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978-1-107-03192-0 - Global Justice and International Economic Law: Three Takes

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Excerpt

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Introduction

I. Why Three Takes on Global Justice?

Global justice has become an increasingly common topic of concern and debate, and the relationship between international trade law and justice theory an increasingly accepted (yet challenging) one.¹ My goal in this book is not to document

¹ See, e.g., Joost Pauwelyn, *Just Trade under Law: Do We Need a Theory of Justice for International Trade Relations?* 100 AM. SOC'Y INT'L L. 375 (2006) (the panel concluded "Yes"). For a recent overview of the current state of conversation between justice theory and international economic law, see *Introduction*, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: CHALLENGES AND OPPORTUNITIES (Chios Charmody, Frank J. Garcia and John Linarelli, eds., 2011) [hereinafter GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW].

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these trends,² nor is it to argue for why they represent an important and welcome development.³ Instead, I propose to step back from specific arguments and examine the different ways in which we conceptualize the problem of global justice and its relationship to trade law, and to international economic law and economic fairness more generally, in view of globalization and the diversity of normative traditions which it highlights.

My task in this book is to examine three different approaches to this problem – three “takes,” if you will,⁴ on

² Recent major works on the subject of global justice include RICHARD W. MILLER, *GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER* (2010); GILLIAN BROCK, *GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT* (2009); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2008); SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* (2005); KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* (2004); Charles Jones, *Introduction*, SYMPOSIUM: GLOBAL ETHICS, 19 CAN. J. L. & JURIS. 213 (2006); SYMPOSIUM: GLOBAL JUSTICE, 39 CORNELL INT’L L. J., 477 (2006). For an overview of the relationship between theories of justice and international economic law, see Frank J. Garcia & Lindita Ciko, *Theories of Justice and International Economic Law* in RESEARCH HANDBOOK ON GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW (John Linarelli, ed., 2013).

³ Ten or fifteen years ago, however, it would have been necessary to establish both as a necessary prolegomenon to a project such as this one. See, e.g., Joost Pauwelyn, *Just Trade* (reviewing FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE*), 37 GEO. WASH. INT’L L. REV. 559 (2005) (noting historic resistance of trade law to formal normative inquiry beyond trade economics).

⁴ By ‘take’ I mean to invoke both the colloquial sense in which this can mean perspective, as in someone’s ‘take’ on something, and the

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the question of global justice – drawn from the “Western”⁵ tradition of political theory: Rawlsian liberalism, communitarianism, and consent theory. There are of course many more theories of justice within Western political theory,⁶ and a comprehensive approach to the ethical foundations of global justice would need to engage in a comparative study of justice in normative traditions both within and beyond the West.⁷ As I will explain further in this chapter, I have

cinematic sense of ‘take’ as one in a series of attempts to capture a moment on film.

⁵ By “Western” I mean the Greco-Roman/Judeo-Christian cultural tradition of philosophical and normative inquiry associated with Western Europe. Today, this tradition is enriched by people and currents from all parts of the world, and its ideas, institutions and systems are deeply interwoven in a global dialogue with other major cultural traditions. *See generally* ALASTAIR BONNETT, *THE IDEA OF THE WEST: POLITICS, CULTURE AND HISTORY* (2004). By invoking the West I do not mean to exclude anyone who finds it meaningful to participate in this tradition of inquiry, whoever and wherever they are. However, I believe that in a work that intends to be about “global” justice it is important to note that normative conversations arise within particular communities of meaning whatever their scope, and that in this book I am working within a specific such community. I will say a bit more about this in footnote seven.

⁶ *See generally* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 312, 312 (Robert E. Goodin, Philip Pettit & Thomas Pogge, eds., 2d ed., 2007).

⁷ As Amartya Sen writes, “similar – or closely linked – ideas of justice, fairness, responsibility, duty, goodness and rightness have been pursued in many different parts of the world, which can expand the reach of arguments that have been considered in Western literature.” *THE IDEA OF JUSTICE* xiv (2009). By working within one specific tradition in this book, I do not mean to obscure this larger

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chosen these three approaches for specific reasons – not to privilege them or assert their superiority, but because they illustrate specific issues of a general or systematic importance to the way global justice has been theorized and its principles applied to international economic law and matters of economic fairness.

