We need several of these ideas, not just one, because as Sen reminds us in *The Idea of Justice*, seeking a single triumphant idea of justice can be both a delusion and a dangerous distraction. When

over 26,000 children die each day, as Dunoff points out, we must move ahead as best we can with the tools we have.

The theoretical contributions in this volume amply illustrate this potential and its realization. Both external and internal principles of justice all have a place in the larger normative conversation, each playing a vital role in generating important mutually reinforcing policy prescriptions – no comprehensive approach to global justice is complete without both approaches. Political theorists must examine, critique, and develop these ideas among themselves on the basis of a number of formal, aesthetic, and disciplinary criteria that are of fundamental importance to the quality and strength of their ideas, but that will never be a major preoccupation of academic lawyers and policy makers.

Second, on the basis of such foundational principles, we need detailed intermediate models for reforming core rules, policies, and procedures in each key functional area of international economic law. Substantively, we need models and structures for the gamut of justice-oriented policy innovations affecting both substantive rules and legal process: mechanisms for universal welfare rights and benefits, transnational transfer payments, increased participation by least developed countries in governance and negotiation, representation of individuals in international economic governance, and basic procedural rights and safeguards, just to name a few. Formally, these models must draw equally on political theory, economic theory, and a nuanced understanding of the nitty-gritty reality of rules, systems of rules, and institutions. They should rely significantly on mediating concepts when based on

external principles of justice, or they should be closely related to internal principles of justice if one begins as James suggests. In either case, this is where academic lawyers and philosophers, together with economists, can have their most fruitful collaboration. Lim, Dunoff, and Thomas remind us of the complexity, contingency, indeterminacy, and contradiction inherent in human social activity, and that academic lawyers are fully capable of analyzing and managing this complexity – it is their strong suit. Essentially, there must be a collaborative effort among philosophers and academic lawyers for each major institution and area of international economic law, which may need revision in view of the demands of global justice.

Third, on the basis of these ideas and these policy models, we need a wide range of legal arguments and an equally wide range of political strategies, addressed to each major country, each major institution, and each major stakeholder – as many arguments as possible and in the terms most persuasive with respect to that audience – in support of movement toward a more just global economic system. This is where philosophers and academic lawyers can work fruitfully with others such as political scientists and social psychologists interested in justice issues.

The need for such arguments reflects the fundamental difference, albeit a mutually reinforcing one, between philosophy, law, and policy. All three involve arguments, but the arguments needed for political, legal, and economic reforms are of a different order than the arguments needed in theoretical discourse or in a court of law. They are not unrelated, but they are more cousins than siblings. If we are to move ahead in implementing the reforms that, by and large, we all agree on (even

communitarians acknowledge the most severe abuses and the basic shape of a response),<sup>5</sup> then we need strategies to persuade (and hold accountable) the entrenched powers and interests that currently dictate the shape of global economic relations. Philosophers may be right about justice and lawyers may be right about institutionalized rules and power, but by themselves neither will be able to bring about any justice without a concerted effort to develop sophisticated, clear, and compelling arguments for political change (and accountability). Following Trachtman, we need the contributions of each discipline, united in a comprehensive policy package that can be delivered and implemented by political leaders.

Together, this shapes a worthy research agenda for the next generation of global justice scholarship.

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<sup>1</sup> Michael Blake, "Distributive Justice, State Coercion and Autonomy," *Philosophy and Public Affairs* 30 (2002): 257, 261–266.

<sup>2</sup> Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2007).

<sup>3</sup> Pierre Bourdieu, *Acts of Resistance: Against the Tyranny of the Market*, translated by Richard Nice (New York: The New Press, 1998).

<sup>4</sup> Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: Norton, 2003).

<sup>5</sup> Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994).