Specifically, I will be comparing these three approaches with respect to how they envision the relationship between international economic law and justice, and how they respond to the challenges to global justice raised by what Rawls calls “the fact of pluralism.”⁸ One consequence of globalization is that we are more aware than ever of the diversity in the world: a plurality of different traditions, cultures, and systems of value and belief.⁹ By highlighting the relationship between justice, diversity, and international law, I hope to suggest new ways to craft a truly *global* approach to the problem of global justice and its relationship to international economic law, one that more fully takes into account the challenges and opportunities of globalization. Borrowing a phrase from Kok-chor Tan, this project can also be seen as one way to assess the current state of competition (I would prefer to say conversation, for reasons that will become clear

point. For Sen’s own approach to justice in such a cross-cultural dialogue, see *id.* at xiii–xvi, 20–24, 36–39 (sampling Hindu and Muslim reflections on justice and toleration).

⁸ JOHN RAWLS, *POLITICAL LIBERALISM* 36 (2d ed. 1996).

⁹ See, e.g., PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 3–57 (2012) (chronicling the facts of pluralism and their challenge for international law).

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as we progress) among normative theories to fill the void left by the demise of Realism.¹⁰ By Realism, I mean (and I take Tan to mean) the theory of international relations that makes two essential claims: a normative claim that states should exclusively pursue their national interest, and an empirical claim that this is in fact what states do.¹¹

Realism may not in fact be quite dead yet – one has only to listen to public media discussions of international politics and statecraft to hear at least a popular version of Realism regularly invoked as a justification for state action – but it has been seriously challenged as a theory (successfully so, in my view) on both normative and empirical grounds.¹² Insofar as one can characterize the Cold War era as reflecting (and being shaped by) a Realist consensus on international relations, the interesting question now is what theory

¹⁰ KOK-CHOR TAN, *TOLERATION, DIVERSITY AND GLOBAL JUSTICE* 1 (2000) [hereinafter TAN, *TOLERATION*].

¹¹ CANEY, *supra* note 2, at 7.

¹² Meaning, that there are persuasive reasons that states should pursue a range of goals in addition to their national interest, and considerable evidence that they in fact do. *See id.* at 136–140; Andrew Hurrell, *Another Turn of the Wheel?*, in *GLOBAL BASIC RIGHTS* 62 (Charles R. Beitz & Robert E. Goodin, eds., 2009). The continued prominence of Realist discourse in public commentary on global affairs may have more to do with fear and the dynamic of public opinion than with its continued normative and empirical validity as a theory of global relations. To fail to pay lip service to realist principles in public discourse on international affairs is the equivalent of being viewed as “soft on crime” in domestic affairs – no politician willingly exposes herself to the charge.

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(or theories) of international relations will take its place in the post–Cold War globalizing era, particularly with respect to issues of distributive justice and international economic law.¹³

It is worth taking a moment at the outset to explain what I mean by international economic law. The scope of international economic law can be defined in a variety of ways; here, I use the term to include essentially the treaty-based rules and institutions of the Bretton Woods System as it exists today: the World Trade Organization (WTO) and international trade law, the International Monetary Fund (IMF) and international finance; and the World Bank and international development lending.¹⁴ The recognition of international economic law as a comprehensive field consisting of what had hitherto been understood as specific, disparate treaty-based legal regimes (trade law, international finance,

¹³ In a global market era, international economic law and international economic relations (especially economic competition) may well be taking the prominent place in international relations that arms control, ideological competition and international security issues had in the Cold War era. If so, then the global justice debate may well become the constitutive global conversation that geopolitical security was in the Cold War – but more about that later.

¹⁴ The law of foreign investment can also be included within the scope of the term, although it will not be directly addressed here. *See generally* IGNAZ SEIDL-HOHENVELDERN, *INTERNATIONAL ECONOMIC LAW* 1 (2nd ed., 1992). International investment law is becoming an increasingly recognized site for the working out of global economic justice. *See* RUDOLF DOLZER & CHRISTOPHER SCHREURER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008).

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etc.) parallels the development of globalization studies and our increasing recognition that there is more going on within global economic relations than a mere intensification of transnational economic flows.¹⁵ This parallelism is not an accident: as global interconnectedness develops, so does our understanding of the regulatory framework that governs and facilitates it, specifically our understanding of it *as* an integrated framework. This has specific implications for the role of justice in international economic law, which this book will to some extent address.¹⁶

It is also worth mentioning at the outset that I will not be examining in detail perhaps the most widely known theoretical approach to global justice, namely,

¹⁵ See GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 149–188 (David Held et al., eds., 1998) (documenting shift in global patterns of trade and trade regulation and emergence of global economic system); Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U. PA. J. INT'L ECON. L. 391 (1998); Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996).

¹⁶ I expand upon this point at greater length in TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE (2003) [hereinafter GARCIA, TRADE, INEQUALITY, AND JUSTICE]. The predominance of international trade examples throughout this book reflects the continued preeminence of trade law within economic globalization and global economic relations more generally (as well as my own professional background in trade law). However, the principles and issues discussed in this book in connection with trade law will often apply directly or with modification to international economic law more broadly; in many cases, I make the extension explicit.

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cosmopolitanism.¹⁷ Cosmopolitanism is derived from the Greek word *kosmopolitēs*, which means cosmopolite, a citizen of the world, “one who has no national attachments or prejudices.”¹⁸ Thus, the etymology of the word reveals its meaning: cosmopolitanism characterizes a family of views relying on the idea that all human beings are morally equal, and therefore constitute a single world community.¹⁹

For reasons I will explain further below,²⁰ I consider cosmopolitanism to be a problematic basis for *global* justice, despite its evident global claims and undeniable theoretical importance.²¹ Therefore, in Takes One and Two, I will focus instead on alternative approaches based on other political theories which might initially (and paradoxically) seem less congenial and more problematic as a basis for global justice: Rawls’s liberal theory of Justice as Fairness, which he confined to justice within domestic societies, not between

¹⁷ I am indebted to Lindita Ciko for her assistance in developing the discussion of cosmopolitanism in this chapter.

¹⁸ See Oxford English Dictionary Online, s.v. “cosmopolite,” http://dictionary.oed.com/cgi/entry/50051143?query_type=word&queryword=cosmopolitanism&first=1&max_to_show=10&single=1&sort_type=alpha (last accessed August 25, 2010).

¹⁹ Thomas Pogge, *Cosmopolitanism* in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 312, 312 (Robert E. Goodin, Philip Pettit & Thomas Pogge, eds., 2d ed., 2007) (1993).

²⁰ See *infra* notes 93 to 107 and accompanying text.

²¹ For a particularly elegant recent account of cosmopolitanism and global justice, see CANEY, *supra* note 2, from which I have learned a great deal despite my reservations about cosmopolitanism.

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them²²; and communitarian theories of justice, which also limit justice to certain social units, namely national communities.²³ The interesting question for me is what sort of global justice bricks can be made from this kind of straw. The results in Take One and Take Two are approaches to global justice that solve certain problems while creating others, thus illuminating the limits of each theory even as the theory itself seeks to throw light on the particular facets of the global justice problem it addresses.

For Take Three, I adopt an entirely different approach to the question – one that requires less in the way of traditional political theory, but instead lies closer to our lived experience of trade as an exchange of value. I begin with the ways in which both language and law²⁴ recognize that theft, coercion, exploitation, and trade are not the same thing,

²² JOHN RAWLS, A THEORY OF JUSTICE 8 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE]. For reasons I will explain, in Take One I will be internationalizing Rawls's domestic theory of justice rather than relying on his own international project as set out in THE LAW OF PEOPLES, although my approach has been quite heavily influenced by the concerns he discusses in the latter. *See infra*, notes 51, 53, 92–104 and accompanying text; JOHN RAWLS, THE LAW OF PEOPLES (1999) [hereinafter RAWLS, THE LAW OF PEOPLES].

²³ *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 30 (1983) [hereinafter WALZER, SPHERES OF JUSTICE].

²⁴ I am working here within the English language and the Anglo-American common law tradition, though I hope in the future to extend the study to embrace at least other major European languages and the civil law tradition as well.

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though value may change hands in all these cases. Using Simone Weil's ideas about consent, I try to work out exactly why that might be so, and what implications this has for trade and for the question of global justice. Take Three aims to fill some gaps identified by the other two Takes, particularly with respect to the challenge of finding a consensus basis for global legal norms in a pluralistic context, yet of course it has its own limits.

Returning to Tan's metaphor of post-Realist normative competition, I conclude that examining these three Takes side by side is not about picking a winner and discarding the others.²⁵ Rather, what emerges from the comparison is that there isn't (and perhaps can't be) a single path or approach to justice on a global scale in a globalizing world.²⁶ This is so because of the persistent reality of pluralism, central to globalization and therefore to global justice, but by no means unique to the global setting.²⁷ Instead, what this book suggests is that there are different kinds of reasons for justice, and each plays a necessary role in a comprehensive (but not complete or seamless) approach to global justice.

²⁵ Indeed, Amartya Sen comes out and simply says that selecting only one approach "may be a mistake." SEN, *supra* note 7, at 10.

²⁶ Sen writes, "there can exist several distinct reasons for justice, each of which survives critical scrutiny, but yields divergent conclusions." *Id.* at x.

²⁷ Sen again: "Reasonable arguments in competing directions can emanate from people with diverse experiences and traditions, but they can also come from within a given society, or for that matter, even from the very same person." *Id.*